

SETTING UP AND OPERATING IN VIETNAM

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PREFACE

The information in this booklet will be helpful to a company investigating Vietnam as an investment venue. This booklet discusses material that would normally be on a site selection team's checklist.

While this is only a summary, it provides the information necessary to understand Vietnam's investment landscape. Specifically, this book focuses on foreign investment projects.

We hope that the material is useful. We would be happy to respond to specific questions, and to bring the information contained in this book to the next level of detail.

* * *

In this book, we define and abbreviate terms the first time that we use them. We have also prepared a Glossary for those readers who may not read from the beginning.

This booklet was written by lawyers from Russin & Vecchi.
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GLOSSARY

BOM	Board of Management
BTA	US-Vietnam Bilateral Trade Agreement
CIT	Corporate Income Tax
CLUR	Certificate of Land Use Rights
DOLISA	Department of Labor, War Invalids and Social Affairs
DOSTE	Department of Science, Technology and Environment
DPI	Department of Planning and Investment
EIA	Environmental Impact Assessment
EL	Enterprise Law
ERC	Enterprise Registration Certificate
EP	Economic Police
FIE	Foreign Invested Enterprise
HCM City	Ho Chi Minh City
IC	Investment Certificate
IL	Investment Law
IPR	Intellectual Property Rights
JSC	Joint Stock Company
LCIT	Law on Corporate Income Tax
LFI	Law on Foreign Investment
LLC	Limited Liability Company
LPIT	Law on Personal Income Tax
LUR	Land Use Rights
LVAT	Law on Value Added Tax
M&A	Mergers and Acquisitions
MCT	Ministry of Communications and Transport
MMO	Market Management Office
MOIT	Ministry of Industry and Trade
MOF	Ministry Finance

MOLISA	Ministry of Labor, War Invalids and Social Affairs
MOST	Ministry of Science and Technology
MPI	Ministry of Planning and Investment
MPS	Ministry of Public Security
NOIP	National Office of Intellectual Property
PIT	Personal Income Tax
PM	Prime Minister
SBV	State Bank of Vietnam
SGM	Shareholders' General Meeting
SSC	State Securities Commission
VAT	Value Added Tax
VND	Vietnamese dong
WTO	World Trade Organization

For this book, we use the approximate rate of exchange of US\$1.00 =VNĐ 20,000.

Chapter One

INVESTMENT REGIME

This chapter sets out the framework for foreign investment. This framework is a point of reference and recognizes that special projects will have special needs.

1.1 Comprehensive Enterprise Law (“EL”) and the Investment Law (“IL”)

The legal framework for doing business in Vietnam changed significantly for foreign investors on July 1, 2006. The prior system, in which there were different legal mechanisms for domestic and foreign investors, has largely disappeared. The Enterprise Law (“EL”) has created a unified legal framework for investment by providing business structures from which both foreign and domestic investors can choose. Special forms of business structures which are available for foreign investors are discussed in Section 1.7 below. The EL also provides rather complete regulations on corporate governance.

The Investment Law (“IL”) provides details on procedures to carry out investment activities, the rights and obligations of investors, assurances of the legitimate rights and interests of investors, investment incentives, state management of investment in Vietnam, and rules on offshore investment from Vietnam.

The IL distinguishes between direct investment and indirect investment. If an investor is directly involved in the management of an enterprise, it is considered to have a direct investment. The distinction exists to differentiate between investors that obtain an investment certificate (“IC”) to carry on investment activities and investors that invest in, say, listed companies where there is no direct participation in management. Indirect investment is governed by other laws.

Foreign investors who invest into Vietnam by establishing a new legal entity need to obtain an IC. Licensing procedures are discussed in Section 1.6 below.

As is normal practice, the EL and the IL have been supplemented with implementing regulations. Those regulations mainly include:

- Decree No. 101/2006/NĐ-CP (September 21, 2006), providing detailed guidelines for re-registration (and/or) conversion by enterprises with foreign invested capital, and registration for investment certificates by enterprises with foreign invested capital pursuant to the EL and the IL (“Decree 101/2006/NĐ-CP”);
- Decree No. 108/2006/ND-CP (September 22, 2006), detailing and guiding implementation of a number of articles of the Law on Investment (“Decree 108/2006/ND-CP”);
- Decision No. 1088/2006/QĐ-BKH (October 19, 2006), issuing standard forms necessary to comply with investment procedures (“Decision 1088/2006/QĐ-BKH”);

- Decree No. 102/2010/ND-CP (October 1, 2010), providing detailed guidelines to implement a number of articles of the EL (“Decree 102/2010/ND-CP”);
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- Decree No. 43/2010/ND-CP (April 15, 2010), providing detailed guidelines for enterprise registration (“Decree 43/2010/ND-CP”);
-
- Circular No. 14/2010/TT-BKH (June 4, 2010), guiding a number of provisions of Decree No. 43/2010/ND-CP (April 15, 2010) on Business Registration, regarding application dossiers and procedures for enterprise registration (“Circular No. 14/2010/TT-BKH”).

Setting up and operating enterprises is subject to industry-specific legislation. Industry-specific legislation includes, for example:

- Law on Credit Institutions;
- Law on Petroleum;
- Law on Civil Aviation of Vietnam;
- Law on Publishing;
- Law on Press;
- Law on Education;
- Law on Securities;
- Law on Insurance Business;
- Law on Lawyers;
- Law on Notarization.

If there are any differences among the IL, the EL and industry-specific legislation on procedures and conditions to establish an enterprise, its ownership structure, its restructuring or dissolution, then industry-specific legislation will prevail.

1.2 From the BTA to WTO commitments

The US-Vietnam Bilateral Trade Agreement (“BTA”), adopted in December 2001, dramatically liberalized access to Vietnam’s market for US--and other--goods, services and investments. It improved the framework for protecting intellectual property rights, which we discuss in Chapter Six.

In many ways, the BTA anticipated Vietnam’s accession to WTO. The requirements of the BTA provided an introduction and road map to the terms that were incorporated into Vietnam’s WTO accession agreement. While some special conditions for US investors remain, since Vietnam’s accession to WTO in January 2007, virtually all special conditions that existed under the BTA are now also available to all WTO members and possibly to others.

In anticipation of Vietnam’s WTO accession, the National Assembly ratified Vietnam’s WTO commitments by Resolution No. 71/2006/QH11, passed by the National Assembly on November 26, 2006 (“**Resolution 71**”). This Resolution provides that, where there are discrepancies between Vietnam’s WTO commitments and Vietnamese law, the WTO commitments will prevail.

A committed service means a service which Vietnam committed to open to market access to foreign investor according to the Vietnam's Schedule of Specific Commitments in Services. Vietnam has made commitments on a range of services. The WTO commitments adopt the classification of services in the United Nations Statistics Division's Classification Registry¹. The commitments and some of the regulations are in Vietnam's Schedule of Specific Commitments in Services²; other information on the regulations is in the WTO Working Party Report on the Accession of Vietnam³. Vietnam's commitments to open the market in a specific service are generally "unbound", "none", or "conditional/restricted". There are no regulations, as yet, to differentiate between "unbound" and "none"⁴. "Unbound" has generally been interpreted to mean that Vietnam has made no commitment in respect of such a service as a result of its WTO accession, and is free to impose restrictions on foreign investment. "None" has been interpreted to mean "no restrictions/conditions" exist.

The legal environment for conditional or restricted investment in services has changed since WTO accession. Some change has been positive, some negative. On the positive side, Vietnam allows foreign investment in more industries which were previously restricted. In addition, the application of WTO commitments creates a fairer investment environment. For example, government subsidies by way of favorable treatment to export industries or to investment in some (but not all) Industrial Zones (IZ)⁵ have stopped or are being phased out.

The negative points relate to a few services which could previously be licensed to foreign investors without restrictions, but which became conditional/restricted under the WTO. The restrictions will mostly be phased out after a few years.

Section 1.13 contains a broader discussion of investment conditions, including those imposed as a result of Vietnam's WTO accession.

One of Vietnam's WTO commitments to deal mainly with "indirect investment" affirms that foreign investors may purchase shares of domestic enterprises. Under this commitment, before 2008, the total equity that could be held by foreign investors in a domestic owned enterprise that engaged in a committed service was limited to 30%.⁶ This 30% cap persists in the case of purchasing shares by a foreign investor in a joint-stock

¹ To see the classifications, go to: <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Lg=1>.

² Each WTO member agrees to a specific schedule of commitments in services. The schedule is a complex document in which each country identifies the service sectors to which it will apply the market access and national treatment obligations of the GATS and any exceptions from those obligations it wishes to maintain.

³ WTO Working Party Report is the final document passed on to the WTO's General Council for approval, covering the applicant country's commitments on opening its markets and on applying WTO rules upon such country's accession to the WTO. Notable pages of this WTO Working Party Report on the Accession of Vietnam include: pages 9 to 14 which report the discussions on the investment regime; pages 25 to 27 which report on pricing policies; pages 27 to 29 which report discussions on competition policies; pages 118 to 127 which report on (general) policies affecting trade in services; pages 127-129 which report on transparency, publication and notifications.

⁴ The Government has actually drafted a Decree to clarify a number of commitments which relate to investment activities. However, such a draft Decree has not been adopted yet.

⁵ In fact, there are different types of zones, namely industrial zones, export processing zones and high-tech zones. We use the general term "industrial zone" to include all types.

⁶ Vietnam's Schedule of Specific Commitments in Services.

commercial bank. For other committed sectors and sub-sectors, this 30% cap has been replaced. The total equity that may now be held by foreign investors in a domestic owned enterprise must be within the limitations on foreign capital participation described in Vietnam’s Schedule of Specific Commitments in Services in its accession to the WTO.

1.3 Key administrative bodies

The Ministry of Planning and Investment (“MPI”) is the central administrative body that oversees all investment activities, including foreign investment. The MPI is responsible for drafting legislation, developing policies, providing guidance and consultation, and coordinating with other authorities. In addition, the MPI will evaluate important investment projects selected by the Prime Minister. The MPI is also the contact point for foreign invested enterprises (“FIEs”)--that is, any investment entity with some foreign investment--in respect of problems or issues that arise. The MPI is headquartered in Hanoi, and has representative offices in Ho Chi Minh City (“HCM City”) and elsewhere throughout the country.

Provincial People’s Committees directly administer their own foreign investment activities and issue ICs for almost all types of foreign invested projects within their province/city. ICs are discussed in more detail at Section 1.6.

If an FIE is located within an IZ, it is under the administration of the provincial IZ’s Management Board or, sometimes, a Management Board of that IZ. For example, the Vietnam Singapore Industrial Zone administers all FIEs located in that IZ. An FIE in an IZ operates subject to the IZ’s rules on import/export, environment, labor, etc., in addition to the general rules of the Government and the MPI. The Provincial Management Board or a Management Board of an IZ is authorized to issue an IC for a project located within its province or IZ.

Only provincial/city People’s Committees and Management Boards of IZs have the authority to issue ICs to foreign invested projects. Even so, some conditional projects and some large size or important projects need approval in principle by the PM. This is given upon recommendation from the MPI and possibly other ministries. Projects that need the PM’s approval are listed in Appendix 4 of this Chapter.

The Department of Planning and Investment (DPI), which administers investment activities for the provincial/city People’s Committees, oversees the licensing process. The DPI either “registers” or “evaluates” an investment. Registration is a simple licensing process for a simple investment, while evaluation is reserved for a project that is conditional or large.⁷

Other, more specialized ministries are also involved in foreign investment. The DPI often consults line ministries prior to making its recommendation to the People’s Committee for issuance of the IC. For example, for high-tech projects, the Ministry of Science and Technology (“MOST”) plays an administrative role in developing the industry’s specific policies for foreign investment, and in overseeing the application of foreign investment regulations to be sure they are in harmony with the industry’s own rules.

⁷ Section 1.13 of this Chapter discusses conditional projects.

1.4 Foreign investment guarantees and investment preferences

In enacting the IL, the Government has committed to creating a safe and friendly environment for foreign investment. The Government expressly states that it treats domestic and foreign investors in all economic sectors equally before the law. The Government guarantees that it will neither expropriate nor nationalize investment capital, real property nor assets of investors, inclusive of foreign investors.

In addition, in the event that law or policy subsequently promulgated provide greater benefits and incentives than those previously given to investors, such larger benefits and incentives will automatically apply retroactively to those investors. If changes adversely affect existing investors, the Government commits to adopt offsetting, particular measures, such as tax holidays or payment of compensation, in order to approximate the same conditions that existed before the amendments. This undertaking appeared also in the prior law, and there is a record of Government adherence to this undertaking.

While developing a more comprehensive IL framework, the Government has continued to improve other laws that affect the business environment, such as Law on Construction 2003, Law on Competition 2004, Commercial Code 2005, Law on Electronic Transactions 2005, Civil Procedures Code 2005, Law on Tendering 2005, Law on Intellectual Property 2005, Law on Securities 2006, Law on Informatics Technology 2006, Law on Vocational Training 2006, Law on Corporate Income Tax (CIT) 2008.

Business entities are offered certain incentives to invest in Vietnam, mostly in the form of tax exemptions or reductions. These incentives, along with rules on the operation of business activities, are presented in the matrix which appears at the end of this Chapter. Compared to the former law, incentives are more limited, reflecting a more selective investment environment.

An investor, depending on the sector, is entitled to investment preferences and special investment preferences (collectively “Investment Preferences”). Investment preferences are available to both domestic and foreign investors. They are based on various factors, but the project location and the business sector are the two major considerations.

1.4.1 Preferences based on locations

Tax and other Investment Preferences are granted to investors in geographical locations in which investment is encouraged. These include geographical locations with socio-economic difficulties, geographical locations with special socio-economic difficulties, economic zones, and hi-tech parks.

The list of geographical areas in which investment is encouraged is provided in Government Decree No. 124/2008/ND-CP (December 11, 2008).

1.4.2 Preferences based on sectors

Sectors in which investors are entitled to Investment Preferences (both tax and non-tax) generally include, but are not limited to:

- Production of new materials or new energy, manufacture of high-tech products, bio-technology or information technology, mechanical engineering;
- Farming and processing of agricultural, forestry and aquatic products, salt making; production of hybrids, new plant varieties and/or animal breeds;
- Use of high technologies or modern techniques, protection of the environment, research, development and nurturing of high technologies;
- Employment of a large number of workers;
- Construction and development of infrastructure, important and large-scale projects;
- Development of education, training, health care, physical training and sports and national culture;
- Development of traditional crafts and industries;
- Other production and service sectors specified by the Government from time to time.

Appendix 2 to this Chapter lists criteria necessary to qualify for different corporate income tax (“CIT”) rates for businesses established after January 1, 2009.

Non-tax Investment Preferences include exemption from or reduction of land use tax, land use levy, land rent or water surface rent in accordance with the land law and the law on taxation.

Appendix 3 to this Chapter lists the sectors in which investors are entitled to Investment Preferences (both tax and non-tax). The list was issued in conjunction with Government Decree No. 108/2006/ND-CP (September 22, 2006).

1.5 Government’s special policies for high-tech industries

Vietnam especially encourages foreign investment in high-tech projects. The MOST identifies what kinds of projects are considered to be high-tech projects.

As they are especially encouraged by the Government, high-tech projects enjoy the best preferential treatment and incentives. For example, the tax rate is the lowest, the tax exemption period is the longest, etc. While we discuss taxes at Chapter Two, briefly, the corporate income tax rate for a high-tech project can be as low as 10% or 15%, depending on the specific nature and the location of the project. Interestingly, for a high-tech project in software development, individuals who are involved in software development will benefit from preferential personal income tax rates. Furthermore, a company with a project to do research, to develop technology or to train professionals in science and technology can be exempt from the payment of land rental for a certain period of time.

A number of high-tech investment projects were licensed under the former Law on Foreign Investment (LFI) in Saigon High-Tech Park and other IZs. As far as we know, no high-tech enterprise has been established outside of a high-tech park since the IL replaced the LFI on July 1, 2006. The reason may be that the licensing procedures to establish a high-tech enterprise are generally only available for investment made in high-tech parks.

The Government issued Decree No. 29/2008/ND-CP (March 14, 2008) on IZs, which confirms that a high-tech investment project can be located in any high-tech park, industrial zone or economic zone. The Law on High-Tech, effective on July 1, 2009,

provides only general policies on high-tech investment. A legal framework for high-tech investment must continue to develop to address certain gaps, including a mechanism to apply for high-tech status outside a high-tech park.

1.6 Licensing procedures (for direct investment)

Generally speaking, foreign investors are able to choose from the same forms of business structures available to Vietnamese investors. The main difference is that when a foreign investor invests in Vietnam, it has to specify particular activities which the new company will conduct, and it must apply for an IC. Depending on its specific nature, a new IC can be obtained either through a registration process or through an evaluation process. As the words imply, registration is slightly simpler. Evaluation means that details about the structure of the project will be reviewed.

- For an investment project in which investment capital is below 300 billion Vietnamese dong or which is not a conditional project⁸, registration only is required.
- For an investment project in which investment capital is from 300 billion Vietnamese dong or which is a conditional project, evaluation procedures apply.

Different projects are licensed by different licensing authorities, depending mainly on the project's location.⁹ As discussed at Section 1.3, although only provincial People's Committees and Management Boards of IZs have the authority to issue ICs to foreign invested projects, some conditional projects and some large size or important projects need approval in principle by the Prime Minister, based on recommendation from the MPI and other ministries. Projects that need to be approved by the Prime Minister are listed in Appendix 4 to this Chapter.

An IC is project-specific in another sense. While there are standard documents to be submitted, additional documentation, such as an Environmental Impact Assessment ("EIA"), land documents and permits are required for certain projects.

