Investment Climate in Vietnam

U.S. Commercial Service Vietnam

Openness to Foreign Investment

Vietnam encourages foreign investment as part of its development strategy, and the Government of Vietnam (GVN) is committed to improving the country’s business and investment climate. The Investment Law of 2005 provides the legal framework for foreign investment in Vietnam. Vietnam became the 150th member of the World Trade Organization on January 11, 2007. Vietnam's commitments in the WTO increase market access for exports of U.S. goods and services and establish greater transparency in regulatory trade practices as well as a more level playing field between Vietnamese and foreign companies. Vietnam undertook commitments on goods (tariffs, quotas and ceilings on agricultural subsidies) and services (provisions of access to foreign service providers and related conditions), and to implement agreements on intellectual property (TRIPS), investment measures (TRIMS), customs valuation, technical barriers to trade, sanitary and phytosanitary measures, import licensing provisions, anti-dumping and countervailing measures, and rules of origin.

Vietnam's record in implementing its bilateral and international obligations has been good overall; however, concerns remain in some areas, such as protection of intellectual property rights (IPR).

The GVN holds regular "business forum" meetings with the private sector, including both domestic and foreign businesses and business associations, to discuss issues of importance to the private sector. Foreign investors use these meetings to draw attention to investment impediments imposed by Vietnamese law and regulation as well as by improper implementation. These forums, together with frequent dialogues between GVN officials and foreign investors, have led to improved communication and have allowed foreign investors to comment on and influence many legal and procedural reforms.

Despite the GVN’s commitment to improving the country’s business and investment climate, Vietnam is still transitioning from a centrally planned economy to a more market-oriented and private-sector based model. As the following indices indicate, Vietnam still faces development challenges relevant for foreign investors, for example: poorly developed infrastructure, underdeveloped and cumbersome legal and financial systems, an unwieldy bureaucracy, non-transparent regulations, high start-up costs, arcane land acquisition and transfer regulations and procedures, and a shortage of skilled personnel. Issuance of investment licenses can be a
lengthy process, and inconsistent practices have been noted between provinces. Investors frequently face policy changes related to taxes, tariffs, and administrative procedures, sometimes with little advance notice, making business planning difficult. Because Vietnam’s labor laws and implementation of those laws are not well developed, companies sometimes face difficulties with labor management issues.

The 2005 Investment Law, together with its implementing decrees and circulars, regulates investment in Vietnam, including investors’ rights and obligations, allocation of incentives, state administration of investment activities and offshore investment. The Investment Law also provides for guarantees against the nationalization or confiscation of assets and applies to all investors, foreign and domestic. Although the Investment Law designates prohibited and restricted sectors for investment, there are also additional laws applying to investment in restricted sectors such as banking, securities, and insurance.

The Investment Law provides for five main forms of foreign investment: (1) 100 percent foreign-owned or domestic-owned companies; (2) joint ventures (JV) between domestic and foreign investors; (3) business cooperation contracts (BCC) and build-and-operate agreements (BOT and BTO); (4) capital contribution for management of a company; and (5) merger and acquisitions (M&A). Vietnam has gradually opened some sectors for foreign investment through M&A. While foreign investors are allowed to buy shares in many domestic companies without limitation, there are ownership limitations for certain companies listed on the Vietnam stock exchange and service sectors. Foreign ownership cannot exceed 49 percent of listed companies and 30 percent of listed companies in the financial sector. Individual foreign investors are usually limited to 15 percent ownership, though a single foreign investor may increase ownership to 20 percent through a strategic alliance with a local partner.

INVESTMENT SECTORS

The Investment Law distinguishes four types of sectors: (1) prohibited sectors; (2) encouraged sectors; (3) conditional sectors applicable to both foreign and domestics investors; and (4) conditional sectors applicable only to foreign investors.

