ARTICLE: Localizing Global Rules: **Public Participation** in Lawmaking in Vietnam

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**SUMMARY:**
... This model is useful because it suggests that entrepreneurs in Vietnam can to some extent influence lawmakers without fully functioning democratic institutions. ... Lawmakers exposed to this asymmetric discourse adjust global legal rules to benefit elite interests and rarely consider the transactional preferences of small-scale entrepreneurs. ... EMERGING PRESSURE GROUPS IN VIETNAM Much literature concerning **public participation** in lawmaking presupposes a political space (civil society) in which social actors can organize and influence lawmakers through unmediated discursive exchanges (deliberative democracy) and elections (Walzer 1992). ... With the exception of groups which have attempted to engage in overtly political activity, state authority has generally tolerated--if not encouraged--the activities of revitalized organizations and newly formed associations. (52) By the late 1990s the proliferating number of associations began to concern party leaders and the Politburo called on state agencies to ensure that associations closely followed party policies. ... There are good reasons for selecting the VCCI as a case study to establish whether SMEs can communicate their views through broadly constituted business associations. ... The Entrepreneur Survey showed that most SMEs considered the complicated rights-based provisions in the Enterprise Law alien and unsuited to the relational norms and practices that ordered business organizations. ... Although SMEs, SOEs, and foreign entrepreneurs were united in their opposition to quan ly kinh te nha nuoc (state
economic management), they disagreed about legal reforms aiming to give foreign investors increased market penetration such as market liberalizations and fair trade laws. ... CIEM officials, for example, deployed neoliberal legalism strategically to avoid offending power brokers within the Ministry of Planning and Investment. ... CIEM drafters played a facilitating role and encouraged consultation that exposed other members of the drafting committee to neoliberal ideas about the economic benefits generated by market deregulation. ... Interviews with entrepreneurs operating household businesses in Hanoi and Ho Chi Minh City confirm that many resist land conversion. ... Now that the commercial legislative framework is almost complete, some commentators (Pham Duy Nghia 2005) are urging lawmakers to localize imported norms and practices. ... Foreign investors and large SOEs are familiar with, and generally support, the foreign legal models underlying commercial legislation while most SMEs consider commercial laws alien and imposed. ... Without their own member-directed associations or access to law reform projects, SMEs lack the sustained communication necessary to effectively communicate complex and unconventional ideas to lawmakers. ... "Nhan Thuc Ve Nguyen Tac Tap Quyen va Vai Khia Canh" Trong Van De Ve Quan He Giua Lap Phap va Hanh Phap O Nuoc Ta Hien Nay Some Perceptions of the Principles of "Unity of Power" and a Few Aspects of the Relationship Between the Legislative and Executive of Bodes of Vietnam Today . ... Enterprise Law, Land Laws, Law on Foreign Investment, Law on Investments: see http://www.vietnamlaws.com/online_database.aspx (accessed April 7, 2008).

HIGHLIGHT:

As the pace of legal harmonization in developing East Asian states increases to comply with international trading treaties, a disjunction is forming between legislative expectations and everyday business practices. Evidence considered in this article suggests that Vietnam is no exception. State control over public discourse favors the interests of business elites, while small-scale entrepreneurs struggle to make their views known. Lawmakers exposed to this asymmetric discourse rarely adjust global legal rules to suit the transactional requirements of small-scale entrepreneurs. As a consequence, the largely imported commercial legislative framework is increasingly reflecting the interests of business elites. The article concludes that for the state to develop a more inclusive regulatory regime, it needs to relax its control over public deliberation and give small-scale entrepreneurs more opportunities to convey local precepts and practices to lawmakers.

TEXT:

[*673] INTRODUCTION

Developing East Asian states such as China and Vietnam are attempting to use laws and legal institutions to stimulate rapid economic development (Peerenboom 2002; Gillespie 2006). Like Japan during the Meiji Restoration (1868) (Chiba 1997), they are trying to open up, industrialize, and become world forces—in short, to catch up with their regional neighbors and the West. Many more commercial laws were enacted during the past decade in China and Vietnam than in the previous four decades, and the pace of law reform is increasing to satisfy international treaty obligations and rapidly changing domestic economies. ¹ In meeting the demand for commercial legislation, lawmakers face a conundrum. How do they devise laws that satisfy both international legal standards and diverse domestic interests that straddle economic, urban-rural, and ethnic divides? The way lawmakers reconcile these differences will for decades affect economic and social
development in the world's most dynamic economic region.

Evidence considered in this article suggests that Vietnamese lawmakers are enacting a commercial legislative framework that primarily reflects international treaty provisions and the interests of an elite group of state-owned enterprises (SOEs) and foreign investors. Most domestic entrepreneurs, on the other hand, struggle to communicate their preferences to lawmakers (Pham Van Chuc 2002). Some commentators believe an unbridgeable gulf is emerging between legislative expectations and the standards and practices that order everyday business transactions (Pham Duy Nghia 2000, 2001). Others (Gillespie 2006) are more open to transplanted legal change but argue that in Vietnam's bifurcated regulatory landscape, most domestic entrepreneurs believe imported commercial laws are imposed, too complex, or simply irrelevant.

The difficulties faced by domestic entrepreneurs in conveying their message to lawmakers cannot be understood in liberal constitutional terms. Liberal constitutionalism, and especially representative democracy, does not readily extend to Vietnamese political-legal institutions (Le Cam 2002; Nguyen Manh Cuong 2002). Most citizens have little influence over draft bills and even less say over who stands for elections in the National Assembly (NA) (Salomon 2007; Sidel 2002). Elected delegates rarely share sympathies with their constituents and only marginally influence the way the country is run. State regulation of statutory rights is unpredictable and frequently compromised by extralegal political interventions. Above all else, the Dang Cong San Vietnam (Communist Party of Vietnam) uses political power to directly manage state-society relations. Measured against the yardstick of liberal constitutionalism, formal state institutions appear unpromising sites for domestic entrepreneurs to influence imported commercial laws.

The idealized notion that representative democracy expresses the collective preferences of individuals has been widely criticized in the West as describing the way liberal democracies should operate rather than how lawmaking actually works (Walker 2002). As a corrective, deliberative democracy theory refocuses attention on the lawmaking processes that take [*675] place outside formal constitutional institutions such as elections, referendums, legislatures, and courts (Habermas 1991; Dryzek 2000a). According to the deliberative model, public discussion provides a forum for different social groups to debate issues that influence lawmaking without resorting to liberal constitutional mechanisms such as democratic representation. This model is useful because it suggests that entrepreneurs in Vietnam can to some extent influence lawmakers without fully functioning democratic institutions.

This article argues that state control over public discourse in Vietnam gives business elites preferential access to lawmakers. In this tightly controlled public space, small-scale entrepreneurs encounter obstacles in making their views known. Lawmakers exposed to this asymmetric discourse adjust global legal rules to benefit elite interests and rarely consider the transactional preferences of small-scale entrepreneurs. As a consequence, the largely imported commercial legislative framework is increasingly reflecting the interests of business elites.

To evaluate this claim, the article first investigates whether state controls over business associations favor business elites. It then assesses whether business elites are more effective than small-scale entrepreneurs in using public forums to communicate their preferences to lawmakers. Part of this story is bound up the role international development agencies play in transferring globalized legal ideas into the Vietnam's lawmaking arena. The article concludes with the proposition that the state can increase its regulatory influence over the economy by relaxing its control over public deliberation and allowing small-scale entrepreneurs a greater say in shaping the legislative framework.
CONCEPTUALIZING LOCAL ADAPTATIONS OF LEGAL TRANSFERS

The problems Vietnamese lawmakers face in localizing global legal rules are not new. During the military expansion of the Roman Empire, jurists struggled to reconcile *ius gentium*, which applied to colonized people, with *ius naturale* (law that should be observed by humanity) (Goodman 1995). In a similar vein, Allan Watson (1978) argues that for centuries disgruntled social groups in Europe resisted imported laws. He believes that "pressure forces" promoting imported laws provoke opposition from domestic actors with something to lose from new forms of commercial regulation. "Pressure forces" generally prevail because they are promoted and resourced by ruling elites and overwhelm poorly organized "opposition forces" (Watson 1978, 324).