An IC is compulsory for a foreign investor that invests to establish a new enterprise in Vietnam and for an investment project which involves an FIE in which foreign investors contribute more than 49% of its charter capital. This IC will be treated as an Enterprise Registration Certificate ("**ERC**"), a document necessary to set up an entity in Vietnam. This treatment is different as between domestic investors and foreign investors. While all domestic investors require an ERC, not all projects invested by domestic investors require an IC.¹⁰ While an ERC contains only particulars of business registration, an IC contains, in addition, particulars of a specific project.

FIEs can perform more than one investment project. If an FIE in which foreign investors

⁸A conditional project must satisfy several conditions before being approved. The Investment Law provides only a general list of conditional projects, for example: projects having an impact on social order and safety, public health, financial/banking projects, real estate projects, entertainment services, etc.

⁹ Despite different opinions among licensing authorities, Vietnam places no geographical limit on the operation of a properly licensed enterprise.

¹⁰ A domestic project which has proposed investment capital of less than 15 billion VND does not require an IC.

contribute more than 49% of its chapter capital wants to undertake a new investment project, it must file an application for a new IC for that project. It need not establish a new enterprise. In other words, an FIE may carry out more than one investment project.

The statutory time limit for a licensing authority to consider and issue an IC is 15 working days if an IC is issued through a registration process, and 20 or 25 days if the IC is issued through an evaluation process.¹¹ If an approval-in-principle by the Prime Minister is required, the time limit is 37 working days. Efficiency in the licensing process has improved, and this time limit is sometimes observed. Unfortunately, the statutory time frame is often exceeded.

The actual time will probably vary for each company, depending on the extent of special conditions requested by or being offered to the company. The justification for special treatment should be carefully documented ahead of time, and informal discussions with the licensing authority beforehand are important. This will help make the application process proceed more smoothly.

An IC will specify the privileges to which a “preferential” or “especially preferential” project is entitled in respect of tax holidays, etc.

It is important to know, in advance, what are the essential approvals and licenses required for a project. An IC is the first step. Other approvals may be required. For example, the construction of a factory requires approvals by certain authorities, such as the land administration body and construction department in that locale.

1.7 Forms of investment

As mentioned, foreign investors and domestic investors have virtually the same choice of direct investment vehicles. However, some industries place restrictions on the vehicle foreign investors can adopt.

Generally speaking, domestic and foreign investors can choose the following forms of investment:

- a business entity in which foreign investors own 100% of the capital;
- a joint venture company between domestic and foreign investors;
- investment under contracts such as a Business Cooperation Contract (“BCC”), or Build-Operate-Transfer (“BOT”), Build-Transfer-Operate (“BTO”), Build-Transfer (“BT”) contracts or a public private partnership (“PPP”) arrangement;
- reinvestment in its existing enterprise;
- purchase of shares or contribution of capital and participation in the management of an enterprise;
- investment in the merger or acquisition of an enterprise;
- other forms of direct investment.

This section further explains these forms of investment.

¹¹ The IL provides a time-frame of 30 to 45 “days” for the licensing authority to evaluate a project from receipt of an application. Decree 108 specifies this to be 20 “working days” if an IC is issued by an IZ Management Board, or 25 working days if issued by a provincial/city People’s Committee.

a) The first two forms will result in the establishment of a business entity and such an entity requires an IC. Both domestic and foreign investors may choose from the following types of enterprise structures:

- One-member limited liability company (“LLC”) for a single investor. An individual domestic investor may establish a private enterprise but an individual foreign investor may not.¹²
- Two-to-fifty member LLC.
- Joint stock company (“JSC”) for a minimum of three shareholders.
- Partnership is a business structure available to foreign investors. However, as the liability of a partnership is not limited to the capital contributed by its partners, but extends to other assets of the general partners, it is rarely used.

Appendix 1 to this Chapter compares these structures.

b) Investment through contracts:

- Investors may enter into BCCs to cooperate in production with agreed profit-sharing, production-sharing and other forms of business cooperation.
- Investors may sign BOT, BTO and BT contracts with state agencies to execute projects on construction, expansion, modernization and operation of infrastructure facilities in the areas of transport, electricity production and business, water supply and drainage, waste treatment and other areas as stipulated by the Prime Minister.
- A new form of state participation is the PPP. Under a PPP arrangement, the government can contribute capital to a project, but does not have a share in the profits. The government can contribute capital in several forms (depending on the nature of the specific project), such as by way of funds, land, investment incentives, special financial concessions, and perhaps loans. The State’s contribution may not exceed 30% of the project’s total investment capital. The project will need to satisfy one of the following project selection criteria: 1) the project is of great significance, large scale, with urgent demand for economic development; 2) the project is capable of repaying investment capital to the investor from its own revenue; 3) the project can exploit advantages in respect of technology, management, and operational experience, and is able to mobilize financial capacity of the private sector; 4) other criteria as decided by the Prime Minister. At the end of the period, the project will be handed over to the State.

c) Investors may also choose to invest in business development in the following ways:

- Expand the scale, capacity or capability of an existing investment;
- Update technologies, raise product quality, reduce environmental pollution.

¹² A private enterprise is a form of business structure which is established and owned by an individual (not by an entity). A private enterprise is not a legal entity separate from its owner; the owner is liable for all of the enterprise’s activities with his or her entire property. In other words, the owner of a private enterprise has unlimited liability for the private enterprise’s obligations.

- d) Investors may invest in Vietnam by contributing capital to or purchasing shares from other existing business entities. The ratio of capital contributed or of shares purchased by foreign investors in some fields and industries is subject to industry-specific legislation and regulations.
- e) In addition, investors have the right to merge or to acquire existing companies and branches. The merger and acquisition of companies and branches is subject to the EL, the Competition Law and other laws. Each case may have its own set of conditions.

1.8 Business lines and investment objectives

An enterprise may have a single or multiple business lines and investment objectives, subject to conditions regarding investment sectors.

Investment objectives or activities must be implemented within the time schedule registered in the IC. Article 68.2(a) of Decree 108 entitles the licensing authority to terminate a project if implementation is delayed more than 12 months without approval.

In the case of a project with multiple objectives, the IC sets out different investment preferential tax treatment for different groups of activities. For ease of tax registration, an enterprise needs to account separately for investment activities taxed at different preferential rates.

1.9 The legal representative of an enterprise

Every legal entity must have a legal representative. Generally, the legal representative has the right, on behalf of the entity, to enter into and perform all civil transactions that bind the entity.

A partnership does not have a single legal representative, as any general partner can represent the partnership.

The legal representative may be either the (General) Director or have one of the following roles (subject to the enterprise's structure):

- In a one-member LLC which does not have a Members' Council (ie, Board of Directors), the legal representative may be the President.
- In an LLC which has a Members' Council, the legal representative may be the Chairman of the Members' Council.
- In a JSC, the legal representative may be the Chairman of the Board of Management ("BOM").

The legal representative must reside in Vietnam. If the legal representative goes abroad for more than 30 days, he or she must authorize another person to act on his or her behalf. Such authorization must be documented. If the legal representative does not provide such an authorization, another legal representative must be appointed to replace him/her.

1.10 Corporate governance and controllers

An enterprise's internal rules are set forth in its charter (which is similar to a company's bylaws or articles of association). The charter must set out certain guidelines on the management and organization of the company, as stipulated in the EL.

The EL introduces basic rules on corporate governance. In general, such rules follow international norms. One notable rule, special to Vietnam, is the requirement that most types of LLCs and those JSCs which have either (a) more than 11 shareholders who are individuals, or (b) an organizational shareholder which holds more than 50% of the JSC's total shares must have a controller. Even though they are not part of management, controllers have a considerable amount of power over almost all legal and financial affairs conducted by both management and the executive teams.

1.11 Term of enterprise and dissolution

The term of an enterprise can be indefinite, unless its charter provides otherwise. However, the term of a foreign invested project may not exceed 50 years, although it may be renewed. In special circumstances, the Government may grant a term of up to 70 years. Upon expiration of the term of an investment project, foreign investors can continue to use their enterprise to carry out other new projects, or they may renew the existing one.

The term of a project located in an IZ is limited by the duration of the IZ's own IC. The term of a project located in an IZ commences from the date the project's IC is issued and ends on the date the IC of the IZ expires. If the IZ's IC is extended, enterprises in the IZ may apply to extend their own project terms to coincide with the expiration date of the extended IC.

An enterprise is dissolved in the following circumstances:

- The operating duration expires, if a fixed duration is stated in the enterprise's charter, and there is no decision to renew;
- The owners of the enterprise decide to dissolve it;
- An enterprise lacks, for six consecutive months, the minimum number of members required by law (ie, two members in a two-to-fifty-member LLC or three members for a JSC);
- The ERC or the IC is withdrawn.

An enterprise may be legally dissolved only after it settles its debts and liabilities. If an enterprise is unable to pay its debts when due, it may become subject to bankruptcy procedures.

1.12 Enterprise capital

There are several concepts of capital under the EL and IL:

- *Legal capital:* The minimum capital that is required by law to form an enterprise. A legal capital requirement exists only for a few specific business lines only (eg, real estate, insurance, banking).

- *Invested capital:* An amount of money and other assets needed to carry out the investment project, including charter capital.
- *Charter capital:* An amount of capital that members or shareholders contribute or commit to contribute within a certain period as stated in the charter.
- *Capital contribution:* The portion of a company's charter capital that an owner actually contributes.

Enterprises in the businesses listed in Appendix 6 to this Chapter have a minimum legal capital requirement, which simply means a minimum amount of charter capital must be contributed in order for the IC or the ERC to be issued.

An LLC must register its proposed schedule for contribution of capital. The timeline for contribution cannot be longer than 36 months counting from the date on which the ERC is issued. The investors are obligated to follow the registered schedule. The charter capital of a JSC on the date on which the business is registered (the date the ERC or the IC is issued) is the total par value of shares for which founding and other shareholders have subscribed, stated in the company charter; such number of subscribed shares must be paid in full within 90 days from the date the ERC or the IC is issued. Founding Shareholders must together subscribe and pay in full at least 20% of the enterprise's registered ordinary shares within the 90 day period stated above.

Charter capital is the real equity. Invested capital may include, in addition to charter capital, non-equity capital such as loans and accumulated, after-tax profits.

Increasing the charter capital is easier than reducing it. In fact, a one-member LLC is not allowed to reduce its charter capital.

1.13 Conditional investments

1.13.1 Conditional investment sectors

Under the IL, a foreign invested project which proposes to operate in sectors or locations which may be adverse to national defense, national security, cultural and historical heritage, traditional customs and morality, or the ecological environment may not be licensed.

There are other sectors in which participation, although not prohibited, is "conditional". The IL provides a general list of conditional investment sectors which apply to both foreign and domestic investment, including:

- Projects that effect national defense, security, social order and safety;
- Finance and banking;
- Sectors that effect public health;
- Culture, information, press and publishing;
- Entertainment services;
- Real estate business;

- Surveying, prospecting, exploring and exploiting natural resources, ecological and environmental projects;
- Development of education and training;
- Other areas as specifically provided.

The conditions that apply in most of the above sectors are in the nature of business requirements that an enterprise must meet after incorporation, rather than as conditions to receipt of a license. However, in the case of a foreign investor which applies for an IC for a new project, the law requires that all of the business conditions must be satisfied before issuance of the IC.

There are investment sectors that are conditional only for foreign investors and are additional to the foregoing. They are listed in Appendix 5 of this Chapter. In some cases investment in a sector in which Vietnam has made an undertaking under, say, its WTO Commitments, is treated as a conditional investment.¹³

1.13.2 Investment conditions

Conditions may relate to the form of investment, nationality of the foreign investors, professional expertise of the investors, the scale of the investment project, the types of goods and services involved, the duration of the investment project, or the basis on which the FIE may acquire its physical premises. An FIE which has been established in Vietnam and in which a foreign investor or foreign investors own more than 49% of the FIE's charter capital will be treated as foreign invested for the purpose of applying investment conditions, whereas an FIE in which a foreign investor or foreign investors own 49% or less of the FIE's charter capital will be treated as a domestic investor.

Typical investment conditions include:

- a) Conditions regarding minimum capital: There is no longer a general minimum legal capital requirement, calculated as a percentage of total invested capital. A minimum amount of charter capital to establish an enterprise is currently required in only a few sectors, such as commercial banking, financial services, finance leasing, real estate, securities services and the securities business. In some sectors, like banking, the foreign investor itself must have a certain minimum capital. The list of the sectors that require minimum capital is attached as Appendix 6 to this Chapter.
- b) Conditions regarding nationality of the foreign investors: Some sectors (eg, trading and logistics) require that the foreign investor belong to a country or territory that participates in an international treaty of which Vietnam is also a member and in which Vietnam has undertaken to open the sector involved. This limitation is now mainly set forth in the Schedule of Specific Commitments in Services which Vietnam made upon its accession to the WTO. The Commitments are detailed by legislation issued by Vietnamese authorities.
- c) Conditions regarding experience/license of investors: Some sectors, such as education,

¹³ Some sectors are not conditional under Vietnamese law (some are even encouraged) but have become conditional, temporarily or permanently, based on Vietnam's WTO Commitments: services incidental to agriculture, sewage treatment, software production, processing and assembly of goods, maintenance and repair of household equipment, market research, warehousing, tourism, etc.

tourism, commercial advertisement, or most telecommunications services, require the Vietnamese partner to be specifically qualified and licensed. A few sectors, such as insurance, banking, or securities services, generally require the foreign investor to be similarly experienced.

d) Conditions regarding sub-licenses such as trading in medicine or in some types of tourism services, or ongoing satisfaction of specific business conditions such as hygienic requirements for restaurant services. Industry-specific legislation to obtain a sub-license or to fulfill conditions must be observed.

e) Conditions which limit foreign ownership of an enterprise via direct investment, including the purchase of shares or contribution of capital to an existing domestic enterprise (in which foreign investors actively take part in the management of such an enterprise):

- The limitation on foreign ownership in some particular areas is subject to industry-specific legislation, such as the Law on Credit Institutions, Law on Civil Aviation, Law on Education, Law on Securities, Law on Insurance Business, Law on Petroleum, etc. Most of these laws do not specify limitations, but generally refer to Vietnam's international undertakings.
- In case of an enterprise which is equitized or converted from a State-owned enterprise ("SOE"), the limitation on foreign ownership is regulated by legislation on the equitization or conversion of SOEs (usually up to 49%).
- The limitation on foreign ownership must accord with Vietnam's WTO Commitments in case of investment in those services which are subject to a Commitment. This limitation varies from service to service. Most limitations are phased out after a few years. For example: for distribution services, the WTO limitation permitted foreign ownership of less than 100%, until the limitation was phased out completely on January 1, 2009; the limitation is 49% for foreign investment in the securities businesses until it is lifted in 2012; the limitation for warehouse services and freight transport agency services is 51% until it is lifted in 2014; and the limitation for maintenance and repair services of household equipment is 49%, which was raised to 51% in 2010, and will be phased out entirely in 2012.

f) Conditions regarding the limitation of foreign ownership of an enterprise via indirect investment, mainly in the form of the purchase of shares of, or the contribution of capital to, an existing domestic enterprise (in which the foreign investor will not engage in management).

- The limitation in some particular areas is subject to industry-specific legislation, as discussed in the first paragraph of point (e) above.
- In case an enterprise is equitized or converted from an SOE, the limitation is regulated by legislation on the equitization or conversion of SOEs, as discussed in the second paragraph of point (e) above.

- The limitation must accord with Vietnam's WTO Commitments in case of investment in a service sector subject to a Commitment, as discussed in the third paragraph of point (e) above.
- In the case of an enterprise listed on the stock exchange, foreign ownership is limited to 49%, except in the case of enterprises which do business in sectors in which specific laws require a smaller percentage.
- In other sectors, there are no limitations on the percentage of the capital contribution made by the foreign party or foreign parties.

Other conditions may apply, such as those regarding forms of investment, professional practice certificates, professional insurance certificate, an economic-technical feasibility study, environmental impact assessment, capital contribution schedule, and the need to legalize certain licensing documents.