The list of sectors in which investment is prohibited includes cases where the investment would be detrimental to national defense, security and public interest, health, and historical and cultural values.
The list of sectors in which investment is encouraged includes high-technology, agriculture, labor-intensive (employing 5000 or more employees), infrastructure development, and those located in remote and mountainous areas.

The list of sectors in which investment is conditional applies to both foreign and domestic investors and includes those dealing with national defense, security, social order and safety (broadly defined); culture, information, press and publishing (also broadly defined); financial and banking; public health; entertainment services; real estate; survey, prospecting, exploration and exploitation of natural resources; ecology and the environment; and education and training. In addition, there are some conditional sectors applicable to foreign investors only, including telecommunication, postal networks, port and airports and other sectors as per Vietnam’s commitments under international and bilateral arrangements.

Upon WTO accession in 2007, Vietnam granted full trading rights (including the right to sell an imported product to any individual or enterprise having the right to distribute such product in Vietnam) to all foreign individuals and enterprises. These rights are accorded to foreign individuals and enterprises without any requirement to invest in Vietnam. Trading rights are granted for all products except for a limited number reserved for state-trading enterprises and those subject to a phased-in period. For the complete lists of goods subject to a phase-in schedule for trading rights, see www.wto.org/english/thewto_e/countries_e/vietnam_e.htm. Foreign investors have the right to sell, market, and distribute what they manufacture locally, and to import goods needed for their investment projects and inputs directly related to their production, provided this right is included in their investment licenses.

Foreign participation in distribution services, including commission agents, wholesale and retail services, and franchising opened to fully foreign-owned businesses in 2009. Vietnam has excluded certain products from its WTO distribution services commitments, including, rice, sugar, tobacco, crude and processed oil, pharmaceuticals, explosives, news and magazines, precious metals and gemstones. Distribution of alcohol, cement and concrete, fertilizers, iron and steel, paper, tires, and audiovisual equipment opened for foreign investors in 2010.

INVESTMENT LICENSING

Provincial authorities in Vietnam’s 63 cities and provinces generally have the authority to issue investment licenses. Provincial authorities and the management boards of industrial zones (Industrial, Export Processing Zones, High-tech and Economic Zones) are the issuing entities for
most types of investment licensing, with the exception of build-and-operate projects (BOT, BO, BTO), which are still licensed by the central government. Domestic investors with projects of less than VND 15 billion (approximately USD $800,000) do not need to acquire investment licenses.

The procedure to obtain investment certification is complex, requiring investors to get approval from several ministries and/or agencies, depending on ownership (foreign or domestic), size and the sector of investment. Projects deemed to be of “national importance” must be approved by the National Assembly. Key infrastructure projects must be approved by the Prime Minister's Office (see below). Investments in conditional sectors such as broadcasting, mining, telecommunications, banking and finance, ports and airports, and education are subject to a more complex licensing process.

Licensing is required to establish new investment as well as to make significant changes to an ongoing enterprise, such as to increase investment capital, restructure the company by changing the form of investment or investment ratios between foreign and domestic partners, or add additional business activities.

Decentralization of licensing authority to provincial authorities has streamlined the licensing process and significantly reduced processing times; however, it has also given rise to considerable regional differences in procedures and interpretations of relevant investment laws and regulations. For an overview on provincial investment climate perceptions, Investment projects that must be approved by the Prime Minister include: - All projects, regardless of capital source and size, in airports and seaports; mining, oil and gas; broadcasting and television; casinos; tobacco; higher education; industrial, export processing, high-tech and economic zones; sea transportation, post and delivery services; telecommunication and internet networks; printing and publishing; and independent scientific research establishments; and - All projects having capital in excess of VND 1.5 trillion (approximately $81 million) regardless of capital source, in electricity, mineral processing and metallurgy, railways, roads and domestic waterways, alcoholic beverages; and foreign-invested projects in sea transport, post and telecommunication, publishing and independent science research units.