Watson takes an economic view of lawmaking where fixed preferences compete in a "marketplace" of ideas to influence lawmakers. Rather than crude competition, other theorists such as David Gerber (2004) and Gunther Teubner (1998) posit a more complex interaction between imported and local [*676*] legal ideas. Teubner (12) uses the metaphor "legal irritant" to avoid what he says is "the false dichotomy" of repulsion or interaction that results from thinking about the local adaptation of legal transfers in competitive terms. His metaphor implies that legal transfers do not automatically displace legal meanings and practices in receipt countries, but rather trigger a new set of unpredictable choices and outcomes.

Watson and Teubner proposed radically different ways to conceptualize legal transfers, but they neglected the complex processes through which local forces adapt and naturalize globalized legal texts. Some recent sociological studies address this shortcoming by focusing on the intermediaries who bridge global legal knowledge and local understandings (Dezalay and Garth 2001; Carruthers and Halliday 2006). Yves Dezalay and Bryant Garth, in their ground-breaking book about the construction and transformation of international commercial arbitration, pioneered this actor-centered approach. *Dealing in Virtue* explains how commercial arbitration disseminates legal ideas and practices around the world. By examining the personal histories of the main actors and the institutions they served, this study found that the localization of global law depends on who supports this process, where they are located in the structure of government, and whether they enjoy close working relationships with the international development agencies promoting legal reform. To summarize, they found that the power available to social actors directly determines their capacity to influence and adapt global law to local conditions.

This actor-centered approach represents a significant advance over previous legal transfer theories because it examines at short range how local actors influence global ideas. But for our purposes, the actor-centered model has some shortcomings: it focuses primarily, although not exclusively, on elite-level interaction between international development agencies and nation states. Research considered in this article suggests the need to include voices at the periphery of state power and consider group discourse and strategic action that cannot be directly attributed to the efforts of individual actors.

DEVELOPING A RESEARCH FRAMEWORK

Deliberative Democracy

In contrast to legal transfer theories, deliberative democracy has much to say about how public discourse and strategic action shape lawmaking. Although its origins go back as far as Aristotle, Habermas (1991) to some extent initiated contemporary debates about deliberative democracy with the publication of his book *Structural Transformation of the Public Sphere* that was first published 1962. He considers representative government more an ideal than a practical reality and has explored ways the public can use deliberative [*677*] pathways to
influence lawmakers (Black 2000). Laws (and ultimately democracy) are shaped, he argues, by morals, ethics, and pragmatic matters synthesized from exchanges and contests between lawmakers and society—a process he termed "communicative rationality" (Habermas 1987, 164-97).

Deliberative democracy is a debated concept with many subthemes (Dryzek 2000b). The core issue pertinent to our discussion is that lawmaking is strongly influenced by deliberation that takes place outside constitutionally defined mechanisms and pathways. The forums in which institutions, social groups, and individuals discuss lawmaking may be spontaneous bottom-up networks, sustained interactive discussions, or highly structured gatherings organized by trade unions, business associations, or law-reform commissions (Hajer 2003). In summary, deliberative democracy rests on three key assumptions about what constitutes effective deliberation between social actors and lawmakers:

1. Social actors are willing and capable of engaging in reasoned and reflective ("rational") debate with lawmakers. 2
2. Deliberation promotes shared understandings (or preference convergence) about the nature of regulatory problems and the appropriate legislative responses.
3. Social actors have the political space to organize and deliberate state policy and law.

Effective Deliberation

Deliberative democracy says little about the ground rules that support effective deliberative exchanges. It suggests that communication between lawmakers and social actors must generate high levels of consensus to change regulatory behavior (McAdams 1997), but it does not clearly indicate what modes of communication are most likely to produce agreement (Rosenberg 2005). What is needed is a method of assessing the effectiveness of public participation.

This article uses a version of discourse analysis synthesized from systems theory and linguistic analysis to evaluate the communicative processes underlying deliberative lawmaking. 3 In contrast to language-based inquiry, which decodes the content of conversations, this study is more concerned with understanding how discursive structures influence public participation in lawmaking. Discourse is taken to mean "all forms of spoken interaction, [*678] formal and informal, and written texts of all kinds," especially political, economic, moral, cultural, and legal modes of communication (Potter and Wetherell 1987, 7).

Discourse analysis points researchers toward the types of communication most likely to generate preference convergence among deliberators. One, effective deliberation usually takes place in comparatively unmediated discursive forums. Research suggests that lawmakers are more likely to listen to and learn from social actors agitating for legislative change in relatively open and sustained exchanges (van Dijk 1997).

Two, effective communication is based on common sets of assumptions or grammar that allows discussants to learn from one another. Luhmann (1987) contributed the valuable insight that different types of social discourse (such as economic, political, and legal conversations) have their own criteria or codes (epistemologies) for prioritizing the relevance and value of external information. This suggests that lawmakers are more likely to learn from social actors expressing their preferences in common or compatible modes of thinking (Oquendo 2002; Baxter 1998). Given the inherent inability of words to express the full range of human perspectives about law (Halpin 2001), the analysis needs to consider both verbal and subverbal communication.

Three, an important claim made in this article is that global legal ideas enter recipient
countries through elite groups or communities that are in sympathy with new approaches to regulation. Discourse analysis provides a way of understanding this phenomenon. It suggests that societies are fragmented into numerous overlapping interpretive subgroups (communities) and that individuals make sense of the world from the perspectives of the subgroups to which they belong. As Robertson (1999, 417) opined, "being embedded in a background context of beliefs, practices and goals is what makes the perception of anything possible and what gives that perception shape." By providing individuals with shared understandings about their common interests, interpretive communities galvanize social forces supporting or opposing imported laws. Imported commercial laws, for example, may appear logical and desirable to foreign investors immersed in a "rule of law"-oriented community but alien and imposed to domestic entrepreneurs operating a relational transactional environment.

Four, social actors can deploy language in strategic ways to realize particular sets of interests. Yves Dezalay and Bryant Garth (2001, 246-57) showed, for example, how Latin American elites used imported laws in "palace wars" to advance their power bases. This strategic dimension is highly relevant to our discussion because it brings actors and power struggles back into the analysis. It also emphasizes the role played by state institutions, international organizations, and domestic pressure groups in reshaping global legal meanings.

Finally, it is worth mentioning why this analytical framework was developed. Comparativists have been warning researchers for decades that it is impossible to avoid observer bias (Frankenburg 1985). The best researchers can do is clearly identify their theoretical preferences and then apply them flexibly to avoid de-emphasizing differences, misunderstandings, and contradictions in the empirical findings. Without this corrective, analysis easily slides into vague historicism or deterministic political economy assumptions.

Another reason for the framework is to standardize results from field research. Empirically, this article draws on over three hundred and twenty interviews conducted between April 2004 and March 2007 by the author and Vietnamese law firms with seventy-two foreign and domestic firms operating in northern Vietnam (Entrepreneur Study). The first interviews used standard questionnaires, but follow-up interviews were semistructured and required research assistants to exercise considerable discretion. To avoid uneven outcomes, researchers needed a clear analytical framework providing unambiguous guidelines.

Previous research has shown that discourse analysis provides a useful framework (Gillespie 2006). It directs researchers toward the types of communication that are likely to produce regulatory outcomes. It assumes very little about the subject matter other than that most regulatory knowledge is communicated in discourse of some shape or form. The following discussion flexibly and reflectively applies the theoretical framework to evaluate the potential for different types of entrepreneurs to influence the adaptation of global legal rules in Vietnam.

**OVERVIEW OF ENTREPRENEURIAL ACTIVITY**

The term "entrepreneur" used in this discussion covers a diverse range of business entities in Vietnam. According to the World Bank (2006, 5), in a population of about 84 million there were about 7.4 million household businesses in the nonfarm sector during 2006. Most are small family-run firms with less than five employees operating in the trade and services sectors. Their contribution to industrial output declined from 15.5 percent in 1996 to 8.2 percent in 2004 (Government Statistics Office 2006).

[*680] There are now approximately 150,000 firms incorporated under the Enterprise Law 2005. They are generally larger and better resourced than household businesses and are
more likely to belong to business associations. They are also the fastest growing business sector, having increased industrial output from 7.9 percent in 1996 to 20 percent in 2004 (Government Statistics Office 2006).

State-owned enterprises are more difficult to categorize because some remain under full state ownership, while others have been partially privatized. Their number sharply decreased from 12,000 a decade ago to fewer than 3,200 in 2006 (World Bank 2006, 8-11). Although their share of industrial output declined from 49.6 percent in 1996 to 27.4 percent in 2004 (Government Statistics Office 2006), SOEs still dominate key industries such as telecommunications, steel production, and construction.