APPENDICES
For Chapter One

**APPENDIX 1
COMPARISON OF FORMS OF ENTERPRISE UNDER THE ENTERPRISE LAW**

A. Two-to-Fifty-Member Limited Liability Company (LLC) and Joint Stock Company (JSC)

Appendix 1. A	Two-to-Fifty-Member LLC	JSC
Characteristics	<p>A two-to-fifty-Member LLC is an enterprise in which:</p> <ul style="list-style-type: none"> ▪ Members are organizations which have legal entity status and/or are individuals; the total number of Members may not exceed fifty. ▪ Members are responsible for the enterprise's debts and liabilities up to the value of capital that they have committed to contribute. <p>The company is not entitled to issue shares.</p>	<p>A JSC is an enterprise in which:</p> <ul style="list-style-type: none"> ▪ Shareholders are organizations which have legal entity status and/or are individuals; the minimum number of shareholders is three, with no maximum number. ▪ Shareholders are liable for the JSC's debts and liabilities up to the value of the capital to which they subscribe. ▪ Charter capital is divided into shares. <p>A JSC is entitled to issue securities, including common and preferred shares and bonds, to mobilize capital.</p>
Appointments to, selections of boards, management	<p>Each Member can appoint one or more representatives to the Members' Council, and can dismiss its appointees.</p> <p>The Members' Council elects and dismisses its Chairman.</p> <p>The Members' Council elects/dismisses, signs/terminates labour contracts with the (General) Director, Chief Accountant and other senior management as contemplated in the charter.</p>	<p>Each Shareholder nominates its representatives to be elected to the Management Board (BOM) or Controller Board at a Shareholders' General Meeting (SGM). The attending shareholders will elect the nominees through cumulative voting.</p> <p>The Management Board elects/dismisses, signs/terminates labour contracts with the (General) Director, Chief Accountant and other senior management as contemplated in the charter.</p>
Legal representative	<p>Either the Chairman of the Members' Council or (General) Director will also serve as the legal representative as stipulated in the charter.</p>	<p>Either the Chairman of the BOM or (General) Director will also serve as the legal representative as stipulated in the charter.</p>

Appendix 1. A	Two-to-Fifty-Member LLC	JSC
Board of controllers	If there are at least 11 Members, a board of controllers must be established, as discussed in Section 1.10 of Chapter 1.	The enterprise must have a board of controllers if: <ul style="list-style-type: none"> ▪ There at least 11 individual Shareholders; and/or ▪ There is a single organizational Shareholder that owns more than 50% of the total shares of the enterprise.
Capital Contribution Schedule	The founding Members must register a schedule of capital contribution. Once registered, they must follow the schedule.	Founding Shareholders must register and follow a schedule of capital contribution, provided that they must together contribute capital equivalent to at least 20% of the enterprise’s registered ordinary shares within 90 days of issuance of the ERC or IC. Registered but unpaid shares must be paid in within three years from the date on which the ERC or IC is issued. After the three-year period, if the balance has not been paid in full, the company must re-register its charter capital to reduce it by the unpaid amount.
Quorum¹⁴	The quorum for a meeting of the Members’ Council is the presence of Members that together own at least 75% of the charter capital. If the first meeting fails to satisfy this condition, the meeting may be convened for a second time within 15 days from the date the first quorum failed. A quorum is present for such a meeting if attended by Members that together own at least 50% of the charter capital. If the second meeting fails to satisfy this condition, the meeting may be convened for a third time within 10 days from the date the second quorum failed. Such a meeting shall be conducted regardless of the number of participating Members and the ratio of their charter	The quorum for a meeting of the BOM is the presence of Shareholders that together own at least 65% of the total voting shares. If the first meeting fails to satisfy this condition, the meeting may be convened for a second time within 30 days from the date the first quorum failed. A quorum is present for such a meeting if attended by Shareholders that together own at least 51% of the total voting shares. If the second meeting fails to satisfy this condition, the meeting may be convened for a third time within 20 days from the date the second quorum failed. Such a meeting shall be conducted regardless of the number of participating Shareholders and the ratio of their voting shares.

¹⁴ In the case of a joint venture LLC or a JSC which operates in the sectors that Vietnam has committed to open pursuant to Vietnam’s WTO Commitments, the enterprise may provide in its charter any quorum to convene a meeting and any mode to adopt a decision of the Members’ Council or the Shareholders’ General Meeting (“SGM”). The meaning of a “joint venture” in this context is not clear. The WTO Commitments and the IL seem to refer to a joint venture in which there are both foreign investors and domestic investors. For companies which do not satisfy the conditions, the quorum stated here is a minimum requirement. Individual charters may require higher ratios.

Appendix 1. A	Two-to-Fifty-Member LLC	JSC
	capital ownership.	
Resolution	<p>Unless the charter provides for higher ratios, a resolution of the Members’ Council requires an affirmative vote equivalent to at least¹⁵:</p> <ul style="list-style-type: none"> ▪ 75% of the LLC’s total charter capital in case of a resolution adopted by collecting written opinions without holding an in-person meeting; ▪ 75% of the total charter capital contribution of attending Members in the following cases: <ul style="list-style-type: none"> ○ Sale of 50% or more of total assets, ○ Amendment of the charter, ○ Re-organization of the company, and ○ Dissolution; ▪ 65% of the total charter capital contribution of attending Members is required in other cases. 	<p>Unless the charter provides for higher ratios, a resolution of the BOM requires an affirmative vote equivalent to at least:</p> <ul style="list-style-type: none"> ▪ 75% of the total voting shares in case of a resolution adopted by collecting written opinions without holding an in-person meeting; ▪ 75% of the total voting shares of attending Shareholders in the following cases: <ul style="list-style-type: none"> ○ Decision on classes and number of shares to be offered, ○ Investment or sale of 50% or more of total assets, ○ Amendment of the charter, ○ Re-organization of the company, and ○ Dissolution; ▪ 65% of the total voting shares of attending Shareholders is required in other cases.

¹⁵ In the case of a joint venture LLC or a JSC operating in sectors in which Vietnam agreed to open its market pursuant to its WTO Commitments, the enterprise may provide in its charter a lesser ratio (as low as 51%) to adopt a decision.

Appendix 1. A	Two-to-Fifty-Member LLC	JSC
Title documents	<p>A company’s Member Registration Book includes a list of Members together with detailed information about their ownership ratios and identifying information; it must be established as soon as the ERC or IC is issued, and must be kept at the head office of the company.</p> <p>Upon full payment of subscribed capital, a Member will receive a capital contribution certificate.</p>	<p>A JSC must establish and maintain a register of Shareholders as soon as the ERC or IC is issued. The register of Shareholders may be in the form of a written document or an electronic file, or both. It must be kept at the company’s head office, or at the Securities Depository Center.</p> <p>A Shareholder of a JSC is entitled to a share certificate, which may be either in the form of a written certificate or a book entry certifying the ownership of one or more shares. Share certificates can be bearer or non-bearer.</p>
Dividends	<p>Dividends can be distributed only when the company generates profits and after it has fulfilled its tax and other obligations. It must ensure that its debts and other property obligations can be paid in full even after distribution of profits.</p>	<p>Dividends can be distributed only when the company generates profits and after it has fulfilled its tax and other obligations. It must ensure that its debts and other property obligations can be paid in full even after distribution of profits.</p> <p>Dividends may be paid in cash, shares or in other assets as provided for in the company’s charter.</p>
Change in charter capital	<p>Any change in the charter capital of a company requires a resolution of the Members’ Council. A change in the company’s charter capital must be registered with the licensing authority.</p> <p>The charter capital may be increased by way of:</p> <ul style="list-style-type: none"> ▪ Increase in Members’ contributed capital; ▪ Increase in charter capital to reflect an increase in the value of assets; and/or ▪ Increase in contributed capital raised from new Members. 	<p>Any change in the charter capital of a company requires a resolution of the SGM. A change in the company’s charter capital must be registered with the licensing authority.</p> <p>The charter capital (or registered shares) can be increased by selling additional shares.</p> <p>After three years from the date of issuance of the ERC or IC, or when the company cancels its issued shares in accordance with the law, the charter capital (or registered shares) can be decreased by deregistering shares which have not been paid for.</p>

Appendix 1. A	Two-to-Fifty-Member LLC	JSC
	<p>The charter capital may be decreased:</p> <ul style="list-style-type: none"> ▪ After two years of continuous operation, part of the contributed capital may be returned to Members in proportion to their share of contributed capital; ▪ Redeeming shares as permitted by law; ▪ Reducing the charter capital to reflect a decrease in the value of assets. <p>A company may only decrease its charter capital if, after such decrease, the company will still be able to meet its financial obligations.</p>	<p>A JSC may only decrease its charter capital if, after such decrease, the company will still be able to meet its financial obligations.</p>
<p>Transfer of capital/shares</p>	<p>Capital can be freely transferred between/amongst Members.</p> <p>A Member of a company is entitled to transfer part or all of its capital to a third party as follows:</p> <ul style="list-style-type: none"> ▪ A capital share must be offered to all other Members of the company under the same conditions and in proportion to their share of charter capital; ▪ A capital share may be transferred to a non-Member if all remaining Members fail to buy such capital share within 30 days from the date of offer. 	<p>Shares are freely transferable, except that voting preference shares and ordinary shares of founding Shareholders may not be transferred within three years from the date the ERC or IC is granted, with some exceptions¹⁶.</p> <p>The transfer may be made in writing or by mere delivery of the share certificate.</p>

¹⁶ Within three years from the day on which the ERC or IC is issued to the JSC, any transfer of ordinary shares of a founding shareholder to any non-founding shareholder requires approval by the SGM, excluding the vote of the transferring shareholder. When such a transfer is approved, the shareholder acquiring the shares becomes a founding shareholder. The foregoing restriction shall only apply to the number of shares that founding shareholders registered for subscription at the time of registration of the JSC and paid for within 90 days from the date on which the ERC was issued.

Appendix 1. A	Two-to-Fifty-Member LLC	JSC
<p>M&A related issues</p>	<p>The number of Members after a transfer/allocation of capital may not exceed fifty. If there is only one Member, the enterprise must convert to a one-Member LLC, which has different rules in terms of organizational structure, quorums, voting, etc.</p> <p>Dilution of the ownership of a Vietnamese Member must not alter any applicable limitation on foreign ownership discussed in Section 1.13 of Chapter 1.</p>	<p>The number of Shareholders may not be less than three.</p> <p>Dilution of the shareholding of a Vietnamese shareholder must not alter any applicable limitation on foreign ownership discussed in Section 1.13 of Chapter 1.</p>
<p>Termination of ownership</p>	<p>A Member who votes against a decision of the Members' Council on matters involving the rights and obligations of the Members or the Members' Council, on re-organization of the company, and on other matters specified in the charter, may leave the company by:</p> <ul style="list-style-type: none"> ▪ Redemption by the company of the Member's capital contribution; and/or ▪ Transfer of the Member's capital contribution to the remaining Members or, if the enterprise does not or cannot redeem the capital, to a third party. <p>A Member may also transfer all of its capital contribution, as discussed above in "Transfer of capital/shares."</p> <p>If a Member is dissolved or goes bankrupt, the enterprise will either redeem its capital contribution or transfer it.</p> <p>A Member may not otherwise withdraw its contributed capital.</p>	<p>A Shareholder may withdraw its capital if all of its shares are redeemed by the company or are transferred to others (as discussed above in "Transfer of capital/shares").</p> <p>A JSC must redeem redeemable preferred shares upon satisfaction of conditions stated in the share certificate or upon the holder's request.</p> <p>A shareholder may not otherwise withdraw its contributed capital.</p>

B. One-Member Limited Liability Company (LLC)

Appendix 1.B	One-member LLC owned by an <u>organization</u>	One-member LLC owned by an <u>individual</u>
Characteristics	<p>The enterprise is established and owned by an entity, either foreign or domestic.</p> <p>The enterprise is a legal entity separate from the owner; the owner is liable for the debts of the enterprise up to the value of the enterprise’s charter capital.</p> <p>The enterprise is not entitled to issue shares.</p>	<p>The enterprise is established and owned by an individual, either foreign or domestic.</p> <p>The enterprise is a legal entity separate from the owner; the owner is liable for the debts of the enterprise up to the value of the enterprise’s charter capital.</p> <p>The enterprise is not entitled to issue shares.</p>
Governance structures	<p>The owner authorizes a single representative or multiple representatives to manage the enterprise. If two or more representatives are authorized, they will together constitute the Members’ Council. In this type of Members’ Council, a member represents a portion of the owner’s capital, but does not himself own capital, as in a two-to-fifty-Member LLC. One consequence is that, unless otherwise stipulated in the charter, the quorum and votes are based on the number of members, but not on the capital each owns. The owner appoints the Chairman of the Members’ Council from among its members.</p> <p>If only a single representative is authorized, he or she will be the President of the enterprise. In that case, there will not be a Members’ Council.</p> <p>Apart from the President or Members’ Council, management includes a (General) Director who is either appointed or employed by the President/Members’ Council.</p>	<p>The owner is the President.</p> <p>The President can concurrently be the (General) Director, or can hire another person to be the (General) Director.</p>

Appendix 1.B	One-member LLC owned by an <u>organization</u>	One-member LLC owned by an <u>individual</u>
Legal representative	The legal representative must be either the Chairman of the Members' Council, or if there is no Members' Council, the President, or the (General) Director.	The legal representative must be either the owner/President or the (General) Director.
Controllers	There must be one to three controllers as discussed at Section 1.10 of Chapter 1.	There are no controllers in this type of enterprise.
Change in Charter Capital	The enterprise is not permitted to decrease the charter capital. The charter capital can be increased by additional contribution by the owner and/or contribution by others. In the latter case, the enterprise must be converted to a two-to-fifty-Member LLC within 15 days from the date on which new Members contribute capital.	The enterprise is not permitted to decrease the charter capital. The charter capital can be increased by additional contribution by the owner and/or contribution by others. In the latter case, the enterprise must be converted to a two-to-fifty-Member LLC within 15 days from the date on which new Members contribute capital.
Transfer of capital	The owner is entitled to sell all or part of its capital share. If the transfer of capital leads to an increase in the number of investors, the enterprise must convert to a two-to-fifty-Member LLC.	The owner is entitled to sell all or part of its capital share. If the transfer of capital leads to an increase in the number of investors, the enterprise must convert to a two-to-fifty-Member LLC.
Owner's documentation required for business registration	For business registration, the owner must file: <ul style="list-style-type: none"> ▪ Copy of its certificate of incorporation (or an equivalent document, such as business license or ERC); ▪ Copy of its articles of association (or an equivalent document, such as by-laws or charter); ▪ Copy of the passports (or Vietnamese identity card) of the legal representative (eg, CEO or president) of the signatory to the 	For business registration, the owner must file only a copy of his/her passport or Vietnamese identity card.

Appendix 1.B	One-member LLC owned by an <u>organization</u>	One-member LLC owned by an <u>individual</u>
	<p>business registration application, and of the owner’s representative(s) in the LLC;</p> <ul style="list-style-type: none"> ▪ Board resolutions on the establishment of the LLC; ▪ List of the owner’s authorized representative(s), and ▪ Letter of appointment of the authorized representative(s). 	

APPENDIX 2

APPLICATION OF CORPORATE TAX RATES/INCENTIVES FOR ENTERPRISES ESTABLISHED AS FROM JANUARY 1, 2009¹⁷

(The below is extracted from the Law on Corporate Income Tax and Government Decree No. 124/2008/ND-CP (December 11, 2008) detailing and guiding the implementation of a number of articles of the Law on Corporate Income Tax)

CIT rate	Application Period	Criteria for CIT exemption and reduction	Exemption Period¹⁸	50% Reduction Period¹⁹
25%	Entire investment period	This is the common CIT rate on every project, unless the project qualifies for a lower rate or the project is operating in the sector of prospecting, exploring, and mining of petroleum, gas and other rare or precious natural resources (in which case, the applicable CIT rate is between 32% to 50%, depending on specific criteria).	None	None
20%	10 years from the first year in which there are sales/revenues (after which the rate reverts to 25%)	Investment in geographical locations with socio-economic difficulties in sectors other than those which are entitled to a CIT rate of 10% as listed below.	2 years	4 years following the Exemption Period
10%	The whole term of a	▪ Investment in	4 years	5 years

¹⁷ In case the Law on CIT (with effect from January 1, 2009) gives an investor licensed before January 1, 2009 more favourable tax incentives, that enterprise is entitled to the new, more favourable tax incentives under the CIT Law (for the remaining term of its project).

¹⁸ The Exemption Period is the period for which the enterprise is exempt from payment of CIT. The Exemption Period is counted from either the first year of taxable income or the fourth year after the first year sales or revenues are achieved, whichever comes first. This rule also applies to an existing enterprise if the first year in which its CIT exemption period was to begin under the former Law on CIT had not yet begun as of January 1, 2009.

¹⁹ The Reduction Period is the period for which the Enterprise's CIT obligation is reduced by 50%.

²⁰ In special cases of large-scale and new/high-tech investment, the PM may decide to apply this 10% CIT rate for up to 30 years, based on a recommendation from the Ministry of Finance.

CIT rate	Application Period	Criteria for CIT exemption and reduction	Exemption Period ¹⁸	50% Reduction Period ¹⁹
	project	<p>education, vocational training, health, culture, sports and environment <u>outside</u> geographical locations with socio-economic difficulties or special socio-economic difficulties.--</p>		following the Exemption Period
		<ul style="list-style-type: none"> ▪ Investment in education, vocational training, health, culture, sports and environment located in geographical areas with socio-economic difficulties or special socio-economic difficulties. 	4 years	9 years following the Exemption Period
	15 years ²⁰ from the first year in which there are sales/revenues (after which the rate reverts to 25%).	<ul style="list-style-type: none"> ▪ Investments of any kind in geographical locations with <u>special</u> socio-economic difficulties, economic zones and high-tech zones; ▪ Newly established enterprises in high technology, scientific research and technological development, development of especially important infrastructure for the State, and software production. 	4 years	9 years following the Exemption Period

In addition, investors are exempt from CIT on income generated from²¹:

1. Products from cultivation, husbandry and aquaculture by organizations established pursuant to the Law on Co-Operatives;
2. Performance of technical services directly serving agricultural production;
3. Performance of contracts for scientific research and technological development; sale of products during a period of trial production, in accordance with the law; and products made by applying technologies for the first time in Vietnam;
4. Production and trading of goods or service activities which are set up exclusively for disabled people, post-detoxification, and HIV-infected people;
5. Job training exclusively for ethnic minorities, disabled people, children in exceptionally difficult circumstances, and victims of social evils;
6. After-tax profits/dividends distributed from activities of capital contribution, joint venture or association with a domestic enterprise; and
7. Income (financed by sponsors) used for education, scientific research, culture, art, charitable or humanitarian activities, and other social activities.

²¹ Law on Corporate Income Tax, Article 4.

APPENDIX 3

BUSINESS SECTORS AND GEOGRAPHICAL LOCATIONS ELIGIBLE FOR INVESTMENT PREFERENCES

(The list below was issued in conjunction with Government Decree No. 108/2006/ND-CP (September 22, 2006) detailing implementation of the Investment Law).