Vietnamese authorities evaluate investment license applications using a number of criteria, including the legal status and financial capabilities of the foreign and Vietnamese investors; the project's compatibility with Vietnam's "Master Plan" for economic and social development; the benefits accruing to the GVN or to the Vietnamese party, especially acquisition of new production capabilities, industries, technologies, expansion of markets, and job creation; projected revenue; technology and expertise; efficient use of resources; environmental protection; plans for land use and land clearance compensation; project incentives including tax rates and land, water, and sea surface rental fees.
The Commercial Law and the implementing guidelines contained in Decree 72 allow foreign firms to establish branches or representative offices. Branches may engage in trading activities, while the representative offices are allowed to liaison with customers, negotiate and enter into contracts and conduct market research, but not to engage in commercial or profit making activity.

OTHER INVESTMENT-RELATED LEGISLATION

Vietnam's Bankruptcy Law of 2004 provides that parties other than creditors are able to participate in bankruptcy procedures and gives courts authority to deal with insolvent businesses. The Law on Competition of 2004 aims to create an equitable and non-discriminative competition environment, and protect and encourage fair competition. The Law acknowledges the importance of the rights of organizations and individuals to compete freely, and addresses anti-competitive agreements, state monopoly, economic concentration and unfair competition.

TAXATION

Vietnam lowered corporate income tax rates from 28 to 25 percent in January 2009. Corporate income tax for extractive industries vary from 32 to 50 percent depending on particular projects, and can be as low as 10 percent if investment is made in selected priority sectors and in remote areas. Incentives are the same for both foreign invested and domestic enterprises.

Vietnam does not tax profits remitted by foreign-invested companies. A new personal income tax regime placing Vietnamese and foreigners on the same tax rate schedule took effect in January 2009. The new law regulates all types of personal income, including income previously subject to other laws such as income from individual businesses and from property sales. The lowest and highest marginal tax rates are 5 percent and 35 percent, respectively.

Conversion and Transfer Policies

Foreign businesses are permitted to remit profits in hard currency, revenues from joint ventures, income derived from services, technology transfers, legally owned capital and intellectual property. Foreigners are also allowed to remit royalties and fees paid for the supply of technologies and services, principal and interest on loans obtained for business operations, investment capital and other money and assets.
According to the 2005 Ordinance on Foreign Exchange Control, all currency transactions between residents and non-residents of Vietnam shall be conducted freely. Residents are allowed to open foreign currency accounts. Exporters are required to remit all foreign currency earnings into a foreign currency account with an authorized credit institution in Vietnam. Retaining foreign currency earnings overseas requires approval of the State Bank of Vietnam (SBV).

Foreign investors are expected to be "self-sufficient" for their foreign exchange requirements. The GVN has in the past assisted in the balancing of foreign currency for foreign invested enterprises and foreign business cooperation parties that invest in infrastructure and certain other sectors when banks have not been able to satisfy their foreign currency requirements.

The SBV publishes daily average interbank exchange rates against the dollar, and then allows dollar/dong transactions to move in a band around this daily rate. The SBV maintained a trading band of less than +/- one percent until March 2008, when it began to widen the band. The band was widened to a high point of +/- five percent, but in November 2009 was reduced to the current three percent trading band.

Dollar shortages were reported at various times in 2009, which the SBV claimed was a result of the global recession. Many enterprises reported difficulty in obtaining sufficient dollar funds, and claimed they were forced to purchase at higher black-market rates to pay for their imports or pay additional bank fees that resulted in an approximation of the black-market rate. Dollar shortages remained an intermittent problem at the end of 2009.

Expropriation and Compensation

The U.S. Mission knows of no recent instances of expropriation of a foreign investment by the GVN. Under the U.S.-Vietnam Bilateral Trade Agreement (BTA), in any future case of expropriation or nationalization of U.S. investor assets, Vietnam will be obligated to apply international standards of treatment - that is taking such an action for a public purpose, in a non-discriminatory manner, in accordance with due process of law, and with payment of prompt, adequate and effective compensation.