The foreign investment sector is even more diverse. The Entrepreneur Study indicates that Western, and to a lesser extent Japanese, multinational investors are familiar with global legal texts. Their internal bureaucracies are staffed by lawyers and accountants that plan and organize business activities according to policies and laws. They prefer an operational environment governed by legal transparency, codified legal standards, and judicially defined boundaries between state and private interests. In contrast, investors from other East Asia countries, and especially Vietnam, tap into local business networks and are much less enthusiastic about global legal rules. About 40 percent of foreign investors in 2006 were in joint ventures with SOEs (World Bank 2006). Output from the foreign investment sector rose steeply from 26.5 percent in 1996 to 43 percent in 2004 (Government Statistics Office 2006).

All this suggests that the business community in Vietnam is fragmented. Large numbers of small- and medium-size entrepreneurs (SMEs), with less than fifty staff, together employ more than twice as many people as the state and foreign sectors combined (Taussig 2005). A small number of foreign, domestic, and state-owned large entrepreneurs (LEs), employing more than one thousand people, account for almost half of the nonfarm economic activity in the country.

The following discussion asks why SMEs, especially those incorporated under the Enterprise Law 2005, have been unable to leverage their growing economic importance to influence legislative policy. But first it is necessary to set the scene by briefly describing constitutional lawmaking in Vietnam.

[*681] CONSTITUTIONAL LAWMAKING

Vietnam is a unitary state comprising five arms: NA, president, government (executive), People's Courts, and People's Procuracy. The Communist Party of Vietnam both overarches and infiltrates state institutions in the one-party state (Sidel 1997). Although a fused "party-state" is conceptually convenient, it blurs power-sharing arrangements between party and state organs and conceals attempts by some party leaders to clarify party and state functions. It also infers that party and state interests coincide, obscuring the possibility that they have different substantive agendas and organizational logics.

State power is divided according to the imported Soviet tap trung quyen luc (concentration-of-power) doctrine that vests ultimate authority in the NA. "Concentration-of-power" is best understood as specialization rather than separation of powers. Although statutes passed by the NA are constitutionally paramount, real legislative power resides in Chinh Phu (the government) (Nguyen Cuu Viet 1997). The government not only drafts most laws for the NA, it promulgates subordinate legislation that injects regulatory detail into hortative high-level legislation.

Further complicating lawmaking, the legislature and government are constitutionally divided among central and local bodies—the NA and ministries at the center, and provincial/city,
district, and village people's councils, and people's committees at the local level. 8 Each level can promulgate subordinate legislation and from a constitutional perspective act as a lawmaker.

EMERGING PRESSURE GROUPS IN VIETNAM

Much literature concerning public participation in lawmaker presupposes a political space (civil society) in which social actors can organize and influence lawmakers through unmediated discursive exchanges (deliberative democracy) and elections (Walzer 1992). Kerkvliet (2003) argues that civil society in contemporary Vietnam is not a source of state opposition because the party and state use their extensive powers to co-opt and suppress public opposition. Nevertheless there are signs that space is emerging outside the state for pluralistic social groups such as business associations (Hannah 2005).

This section considers whether SMEs are given the social space to organize and communicate their concerns to legislative drafters. Particular attention [*682] is given to the social understandings that determine who is entitled to participate in lawmaking. Such notions decide who constitutes the public, whether the public should participate in lawmaking, and "who should speak on their behalf" (Hendriks 2005, 3).

Public Associations in Vietnam

During the high-socialist period (1954-1986) in Vietnam, official narratives about social organization were influenced by lam chu tap the (collective mastery). This system of belief rejected xa hoi dan su (civil society) or individual space outside state and collective orbits as bourgeoisie individualism (Do Sang and Dui Hanh 1986). Mass organizations were enlisted as two-way communication channels—from the lowest to the highest—to give citizens a forum to participate in policy making. In practice, these channels were primarily used by the party to educate and propagandize rather than listen to the people (Jeong 1997).

Following doi moi (renovation) reforms in 1986, the party cautiously granted social actors, especially entrepreneurs, more autonomy to form business associations. Carlyle Thayer (1995) wrote,

> Vietnam's market reforms have not only given birth to a legalized private sector, but have led to the revitalization of groups and associations formed as a result of local initiatives. With the exception of groups which have attempted to engage in overtly political activity, state authority has generally tolerated—if not encouraged—the activities of revitalized organizations and newly formed associations. (52)

By the late 1990s the proliferating number of associations began to concern party leaders and the Politburo called on state agencies to ensure that associations closely followed party policies. 9 After years of debate and numerous redrafts, Decree No. 88 ND-CP Providing for the Organization, Operation, and Management of Associations was passed in 2003. It attempts to reconcile the party's desire for associations that promote economic and social development with concerns that nonstate organizations may oppose party and state policies. On balance, however, the decree gives the state ample powers to strictly quan ly (manage) associations. Even well-connected business groups encounter difficulties in gaining approval from the Ministry of Home Affairs (Industry Magazine 2003). The draft Law on Associations, which is supposed to ease restrictions over the formation of associations, is [*683] currently blocked in the NA. 10 Because legislative drafters cannot consult "the masses" but only the groups that represent them, the state now encourages entrepreneurs to join hoi hiep hoi kinh doanh (state-authorized business associations) to participate in lawmaking.
Member-Directed Business Associations in Vietnam

The diversity and growing number of business associations conveys the erroneous impression that entrepreneurs interact with legislative drafters through many channels. A recent study (Tran Huu Huynh and Dau Anh Tuan n.d.) claims, on the contrary, that LEs convey their views to lawmakers through a small number of member-directed industry-based associations and country-based chambers of commerce. For example, the Vietnam Steel Association draws on the financial resources and political connections of its forty-nine state and foreign members to protect domestic production from foreign competition (VNS 2007, 16). The association benefits from a close working relationship with the Vietnam Steel Corporation (VSC): it uses premises supplied by the VSC and is led by former senior officials from the VSC. In another example, foreign investors use country-based chambers of commerce such as AmCham and EuroCham to request changes to policies and laws. Many of the changes to the Law on Investments 2005 are attributable to submissions made by foreign chambers of commerce.

So far SMEs have been unable to form their own member-directed business associations or join industry associations. But they can join broadly constituted business associations such as the Vietnam Chamber of Commerce and Industry (VCCI), the Vietnam Young Entrepreneurs Organization (VYEO), and the Union of Association of Industry and Commerce (UAIC).

A recent report (Tran Huu Huynh and Dau Anh Tuan n.d.) shows that the percentage of firms that regularly submit comments about draft legislation to business associations has increased from 29 percent in 2001 to 39 percent in 2006. Although many of these firms are LEs, the report concludes that societal attitudes toward chay lo thu tuc (lobbying) lawmakers are rapidly changing.

[*684] Does the VCCI Represent the Interests of SMEs?

There are good reasons for selecting the VCCI as a case study to establish whether SMEs can communicate their views through broadly constituted business associations. Not only is it the most organized and active of the broadly based business associations, unlike the VYEO and UAIC, it has a government mandate to "solicit opinions from its members" and report their comments to government drafting agencies. In short, it is the association most likely to represent the views of SMEs to lawmakers.

Opinions differ whether the VCCI acts like a member-directed, dai dien (representative) organization. Some commentators maintain that the VCCI is slowly disaggregating from the party and state (Stromseth 2003). Yet many private entrepreneurs remain skeptical that a body receiving approximately 30 percent of its revenue from the state can meaningfully disengage from party and state organs and communicate unorthodox or controversial ideas to lawmakers. They argue that the VCCI resembles a state-corporatist body, since it is more interested in inculcating party and state policies than advocating member interests. The following case study about the Enterprise Law 1999 (amended in 2005) tests their assertion.

Case Study About Entrepreneurial Influence over the Enterprise Law 1999

In 1995, the Central Institute of Economic Management (CIEM), a research institution attached to the Ministry of Planning and Investment, commenced work on a new company law (Le Dang Doanh 1999). Departing from previous practice, the drafting committee included a representative from the VCCI.

A great deal of the information that eventually convinced the drafting committee to partially deregulate market entry for entrepreneurs came from research reports prepared by the VCCI
and the CIEM. Officials from the CIEM needed the VCCI's cooperation to counter arguments raised by some other members of the drafting committee that the existing business licensing system maintained market stability.