A. Activities Eligible for Investment Preferences

I. Manufacture of new materials and production of new energy; manufacture of high-technology, bio-technology, information technology products; and mechanical manufacturing:

1. Production of: soundproof, electricity-insulated or high heat-insulated materials; synthetic materials used as a substitute for wood; fire-proof materials; construction plastic, glass fiber; special-use cement.
2. Production of non-ferrous metals and refining of cast iron.
3. Production of moulds and prototypes for metal and non-metal products.
4. Investment in the construction of new power plants, and in power distribution and transmission.
5. Production of medical supplies and equipment, construction of warehouses for pharmaceutical products, stockpiling of medicines for use by humans in case of natural disasters and epidemics.
6. Production of equipment used to test toxic substances in foodstuffs.
7. Development of the petrochemical industry.
8. Production of coke and active coal.
9. Production of: plant protection drugs, pesticides, disease preventive and curative drugs for animals and aquatic creatures; veterinary drugs.
10. Materials for production of medicines including medicines for prevention or treatment of social diseases, vaccines, biological products, medicines produced from pharmaceutical materials, eastern medicines.
11. Investment in construction of: facilities for biological experimentation, assessment of the applicability of medicines, pharmaceutical establishments to satisfy good practice standards in producing, preserving, testing, and carrying out clinical tests of medicines, and in rearing and growing, harvesting and processing pharmaceutical materials.
12. Development of: sources of pharmaceutical materials and production of medicines from pharmaceutical materials; projects for research or to substantiate scientific grounds for prescriptions for eastern medicines and formulation of standards for testing of prescriptions for eastern medicines; survey and statistics of types of pharmaceutical materials used to produce medicines; collection and application of prescriptions for eastern medicines, finding, exploiting and using new pharmaceutical materials.
13. Production of electronic appliances.

14. Production of machines, equipment and detailed assemblies for mining, energy and cement; production of large-sized lifting equipment, production of machine tools for metal processing and metallurgy equipment.
15. Investment in the manufacture of high and medium voltage electrical devices or large capacity generators.
16. Investment in: production of diesel engines; repair or construction of ships; equipment and spare parts for transportation ships and fishing ships; production of compressors and dynamic and hydraulic machinery and spare parts.
17. Production of equipment, vehicles and machinery for construction, technical equipment for the transportation sector, locomotives and carriages.
18. Investment in: manufacture of machine tools, machinery, equipment and components for agricultural and forest production, machinery for food processing; manufacture of irrigation equipment.
19. Investment in the production of equipment and machinery for textiles, garments and the leather industry.

II. Breeding, rearing, growing and processing of agricultural, forestry and aquaculture products; salt making; production of artificial strains, new plant varieties, and livestock breeds.

1. Growing plants for pharmaceutical purposes.
2. Investment in post-harvest preservation of agricultural products, preservation of agricultural and aqua-cultural products and foodstuffs.
3. Production of bottled or canned fruit juices.
4. Production and refining of feed for cattle, poultry and aquatic resources.
5. Technical services for planting industrial and forest trees, husbandry, aquaculture, protection of plants and livestock.
6. Production, multiplication or crossbreeding of new plant varieties or livestock breeds.

III. Use of high technology and modern techniques; protection of the ecological environment; research, development and nurturing of high technology

1. Manufacture of equipment to respond to and deal with oil spills.
2. Manufacture of equipment for waste treatment.
3. Investment in construction of technical facilities; laboratories and experimental stations to apply new technology to production; investment in the establishment of research institutes.

IV. Labor intensive industries

Projects employing between 500 and 5,000 employees on a regular basis.

V. Construction and development of infrastructure

1. Construction of infrastructure serving production and the business of cooperatives and the life of communities in rural areas.

2. Investment in and commercial operation of infrastructure and investment in production in industrial complexes, industrial locations, rural trade villages.
3. Construction of water plants and water supply systems for civil and industrial use; investment in the construction of water drainage systems.
4. Construction and upgrading of bridges, road, terminals, airports, seaports, railway stations, bus station and parking lots; establishment of new railway routes.
5. Construction of technical infrastructure in densely populated areas in geographical areas described in List C of this Appendix 3.

VI. Development of education, training, health care, physical training and sports and national culture

1. Investment in the construction of infrastructure for education and training establishments; investment in the construction of private schools and education and training establishments at the levels of pre-school education; general education, vocational high-school education and tertiary education.
2. Establishment of private hospitals.
3. Construction of physical training or sports centers, training facilities and physical training and sports clubs; establishments for production, manufacture and repair of equipment, supplies and equipment for physical training and sports.
4. Establishment of national cultural houses; national dance, music and song troupes; theaters, film studios, cinemas; establishment of production, manufacture and repair workshops for national musical instruments; maintenance and preservation of museums, national cultural houses and culture and art schools.
5. Investment in the construction of national tourist sites, ecological tourist sites and cultural parks for sports, entertainment and recreation activities.

VII. Development of traditional trades and occupations

Building up and development of traditional trades and occupations for production of fine-arts and handicraft goods, processing of agricultural products, foodstuffs and cultural products.

VIII. Other manufacturing and service sectors

1. Provision of Internet connection, access and application services and points for accessing public telephones in areas identified in Appendix II to Government Decree No. 124/2008/ND-CP (December 11, 2008) which provides a list of geographical locations with social-economic difficulties.
2. Development of mass transit including: ships, aircraft; railway transportation; road transportation of passengers by vehicles with 24 seats or more; transportation of passengers by modern and high-speed vehicles by inland waterway; container transportation.
3. Investment in the relocation of production establishments to non-urban areas.
4. Investment in the construction of class-I marketplaces and exhibition centers.
5. Production of children's toys.
6. Activities in mobilizing capital and lending capital which is part of people's credit funds.
7. Legal consultancy, services of consultancy on intellectual property and technology transfer.

8. Production of various types of materials for production of pesticides.
9. Production of base chemicals, purified chemicals, special-use chemicals and dyes.
10. Production of materials used to produce detergents and additives for the chemical industry.
11. Production of paper, cartons, artificial planks from domestic agricultural and forest materials; production of pulp.
12. Weaving and fashioning textile products; production of silk and fibers of all types; tanning and processing of leather.
13. Investment projects on production activities in industrial parks established under decisions of the Prime Minister.

B. Activities Eligible for Special Investment Preferences:

I. Manufacture of new materials and production of new energy; manufacture of high-technology products, bio-technology, information technology products, and mechanical manufacturing

1. Manufacture of composite materials, light construction materials, precious and rare materials.
2. Manufacture of high-quality steel, alloys, special metal, porous iron and steel billet.
3. Investment in the construction of establishments using solar energy, wind energy, biogas, geothermic and tidal energy.
4. Production of medical equipment for analytical and extractive technology in the medical sector; orthopedic equipment, specialized vehicles and equipment for the disabled.
5. Application of advanced technology, bio-technology for production of medicines for human use up to international GMP standard; production of antibiotic materials.
6. Production of computers, telecommunications and communications and Internet equipment and key information technology products.
7. Production of semi-conductors and hi-tech electronic components; production of software products, items of digital information; provision of services on software, research into information technology and training of human resources for information technology.
8. Investment in the production and manufacture of precision mechanical engineering equipment; equipment and machines for examination and control of industrial manufacturing safety; industrial robots.

II. Breeding, rearing, growing and processing agricultural, forestry and aquaculture products; salt making; production of artificial strains, new plant varieties, and livestock breeds

1. Forestation, tending of forests.
2. Breeding, rearing and growing agricultural, forest and aquaculture products on uncultivated land, unexploited waters.
3. Fisheries in offshore sea waters.
4. Production of artificial strains, new plant varieties and livestock breeds of high economic value.
5. Production, mining and refining of salt.

III. Use of high technology and modern techniques; protection of the ecological environmental; research, development and nurturing of high technology

1. Application of high technology or new technology which has not yet been used in Vietnam; application of bio-technology.
2. Treatment of pollution and protection of the environment; production of equipment for pollution treatment and equipment for observation and analysis of the environment.
3. Collection and treatment of wastewater, waste gas and solid waste; recycling or reuse of waste.
4. Research, development and incubation of high technology.

IV. Labor intensive industries

Projects employing 5,000 or more employees on a regular basis.

V. Construction and development of infrastructure and important projects

Investment in the construction and commercial operation of infrastructure of industrial parks, export processing zones, hi-tech parks and economic zones or important projects which fall within the decision-making competence of the Prime Minister.

VI. Development of education, training, health care, physical training and sports

1. Investment in the construction of facilities for treatment of tobacco or drug addiction.
2. Investment in the establishment of facilities for prevention and control of epidemics.
3. Investment in the establishment of geriatric centers or centers for relief and care of the disabled and orphans.
4. Investment in the construction of centers of training for high-achievement sports, sports training for the disabled; the construction of sport facilities with training and competition equipment satisfying requirements for the organization of international tournaments.

VII. Other manufacturing and service sectors

1. Investment in research and development (R & D) accounting for 25% or more of the enterprise's revenue.
2. Salvage at sea operations.
3. Investment in the construction of apartment buildings for workers working in industrial parks, export processing zones, hi-tech parks and economic zones; investment in the construction of dormitories for students and of residential houses for social policy beneficiaries

C. Geographical Locations with Socio-Economic Difficulties

(The List is provided in Government Decree No. 124/2008/ND-CP (December 11, 2008). It contains geographic names, and is quite extensive. If you are interested in obtaining the List, please contact us).

APPENDIX 4

**LIST OF PROJECTS THAT NEED TO BE APPROVED BY THE PRIME MINISTER
BEFORE ISSUANCE OF AN INVESTMENT CERTIFICATE**

**(Pursuant to Article 37 of Decree 108/2006/ND-CP (September 22, 2006) providing guidelines
for implementation of the Law on Investment)**

The Prime Minister must approve issuance of an IC for the following projects:

1. Investment projects in the following sectors, irrespective of source (domestic, foreign) and amount of invested capital:
 - a) Construction and commercial operation of airports, air transportation;
 - b) Construction and commercial operation of national seaports;
 - c) Exploration, exploitation of petroleum and rare and precious natural resources;
 - d) Radio and television broadcasting;
 - e) Investment in and operation of casinos;
 - f) Production of cigarettes;
 - g) Establishment of tertiary training institutions;
 - h) Investment in establishment of industrial zones, export processing zones, high-tech zones and economic zones.

2. Investment projects not covered by clause 1 above and having invested capital of VND1,500 billion or more in the following sectors:
 - a) Electricity business, minerals processing, metallurgy;
 - b) Construction of railway infrastructure, roads, internal waterways;
 - c) Production and business of alcohol, beer.

3. Investment projects with foreign invested capital in the following sectors:
 - a) Sea transportation;
 - b) Postal and delivery services; establishment of telecommunications, internet and wave transmission nets;
 - c) Press, publication;
 - d) Establishment of independent scientific research capability.

APPENDIX 5

LIST OF CONDITIONAL INVESTMENT SECTORS APPLICABLE TO FOREIGN INVESTORS

(Issued in conjunction with Decree 108/2006/ND-CP (September 22, 2006) providing guidelines for the implementation of the Law on Investment)

1. Radio and television broadcasting;
2. Production, publishing and distribution of cultural products;
3. Exploration and mining of minerals;
4. Construction, installation, operation and maintenance of telecommunications equipment;
5. Establishment of infrastructure for telecommunications networks, transmission and provision of internet and telecommunications services;
6. Construction and operation of river ports, seaports and airports;
7. Transportation of goods and passengers by railway, airway, roadway and sea and waterways;
8. Harvesting aquaculture;
9. Production of tobacco;
10. Real estate business;
11. Import, export and distribution business;
12. Education and training;
13. Hospitals, medical clinics;
14. Other investment sectors dealt with in international treaties of which Vietnam is a member and which restrict foreign investors in such sectors.

Investment conditions applicable to foreign investors with investment projects in sectors stipulated in this Appendix must conform to measures stipulated in international treaties of which Vietnam is a member.

APPENDIX 6

LIST OF BUSINESS LINES WHICH REQUIRE MINIMUM LEGAL CAPITAL²²

No	Form	Level of legal capital requirement
I	Credit institutions	
1	Shareholding commercial bank	3,000 billion VND
2	Policy bank	5,000 billion VND
3	Development bank	5,000 billion VND
4	Foreign invested bank	3,000 billion VND
5	Foreign bank branch	15 million USD
6	People's credit fund	3,000 billion VND
II	Non banking credit institutions	
1	Finance company	500 billion VND
2	Finance leasing company	150 billion VND
III	Real estate business	
	Enterprise or cooperative	6 billion VND
IV	Security service	2 billion VND
V	Debt collection service	2 billion VND
VI	Film production	1 billion VND
VII	Operation of aviation port and airport	
1	Domestic airport operator	30 billion VND
2	International aviation port and airport operator	100 billion VND
VIII	Other Aviation services	
1	Operating in a domestic airport	10 billion VND
2	Operating in an international airport	30 billion VND
IX	International air transportation service	
1	Airline with 10 aircraft or fewer for international flights	500 billion VND
2	Airline with 10 aircraft or fewer for domestic flights	200 billion VND
3	Airline with 11 – 30 aircraft for international flights	800 billion VND
4	Airline with 11 – 30 aircraft for domestic flights	400 billion VND
5	Airline with over 30 aircraft	1,000 billion VND for international flights and 500 billion VND for domestic
6	General trading aviation	50 billion VND
X	Insurance Business	
1	Non-life insurance business	300 billion VND
2	Life insurance business	600 billion VND
3	Insurance brokerage	4 billion VND
XI	Commodities exchange	

²² This list has been compiled from many sources. We believe the list is complete, but there may be some inadvertent omissions.

1	Commodities exchange operator	150 billion VND
2	Traders on the commodities exchange	75 billion VND
3	Commodities exchange brokerage	5 billion VND
XII	Securities business	
1	Securities company <ul style="list-style-type: none"> • Securities trading • Securities brokerage • Underwriting for securities issuance • Securities investment consultancy 	100 billion VND 25 billion VND 165 billion VND 10 billion VND
2	Fund management company	25 billion VND
3	Securities investment company	50 billion VND
XIII	Importing books	5 billion VND
XIV	Multimodal transportation business	80.000 SDR ²³
XV	Establishment of private university	50 billion VND (excluding land use rights value)

²³ SDR units are Special Drawing Rights and are calculated and valued by the International Monetary Fund. The exchange rate between SDRs and Vietnamese dong is announced by the State Bank of Vietnam from time to time.

Chapter Two TAXES

Both domestic and foreign invested enterprises are subject to several taxes, including corporate income tax, import and export taxes, and value added tax, and their employees are subject to personal income tax. Some significant tax reform was introduced as a result of three amended laws: the Law on Corporate Income Tax (“LCIT”), the Law on Value Added Tax (“LVAT”) and the Law on Personal Income Tax (“LPIT”), all of which came into effect on January 1, 2009.

Tax incentives – mainly in the form of tax rates and tax exemptions – depend mainly on the type of business in which a company is engaged and on standard incentives which the Government grants. They are discussed in more detail in Chapter One.

2.1 Corporate income tax (“CIT”)

CIT calculation is based on assessable income and the CIT rate. CIT payable is assessable income multiplied by the CIT rate.

2.1.1 Assessable income

Assessable income within any one tax period is equal to taxable income minus tax exempt income and losses carried forward.

2.1.1.1 Taxable income

Taxable income includes business and other income. In particular, taxable income is turnover minus deductible expenses plus other income (including income received from outside of Vietnam).

Turnover

Turnover is the total sum earned from the sale of goods or services, processing fees, surcharges, additional charges and fees to which a taxpayer is entitled.

Deductible expenses

As from January 1, 2009, under the LCIT, a taxpayer is entitled to deduct all expenses (instead of only “reasonable” expenses as specified in the prior law) provided that such expenses are (i) actual and related to the taxpayer’s operation, (ii) can be established by proper invoices, vouchers, and (iii) are not classified as non-deductible expenses as described below.

Non-deductible expenses

Non-deductible expenses include:

- a) Expenses that fail to meet the conditions of a deductible expense;
- b) Administrative fines;
- c) Expenses covered by other funding sources;
- d) That part of management expenses incurred by a foreign company allocated to a permanent establishment in Vietnam, which exceed the level calculated by the allocation method under Vietnamese law;
- e) Expenses that exceed the level of provisional reserves set out by law;
- f) That part of expenses for raw materials, fuel, energy and goods that exceed the level formulated by the taxpayer, notified to the tax authorities, and actual expenses at the ex-warehouse prices;
- g) Interest expense incurred by a non-credit organization or the portion of interest expense incurred by an economic entity that exceeds 150% of the base interest rate announced by SBVN at the time the loan was made;
- h) Depreciation or amortization made contrary to law;
- i) Advanced expenses made contrary to law;
- j) Salary, remuneration paid to an owner of a private enterprise; remuneration paid to founding members of an enterprise who do not manage the business; salary, remuneration and other compensation recorded as expenses paid to employees but not actually paid, or which lack the vouchers required by law;
- k) Interest expense on borrowed money paid as loan capital corresponding to the un-paid equity set out in the company's charter;
- l) Input VAT that has been credited, output VAT paid in accordance with the deduction method, corporate income tax;
- m) That part of expenses for advertisement, commercial promotion, brokerage commission, public affairs, conferences; marketing support expenses, discounted payments which exceed 10% of all deductible expenses²⁴;
- n) Financial aid (except for financial aid for education, health care, relief for natural disasters and construction of charitable homes);
- o) Expenses which do not correspond to the assessable revenue;
- p) Exchange differences arising from re-valuation of monetary items having foreign currency origin at the end of the tax period; exchange differences arising from capital expenditures.

²⁴ A newly established enterprise is entitled to a higher percentage (15%) during the first three years after the enterprise is established. In the case of a trading entity, deductible expenses must exclude cost of goods sold.