Dispute Settlement

Foreign and domestic arbitral awards are legally enforceable in Vietnam. Vietnam is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, meaning that foreign arbitral awards rendered by a recognized international arbitration institution must be respected by Vietnamese courts without a review of the case's merit.
Under the investment chapter of the BTA, Vietnam gives U.S. investors the right to choose a variety of third-party dispute settlement mechanisms in the event of an investment dispute with the GVN. Vietnam has not yet acceded to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID), but has asked the United States to provide advice in this area as part of the U.S. technical assistance program designed to assist Vietnam to implement the BTA. The Ministry of Planning and Investment (MPI) has submitted a proposal to the GVN to join the ICSID, which is under consideration.

Vietnam's legal system, including its dispute and claims settlement mechanisms, remains underdeveloped and ineffective in settling disputes. Negotiation between the concerned parties is the most common and preferred means of dispute resolution.

Under the 2005 Civil Code, all contracts are “civil contracts” subject to uniform rules over all contractual relations, including those with foreign businesses. In foreign civil contracts, parties are allowed to choose foreign laws as reference for their contractual agreement, provided that the application of the law does not violate the basic principles of Vietnamese law. In addition, commercial contracts between businesses are also regulated by the 2005 Commercial Law.

**Performance Requirements and Incentives**

As part of its WTO accession, Vietnam committed to remove performance requirements that are inconsistent with the TRIMS agreement. In particular, the Investment Law specifically prohibits the following requirements: giving priority to the purchase or use of domestic goods or services; compulsory purchase of goods or services from a specific domestic manufacturer or services provider; export of goods or services at a fixed percentage; restricting the quantity, value or type of goods or services that may be exported or which may be sourced domestically; fixing import goods at the same quantity and value as goods exported; requirements to achieve certain local content ratios in manufacturing goods; stipulated levels or values on R&D activities; supplying goods or services in a particular location whether in Vietnam or abroad; or mandating the establishment of head offices in a particular location.

The GVN actively promotes foreign investment in certain priority sectors or geographical regions, such as mountainous and remote areas of the country with difficult economic and social conditions. The GVN specially encourages investment in production of new materials, new energy sources, manufacturing of high-tech products, bio-technology, information technology, mechanical engineering, agricultural, fishery and forestry production, salt production, generation of new plant varieties and animal species, ecology and environmental protection, research and development, labor-intensive projects (using 5,000 or more full time laborers), infrastructure projects, education, training, and health and sports development.
Foreign investors are exempt from import duties on goods imported for their own use and which cannot be procured locally, including all equipment, machinery, vehicles, components and spare parts for machinery and equipment, raw materials, inputs for manufacturing and construction materials that cannot be produced domestically.

Remote and mountainous provinces are allowed to provide additional tax and other incentives to prospective investors.

Vietnam has also instituted a number of incentives designed to attract investment from Vietnamese expatriates and their families. In 2008, the GVN recognized dual citizenship for Vietnamese expatriates. They are allowed to choose the option of operating as domestic or foreign businesses. Real estate laws have also been amended to permit limited categories of these investors to buy land use rights to build homes.

U.S. citizens of Vietnamese descent may be treated as Vietnamese nationals unless they have formally renounced their Vietnamese citizenship. U.S. investors of Vietnamese origin should consult with the U.S. Embassy in Hanoi or the U.S Consulate General in Ho Chi Minh City for more information.

**Right to Private Ownership and Establishment**

The right to private property was enshrined in Vietnam's Constitution in 1992, recognizing "the right of ownership with regard to lawful income, savings, housing, chattel, means of production funds and other possessions in enterprises or other economic organizations" (Article 58).