The VCCI organized a series of workshops to collect evidence from its members that business licensing increased incorporation costs. As anticipated, case studies revealed licenses were inefficient and produced absurd market distortions. CIEM (1998) synthesized these findings into a highly influential report that was presented in 1998 to the government and members of the drafting committee.

[*685] Some SMEs were invited by VCCI to attend workshops with the drafting committee. They later revealed that VCCI staff tightly managed interaction with drafters. 15 VCCI officials used formal agendas and other discursive controls to manage what was discussed and prevent unsolicited comments. The SMEs were not given the prolonged and unmediated contact with lawmakers that discourse analysis suggests is necessary to convey complex preferences and ideas.

To make matters worse, drafters and SMEs came to the meeting with different sets of assumptions about what needed to be changed and how change should be accomplished. Although SMEs supported market-entry deregulation, many were much less enthusiastic about proposals to expand corporate governance rules, increase statutory reporting, and strengthen minority shareholder rights. They worried that complex rights-based rules would disrupt the organizational structures and processes underpinning family-based management hierarchies (Gillespie 2002). They also thought that minority shareholders' rights would discourage employers from offering their employees shares and that more rigorous disclosure requirements would give the state and business competitors access to sensitive business information.

The Entrepreneur Survey showed that most SMEs considered the complicated rights-based provisions in the Enterprise Law alien and unsuited to the relational norms and practices that ordered business organizations. They used proverbs like gia dinh la tren het (family first, others second) to invoke a social ordering in which close family connections formed the bonds that generated dependable and trustworthy management structures. When external skills were required, managers turned first to family and then to friends from the same home village or to those with longstanding personal ties developed in the workplace, universities, or military units. In each case, entrepreneurs sought personal relationships to replicate trung thanh (loyalty), tinh cam (sentiment toward others), and tin (trust) binding family members.

Entrepreneurs strove to develop a family-like atmosphere within their firms by celebrating birthdays and weddings and marking other significant occasions such as funerals. With few exceptions, the staff members interviewed believed that sentiment, as much as profit, bound their firms together. They repeated similar narratives that stressed a common history of working together against unconscionable market competition such as ruthless, irrational, and fraudulent competitors. Storylines emphasized the need for self-sacrifice (for example, wage restraint in tough economic times) and collaboration with the owners. They attributed their firm's success to tam (good heart), thong cam (compassion), and tinh cam (sentiment) among the owners and staff.

[*686] Codified rules stipulating precise rights and duties were considered unnecessary because the owners and staff knew and trusted each other to follow common ethical values. They preferred personal and tacit interaction and worried that the rights-based mental categories underlying much of the Enterprise Law might generate distrust and undermine the firm's sentimental foundations. Few contemplated resolving internal disputes through litigation, a strategy that would require legally defined corporate relationships (Taussig 2005).
It is possible to interpret this case study as showing that the VCCI, together with its government allies, took on powerful adversaries to champion greater market access for its private-sector members (Stromseth 2003). What this account fails to explain is that the VCCI ignored opposition from SMEs to imported corporate governance rules. Rather than fearlessly championing its members' interests, the VCCI joined with the CIEM and like-minded government agencies in a "palace war" against ministries trying to retain lucrative licensing powers. The VCCI and the CIEM selectively represented entrepreneurial views that supported market liberalization, while ignoring opposition to complex corporate governance provisions.

Five years later, in 2004, the party instructed the CIEM to draft a new unified company law (Duong Dang Hue 2005). By this time, international legal harmonization had become a central political objective and the party wanted the Enterprise Law 1999 to comply with provisions in the United States-Vietnam Bilateral Trade Agreement (BTA) requiring uniform treatment for foreign and domestic investors.

Greater efforts were made by lawmakers drafting the Unified Enterprise Law to solicit public opinion. For example, twenty drafts of the law were posted on the VCCI Web site, and the drafts received some media coverage. Nevertheless, public consultations conducted in 2005 overwhelmingly focused on concerns raised by foreign investors, international donor agencies, and law firms. Lacking resources and access to a member-directed business association, SMEs were given few opportunities to express their opposition to complex internal organizational practices that supported the organizational structures used by their large-scale competitors. Throughout the drafting process, the VCCI remained remarkably silent about the growing unease among its SME members about the draft Enterprise Law and the broader legal harmonization project that aimed to give foreign companies greater market access.

To summarize, the VCCI and the CIEM strategically deployed the storylines collected from entrepreneurs to promote neoliberal deregulation. But the VCCI did not act like a member-directed organization and communicate opposition by SMEs to complex global legal rules. Furthermore, political and legal controls prevented SMEs from forming member-directed associations to convince lawmakers to bring imported laws closer to local business precepts and practices.

[*687] PUBLIC PARTICIPATION IN LEGISLATIVE DRAFTING

State Policy Support for Public Participation

Rhetorical support for public participation in lawmaking is found in imported Soviet revolutionary drafting practices that stressed the need to duong loi quan chung (make the people part of the process) (Dinh Gia Trinh 1961). "Collective mastery" also encouraged "working class" participation in government (Pham Van Dong 1977, K11--K12). These principles were encapsulated in the well-known maxim dan biet, dan ban, dan lam, dan kiem tra (people know, people discuss, people do, and people supervise) (Vo Kim Son 2006). More recently, the state has called attention to public participation as a means of bringing laws closer to the people (Pham Duy Nghia 2006). Some scholars maintain that public participation will excite chu quyen nhan dan (people's sovereignty) and ensure that phap luat la y chi chung cua xa hoi (laws reflect the common will of society) (Nguyen Dang Dung 2001).

However, it is important to view public participation in the broader context of Vietnamese constitutional and organizational principles. Tap tung dan chu (democratic centralism), for example, is designed to entrench party leadership over the state (Dixon 2004). It might work
against **public participation** by discouraging lawmakers from seriously considering public comment that challenges party policy.

This policy is reflected in official pronouncements that insist the state should lead **public participation** by stimulating *y thuc phap luat* (legal consciousness) and discrediting "false" opinions and ideologies. From this pragmatic perspective, **public participation** is a method of increasing the effectiveness of laws, but it does not convey general civil rights for businesses to advocate their interests.

**Legislative Support for Public Participation**

Over the past two decades, the state has gradually broadened the legislative basis for **public participation** in lawmakers. The Law on the Promulgation of Normative Documents 1996 (amended 2002) formalized this policy by establishing procedures for businesses to *tham gia* (participate) in lawmakers. Article 26 requires drafting agencies to "organize public comment" from those affected by draft bills (Thanh Nien 2004b, 19) but gives regulatory authorities the discretion over what legislation requires public comment and which *lay y kien nhan dan* (people's opinions) to solicit. In addition, drafting agencies are required to consolidate comments received from the public into a report that is sent together with the draft law to the government for approval.

A central question in determining the effectiveness of public consultation is whether lawmakers believe they have an obligation not only to consult but also to reflect *lay y kien nhan* clan (people's opinions) in laws. Government reports suggest that most drafting committees treat public consultation as a *hinh thuc* (mere formality) -- a compulsory process that can later be disregarded. For example, the Office of Government (2003) accused some drafting committees of "being conservative, refusing to accept comments from enterprises, generally compartmentalizing their thinking and favoring the state's interests over private interests" (5). More recently the VCCI concluded that drafting committees discussed policy within closed "circles" and treated public consultation as a "mere formality" (Tran Huu Huynh and Dau Anh Tuan n.d., 29-30).

Although there is currently no express right for entrepreneurs to comment on legislation, the legislative framework is moving closer to this position. Amendments proposed by the Ministry of Justice to the decrees implementing the Law on the Promulgation of Normative Documents 1996 (amended 2002) will, for the first time, give the public a positive right to comment on draft legislation. If adopted, the proposed amendments will create a duty for lawmakers to "seriously absorb" public opinion and explain why comments were not incorporated into legislation. If enacted, they will create a legislative platform for SMEs to comment on draft legislation, but as the following discussion implies, they will not necessarily level the deliberative playing field with LEs.

**The Influence of Business Forums on Drafting Committees**

Although SMEs are prevented from forming member-directed associations to advance their cause, it is possible for them to use formal deliberative channels to communicate their message. For a brief period from 1996 until 2001, the Dien Dan Khu Vuc Tu Nhan (Private Sector Forum) (PSF) promoted open dialogue among government officials and foreign and domestic investors. The PSF was established to "improve investment and the business environment for the private sector in Vietnam in order to stimulate economic development, increase employment and improve people's lives" (Nguyen Hong 2002, 4).