2.1.1.2 Tax exempt income

To determine assessable income for any tax period, a taxpayer is entitled to deduct the following income:

- a) Income from cultivation, husbandry and aquaculture of organizations established under the Law on Cooperatives.
- b) Income from the performance of a technical service contract that directly serves agriculture.
- c) Income from the performance of contracts that relate to scientific research and technological development, products made within a trial period, and products made with technologies used for the first time in Vietnam.
- d) Income from producing goods and services and business activities of an enterprise that exclusively employs disabled workers, HIV-infected workers, and workers recovering from addiction.
- e) Income from job-training activities that relate exclusively to ethnic minorities, the disabled, extremely disadvantaged children, and persons involved in social evils.
- f) Income received from capital contribution to joint ventures or associations with domestic enterprises, after such enterprises have paid corporate income tax.
- g) Financial support received and used for education, scientific research, or cultural, artistic, charitable, humanitarian and other social activities in Vietnam.

2.1.1.3 Loss carry forward

If an enterprise suffers losses, it is permitted to carry its losses forward to the following year, and the amount of the losses may be set off against assessable income. The continuous duration of loss carry forward may not exceed five years.

2.1.2 CIT rate

The standard CIT rate is 25%. The CIT rate applicable to business establishments conducting exploration and exploitation of oil and gas and other valuable and rare natural resources is between 32% and 50%.

Preferential CIT rates of 20% and 10%, in the form of incentives, apply if the enterprise meets certain specific criteria. The tax incentive period starts from the first year in which the enterprise generates revenue. See Appendix 2 to Chapter One.

2.1.3 Tax exemption and reduction

Enterprises that receive preferential CIT rates because they qualify for tax incentives enjoy CIT preferences for a certain number of years. Depending on the nature of the investment, sector and location, an enterprise can enjoy two to four years of CIT exemption, plus a 50% CIT reduction period for up to nine years. See Appendix 2 to Chapter One.

2.1.4 Place to pay CIT

Beginning January 1, 2009, a taxpayer is required to pay CIT to the tax authority where its head office is located, but it must also allocate its CIT payments among the tax authorities where its manufacturing facilities are located. The allocation is made *pro rata* on the basis of expenses. The purpose of the rule is to distribute tax collections to provinces in which the taxpayer's manufacturing facilities are located.

2.2 Export tax and import tax

The Law on Export Tax and Import Tax of the Government (June 14, 2005) provides incentives in the nature of lower export and import taxes. Generally, all goods which enterprises are permitted to export and/or import, including goods sold to enterprises in EPZs and/or goods sold by enterprises in EPZs, are subject to export and/or import tax pursuant to the Law on Export Tax and Import Tax. There are some exemptions.

2.2.1 Export tax

Most finished products, if exported, are subject to an export tax rate of 0%. Enterprises that export in the circumstances described below are exempt from export tax:

- Materials, raw materials, semi-finished products sold by enterprises to EPZs and that are used to produce and/or process exported goods;
- Products that are exported back to foreign parties under signed processing contracts.

2.2.2 Import tax

Enterprises are exempt from import tax in the following circumstances:

- Goods imported to create fixed assets of projects funded by Official Development Aid (ODA), of projects invested in certain business sectors²⁵ and in certain geographical areas²⁶ which are eligible for preferential import tax;
- Certain equipment²⁷ imported to create fixed assets of projects which are eligible for preferential import tax and of projects funded by ODA on hotels, offices, apartments for lease, residential housing, commercial centers, technical services, supermarkets, golf courses, resorts, entertainment areas, medical, training, cultural, financial, banking, insurances, auditing and consulting services (tax exemption applies to first-time import. It does not apply to replacements.);
- Plant varieties and animal breeds imported for use in investment projects in agriculture, forestry or fisheries;
- Goods imported to support petroleum activities;
- Raw materials and supplies not yet available in Vietnam for direct service in the manufacture of software;
- Goods imported for direct use in scientific research and technological development

²⁵ The list of projects which are eligible for preferential import tax was issued together with Government Decree 87/2010/ND-CP (August 13, 2010) ("Decree 87").

²⁶ The list of geographical areas was issued together with Government Decree 124/2008/ND-CP (December 11, 2008) and Government Decree 53/2010/ND-CP (May 19, 2010).

²⁷ The list of equipment and facilities entitled to import tax exemption was issued together with Decree 87.

- (including equipment, machinery, spare-parts, materials, transportation means which cannot be made in Vietnam, technology which is not yet available domestically; and scientific magazines, books, and technological and scientific data);
- Equipment, facilities, and forms of transportation of a technological nature used to form fixed assets in connection with shipbuilding (including raw materials, materials and semi-finished products which are not yet able to be produced domestically);
 - Goods imported to be processed for export for foreign parties under signed processing contracts;
 - Goods which are produced, processed, recycled or assembled in non-tariff zones without using raw materials or component parts imported from abroad and which are then “imported” into Vietnam for domestic use.

In addition, enterprises are exempt from import tax for five years after they commence production of raw materials, supplies and components which are not yet able to be produced domestically and which are imported for production under projects on the list of domains eligible for special investment encouragement; or on the list of geographical areas with extremely difficult socio-economic conditions²⁸ (except for projects which produce or assemble automobiles, motorbikes, air conditioners, electric heaters, fans, irons, refrigerators, washing machines, dishwashers, disk players, stereo systems, water boilers, hairdryers and other goods as decided by the Prime Minister from time to time);

Enterprises will be reimbursed for import tax paid on goods temporarily imported for re-export and in other cases stipulated in the Law on Export Tax and Import Tax.

2.3 Value added tax (“VAT”)

Goods and services used for production, business and consumption in Vietnam are subject to VAT, except for some goods and services which are specifically exempt.

Most organizations that produce and trade in goods and services are subject to VAT. Under the VAT law, an enterprise is responsible to pay VAT if it sells goods/provides services in Vietnam. The VAT rate on exported goods/services is 0%, as discussed in more detail below.

2.3.1 VAT calculation bases

Calculation of VAT is based on two elements: taxable price and VAT rate.

2.3.1.1 Taxable price

Taxable price is the selling price for goods sold or services rendered, prior to inclusion of VAT. The taxable price on imported goods is the border-gate import price plus import tax.

²⁸ The list of geographical areas was issued together with Decree 87.

2.3.1.2 VAT rates

Currently, VAT rates are 10%, 5% and 0%. The common rate is 10%. The 5% rate is limited to certain goods and services. The zero rate applies to:

- construction and installation of EPZ enterprises;
- international transportation (the zero rate also applies to international transportation that consists of both domestic and international transportation);
- exported goods and services (i.e. goods exported to foreign countries, sold to duty-free zones and to duty-free shops; services provided directly to entities or individuals in foreign countries²⁹ or in duty-free zones); and
- “deemed” exported goods (i.e. processed goods transmitted from a processor for further processing for export; processed goods sold to other processors for further processing/production for export; goods exported for sale at offshore fairs and exhibitions).

2.3.2 VAT payable

VAT payable is calculated by the deduction method, as stipulated in the Law on VAT. Briefly, the deduction method means that an enterprise’s VAT payable is output VAT (VAT received) minus deductible input VAT (VAT paid).

Output VAT is the taxable price of goods sold or services rendered, multiplied by the applicable VAT rate.

Deductible input VAT is determined on the basis of the amount of VAT paid by the enterprise. The amount appears on the VAT invoices that a seller issues to the enterprise.

2.3.3 Conditions to claim input VAT

A taxpayer that applies the deduction method is entitled to claim input VAT provided that it produces the following documentation:

- VAT invoices or tax receipts for VAT30 paid at the time of import;
- Documents evidencing that payment for the goods/service that were purchased, was made through bank transfer (with a few exceptions);
- In case of exported goods/services, in addition to the documents described in the points above, the taxpayer must provide a customs declaration, sales contract, invoices and documents evidencing that payment for goods/services sold was made through bank transfer.

²⁹ Entities in foreign countries are entities that do not have a permanent establishment and are not VAT taxpayers in Vietnam. Individuals in foreign countries are foreigners who do not reside in Vietnam or they are overseas Vietnamese who reside outside of Vietnam at the time the services are provided.

³⁰ At the import stage, only VAT receipts are issued by the tax authorities. There are no VAT invoices.

2.4 Personal income tax ("PIT")

2.4.1 PIT payers

Vietnamese citizens living in Vietnam or working in foreign countries, expatriates working in Vietnam and receiving income, and/or expatriates whose income is derived from Vietnam (even if they do not live in Vietnam) are subject to PIT.

2.4.2 Assessable income

The computation of assessable income may vary depending on the kind of income. For example: with regard to salary and wages, certain amounts may be deducted before determining assessable income, including a personal deduction (VND4 million per month), deduction for each dependant (VND1.6 million per month), charitable contributions, social insurance, health insurance and compulsory professional liability insurance.

With regard to business income, a taxpayer is entitled to deduct reasonable expenses that relate to creation of revenue, provided that the taxpayer implements the accounting regime in respect of invoices and vouchers. If a taxpayer fails to do so, the tax authorities are entitled to fix assessable income in respect of business income.

2.4.3 Income subject to PIT

Certain income is subject to personal income tax under the LPIT, eg, income from salary, remuneration, income from interest, dividends, sale of real estate, sale of securities, assignment of interest in an entity, inheritance, etc. Moreover, taxable income includes both monetary and non-monetary benefits. The term "non-monetary benefit" includes several items, eg, premium paid for non-compulsory insurance; membership fees; other services for individuals in healthcare, entertainment, sports and aesthetics; housing rent, electricity, water and other related services paid by the employer. Under the LPIT, the following items are taxable:

- a) Business income (eg, income from producing, trading goods, or providing services; income from independent professional activities, etc.);
- b) Income from salaries, wages and similar income; allowances and subsidies (with a few exceptions); brokerage commissions, payments for participation in projects, schemes, royalties and other remuneration; stipends paid for participation in business associations, boards of directors, control boards, management boards, associations, professional societies and other organizations; monetary or non-monetary benefits other than salaries and wages paid by employers to or on behalf of taxpayers in any form (except for organizational membership cards for common use; transportation for common use; mid-shift meal; training to improve an employee's knowledge and skills; per diem expenses for travel, telephone, uniform, etc.). There are some exceptions that apply only to expatriates: a one-off relocation allowance; one round trip air ticket for annual leave; tuition paid by the employer for children, through high school level; house rental paid by the employer that exceeds 15% of total taxable income; monetary or non-monetary bonuses (including securities in lieu of bonus), etc.;

- c) Income from capital investments [eg, loan interest (except interest received from banks or from life insurance policies); dividends; income that represents an increase of the value of capital contribution in case of merger, dissolution, re-structure, consolidation or capital withdrawal)];
- d) Income from capital transfer (eg, transfer of interest in companies, cooperatives or other entities; sale of securities, etc.);
- e) Income from transfer of real estate (eg, transfer of land use rights, transfer of land use rights plus assets attached to the land; transfer of house ownership; transfer of the right to lease a house/land/water surface, etc.);
- f) Income from winnings (eg, lottery, prizes received from commercial promotions, winnings from legal betting; winnings from casinos, etc.)
- g) Income from royalties (eg, use fees, assignment of rights in respect of intellectual property assets, technology transfer, etc.);
- h) Income from commercial franchises;
- i) Income from inheritance (eg, securities, real estate, interest in an entity, etc.); and
- j) Income from receipt of gifts (eg, securities, real estate, interest in an entity, etc.).

In the case of a resident, taxable income includes income generated both inside and outside of Vietnam, regardless of the place where it is paid or received.

In the case of a non-resident, taxable income includes income generated from Vietnam, again, regardless of the place where it is paid or received.

An expatriate is taxed with reference to the duration of his stay in Vietnam or the nature of his residence in Vietnam. Depending on these two factors, personal income is taxed at a partially progressive rate described at point 2.4.3.1 below, or at a flat rate.

- If an expatriate stays in Vietnam for 183 days or more during a period of 12 consecutive months counting from the date of his arrival, or if he leases a house with a term of more than 90 days, or if he has registered a permanent residence in Vietnam, then for tax purposes, he is considered to be a resident of Vietnam, and is taxed at the partially progressive rates listed in Section 2.4.3.1.
- If an expatriate is not a resident, as defined above, his income is taxable on the basis of gross income at the following flat rates:

Income from	Rate (%)
Trading in goods	1
Services	5
Manufacturing, construction, transportation and other businesses	2

Royalty, franchising fees (except contractual income less than VND10 million)	5
Salaries, remuneration generated from Vietnam (regardless of place of payment/receipt)	20
Capital investments (dividends/interest)	5
Inheritance	10
Sale of securities/transfer of interest in an entity	0.1
Sale of real estate	2

2.4.3.1 Tax rate for residents

- a) The tax on a resident’s business income, including salary and wages, is calculated on the basis of partially progressive rates and on average monthly assessable income.

There is no difference between a resident-expatriate and a Vietnamese taxpayer as far as tax rates are concerned. The same partially progressive rates apply equally to assessable income of both Vietnamese and resident expatriate taxpayers. See table below:

Tax bracket	Annual assessable income (million VND)	Monthly assessable income (million VND)	Tax rate (%)
1	Up to 60	Up to 5	5
2	Over 60 to 120	Over 5 to 10	10
3	Over 120 to 216	Over 10 to 18	15
4	Over 216 to 384	Over 18 to 32	20
5	Over 384 to 624	Over 32 to 52	25
6	Over 624 to 960	Over 52 to 80	30
7	Over 960	Over 80	35

- b) The tax on other income of a resident is determined on the basis of the type of assessable income and flat rates. See table below:

Assessable Income	Rate (%)
Capital investments [dividends, interest (except on bank deposits and life insurance policies)]	5
Royalty, franchising fees (except income less than VND10 million)	5

Assessable Income	Rate (%)
Inheritance, winnings and gifts	10
Sale of securities/assignment of interest in an entity	
• Gain	20
• Sales proceeds	0.1 ³¹
Sale of real estate (with a few exceptions)	
• Gain	25
• Sales proceeds	2 ³¹

- c) Individuals (regardless of whether they are Vietnamese or expatriates) who work in all economic zones are entitled to a 50% reduction of their PIT.

2.4.3.2 Non-taxable compensation

The following incomes and allowances paid to employees (whether Vietnamese or expatriates) are tax free:

- Actual amount of rental paid by the employer that exceeds 15% of the total taxable income (excluding rental);
- Organizational membership card for common use;
- Transportation for common use;
- Mid-shift meal;
- Training to improve employee’s knowledge and skills;
- Per diem expenses for telephone, uniform, stationary, etc.;
- Travel expenses for business trips;
- The positive difference between income from night-shift or overtime payment and the day shift payment or the salary payment for normal working hours;
- Allowances given to employees who work under hardship conditions in remote areas, offshore areas, etc. and in a toxic or dangerous environment;
- Allowances as set out in the Labor Code and in the Law on Social Insurance: one-off payment for delivery of a child or for adopting a child; one-off payment on retirement and monthly death gratuity, severance allowance, retrenchment allowance, unemployment allowance, etc.;
- Pension paid by the Social Insurance Fund.

Some compensation is non-taxable only to expatriates:

- One-off relocation allowance;
- One round trip air ticket for annual leave;
- Tuition paid by the employer for the employee’s children, through primary and secondary education level;
- Compulsory insurance paid in a foreign country.

^{31*} This rate applies in case the purchase price and related expenses cannot be determined.

Of course, the expatriate is obliged to provide documents and receipts (e.g, employment contract, air ticket, receipt for tuition, insurance receipts etc.).

2.4.3.3. Examples

Following are examples of the PIT obligation which applies to seven different levels of income. The presentation is on a monthly tax basis and is made in US dollars rather than Vietnamese dong. Payment, however, must be made in Vietnamese dong. In order to calculate tax rates, we have converted Vietnamese dong to US dollars in this table at the rate of US\$1 = VND20,000.

Please refer to the next page.

Employee reductions before Assessable Income						Employer contribution (*)						
Taxable Income (Gross Income)	Taxpayer Deduction ³²	Social Insurance (**) 6% Unemployment	Social Insurance (**) 1% Unemployment	Health Insurance (**) 1.5%	Total Deduction	Assessable Income	Personal Income tax	Take-home Salary (Net Income)	Social Insurance (**) 16%	Social Insurance (**) 1% Unemployment	Health Insurance (**) 3%	Total cost
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9) ³³	(10)	(11)	(12)	(13) ³⁴
300	200	18.00	3.00	4.50	225.50	74.50	3.73	270.78	48.00	3.00	9.00	360.00
500	200	30.00	5.00	7.50	242.50	257.50	13.25	444.25	80.00	5.00	15.00	600.00
750	200	43.80	7.30	10.95	262.05	487.95	36.30	651.66	116.80	7.30	21.90	896.00
1,000	200	43.80	7.30	10.95	262.05	737.95	73.19	864.76	116.80	7.30	21.90	1,146.00
2,000	200	43.80	7.30	10.95	262.05	1,737.95	271.99	1,665.96	116.80	7.30	21.90	2,146.00
2,500	200	43.80	7.30	10.95	262.05	2,237.95	396.99	2,040.96	116.80	7.30	21.90	2,646.00
5,000	200	43.80	7.30	10.95	262.05	4,737.95	1,165.78	3,772.17	116.80	7.30	21.90	5,146.00

³² Every tax payer is entitled to a deduction of VND 4 million (equivalent to US\$200) per month when calculating his or her assessable income for his/her own personal expenses.

³³ (9) = (1) - (3) - (4) - (5) - (8)

³⁴ (13) = (1) + (10) + (11) + (12)

Note that:

(*) There is no statutory requirement for an employer to contribute/deduct social, and unemployment insurance of an expatriate.

(**) The Law on Social Insurance and the Law on Health Insurance set a ceiling on the salary on which contributions by both employers and employees will be calculated, and beyond which no contribution need be made. Contributions and payment of social insurance benefits/unemployment insurance are based on employees' monthly salary. If total salary on which contributions are based is higher than twenty times the Government's general minimum wage³⁵, then for purposes of calculating social insurance contributions/benefits, salary will be deemed to be fixed at twenty times the general minimum wage ("maximum contribution salary"). Based on a current general minimum wage of VND730,000 per month, the maximum contribution salary fixed as of May 1, 2010 is VND14,600,000.