Real estate rights in Vietnam are divided into land ownership, which is collective, and land-use and building rights, which can be held privately. All land in Vietnam is owned collectively and managed by the state and, as such, neither foreigners nor Vietnamese nationals can own it. In addition to land, collective property includes "forests, rivers and lakes, water supplies, wealth lying underground or coming from the sea, the continental shelf and the air, the funds and property invested by the State in enterprises and works in all branches and fields - the economy, culture, society, science, technology, external relations, national defense, security - and all other property determined by law as belonging to the State."
The Land Law of 2003 extended "land-use rights" to foreign investors, allowing title holders to conduct real estate transactions, including mortgages. Foreign investors can lease land for (renewable) periods of 50 years, and up to 70 years in some poor areas of the country. Starting in 2009 certain foreigners can own apartments in Vietnam, but not the associated land.

Protection of Property Rights

The basis of the legal system related to property rights includes the 2005 Civil Code, the 2005 Intellectual Property Law, and implementing regulations and decrees. Vietnam has joined the Paris Convention on Industrial Property and the Berne Convention on Copyright and has worked to meet its commitments under these international treaties.

In 2009, Vietnam revised the Intellectual Property (IP) Law and IP-related provisions in the Criminal Code with respect to criminal penalties for certain acts of IPR infringement or piracy. These revisions further codify criminal provisions set out in an Inter-ministerial Circular. The GVN also issued a Decree on Penalties on infringement of copyrights and related rights, which increased the maximum fines to VND 500 million (approximately USD 30,000).

Although Vietnam has made progress in establishing a legal framework for IPR protection, various forms of infringement and piracy of intellectual property continues to be widespread. Enforcement of administrative orders and court decisions on IP issues remains inconsistent and weak. In addition, the system of administrative enforcement is complex and rightsholders have raised concerns regarding inconsistent coordination among enforcement agencies.

Most often, authorities use administrative actions such as warnings and fines to enforce IPR protection because they are less demanding on limited enforcement time and resources. The United States and other interested countries have conducted training for enforcement agencies, prosecutors and judges. Some businesses and rights holders have started to assert their rights under the law more. In recent years, the government pledged and then successfully implemented a plan to rid government offices of pirated software. Vietnamese enforcement bodies have investigated, and in some cases raided and fined, businesses suspected of using pirated software.

However, Vietnam still has one of the highest rates of piracy in the world, and enforcement remains uneven, particularly for software, music and movies. Rights holders continue to seek additional enforcement actions against websites containing infringing digital content. However, to date, very little enforcement action has been taken to punish or prevent digital and Internet piracy.
Substantial compensation for IPR violations is only available under the civil remedies section of the IP Law. However, Vietnam's courts are untested in this regard, and concerns remain as to whether rights holders have adequate access to effective civil remedies under the IP Law. Criminal offenses are prosecuted under the Criminal Code, and criminal proceedings are regulated under the Criminal Procedure Code. In practice, however, criminal prosecutions are rarely used to prosecute IPR violations.

Transparency of Regulatory System

In recent years, Vietnam has improved its process for making and publicizing laws, particularly with major national laws and regulations. The Law on the Promulgation of Legal Normative Documents requires all legal documents and agreements under the drafting process be published online for comments for 60 days, and published in the Official Gazette before implementation. However, there are reports of regulations sometimes being issued without public notification or with little advance warning or opportunity for comment by affected parties.

Substantial foreign assistance, including by the United States, continues to be provided to assist Vietnam’s own efforts to establish a legal structure compatible with international standards. The USAID-funded Support for Trade Acceleration (STAR) project has made a significant contribution to Vietnam’s successful efforts to draft the new laws and regulations required under the BTA and the WTO. The USAID-funded Vietnam Competitiveness Initiative (VNCI) works with the Ministry of Justice to implement the requirements under the updated Law on Laws for regulatory impact assessments for all new laws, decrees and ordinances to improve regulatory quality and consultations with the private sector and civil society. VNCI is also working with the Office of Government to launch a new National Database of Administrative Procedures (AP) to improve and simplify the administrative procedures required to establish and conduct business in Vietnam.

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