[*689] During monthly meetings, government officials and legal drafters discussed policy in informal, unmediated exchanges with domestic and foreign entrepreneurs and law firms. Although SMEs, SOEs, and foreign entrepreneurs were united in their opposition to *quản...*
ly kinh te nha nuoc (state economic management), they disagreed about legal reforms aiming to give foreign investors increased market penetration such as market liberalizations and fair trade laws. SMEs, in particular, pressed lawmakers to incorporate local business practices into law and not merely rely on imported models. Some participants believe that these arguments eventually convinced key state officials that "state economic management" practices undermined private-sector development.

Agencies such as the CIEM, which were influenced by neoliberal deregulatory theory, were receptive to economic arguments that the state should transfer more decision-making power to entrepreneurs. But they were un receptive to the highly figurative and contextual moral and sentimental arguments presented by most SMEs. For example, some SMEs contended that predatory management practices by local regulators distanced entrepreneurs from state law. A statement from a sunglasses trader illustrates this discursive style.

State officials generally leave the smaller shops alone because there are insufficient resources to worry about, but they frequently inspect larger shops. Everyone knows that the sunglasses are fake or smuggled and economic police and market control authorities pretend to look for certificates of origin. I vui ve [literally pacify, but implying bribery] the inspectors in my area. But for this to happen I must remember them before they remember me. The main reason for the visits is to remind me who they are. This is a mandarin mentality that tells me that the law is something that is very far away from people. 

In another example, Nguyen Thi Nghia, a Ho Chi Minh City-based company director, discussed the disconnect between central regulation and business practices.

In principle, "intentional contravention" breaches the law, however, it is very difficult to apply the relevant law in practice. Boi duong [feeding up] customs officers, for example, is obviously an intentional contravention, but we cannot help doing it while operating our businesses. It is very difficult to do business in a vague legal environment that is full of unclear and general provisions. In fact, enterprises cannot exist without "intentional contravention." (Tan Duc 1999, 10)

[*690] Such narratives are frequently interlaced with emotive references to the positive contribution the private sector makes to the economy and the moral virtues of entrepreneurs. But they rarely synthesize highly contextual and figurative information about "how regulation affects me" into abstract commercial and legal principles that can inform commercial policy debates. It is also uncom mon for this type of discourse to enlarge and analyze particular viewpoints or propose normative and procedural alternatives to imported commercial laws.

Unlike foreign investors and SOEs, SMEs lack the resources to employ lawyers to convert their contextual concerns into the abstract legal language understood by lawmakers. They rarely reconfigure particular concerns about "what is good for me?" into particular regulatory questions about "what is good for us?" Lawmakers find the abstract regulatory discourse used by LEs easier to codify than the highly contextual and socially embedded preferences conveyed by SMEs.

In a subtle strategic maneuver, the government in July 2001 renamed the PSF the Dien Dan Doanh Nghiep Viet Nam (Vietnam Business Forum) (VBF) and directed SMEs to express their views through mass organizations and state-approved business associations. In contrast with the vigorous exchanges in the PSF, discussions in the VBF returned to the cautious, often
deferential language that characterizes interactions between mass organizations and the state. SMEs that had energetically promoted their interests withdrew and were replaced by organizations with close links to the party.

In contrast to the quiescent domestic associations, foreign business associations continued to advocate their members' interests through the VBF. They subdivided the VBF into working subcommittees. Each focused on topics such as taxation, infrastructure, land, capital markets, and banking. Subcommittees formulated policy options that lawyers then translated into a legal language cognizable to lawmakers.

Further strengthening their influence, foreign investors used the VBF to work with international agencies (such as the Asian Development Bank, International Finance Corporation, and United States Agency for International Development (USAID)) on law reform projects designed to import neoliberal legalism into Vietnam. Take, for example, the drafting of the Ordinance on Arbitration. In 1998, the United Nations Development Program (UNDP; 1999) identified the lack of independent (from the courts) commercial arbitration as a major impediment to foreign investment. Yet it was not until 2001, when the government ratified the BTA, which required an independent commercial arbitration system, that work commenced on drafting a new arbitration ordinance (Bach Quoc An and Thi Van Anh 2002; Pham Duy Nghia 2001).

Foreign members of the VBF strongly supported the drafting program. Together with foreign advisors recruited by international development agencies, they discussed the draft with members of the drafting committee [*691] in a mutually comprehensible legal and economic language. They arranged for members of the drafting committee to attend seminars that explained the role of arbitration in rights-based legal systems and to travel on study tours designed to see how arbitration functioned in capitalist economies. Foreign advisors were careful to avoid political modes of thought that could transform discussions into power contests between local and foreign interests. For example, in overcoming government resistance to foreign-appointed arbitrators and limitations to judicial review of arbitration awards, foreign advisors reminded government drafters that Vietnam is legally obligated under the BTA to provide an "international best practice" arbitration system (BTA 2000, chap. 4, art. 4). Foreign advisors managed to persuade the drafters to adopt many provisions from the United Nations Commission on International Trade Law arbitration model into the Ordinance on Commercial Arbitration 2003.

In cases where the VBF is unable to shift government policy, foreign investors use country-based chambers of commerce to lobby policy makers. For example, in an event organized by AMCham, the Deputy Prime Minister, Pham Gia Khiem, discussed problems encountered by U.S. investors in Vietnam (Thanh Nien 2007). As the next section shows, the collaboration between foreign investors and international development agencies has unquestionably had a considerable impact on lawmakers. Locked out of these privileged discussions, SMEs struggle to communicate their views through government mediated deliberative channels.

**THE INFLUENCE OF INTERNATIONAL DEVELOPMENT AGENCIES ON VIETNAMESE LEGAL REFORM**

International development agencies have profoundly shaped the commercial regulatory environment in Vietnam. From the Law on Foreign Investment 1987 onward, they have supported every major commercial law initiative (Ministry of Justice 2005). What is more, they have agreed to assist the legislative drafting program until 2010. The collective effort of international development agencies rivals, and perhaps exceeds, the legal assistance provided by the Soviet Union during the high socialist period.
Legal assistance programs in Vietnam (Quinn 2002; Rose 1998) aim to perfect constitutional institutions by encouraging representational democracy, improving legislative drafting, strengthening the courts, and expanding legal training. They advocate neoliberal legal teachings that promote rights-based regulation but discourage government initiatives designed to ameliorate harm caused by deregulated international trade, services, and capital. They also rarely discuss the rich sociolegal literature (McMillan and Woodruff 2000) showing that relational transactions augment and coexist with legal rights.

[*692] To some extent, the ascendency of neoliberal legalism over other regulatory models (such as the Japanese administrative model) mirrors a broader global hegemony propelled by American political, economic, and military supremacy (Jensen 2003; Santos 2006). Conditions attached to loans for structural development under the World Bank's Comprehensive Poverty and Growth Strategy and membership of international market-access treaties (especially the BTA and the World Trade Organization (WTO)), for example, aim to promote the neoliberal deregulatory agenda (Norland, Tran Ngoc, and Nguyen Dinh Tuyen. 2003). The penetration of these ideas into elite thinking is evident in party resolutions that now endorse rule of law ideas, such as entrepreneurs can conduct any business not proscribed by law. 21

Neoliberal legalism is not uncontested in elite thinking. Rather than displacing preexisting legal ideas, it has infused them with new meanings. Senior officials were taught in former Eastern Bloc countries to believe that socialist law has a modernizing influence that would sweep away feudal business practices. As socialism lost its explanatory power in the mixed market economy, they turned to other global discourses for inspiration.

There are small but influential cliques within the lawmaking elite in sympathy with neoliberalism. They cluster around the collaborative structures that bind foreign donors/lawyers, Vietnamese consultants, and state officials working on law reform projects. These communities inculcate neoliberal regulatory ideas by bringing foreign advisors into a close working relationship with local legal consultants and state officials. 22 They should not be thought of as communities in a physical sense, but rather as abstract bonds with the potential to generate cooperation and shared understandings and responses to lawmaking.