2.5 Tax treaties

Vietnam has signed treaties on avoidance of double taxation with many countries. Expatriates living in Vietnam who are residents of any treaty partners are allowed to deduct tax paid in their home country from their Vietnamese tax obligation. Certain conditions have to be met in order to qualify. Of course, treaties on avoidance of double taxation affect many rules and regulations that regulate CIT and other forms of taxation.

Following is a list of countries that have signed treaties on avoidance of double taxation.

No.	Country	Date Signed	Effective date
1	Algeria	6/12/1999 Algiers	Not yet effective
2	Australia	13/10/1992 Hanoi	30/12/1992
3	Austria	2/6/2008 Vienna	Not yet effective
4	Bangladesh	22/3/2004 Dhaka	19/08/2005
5	Belarus	24/4/1997 Hanoi	26/12/1997
6	Belgium	28/2/1996 Hanoi	25/06/1999
7	Bulgaria	24/5/1996 Hanoi	04/10/1996
8	China	17/5/1995 Beijing	18/10/1996
9	Canada	14/11/1997 Hanoi	16/12/1998

³⁵ The Government's general minimum salary is the minimum salary fixed by the Government from time to time. It is a minimum base on which government salaries and allowances are fixed.

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No.	Country	Date Signed	Effective date
10	Cuba	26/10/2002 Havana	26/06/2003
11	Czech Republic	23/5/1997 Hanoi	03/02/1998
12	Denmark	31/5/1995 Copenhagen	24/04/1996
13	Egypt	6/3/2006 Cairo	Not yet effective
14	Finland	21/11/2001 Helsinki	26/12/2002
15	France	10/02/1993 Hanoi	01/07/1994
16	Germany	16/11/1995 Hanoi	27/12/1996
17	Hong Kong	16/12/2008 Hanoi	12/08/2009
18	Hungary	26/8/1994 Budapest	30/06/1995
19	Iceland	3/4/2002 Reykjavik	27/12/2002
20	India	7/9/1994 Hanoi	02/02/1995
21	Indonesia	22/12/1997 Hanoi	10/02/1999
22	Ireland	10/3/2008 Dublin	Not yet effective
23	Israel	4/8/2009 Hanoi	Not yet effective
24	Italy	26/11/1996 Hanoi	20/02/1999
25	Japan	24/10/1995 Hanoi	31/12/1995
26	Korea (South)	20/5/1994 Hanoi	11/09/1994
27	Korea (North)	3/5/2002 Pyongyang	Not yet effective
28	Kuwait	10/03/2009 Kuwait	Not yet effective
29	Laos	14/1/1996 Vientiane	30/9/1996
30	Luxembourg	4/3/1996 Hanoi	19/5/1998
31	Malaysia	7/9/1995 Kuala Lumpur	13/8/1996
32	Mongolia	9/5/1996 Ulan Bator	11/10/1996
33	Morocco	24/11/2008 Hanoi	Not yet effective
34	Mozambique	3/9/2010 Hanoi	Not yet effective
35	Myanmar	12/5/2000 Yangon	12/8/2003

No.	Country	Date Signed	Effective date
36	Negara Brunei Darussalam	16/8/2007 Bandar Seri Begawan	Not yet effective
37	Norway	1/6/1995 Oslo	14/4/1996
38	Oman	18/4/2008 Hanoi	Not yet effective
39	Pakistan	25/3/2004 Islamabad	04/2/2005
40	People's Republic of China	17/5/1995 Beijing	18/10/1996
41	Philippines	14/11/2001 Manila	29/9/2003
42	Poland	31/8/1994 Warsaw	21/1/1995
43	Qatar	8/03/2009	Not yet effective
44	Republic of Seychelles	4/10/2005 Hanoi	07/7/2006
45	Romania	8/7/1995 Hanoi	24/4/1996
46	Russia	27/5/1993 Hanoi	21/3/1996
47	Saudi Arabia	10/4/2010 Riyadh	Not yet effective
48	Singapore	02/3/1994 Hanoi	09/9/1994
49	Slovak Republic	27/10/2008 Hanoi	Not yet effective
50	Spain	07/3/2005 Hanoi	22/12/2005
51	Sri Lanka	26/10/2005 Hanoi	28/9/2006
52	Sweden	24/3/1994 Stockholm	08/8/1994
53	Switzerland	6/5/1996 Hanoi	12/10/1997
54	Taiwan	6/4/1998 Hanoi	06/5/1998
55	Thailand	23/12/1992 Hanoi	29/12/1992
56	Tunisia	13/4/2010 Tunis	Not yet effective
57	The Netherlands	24/1/1995 Amsterdam	25/10/1995
58	UAE	16/2/2009 Dubai	Not yet effective
59	Ukraine	08/4/1996 Hanoi	22/11/1996
60	United Kingdom	09/4/1994 Hanoi	15/12/1994

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No.	Country	Date Signed	Effective date
61	Uzbekistan	28/3/1996 Hanoi	16/8/1996
62	Venezuela	20/11/2008 Hanoi	26/5/2009

Vietnam has not yet signed such a treaty with the United States.

Chapter Three

ENVIRONMENTAL CONSIDERATIONS

In this Chapter, we provide an overview of environmental legislation. While environmental legislation is not yet fully developed, Vietnam pays attention to protection of the environment. Foreign investors should find the discussion below helpful in understanding the environmental framework.

3.1 Environmental legislation

Although the 1993 Law on Environmental Protection created the foundation for Vietnam's legal framework on protecting the environment, it revealed limitations that had to be addressed amid the country's efforts to boost industrialization, modernization, and Vietnam's global economic integration. In anticipation of accession to the WTO, Vietnam adopted a new Law on Environmental Protection with effect from July 1, 2006. It replaced the 1993 Law on Environmental Protection.

As in normal practice, the new law required implementing regulations. There are a number of implementing documents. Decree 80/2006/ND-CP of the Government (August 9, 2006) ("**Decree 80**") detailing and guiding the implementation of a number of articles of the Law on Environmental Protection; Decree 21/2008/ND-CP of the Government (February 28, 2008) ("**Decree 21**") amending and supplementing a number of Articles of Decree 80; Decree 81/2006/ND-CP of the Government (August 9, 2006) ("**Decree 81**") on sanctioning administrative violations in environmental protection; Decree 29/2011/ND-CP (April 18, 2011) ("**Decree 29**") regulating the strategic evaluation on environmental impact, evaluation on environmental impact, commitment to environmental protection; Circular 05/2008/TT-BTNMT of the Ministry of Natural Resources and Environment ("MNRE") (December 8, 2008) ("**Circular 05**") guiding implementation of Decree 80 and Decree 21; Circular 08/2006/TT-BTNMT of the Ministry of Natural Resources and Environment (September 8, 2006) ("**Circular 08**") implementing Strategic Environmental Assessments, Environmental Impact Assessment Reports and Environmental Protection Undertakings; Circular 04/2008/TT-BTNMT of the MNRE (October 18, 2008) ("**Circular 04**") guiding the Formulation and Approval or Certification of Environmental Protection Schemes and the Examination and Inspection of Implementation of Environmental Protection Schemes; Joint Circular 02/2007/TTLT-BCT-BTNMT promulgated by the Ministry of Industry and Trade and the Ministry of Natural Resources and Environment (August 30, 2007) ("**Circular 02**"), guiding the implementation of Article 43 of the Law on Environmental Protection regarding criteria for and conditions on the import of scrap; Circular 25/2009/TT-BTNMT of MNRE (November 16, 2009) ("**Circular 25**") promulgating National Technical Regulations on Environment.

In addition, there are some other specific provisions, such as: Decree 59/2007/ND-CP of the Government (April 9, 2007) ("**Decree 59**") on Management of Solid Wastes; Circular 12/2006/TT-BTNMT of MNRE (December 26, 2006) ("**Circular 12**") guiding the Implementation of Conditions, Registration, Licensing, and Issuance of Code Numbers to Organizations and Individuals Which Release Hazardous Wastes; and Decision 23/2006/QD-BTNMT of the Minister of MNRE (December 26, 2006) ("**Decision 23**")

promulgating the List of Hazardous Wastes.

3.2 State management agencies

The Ministry of Natural Resources and Environment (“MNRE”) is the primary regulatory body responsible for protecting the environment under the Law on Environmental Protection. Its responsibilities include:

- Submitting to the Government for promulgation, or itself promulgating and implementing detailed laws and regulations to protect the environment;
- Submitting to the Government for decision national policies, strategies and plans on environmental protection;
- Establishing and regulating a system of environmental standards;
- Creating plans to combat environmental degradation; and
- Performing uniform management of the evaluation and approval of environmental impact assessment reports and registration of environmental protection undertakings nationwide; organizing the evaluation and approval of environmental impact assessment reports; guiding the registration of environmental-friendly establishments and products and granting environmental standard conformity certificates.

While it is MNRE that is primarily responsible for regulating protection of the environment, a number of other agencies are also involved. Local environmental authorities, local governments and non-governmental entities also play a major role in monitoring and enforcing environmental protection policies within their jurisdictions.

3.3 Enterprises and environmental obligations

Any Vietnamese or foreign individual or organization that invests in Vietnam must comply with Vietnam’s Law on Environmental Protection. Although Vietnam is a developing country, in practice, it seems to take seriously the need to protect the environment. There are certainly lapses, but Vietnam does pay attention, at least to the large industrial environmental issues, at both a local and national level.

The Law on Environmental Protection requires that certain foreign investors prepare either an Environmental Impact Assessment Report (“EIAR”) or an Environmental Protection Undertaking (“EPU”) for their projects, depending on the importance and level of environmental impact of the project. An EIAR must be submitted to the appropriate authority for appraisal, while an EPU need only be registered.

Under Article 19.2 of the Law on Environmental Protection, an EIAR must be prepared concurrently with the feasibility study of a project. The law does not clearly state when an EIAR must be submitted. Based on the Investment Law and conversations with officials of the HCM City DPIn – the licensing authority – investors may submit an EIAR after they receive their investment certificate. In other words, an EIAR is required only after an investment certificate is issued. Depending on the nature of each project, the appropriate authority to appraise an EIAR can be the MNRE, or a ministry, government agency or provincial-level people’s committee. The appropriate authority appoints a council to perform the actual appraisal.

An EPU is simpler than an EIAR. An EPU is registered with the district-level people's committee. That body, when necessary, may authorize commune-level people's committees to issue a certificate of registration and the investor may proceed with the activity. An EPU is also normally required only after an investment certificate is issued.

Investors must comply with Vietnam's environmental laws and regulations. Violation may result in penalties, the most severe of which is the withdrawal of the investment certificate. Investors are subject to civil and criminal penalties (see Section 3.8 below). At the same time, incentives are provided to those that employ technological innovations to limit pollution. Investors that employ environmentally friendly technology in otherwise polluting industries will find it easier to obtain an investment certificate.

3.4 Building a factory: compulsory environmentally friendly facilities

In order for a project to satisfy environmental requirements, as mentioned above, the investor must prepare either an EIAR or an EPU, depending on the importance of the project.

Projects for which an EIAR must be prepared are specified in Appendix II to Decree 29. There are 146 projects, categorized into 20 groups. Following are several examples:

- Projects that needs National Assembly's or Prime Minister's approvals;
- Projects relating to construction; construction materials;
- Projects relating to transportation;
- Projects relating to power, radioactive substances;
- Projects relating to telecommunications facilities;
- Projects relating to irrigation, forestation and forest exploitation, minerals;
- Projects relating to oil and gas; waste treatment;
- Projects relating to mechanical and metallurgy matters;
- Projects relating to wood processing, glass production, pottery, food and drink processing plants; farm products processing plants, poultry, aquatic products processing plants;
- Projects relating to chemical fertilizer plants;
- Projects relating to chemical substances, pharmaceutical products, cosmetics, dyeing textiles and garments.

We do not discuss EIAR considerations in great detail, but a number of projects will be affected.

Investors in projects other than those for which an EIAR is required must register an EPU. An EPU registration includes: location, form and scale of manufacturing business and raw materials, fuel that will be used, types of waste produced, and an "undertaking to apply measures aimed at minimizing and treating wastes and to comply strictly with the provisions of the Law on Environmental Protection." Unlike procedures for approval of an EIAR, as mentioned above, an EPU need only be registered. The registration procedure is quite simple. An EPU registration serves as a basis for the state to inspect the factory's design, construction, and operation.

According to Circular 490/1998/TT-BKHCMNT of the Ministry of Science and Technology (April 29, 1998) (“**Circular 490**”), investors in projects that were located in an IZ or EPZ were only required to submit EPU. Although an investor whose project was located in an IZ was not required to produce its own EIAR, it still had to follow commitments of the IZ on environmental protection. However, Circular 490 has expired and was replaced with Circular 08. Now, even investors whose projects are located in an IZ or EPZ must prepare an EAIR if their projects fall within Appendix I of Decree 80.

3.5 Application of Vietnamese environmental standards

Environmental standards refer to the permitted parameters of the quality of the surrounding environment, and the nature and the content of pollutants contained in wastes. The standards are set by the responsible state agencies as a basis for management and protection of the environment.

All investment projects in Vietnam must apply Vietnamese environmental standards issued by MNRE. Some provinces or cities have issued their own environmental standards; those standards may be applied, provided they are more strict than those issued by MNRE. Vietnam’s environmental standards apply mainly to air quality, water quality, noise, vibration, and soil quality.

In case Vietnam’s environmental standards are silent on a particular quality measure, an investor may obtain written permission from MNRE to apply environmental standards of other advanced countries in that area. Generally, obtaining such permission is not difficult.

3.6 Responsibility of environmental protection of investor in production, business and service activities

According to the Law on Environmental Protection, every individual and organization is responsible to:

- Comply with the Law on Environmental Protection;
- Take such environmental protection measures as are required in an EIAR or EPU and satisfy environmental standards;
- Prevent and limit any adverse impact on the environment caused by its activities;
- Remedy environmental pollution caused by its activities;
- Disseminate, educate and raise environmental protection awareness among its employees;
- Comply with requirements of environmental reporting;
- Observe environmental protection, supervision and inspection regimes;
- Pay environmental tax and environmental protection fees. An environmental tax is applicable to any individual, organization that produces and trades in products that have a long-term adverse impact on the environment and human life.

3.7 Investor’s responsibility for environmental protection in case of imported products

Imported machinery, equipment, means of transportation, materials, fuels, chemicals and other imported products must satisfy environmental standards.

The Law on Environmental Protection prohibits an enterprise from importing new or used machinery, equipment, means of transportation, materials, fuels, chemicals and other kinds of products in the following cases:

- Machinery, equipment, and means of transportation do not meet environmental standards;
- Machinery, equipment, and means of transportation are intended for scrap;
- Materials, fuels, chemicals are on a list of substances that are prohibited from import;
- Machinery, equipment, and means of transportation are contaminated with radioactive substances, pathogenic microbes or other poisons;
- Foods, medicines are either out of date or do not satisfy standards of hygiene or safety.

3.8 Corporate liability in respect of environmental management

According to the Law on Environmental Protection, insurance for environmental damage is compulsory for organizations that engage in activities that have the potential to cause large-scale environmental damage.

The Law on Environmental Protection specifically discusses handling violations. Entities that violate the Law, depending on the nature and severity of their violations, may be administratively sanctioned. Sanctions include warning, monetary fine, revocation of an investment certificate or criminal penalties. Moreover, if their violations cause environmental pollution, degradation that damages other individuals or organizations, they may be required to provide remedies, rehabilitate the environment, and pay compensation. Compensation for environmental damage is handled on the basis of negotiations between parties. In case negotiations fail, the parties may request settlement by arbitration or they may initiate lawsuits.

Polluters may also face criminal penalties. These penalties are stated in the Penal Code, and their severity depends on the nature and impact of the violation on the environment. For violations that have a severe adverse impact on the environment, the penalty ranges from probation for up to one year or imprisonment for between three months to two years. The penalty for violations that have an extremely severe adverse environmental impact is imprisonment for between one to five years. In addition to these penalties, polluters must answer for acts or omissions such as destruction of public property, failure to meet safety standards required for hazardous substances, and failure to comply with labor safety standards.

Chapter Four

LAND AND CONSTRUCTION

In this Chapter, we discuss a number of legal and practical issues to acquire land to construct a factory. This Chapter does not discuss the special rules that apply to acquire land for development and for resale or sublease.

4.1 Foreign invested enterprises (“FIEs”) and Land Use Rights (“LURs”)

In Vietnam, land cannot be owned either by individuals or by entities, whether they are Vietnamese or foreign. The Constitution provides that land is owned by the entire people and that the State administers it on their behalf. In its exercise of the people’s ownership rights, the State *allocates* (i.e., the State gives a piece of land to a land user to use for a definite or an indefinite period of time, with or without the need to pay a land use fee (levy)) or *leases* a piece of land to individuals, households or entities to use in accordance with the Land Law and its implementing regulations.

Any individual or entity to which a piece of land has been allocated or leased must use the land for the purposes stipulated in the land allocation decision or in the land lease. After being allocated or leased a parcel of land, or after a land user receives a piece of land (land use rights) transferred from others, the land user is entitled to receive a Certificate of Land Use Rights, Residential House Ownership and Ownership of Other Assets Attached to the Land (“**LURs Certificate**”) granted by a competent State agency.³⁶ An LURs Certificate permits a land user to protect its rights and interests. Even though individuals and entities do not have outright ownership of land, when they receive LURs, they have basic control over the land and are entitled to exercise the right to use, transfer, mortgage, lease, and many other rights that are associated with land ownership.

Land users include any individual or entity that has been allocated or leased land, or that has had its LURs recognized by the State, or that has received its LURs through transfer.