Officials working on donor projects are mostly Western educated and well acquainted with the neoliberal legal canon. They are encouraged to follow stylistic and methodological approaches prescribed by foreign donors. Information in reports prepared by local consultants, for example, is ordered, analyzed, and presented according to templates prescribed in tender documents or terms of reference. The professionalization of domestic consultants is inferred by standardized report writing styles and structures, and their advocacy of neoliberal legalism implies agreement with the donors' regulatory objectives.

The incentive to conform is provided by access to donor-funded projects, high incomes, social status, foreign travel, and education. Tendering rules reinforce the stylistic requirements while friendships and networking with [*693] members of foreign donor/investment communities provide access to the unwritten "rules of the game." Projects are awarded to consultants who have learned how to analyze problems and prescribe solutions from neoliberal perspectives.

For example, officials from CIEM responsible for drafting the Enterprise Law 1999 and Enterprise Law 2005 collaborated closely with foreign donors, foreign investors, and local consultants. Legislative drafters, foreign advisors, staff working in donor agencies, and domestic consultants knew each other, worked on the same projects, and often shared similar educational backgrounds and world views. Common social interests and professional ideas encouraged an enclave-like and self-referential approach to policy alternatives. This in turn generated a propensity for the project members to exclude or downplay critical legal,
economic, and political perspectives.

CIEM officials adopted a set of preferences and epistemological assumptions that set them apart from most domestic entrepreneurs. Many were more familiar with globalized economic and legal discourses than underlying Vietnamese businesses precepts and practices (Pham Duy Nghia 2005). Global legal principles equated legal rights and transparent procedures with modernism while relational transactions based on sentiment and morality are considered incompatible with industrialization and international economic integration. This discourse not only privileged certain regulatory ideas but also arguments expressed in ordered, structured, and dispassionate language. By favoring particular modes of discourse, drafters used their power to discount the sentimental, figurative, and highly contextual arguments raised by domestic entrepreneurs.

Members of neoliberal-oriented interpretive communities are rather heterogeneous in their use of language and ideas. This epistemological flexibility reflects their need to reconcile competing values between the various interpretive communities--based on the party, state, and family--to which they belong. CIEM officials, for example, deployed neoliberal legalization strategically to avoid offending power brokers within the Ministry of Planning and Investment. But they used well-scripted neoliberal prescriptions to gain a rhetorical edge over rival drafters. Drafters from the Ministry of Transport, for example, argued that licensing provisions were needed to prevent private transport companies from exploiting the "working class." Never far below the surface was the political concern that regulatory agencies need broad licensing powers to ensure that entrepreneurs do not accumulate levels of wealth that pose a threat to party power.

CIEM drafters believed the socialist specter was raised as a pretext to preserve (frequently corrupt) discretionary powers over market entry. As [*694] members of a research institute, they lacked the political power to prevent these views from entering law-making discussions. Forces opposing deregulation such as the Party Economic Commission, Ministry of Transport, and Ministry of Industry would have undermined reforms if their views were stifled.

CIEM drafters played a facilitating role and encouraged consultation that exposed other members of the drafting committee to neoliberal ideas about the economic benefits generated by market deregulation. In the end, well-researched economic and (to a much lesser extent) legal arguments defeated political and moral objections to deregulation. As the party's policy of international economic integration gained momentum, members of neoliberal oriented interpretive communities grew in status and their ideas penetrated further into organizational hierarchies.

The discussion so far shows that SMEs cannot compete with LEs in state mediated forums. The next section considers whether SMEs are more successful in using informal communicative channels to convey their concerns to lawmakers.

**INFORMAL DELIBERATIVE PATHWAYS**

The Entrepreneur Study shows that many SMEs do not consider **public participation** an effective way to influence legislative policy. As David Marr (1994) opined, "Vietnamese active in the public sphere do not generally see themselves as asserting civic power against state power. Rather, they prefer to infiltrate the state, find informal allies, and build networks that may conceivably be seen as fulfilling state, public and private objectives simultaneously" (12). For example, SMEs have traditionally organized **tuong tro Ian nhau** (mutual assistance) networks to influence the implementation of law by state officials.

Studies into the origins of agricultural reforms in Vietnam during the 1960s and 1970s...
illustrate this practice. Farmers used informal deliberative pathways to convince state officials to relax strict controls over private food production (Kerkvliet 2005). Faced with declining agriculture production under the cooperative system, state officials tacitly allowed farmers to grow crops on private plots (Hy Van Luong 1994). During a quiet, sometimes covert, process of negotiation and compromise, state officials learned from farmers and over many years brought the cooperative system closer to the realities of private household production. Ben Kerkvliet (2001) characterized these exchanges as "dialogue in the broadest sense of the word, which incorporates communication of contentious ideas and preferences in ways that, in Vietnam, are often indirect and non-verbal" (2-3).

What is instructive about these exchanges is that farmers succeeded in localizing imported Soviet agricultural policies at a time when private rural [*695] production constituted a criminal offense. 24 Discussions took place outside formal deliberative channels because ideological antipathy toward private farm production blocked constructive dialogue. Principles extracted from the dialogue slowly gained high-level party consent and eventually crystallized into statutory norms.

**Informal Deliberation by LEs**

Informal and secretive dialogical exchanges are naturally difficult to research. Fortunately, lawyers involved in these exchanges are a useful source of information. They describe two types of interaction. 25 Large enterprises employ intermediaries such as lawyers and business consultants to communicate specific requests to lawmakers. Economically powerful SOEs and multinational firms negotiate directly with lawmakers. For example, legal advisors acting for BHP Petroleum, a large investor in offshore gas production during the early 1990s, worked directly with lawmakers in PetroVietnam to import international profit-sharing and repatriation principles into Vietnamese law. More recently, foreign-owned car manufacturers persuaded the government to lower the high tariffs on imported car parts (Dau Tu 2006).

Lawyers and business consultants play a crucial role in brokering informal agreements between LEs and lawmakers. They leverage personal relationships with state officials to give LEs relatively unmediated access to policy and lawmakers. They explain to officials how regulators in other systems (typically Singapore or Hong Kong) use laws to balance private and state interests and standardize commercial practices. They also arrange training courses and study trips to shed further light on international regulatory practices. In building trust through personal relationships, lawyers assist officials to adjust globalized legal principles to local business conditions. Incrementally, these interventions are beginning to weave a protective web around the private legal rights that secure the interests of LEs.

For specifics, consider the discussions about the appropriate levels of corporate income tax for a large foreign-funded construction project in Phu My Hung (near Ho Chi Minh City) (Hoang Hai Van 2004). A Taiwanese construction firm in 1993 formed a joint venture with a Vietnamese SOE to develop cong trinh dan dung (civil construction) projects. When the joint venture commenced work on the Phu My Hung apartment project in 2003, [*696] the Ministry of Investment and Planning (MPI) increased the tax rate from 10 percent to 25 percent per annum, claiming that residential construction attracted a higher rate than civil construction.

Lawyers acting for the joint venture successfully persuaded the Ministry of Justice to issue an official letter stating that "civil construction" projects include residential apartments. 26 When the MPI refused to follow the official letter and reduce the tax, the Office of Government ordered the Ministry of Finance, MPI, and the Ho Chi Minh City People's Committee to resolve the impasse. It took many meetings for lawyers to convince key state officials that Article 121 of Decree No. 24 Implementing the Foreign Investment Law 2000 granted foreign investors legal protection against future adverse change. In practice, this principle exempted
profits generated from construction activities authorized under the investment license from future tax increases.

For six months it seemed that this legalistic interpretation of Decree No. 24 of 2000 would prevail against political arguments used by the MPI to support tax increases. But in August 2004, the prime minister intervened by issuing a decision that forced the Phu My Hung Corporation to pay the 25 percent tax (Sai Gon Giai Phong 2004).

It is possible to infer from these case studies that through sustained and unmediated dialogue, LEs are slowly convincing state regulators that rights-based laws play a valid role in ordering economic activity. Norms and procedures formulated during these negotiations occasionally percolate up to higher-level authorities to inform subordinate legislation that requires less discretion to implement. The views of SMEs are noticeably absent from these elite-level dialogues.

**Popular Resistance to Laws by SMEs**

SMEs generally use informal pathways to influence the implementation of law. Firms surveyed under the Entrepreneur Study used personal (frequently corrupt) relationships with state officials to moderate state interference. They prefer informal social gatherings such as weddings, parties, sporting clubs, and even funerals to influence state officials. Yet they rarely meditatively set out to change regulatory policy, preferring instead to modify the implementation of law.

As Kerkvliet (2005) showed in his study about farmer resistance to Soviet-style collectivization, there is a tradition for the "little person" to use informal mechanisms to influence state policy. This tradition is discernable in the popular resistance shown by many household businesses to the government's land tenure system. 27

For household businesses, the central issue is whether the state should replace land ownership titles conferred by the French colonial government and Republic of Vietnam with Socialist-inspired "long-term" usage rights under the Land Law 2003. Fewer than 30 percent of SMEs in Vietnam's major urban centers possess giay chu nhan quyen su dung dat (land use rights certificates) issued by the government (World Bank n.d.). Prior to the enactment of the 1980 Constitution, land could be privately owned, and many household businesses assert informal occupancy rights based on titles issued before this date. Following the enactment of the Land Law 1993 (replaced in 2003), the state began to convert informal occupancy based on ancien regime titles into formal land use rights (Van Thong 1999). This program has been remarkably unsuccessful, and at current conversion rates it will take many decades to complete.

Interviews with entrepreneurs operating household businesses in Hanoi and Ho Chi Minh City confirm that many resist land conversion. They believe that informal occupancy already conveys the advantages of state-sponsored land use rights, such as transfer and security rights, without the disadvantages of taxes and state inspections. Most had formed the view that eventually the state will abandon unpopular conversion policies and formally recognize existing land tenure norms. They used arguments based on uy tin (moral legitimacy) to assert their land entitlements. For example, they thought the state was unreasonable in not acknowledging ownership rights conveyed by the French colonial government before 1954. Many stressed that what their grandfather owned, they own, and that the state had no authority to interfere with inheritance rights. Laws that ignored moral property rights lacked co ly co tinh (right and compassion) and consequently were unsuitable sources of transactional guidance and security.

Entrepreneurs found it difficult to convey their preferences directly to central-level officials.
that formulate land policy. Officials at this level were unreceptive to ideas that directly
contravened state law. But more than this, entrepreneurs could not easily express subtle
normative preferences based on sentimental and moral feelings about moral property rights
into words. Instead they used popular resistance, a form of subverbal communication, to
express their opposition to state-based land titles.

[*698] Official government discourse dismisses moral attachments to land as superstitious
or irrational with no place in a modern, law-based society. 28 From a legal perspective, land
rights are privileges bestowed by the state and customary and moral land claims lack
legitimacy. This strict legalism gives central-level lawmakers little discretionary space to
adjust legal modes of thinking to accommodate moral claims to land. Paradoxically, the same
lawmakers who unwaveringly advocate state legalism in public, privately admit that they and
their families live in informal housing. In moral mode they agree with the household
businesses that informal tenure is an appropriate way to order land entitlements (Koh 2000).

Facing large-scale passive resistance, central-level lawmakers have incrementally changed
the rules to make land conversion more attractive. They initially expanded the types of
informal land occupancy that were recognized by the state. When this did not work, they
reduced the taxes imposed on land conversion from 20 percent to 2 percent. 29 Resistance
continues, however, because law reforms address economic concerns about the cost of
conversion rather than the moral conviction that informal tenure is legitimate.

In contrast to central-level officials, local officials are more tolerant of customary claims to
land. Officials at this level negotiate with household businesses in a personal and contextual
language that focuses on problem solving rather than legal fine points. For example,
household businesses routinely invoke the moral principle of good neighborliness or tinh cam
lang gieng (sentiment among neighbors) to persuade local officials to bend state law and
approve technically illegal property transactions. Phuong (ward) authorities certify and levy
taxes on the sale of informal land and housing. They also validate vendors’ claims to
exclusive occupancy of informal land by affixing chop (official seals) to chu quyen ti nhan
(informal ownership papers). Decisions are made with tam (good heart), thong cam
(compassion), tinh cam (sentiment), and social understanding.

One explanation for the different regulatory responses to informal land claims is that
different precepts and ideals circulate at central and local levels. Working closely with
international development agencies, central land authorities are familiar with Hernando de
Soto’s (1989) assertion that formal land titles stimulate economic growth. 30 They also
consider the title by [*699] registration system a “litmus test” of state regulatory power.
On a more pragmatic level, land titling facilitates the collection of land tax.

Working at the shadowy interface between state and personal obligations, local officials are
more skeptical about neoliberal claims that land titles generate economic growth. More
importantly, they risk losing local trust unless they apply the law flexibly. From a local
perspective, informality and formality describe regulatory styles rather than binary
legal/illegal cleavages between property rights and unlawful occupation. Reflecting this
understanding, local officials recognize shades of informality, where each degree of
informality attracts different levels of toleration.

This case study shows household businesses using silent resistance to communicate highly
unorthodox views that would not have been tolerated in constitutional forums or public
discourse. Over time, the combined effect of highly personalized local-level negotiations and
silent resistance forced the state to facilitate the conversion of informal land into the formal
land titling system. However, central land policy still falls well short of providing a viable
alternative to informal land tenure. As a result, the bifurcation between the registered title
system that governs LEs and the informal regime that applies to most SMEs is likely to
continue.

**CODIFYING ENTREPRENEURIAL PREFERENCES**

In converting public comments into legislation, lawmakers must condense vast amounts of information about everyday trading conditions into general normative rules and procedures that apply to everyone. This difficult task is generally achieved by applying predetermined criteria that prioritize certain types of commercial practices (Boisot 1995). In Vietnam, the policy directives given by the party to drafters operate at too high a level of abstraction to provide concrete guidelines for selecting one type of business transaction over another. Rather than codifying masses of local detail into legal texts—a process requiring politically sensitive decisions about which transactions deserve codification—Vietnamese drafters have for decades shown a propensity to borrow well-prepared and prestigious foreign legal solutions (Gillespie 2006; Le Minh Thong 2003). In fact, large-scale legal importation was the only way lawmakers could meet the legislative deadlines imposed by international market-entry treaties (especially the BTA and the WTO).

Unlike post-Socialist Europe, Vietnam does not have a usable legal past. Lawmakers have been unwilling to recycle legislation from the French colonial and Republic of Vietnam periods. French commercial law applied [*700] only to a tiny group of Europeans and francophone Vietnamese and did not become naturalized. The last traces of colonial law disappeared in the North when most French-trained lawyers were purged from the legal system during the 1960s. French law continued in the South until it was replaced in 1976 by Soviet law brought by the victors (Sidel 1993).

Now that the commercial legislative framework is almost complete, some commentators (Pham Duy Nghia 2005) are urging lawmakers to localize imported norms and practices. Yet, as we have seen, SMEs have been unable exert a level of influence over lawmakers that corresponds to their growing economic importance. This is attributable partly to government policy. Strict control over the formation of business associations constrains SMEs from pooling their resources and engaging professional staff to communicate their preferences in a mode that is cognizable to lawmakers.

By default, SMEs are represented at the central level by large business associations and international donors that privilege global legal texts over local understandings and practices. Popular resistance takes decades to change central laws and as such it is an inefficient mode of communication. Without access to lawmakers, SMEs have little alternative to using costly, time-consuming, and frequently corrupt relationships with local-level officials to naturalize global legal texts.

Foreign entrepreneurs, in contrast, have successfully used formal and informal mechanisms to convey their regulatory preferences to lawmakers. Neoliberal-oriented interpretive communities clustered around donor-supported legal projects are also spreading global principles into lawmaking institutions. But foreign entrepreneurs lack the close political linkages enjoyed by SOEs. Adam FForde (2005) argues that SOEs have in many cases successfully convinced their political patrons to oppose neoliberal deregulatory reforms that aim to erode their market monopolies. Domestic banks, for example, have persuaded the State Bank to limit foreign banking services. In another example, foreign investors ascribe the weak antimonopoly rules adopted in the Competition Law 2004 to sustained lobbying by SOEs and their supervising agencies (Thanh Nien 2004a).

**CONCLUSION**

This study shows that despite their growing economic importance, SMEs in Vietnam have only marginally increased their influence over lawmakers. Foreign entrepreneurs and SOEs,
on the other hand, have successfully used business associations and formal deliberative forums to communicate their preferences to lawmakers. One consequence of this asymmetric discourse is a commercial legislative framework that increasingly reflects elite business preferences.