The rights and obligations of a land user that has been allocated land by the State are different from those of a land user that has been leased land from the State or that leases land from others. Generally speaking, each type of land user has different rights and interests in relation to the use of a specific parcel of land. For example, Vietnamese individuals and entities can receive their LURs by being allocated or leased land by the State or by receiving LURs transferred from another LURs holder. FIEs can only receive their LURs by being leased land from the State or, in some cases, by being leased or sub-leased land from others who are permitted by law to lease or sublease land to them. An FIE might also receive LURs as contribution of capital from a local enterprise. This mode has features of both a lease and of capital contribution.

³⁶ The name of this Certificate of Title has been changed several times. Before December 10, 2009, there were two different certificates: Land Use Right Certificate and House Ownership Certificate (or House Ownership and Land Use Right Certificate if the owner of the house is also the one who has the land use right). Currently, the land user and owner of houses or owner of other assets attached to the land is issued a Certificate called Certificate of Land Use Rights, Residential House Ownership and Ownership of Other Assets Attached to the Land. The Certificate will clearly state information on whether the land user has the right to use such piece of land by being allocated by the State or by being leased by others, and whether there is any residential house or any other assets affixed to the land.

An FIE with an investment project in Vietnam may select to lease land and pay rent either annually or in a lump sum for the entire term of the lease.

The means by which an FIE can secure land to implement its project vary slightly depending on the location of the project:

- An FIE that requires land outside an industrial zone, a hi-tech zone or an economic zone to construct a factory or a commercial building for its own use may either: lease land from the State, or lease or sublease land from overseas Vietnamese or domestic economic entities that are permitted to sublease land. In the latter case, they may do so only if there is already construction work or infrastructure affixed to the land. An FIE may also sublease land (on which infrastructure has already been built) from other FIEs, as long as the FIE lessor is permitted to sublease land.
- An FIE that has a license to develop an industrial zone can lease land from the State. An FIE that puts its factory in an industrial zone may also choose to sublease land from the industrial zone developer, or sublease land with infrastructure from other enterprises located in the zone, if a sublease is approved by the industrial zone developer.
- An FIE that has a license to develop a hi-tech zone or an economic zone can lease the land from the zone management board.
- Finally, the foreign investor may form a joint-venture with a Vietnamese company and the Vietnamese company may contribute its LURs as capital for use by the new enterprise. There are many conditions and exceptions to this general statement, and each case must be separately examined.

An FIE will be granted an LURs Certificate if it leases land from the State or subleases land in industrial zones, in hi-tech zones or some specific areas in economic zones. The term of validity of the land lease and of the LURs Certificate of an enterprise coincides with the term of the investment certificate, but may not exceed fifty (50) years in normal cases, and seventy (70) years in special cases. If an FIE leases land in an industrial zone, the duration of the lease may depend on the duration of the industrial zone's own investment certificate.

Besides being the most vital land document that the enterprise might possess, the LURs Certificate brings an added value to the FIE. The FIE can mortgage its LURs with a Vietnamese credit organization, a branch of a foreign bank, or with a joint venture bank licensed to operate in Vietnam when it had paid the rent in a lump sum for the entire term of the lease. There are specific laws which detail the method of calculating the value of LURs and which outline mortgage procedures. There are certain limitations, but we do not discuss these limitations here. In order to mortgage LURs based on a lease, the main requirement is that rent for the entire term of the lease has been paid.

4.2 Choosing and renting a land site: outside vs. inside an Industrial Zone (“IZ”)/Export Processing Zone (“EZ”)

A foreign investor may lease a piece of land inside or outside of an IZ/EZ. There are

advantages and disadvantages attached to each option.

4.2.1 Location outside an IZ/EZ

If an investor decides to locate its project outside an IZ/EZ, it may choose a location which is best suited to its needs such as: close to an airport or a seaport, close to its major suppliers or its major customers, or to secure some other advantage. However, the investor needs to assure itself that its project, once it is built, will be in line with the State's development plan for that area. It must also clear that parcel of land, and must compensate inhabitants or owners of any properties existing on the land. We discuss land clearance issues in more detail below, but it is a difficult exercise, and strong support from the local government is very important.

If an investor decides to lease a factory that has already been built instead of leasing a piece of land in order to construct its own factory, it may lease from the owner of the factory. In such case, the investor must ensure that the lessor owns the factory or that the lessor is allowed by law to sublease that property.

In addition, before leasing a piece of land for a factory outside an IZ/EZ, the investor should check with the licensing authority to ensure that the location of the factory is acceptable, meaning it does not violate any zoning plan. Factories likely to pollute the environment or cause noise may not be allowed to locate in populated areas.

Furthermore, there are infrastructure issues to consider such as: clean water, stable power, waste disposal, and a waste water treatment system. If they are lacking, can existing facilities be augmented? For example, should a power plant be built or can the enterprise tap into a nearby private power source? What is the volume of available clean water?

Although an enterprise located outside an IZ/EZ will not receive benefits available to an enterprise located in an IZ/EZ, discussed below, it can achieve some benefits:

- If an enterprise located outside an IZ/EZ leases land from the State, the local provincial Department of Finance will decide the rent, based on a Price List issued by the local provincial People's Committee at the beginning of each year (current annual rent ranges from 1.5% to 2% of the price of land for the same purpose as specified in the Price List, subject to some deductions depending on the location and the business objectives of the project). However, if the Price List issued by the local provincial Peoples' Committee is not comparable to the market price, the Peoples' Committee may refer to the actual market price to determine a suitable price. For rent that is paid annually, rent can often be capped for a minimum term of five (5) years. After this, if there is a rent adjustment, some provinces provide that the increase in the annual rent may not exceed 15% of the existing rent. For rent that is paid in a lump sum for the entire term of the lease, the rent is equal to the land use fee payable by a domestic enterprise that has been allocated the same piece of land for the same purpose and for the same term. An FIE may also obtain the land through a tender, and in such a case the rent will be decided by bidding.
- In case the lease term (for which the rent for the entire term has been prepaid) is longer than the term of the investment project stated in the IC, the term of the investment project will be extended to be equal to the lease term.

- Some provinces provide full rent holidays.
- The enterprise can sublease the land and the assets attached to the land to other parties, if permitted in the lease agreement.

4.2.2 Location inside an IZ/EZ

Locating inside an IZ eliminates any land clearance problems. The enterprise will be located in a zone in which land lots have already been systematically subdivided. The IZ infrastructure is well established, properly maintained, and supplied with wastewater treatment system, security, roadways, and sometimes with a private power supply. Some IZs have on-site Customs clearance. The investor may be entitled to negotiate some commercial terms with the IZ developer. Leases, however, are standardized and many non-commercial terms may be more difficult to negotiate. In certain cases, investment in an IZ is encouraged, and some incentives, mainly tax incentives, are available. Moreover, locating in an IZ eliminates the concern of whether the factory fits into the local development plan.

IZ developers may construct factories to investors' specifications. It may or may not be hard to find a small piece of land or small factory in an IZ. Of course, land within an IZ is more expensive.

If an investor locates in an EZ, besides the benefits to which an investor is entitled if it locates in an IZ, it may also enjoy the following:

- Generally speaking, in some areas of an EZ, the land has been cleared and there are no occupants to compensate.
- It will be entitled to separate investment incentives applicable to areas with special socio-economic difficulties (there is a list of remote areas that have special socio-economic difficulties).
- It will have the opportunity to negotiate an exemption and reduction of land rent for a certain period of time.

There are IZs /EZs in various stages of development. Those that are mature tend to have full supporting facilities, but tend to be more expensive and have less land still available. New IZs/EZs may be less developed, but the rents may be significantly lower, and the developer may be more willing to negotiate both commercial and non-commercial terms.

4.3 Building a factory outside of an IZ

As mentioned, more issues arise if one builds a factory outside of an IZ. If investors want to lease land from the State, the threshold task in many instances is land clearance. By law, it is the State's responsibility to relocate and compensate residents, and to clear the land in order to lease it to investors. Once land is approved for lease by the State, the local People's Committee is responsible to organize both the compensation and the relocation process. The investors often advance the cost of land clearance. That amount is then

deducted from the rent that investors must pay to the State. The basic unit price for relocation compensation is fixed according to State regulations, but negotiation may often still be required. If the foreign investor pays compensation that exceeds the government guidelines, there is an issue of whether the excess can be set off against the rent.

If problems occur, it will most often be during the land clearance stage. The most common difficulty is usually that residents do not want to move because they are not satisfied with the compensation, because they do not like the new location, and sometimes because the new location is not ready. Even though the Land Law supports State involvement in land clearance, in practice an investor needs to pay compensation to the existing user of the land to speed up the land clearance process. After approvals for land recovery are issued along with a compensation program, site clearance plans and the resettlement of occupants must proceed according to the land recovery decision. If a land user fails to comply with the decision, the People's Committee can force relocation.

A foreign investor should be sure to examine the site clearance plan for each location it considers. If the local People's Committee plays a strong and active role, as it should, problems can be mitigated. It will be important to secure assistance from the People's Committee.

Leasing land directly from the State may result in lower rent. Because the State tends to reserve land for large and more important projects, obtaining a lease from the State can be difficult, especially for small projects. In order to lease land directly from the State, investors must satisfy certain criteria.

If investors prefer to lease land from enterprises, the investor must negotiate directly with the holder of the LURs Certificate. This is much closer to simple, unregulated economic negotiation. It is important to ensure that the lessors are legally allowed to lease the land and ascertain what infrastructure is available on the land.

4.4 Obtaining a construction permit

An investor must obtain a construction permit before building a factory. The investor may authorize its contractor to obtain the permit on its behalf, and this is often done. In most cases, the zone authority is competent to issue the construction permit. Otherwise, the local construction department under the provincial People's Committee has the responsibility to do so. A construction permit can usually be expected within 20 days from submission of an application.

A construction permit will not be required in a number of special cases, for example:

- Temporary works to service construction of main works;
- Construction works built along a route which does not pass through an urban area and which comply with the construction master plan; construction works within a construction investment project already approved by authorities;³⁷

³⁷ Decree 12/2009/ND-CP.

- Construction works within a project for an urban zone, IZ, EZ, hi-tech zone or residential housing zone where the detailed construction zoning is on a ratio of 1/500 and already approved by the authorities;
- Repairs or improvement, and interior installation of equipment which does not change the architecture, weight-bearing structure or safety of the works;
- Technical infrastructure works which have a total invested capital of less than VND7 billion in remote and distant areas and which do not infringe on cultural and heritage zone sites;
- Separate dwelling houses in remote locations which are not in urban residential zones, or are in rural residential areas for which there is no approved construction master plan.

4.5 Selecting a contractor

A 100% FIE is not required to invite bids in order to select a contractor. A 100% FIE may select any contractor it wishes. However, the contractor must be qualified under the law of Vietnam.

In the case of a joint venture FIE, if the project contains 30% or more state capital, the FIE must invite bids to select the contractor.

4.6 Construction agreements

A construction agreement between an enterprise and a contractor (a legal entity) is a commercial contract. In addition, foreign contractors can be used. For projects performed by international companies, international contract formats are quite common. There is also a model construction agreement provided by law that contains compulsory provisions.

A construction agreement can have special provisions in respect of governing law, place of arbitration, and the arbitration rules under which a dispute will be resolved. Vietnam is a signatory of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and is developing a record of recognizing foreign arbitral awards. However, because awards are not automatically enforced in Vietnam, there may be a number of obstacles to efficient enforcement. The parties will need to go through a two-part enforcement process: first, it will need to have the award recognized by a competent Vietnamese court; second, once recognized, the award may then be enforced.

Foreign court judgments are generally not enforceable in Vietnam, except in cases where Vietnam and the country in which the court judgment is issued have signed or acceded to an international treaty on judicial assistance in civil procedures. Such countries are mostly former Soviet bloc countries. Enforcement is also possible if judicial assistance in civil procedures is accepted by the two countries on the principle of reciprocity. The outcome of litigation in Vietnamese courts is sometimes unpredictable.

4.7 Approval of completion of the construction work

Generally speaking, a construction project can be divided into several phases, each of which is stated in the construction agreement. Upon completion of the whole project, the investor must invite its design consultants, its contractors and its supervising consultants to witness the commissioning of a project. Minutes of commissioning and acceptance are executed by all parties. Such minutes constitute a legal document, and allow the investor to bring the project into operation. In addition, they serve as the basis on which the investor can prove the contribution of its investment capital, and on which the FIE can register its ownership of the building.

4.8 Certification of ownership of a factory

The FIE will be issued an LURs Certificate upon submission of an application dossier to the provincial Peoples' Committee or the Department of Natural Resources and Environment under authorization given by the provincial Peoples' Committee where the factory is located.³⁸ This LURs Certificate will record the status of the FIE's LURs and the ownership of the FIE over the factory or the construction work which has been developed on the leased land. The FIE may mortgage its factory to credit institutions licensed to operate in Vietnam. If the FIE has paid the rent for the land to which the factory is affixed in a lump sum upfront for the entire lease term, it can also mortgage the LURs as well as the factory affixed to the land, but only at a credit institution licensed to operate in Vietnam.

4.9 The right of FIEs to purchase and own apartments in Vietnam

An FIE is entitled to buy and own apartments in order to provide accommodations for its employees. Representative branches/offices of offshore entities do not have this right.

An FIE must meet certain conditions in order to buy/own apartments: (i) it must have an investment certificate; and (ii) it must not be licensed to operate in the real estate sector.

An FIE is entitled to buy only apartments in commercial residential projects. In other words, an FIE is not permitted to buy or own a private house, villa or land. Moreover, an FIE is entitled to use such apartments only for residential purposes. Other purposes (eg, leasing, using as an office, etc.) are not permitted. There is no limit on the number of apartments that an FIE may own.

³⁸ Decree 88/2009/NĐ-CP.

Chapter Five LABOR

This Chapter highlights several basic concepts from the substantial body of law that governs workplace relationships and employment conditions.

5.1 Brief comments on Vietnam's labor force

Vietnam has a young labor force. The level of experience and expertise in certain areas is still low. However, literacy is high, and computer literacy in particular has quickly developed. Young Vietnamese are dynamic, eager and quick to learn and to acquire new skills.

A near universal view within the foreign manufacturing community is that Vietnamese workers have good assembly skills. They are attentive to detail, especially in areas that require a high level of accuracy.

5.2 State management agencies

The Ministry of Labor, War Invalids and Social Affairs ("MOLISA") acts on behalf of the State in managing labor and the labor-related activities of enterprises. MOLISA formulates and enforces policies on the salary system and the management and development of the labor force. It sets out general employment rules applicable to all enterprises.

People's Committees, acting through Departments of Labor, War Invalids and Social Affairs ("DOLISA") under them, are responsible for management of labor in their locale. They implement labor rules and monitor compliance. They follow labor issues and report to the MOLISA.

Trade unions exist at all levels, from the enterprise level to the industry level, and from the provincial level to the central level. They participate in the supervision of labor-related activities. Trade unions have traditionally been regarded as an essential part of Vietnam's political system. Their current task is to represent and protect workers' rights and interests. In reality, however, they have not been very dynamic as either a political force or even in labor matters.

There are also labor inspectorates that have been established by the MOLISA and People's Committees at all levels to survey compliance and investigate labor complaints. Normally, these bodies are reactive rather than proactive.

5.3 Employers' Representative

The Vietnam Chamber of Commerce and Industry ("VCCI") is recognized by law as a representative of Vietnam's employers (and of the business community) to promote

employers' interests in domestic and international labor relations.³⁹ Any employer can become a member of the VCCI. VCCI provides services to members regarding labor issues, i.e. labor disputes, wage determination, work safety. It serves as a liaison between employers and the State.

5.4 General employment conditions

The Labor Code regulates the employment of workers. It also provides for rights and obligations of both employees and employers. There are many independent regulations which implement the Labor Code.

5.4.1 Minimum wage

The minimum wage is the lowest monthly wage that may be paid to an employee hired to perform a basic job that does not require training. The minimum wage is fixed from time to time by the Government.

There are two minimum wage systems. One system applies to employees who work for enterprises with foreign-invested capital, foreign organizations, or international organizations. The other system applies to employees who work for non-foreign-invested enterprises such as state agencies, state-owned enterprises and other domestic enterprises. The general minimum monthly wage is VND 730,000 per month.⁴⁰

The minimum monthly wage that applies to employees who work for enterprises with foreign-invested capital and other foreign organizations depends on the classification of the enterprise:⁴¹

- Level 1: VND1,550,000 per month for employees who work for enterprises in urban districts of Hanoi, urban and rural districts of Ho Chi Minh City and some designated cities and districts of Dong Nai, Binh Duong and Ba Ria-Vung Tau provinces.
- Level 2: VND1,350,000 per month for employees who work for enterprises in various designated cities and districts of provinces and in centrally-run cities.
- Level 3: VND1,170,000 per month for employees who work for enterprises in cities and districts of other provinces.
- Level 4: VND1,100,000 per month for employees who work for enterprises in other locations.

An enterprise will pay wages based on the above minimum wage structure. If an employee has gone through “vocational training or an apprenticeship” (that is, he is a trained employee), he is eligible for at least the applicable minimum wage plus 7%.

³⁹ The law also recognizes the Vietnam Cooperative Alliance (“VCA”) as a representative of Vietnam’s employers. Unlike the VCCI, most members of the VCA are cooperatives.

⁴⁰ Art. 1 Decree 28/2010/ND-CP (March 25, 2010) regarding general minimum wage.

⁴¹ Art.1 Decree 107/2010/ND-CP (October 29, 2010).

5.4.2 Overtime payment

Generally speaking, a worker who works overtime is entitled to receive commensurate pay. The Labor Code provides different mandatory payment rates for overtime: 150% after normal working hours, 200% on weekends, and 300% on a holiday or a paid leave. Employees and their employer may agree on an amount of overtime that may generally not exceed four hours per day and 200 hours per year. In some cases, it may reach 300 hours per year.