An important finding is that LEs and SMEs inhabit different regulatory worlds. Foreign investors and large SOEs are familiar with, and generally [*701] support, the foreign legal models underlying commercial legislation while most SMEs consider commercial laws alien and imposed. LEs and SMEs lack common "ground rules" to negotiate, structure, and adjudicate commercial agreements. Without the transactional grammar to link their regulatory worlds, SMEs are likely to remain isolated from each other in fragmented and poorly integrated markets.

If the state is to construct regulatory bridges that integrate LEs and SMEs, it must change its thinking about localizing commercial laws. Discourse analysis has assisted our understanding about this problem. It makes us ask: Who must engage with lawmakers to localize global legal texts and principles? What issues must they discuss, and how do they advance the regulatory objectives of key players? Most importantly, it allows us to assess what types of conversations are most likely to generate preference convergence and the adoption of local ideas and practices by lawmakers.

Persuading lawmakers to take local ideas seriously is difficult because this project challenges deeply held convictions about the modernizing influence of global rules and state socioeconomic policy. Discourse analysis suggests reasons why SMEs are unable to effectively communicate their views. Without their own member-directed associations or access to law reform projects, SMEs lack the sustained communication necessary to effectively communicate complex and unconventional ideas to lawmakers.

In some instances the insights generated by discourse analysis were enriched by a political and legal context. For example, it is not just communicative barriers that prevent SMEs from forming member-directed associations and mobilizing the resources to counter lobbying by LEs. In the current political environment, the party is unlikely to give a large and potentially restive group like SMEs an independent voice in shaping commercial policy. Further, discourse analysis has little to say about emotional exchanges based on offense, resentment, shame (loss of face), respect, and self-esteem. As the land case demonstrated, subverbal public sentiment can influence lawmakers without (or in addition to) verbal discourse.

It is useful to conclude by speculating on what the government can do to make imported laws more relevant to local business conditions. First, it needs to acknowledge that in a fragmented marketplace, imported legislation cannot provide all the regulatory solutions to commercial problems. Lawmakers need to respect and learn from domestic business practices. Second, it needs to relax its regulatory control over the formation of business associations and public deliberation. In practical terms, this means allowing SMEs to form member-directed associations, as well as establishing public forums where entrepreneurs can publicly debate their regulatory preferences. Transparent policy debates have the potential to deter secretive and collusive deals between well-resourced special interest groups and lawmakers. Third, the government needs to change from being the regulator to behaving more [*702] like a mediator or facilitator. In some circumstances global legal texts are inappropriate, and the government could increase its regulatory reach by encouraging entrepreneurs to self-regulate through industry codes of conduct. Ultimately lawmaking should stimulate dialogical exchanges that reconcile imported commercial laws with a broad range of domestic precepts and practices. Without this shift, most entrepreneurs are likely to continue to prefer self-regulation to rule of law.

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- Business & Corporate Law > Foreign Businesses > General Overview
- Immigration Law > Nonimmigrants > Investors & Traders (E Visas)
- International Trade Law > Dispute Resolution > General Overview

FOOTNOTES:

n1 The Vietnamese government is committed under treaty agreements to enacting approximately twenty new commercially oriented laws a year for the next decade (Ngo Duc Manh 2002, 12). The legislative explosion in China has seen over 350 laws and 6,000 subordinate statutes enacted between 1978 and 2002 (Peerenboom 2002).

n2 Much has been written on whether Rawls's (1993, 43) notion of "rational discourse" is a prerequisite for deliberative lawmaking in Western and non-Western societies. A contrary view is that "rational discourse" is contextually determined (Habermas 1993; Rorty 2000).

n3 Discourse analysis is an amorphous area comprised of ideas drawn from system theory, linguistic analysis, and neo-Gramscian theory (Black 2002; van Dijk 1997; Luhmann 1987; Teubner 1993; Wetherell 1998).

n4 The foreign and domestically owned firms operated in five industries: cooper wire, car battery, sunglasses trading, computer, and garment manufacturing. Approximately half of the interviews were conducted with the assistance of Vietnamese lawyers (N. H. Quang and Associates and Investconsult), others were conducted with the assistance of research assistants. Information about international donors was gleaned by the author while working on numerous international development assistance projects between 1994 and 2007 with Australian International Development Agency (AusAid), Canadian International Development Agency (CIDA), Danish International Development Agency (DANIDA), Foreign Investment Advisory Service (FIAS), International Finance Corporation (IFC), United Nations Development Program (UNDP), and the World Bank. All fieldnotes of all interviews are on file with the author.


n6 At the end of 2003, sole proprietors had on average fifteen employees, and limited liability and joint stock companies had on average thirty-eight and fifty-three employees, respectively (World Bank 2006, 8; Tran Huu Huynh and Dau Anh Tuan n.d.).


n8 Vietnamese Constitution 1992, arts. 120 and 124. Ordinance on the Concrete Tasks and Powers of the People's Councils and People's Committees at each Level 1996.


n10 Pressure by the Ministry of Home Affairs to bring associations further under state management is opposed by groups within the party that want a diversity of associations to represent the interests of citizens (Nguyen Chi Dung 2006). Interview with Dau Anh Tuan,
Legal Office, VCCI, Hanoi, March 2007 about the draft Law on Associations prepared by the Vietnam Union of Science and Technology Associations.

There are approximately ninety national and two hundred provincial business associations (Nguyen Ngoc Lam 2007).

Interview with member of the Law on Investments 2005 drafting committee, Hanoi, March 2006.

VCCI claims 5,270 members, the Vietnam Young Entrepreneurs Organizations claim 5,600 members, and the UAIC has approximately 1,800 members (World Bank 2006).


These comments are based on interviews between 2001-2007 with eleven business associations located in Hanoi and Ho Chi Minh City.


Speech by Hoang The Lien, Vice Minister of Justice, "Public Participation in Commercial Policy and Lawmaking Workshop," at Thanh Hoa, March 31, 2007 (Nguyen Chi Dung 2006.)

These comments are based on interviews from 2002-2006 with lawyers from Leadco, N. H. Quang, Investconsult, and VILIF, Hanoi-based law firms.

This statement was presented to the PSF in April 2000 by lawyers working for Leadoc, a Hanoi-based law firm.

Politburo Resolution No. 48 NQ/TW Building and Perfecting a Socialist Oriented Economic System and Nha Nuoc Phap Quyen (Law-Based State), May 24, 2005.

Investment consultant firms such as Investconsult, Galaxy, Leadco, N. H. Quang, Vietbid, and Concetti, as well as foreign law firms, work closely with foreign investors and donors in providing research and strategic advice in law reform projects.

These observations are based on interviews with Le Dang Doanh, Former Director CIEM, Hanoi, January 2004 and April 2005.

Criminal Code 1986 art. 80 (Sabotaging the Implementation of Socio-Economic Policies) and art. 137 (Illegal Use of Socialist Property).

Comments concerning informal deliberative exchanges are based on numerous interviews with Hanoi-based law firms VILAF, Leadco, Bizconsult, Investconsult, and N. G. Quang and Associates from March 2002 until July 2007. Also see Gainsborough (2002).

See Official Letter No. 5 TP PL QT 5 November 2003, Ministry of Justice (on file with the author).
Information used for this case study was gleaned from interviews conducted with land officials and residents in Hanoi, Ho Chi Minh City, Hai Phong, and Ninh Binh during a World Bank Urban Upgrading Mission in May and June 2001. Follow-up interviews were conducted under a FIAS regulatory impact assessment project conducted between August and October 2006.

Interviews Do Duc Doi, Deputy Director General, Ministry of Natural Resources and Environment, Department of Land Registration and Statistics; Dao Trung Chinh, Legal Director, Ministry of Natural Resources and Environment Department of Land Administration, Hanoi, March 2006.

Decree No. 38 on the Collection of Land Use Levies 2000, art. 7; Decree No. 198 on the Collection of Land Levies 2004, articles 2 through 7.

These comments are based on interviews conducted by the author with central and local level official during the "FIAS/MPDF/MONRE Project on the Implementation of the 2003 Land Law and Business Access to Land," with the Ministry of Natural Resources and Environment, Hanoi, April 2006.

These comments are based on interviews with members of the Hoi dong Dan chu va Phap Luat (Council of Democracy and Law), a Fatherland Front organization that was influential in shaping the post-doí moi [renovation] legislative landscape. Interviews with Luu Van Dat, the former Director of the Law Department of the Ministry of Trade, and Phan Huu Chi, the former Chief Advisor to the Minister of Justice, Hanoi, March and April 1992.