The Labor Code requires that workers who work overtime at night must receive at least 30% more overtime pay than those who work overtime in the daytime.

5.4.3 Annual leave

An employee who has worked for one year is entitled to a statutory annual leave of 12 working days. An employee who has worked for less than a year may receive leave on a pro-rated basis. If, by reason of termination of employment or for any other reason, an employee has not taken all of his annual leave, the employee must be paid for the days not taken.

5.4.4 Bonuses

Paying annual bonuses is generally a matter of an employer's own discretion, based on the enterprise's annual business performance and its workers' performance. However, the practice most employers have consistently followed is to pay an annual bonus equivalent to at least one's month salary. An employee in his first year may receive a portion of the annual bonus corresponding to the time he has been with the enterprise.

5.4.5 Social, health and unemployment insurance

Social insurance and medical insurance are compulsory for any employee who works for at least three months. In addition, an employee who works for an employer who employs ten or more employees, and has a labor contract of indefinite term or a term of between 12 months and 36 months is obliged to participate in the unemployment insurance regime.

Under the compulsory social insurance, compulsory health insurance, and unemployment regimes, both the employer and the employee are required to contribute to the insurance fund. Their contributions are based on the entire contracted salary that an employee receives. The government also contributes and provides additional funds.

Nevertheless, the Law on Social Insurance sets a ceiling for the salary on which contributions will be calculated, and no contribution need be made beyond this ceiling. If an employee's salary is higher than 20 times the Government's general minimum wage, then for the purposes of calculating social insurance contributions, the employee's salary will be deemed to be fixed at 20 times the general minimum wage. Therefore, the maximum social insurance contribution will depend on the minimum wage fixed by the Government from time to time. The current legal minimum is VND730,000, and 20 times the general minimum wage is VND14,600,000. Thus, the maximum contribution salary is currently VND14,600,000.

Under the compulsory social insurance regime, employees and their beneficiaries can claim social benefits in the form of compensation for sick leave, maternity leave, compensation for work-related accidents and occupational diseases, retirement and death benefits. Upon termination of their employment, unemployment insurance provides employees with (i) an unemployment allowance, (ii) re-training vocational support, and (iii) job search support. Medical insurance covers non work-related medical expenses.

For employees who work for less than three months, social and medical insurance must be included in their wages, and those employees may voluntarily join the social insurance fund, or they may, by themselves, obtain insurance from other sources.

5.4.6 Retrenchment

An employer has a right to terminate employees in certain circumstances, and must pay a retrenchment (severance/redundancy) allowance. The Labor Code provides for the payment of the retrenchment allowance for employees who have worked for the employer for more than one year.

Types of retrenchment allowance vary depending on the particular circumstances of a retrenchment. For example, if the employer unilaterally terminates an employee in case of natural disasters, fire or other cases of force majeure and the employer has in fact made every effort to avoid terminations but is nevertheless compelled to make cuts in production and workforce, the employee may receive a severance equal to one-half month's salary for every year of employment. If the enterprise merges or is divided, an employee whose employment is discontinued as a result of such merger or division is entitled to receive a redundancy allowance of one month's salary for every year of employment, or a total of two months' salary, whichever is greater. Other benefits, such as accumulated leave or bonuses, must also be paid.

As of January 1, 2009, seniority for severance/redundancy allowance purposes stopped accruing for any Vietnamese employee who worked under an indefinite term or a definite term labor contract of 12 months or more in a place with 10 or more employees. In this connection, the duration during which the employee contributes to an unemployment insurance plan is set-off against the total working time which is counted for paying severance/ redundancy allowance.

5.5 Individual and collective labor agreements

5.5.1 Individual labor agreement

Essentially, all employees are required to have a labor agreement with their employer. There are three types of individual labor agreements recognized by law: an agreement for an indefinite term, an agreement for a definite term of 12 to 36 months, and an agreement to perform a specific task which will last for less than 12 months.

Insofar as the second and third types are concerned, if such an agreement expires without being renewed, or if no new agreement is executed but the employee continues to work after its expiration, the expired agreement will be deemed to remain effective with one condition -- that is, in certain circumstances, it will become an indefinite term agreement. More specifically, a definite term labor agreement may be used only for two consecutive

terms, including one renewal. After the second consecutive definite term, if the employer and the employee enter into a new labor agreement, this agreement must be an indefinite term labor agreement. If the employment continues, but no new labor agreement is executed, the current labor agreement will automatically be considered to be an indefinite term labor agreement.

An individual labor agreement signed between an enterprise with foreign investment and an employee must be prepared on a standard form issued by the MOLISA. It contains particulars such as the nature of the work, working hours, employment term, remuneration package, leave, bonus, and insurance. Additional terms may be added. The employer and the employee must each receive one original.

Before signing a labor agreement, an employer and an employee may enter into an agreement on probation within the following parameters:

- A probationary period cannot exceed 60 days if the employee is recruited for a position that requires a professional or technical college qualification or above;
- A probationary period cannot exceed 30 days if the employee is recruited for a position that requires an intermediate-level qualification, or if he is recruited to be a technical worker or staff;
- A probationary period cannot exceed six days if the employee is recruited for other positions.

During the probationary period, the employee is entitled to a salary equivalent of at least 70% of the salary to which he will be entitled if he is employed.

Upon expiration of the probationary period, the employer must give notice to the employee of the result of his probationary performance. If the performance meets the requirements set out in the agreement on probation, the employer must enter into a labor contract. If, upon expiration of the probationary period, the employer does not give any notice and the employee continues to work for the employer, the employee is deemed to have been recruited.

During the probationary period, either the employer or the employee may terminate employment without the need to give notice or reason. Neither party is obliged to pay compensation for such early termination.

5.5.2 Collective labor agreement

An employer may enter into a collective labor agreement with its employees in cases where a trade union has been formed in the enterprise. A collective labor agreement must contain basic terms such as working hours, salaries and bonuses, insurance, work safety provisions, and guarantee of employment. A collective labor agreement may be signed for a term of one to three years. The term could be less than one year if it is the first time the employer has entered into a collective labor agreement.

A collective labor agreement must be registered with the relevant labor department within 10 days after its execution, and it becomes effective upon registration. A collective labor agreement is the main source of employees' rights and interests. There may be some overlap between a collective labor agreement and an individual labor agreement. In that

case, a collective labor agreement prevails.

5.6 Internal Labor Rules

A company must have internal labor rules (“ILRs”) if it has 10 or more employees. The ILRs must include information on the following:

- Working hours and rest breaks;
- Company rules and discipline;
- Occupational safety and hygiene in the work place;
- Protection of assets and confidentiality of technology and business secrets of the company; and
- Conduct which is in breach of labor rules and penalties imposed for those breaches, and responsibility for damages.

Carefully worded ILRs are important in order for the employer to take disciplinary action against an employee, or to terminate a labor contract in case of an employee’s poor performance. It is difficult for a company to dismiss an employee for an offense if that offense is not specified in its ILRs or if the company does not have duly registered ILRs.

5.7 Trade unions

Trade unions exist at all levels, and, as mentioned, form a part of Vietnam’s political system. Vietnam has a separate Law on Trade Unions that deals with the establishment and operation of trade unions at all levels. Trade unions are empowered to monitor compliance with labor regulations. They have a role in educating workers to perform their duties of citizenship in the interest of the country.

The right to form a trade union is given to all employees. The employer is required to acknowledge the status of a legally established trade union, to assist, if requested, in its formation, and to provide facilities in order for the trade union to function. An employer may not discriminate against an employee because he has formed or joined a trade union.

An enterprise, whether in the public or private sector, is required to contribute to a fund to operate the trade union established within that enterprise. In domestically-owned enterprises, the rate of contribution is equal to 2% of the payroll. In foreign-invested enterprises and operating offices of foreign parties to business co-operation contracts, the rate of contribution is 1% of the payroll.

5.8 Work safety

The law strictly requires an employer to implement safety measures in the workplace. Liability is imposed on the employer in relation to work-related accidents that cause injuries or casualties to its employees in the course of employment. If an employee is not covered by social insurance, the employer is obliged to pay compensation to the employee or his beneficiary. Whether or not the employee was at fault is irrelevant in respect of the employer’s obligation to pay compensation, but fault is relevant in determining how much is to be paid.

5.9 Labor dispute resolution

Emphasis is placed on negotiation and conciliation in order to resolve labor-related disputes. The law sets out rules for conciliation, including powers of conciliators, and responsibilities of parties to a dispute. If conciliation fails, a court action may be instituted with the appropriate Labor Court. The time limit within which an employee must file a request to resolve a dispute with the court ranges from six months to one year, depending on the nature of a particular dispute. DOLISAs can participate in labor dispute settlement by appointing conciliators and arbitrators for negotiations.

5.10 Employment of expatriates

The employment of an expatriate is generally limited to a managerial position or to a position requiring a high level of expertise for which position Vietnamese are not yet qualified. An enterprise that employs an expatriate usually must have a plan for Vietnamese staff to replace the expatriate; however, an enterprise with foreign-invested-capital is permitted to extend employment of an expatriate if it does not yet have a qualified Vietnamese replacement.

Decree No. 34/2008/ND-CP of the Government (March 25, 2008) on recruitment and management of foreign labor working in Vietnam, eliminates the restriction on the number of expatriates that an enterprise is allowed to employ. One exception, however, is the use of intra-corporate transferees, in which case an employer must be able to show that at least 20% of the total number of its managers, executives and specialists are Vietnamese citizens. This requirement does not apply to representative offices.

5.11 Work Permits

With limited exceptions, most expatriates who work for three months or more in Vietnam are required to have a work permit. An expatriate is exempt from the need to have a work permit in the following circumstances:

- He enters Vietnam to work for less than three months or to handle an emergency case or one with complicated technical or technological problems that affects production/business activities and that cannot adequately be addressed within Vietnam;
- He is a member of a limited liability company with two or more members;
- He is the owner of a single-member limited liability company;
- He is a member of the Board of Directors of a joint stock company;
- He is a foreign service sales persons;
- He is a lawyer who has received a Certificate for the practice of law in Vietnam granted by the Ministry of Justice.

In Chapter Two, we discuss the personal income taxes that apply to expatriates.

Chapter Six

PROTECTION OF INTELLECTUAL PROPERTY

Vietnam has made a late start in protecting intellectual property rights (“IPRs”). Increasing demand for protection from foreign investors, and the requirements of the BTA and WTO have resulted in positive actions towards recognizing and protecting IPRs.

6.1 Current legal framework

The IPRs recognized in Vietnam are as follows:

- a) Copyright of literary, artistic and scientific works; copyright related rights of performances, audio and visual fixation, broadcasts and encrypted program-carrying satellite signals;
- b) Industrial property rights, comprising inventions, industrial designs, layout designs of integrated circuits, trade secrets, trademarks, trade names, and geographical indications;
- c) Plant varieties and plant reproductive materials.

These rights are regulated by the following domestic laws and international agreements:

Domestic laws:

- Civil Code 2005, effective January 1, 2006;
- Criminal Law (Articles 156, 157, 158, 170, 171 on sale and manufacture of counterfeit goods in violation of regulations on granting title for protection of industrial property rights and in violation of intellectual property rights).
- Intellectual Property Law, effective July 1, 2006 (“IP Law”).
- Law on Amendment of the IP Law, effective January 1, 2010;
- Decree 56/2006/ND-CP of the Government (June 6, 2006), providing guidance on administrative measures in culture and information sectors.
- Decree 100/2006/ND-CP of the Government (September 21, 2006), detailing and guiding the implementation of a number of articles of the Civil Code and the IP Law regarding copyright and related rights.
- Decree 103/2006/ND-CP of the Government (September 22, 2006), guiding implementation of several provisions of the IP Law.
- Decree 122/2010/ND-CP of the Government (December 31, 2010), amending several provisions of Decree 103/2006/ND-CP.

- Decree 104/2006/ND-CP of the Government (September 22, 2006), guiding implementation of several provisions of the IP Law in respect of plant varieties.
- Decree 88/2010/ND-CP of the Government (August 16, 2010), guiding implementation of several provisions of the IP Law and the Law on Amendment of the IP Law, and supplementing several revisions of the IP Law in respect to plant varieties.
- Decree 105/2006/ND-CP of the Government (September 22, 2006), guiding implementation of several provisions of the IP Law in respect of protection of intellectual property rights and of State management in the field of intellectual property.
- Decree 119/2010/ND-CP of the Government (December 30, 2010), amending several provisions of Decree 105/2006/ND-CP.
- Decree 172/2007/ND-CP of the Government (November 28, 2007), revising and supplementing a number of articles of Decree No 57/2005/ND-CP (April 27, 2005) on penalties for administrative violations in the field of plant varieties.
- Decree 47/2009/ND-CP of the Government (May 13, 2009), stipulating settlement of administrative infringement in copyrights and relevant rights.
- Decree 97/2010/ND-CP of the Government (September 21, 2010), on sanctions against administrative violations in the field of industrial property.
 - Circular 01/2007/TT-BKHCHN of the Ministry of Science and Technology (February 14, 2007), guiding implementation of several provisions of Decree 103/2006/ND-CP.
 - Circular 12/2007/TT-BVHTT of the Ministry of Culture and Information (May 29, 2007), guiding implementation of Decree 56/2006/ND-CP on administrative measures in culture and information sectors.
 - Circular 01/2008/TT-BKHCHN of the Ministry of Science and Technology (February 25, 2008), guiding grant and revocation of Industrial Property Examiner License and Industrial Property Examination Business License.
 - Joint Circular 01/2008/TTLT-TANDTC-VKSNDTC-BCA-BTP (February 29, 2008), guiding examination of penal liability for acts of infringement of intellectual property rights.
 - Circular 01/2008/TT-BKHCHN (February 25, 2008), guiding grant and revocation of Intellectual Property Examiner License.
 - Joint Circular 02/2008/TTLT-TANDTC-VKSNDTC-VVHTT&DL-BKHCHN-BTP (April 3, 2008), guiding settlement of disputes in the field of intellectual property.

••• Decision 11/2008/QD-BTC of the Ministry of Finance (February 19, 2008), guiding collection and use of fees in the plant variety sector.

- Decree 154/2005/ND-CP of the Government (December 15, 2005), detailing implementation of a number of Articles of the Customs Law regarding Customs procedures, inspection and supervision of import and export goods.

International agreements:

- Paris Convention for the Protection of Industrial Property;
- Patent Cooperation Treaty (PCT);
- Madrid Agreement concerning the International Registration of Marks;
- Madrid Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks;
- Berne Convention for the Protection of Literary and Artistic Works;
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;
- International Union for the Protection of Plant Varieties;
- Brussels Convention relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite;
- Phonograms Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Programs;
- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement);
- Bilateral Agreement between the Socialist Republic of Vietnam and the United States of America on trade relations;
- Agreement between the Socialist Republic of Vietnam and the United States of America on cooperation in the field of science and technology; and
- Agreement between the Socialist Republic of Vietnam and Switzerland on intellectual property and on cooperation in the field of intellectual property.

6.2 The BTA between the Socialist Republic of Vietnam and the United States of America

By entering into the BTA, Vietnam has agreed to treat American IPR holders no less favorably than it treats its own IPR holders with regard to the acquisition, protection, enjoyment, and enforcement of IPR and any benefits derived therefrom.

6.3 The TRIPS Agreement

To become a member of the WTO in 2007, Vietnam agreed that intellectual property matters will be governed in accordance with the TRIPS Agreement. As a matter of interest, we attach an Appendix which summarizes the contents of the TRIPS Agreement.

6.4 Enforcement of IPRs in Vietnam

When a company's IPRs (including patents) are infringed, it can follow either administrative or judicial procedures in order to enforce its rights. Judicial procedures may entail either civil or criminal procedures. Each procedure has its advantages and also its shortcomings, which are discussed below.

In either procedure, the following steps are required:

- Collect evidence on infringement: place of sale, manufacture, etc.;
- To the extent possible, identify the infringer;
- Send warning letter to infringer.

6.4.1 Administrative procedures

The State bodies involved in administrative procedures include:

- Local inspectors of the Ministry of Science and Technology ("MOST").
- Market Control ("MC"), an office under the Ministry of Trade. It has the right to seize, confiscate or destroy infringing products. The MC can also impose administrative fines on infringers.
- Economic Police ("EP"), under the Ministry of Public Security, have the right to apply enforcement measures and to impose administrative fines on infringers.
- Provincial or cities' customs offices.

When infringement is thought to have occurred, an IPR holder files with any of the above authorities a request to act against the infringement. The request must be accompanied by proof of infringement.

If the intellectual property right is infringed, one of the principal penalties, a warning or a monetary fine of up to VND300,000,000, is imposed. Besides the principal penalty, one or more additional penalties may be imposed, depending on the severity of the infringement: removal of the infringing labels and seizure of the infringing goods or facilities; revocation of the business license or suspension of the infringer's business activities; destruction of infringing articles which are harmful to human health or detrimental to society; etc.

In practice, and in the current environment, the use of administrative procedures is the most efficient way to deal with an infringement. It is more simple and cost-effective than judicial procedures. However, there are several principal shortcomings of administrative

procedures:

- MC, EP, and Customs usually base their actions on a decision on infringement. In the past, decisions on infringement were issued by the National Office of Intellectual Property (“NOIP”). However, after the effective date of the IP Law on July 1, 2006, the NOIP no longer issues such decisions. It may make an exception at the request of an enforcement body, but not for the IPR owner. Without a decision on infringement, an administrative action usually cannot move forward, and no other authority has been authorized to provide a similar decision which is also binding. So far, the question of how to use administrative procedures to enforce intellectual property rights without the NOIP’s decisions on infringement is unresolved. Recently a private commercial organization, the Vietnam Intellectual Property Research Institute (“VIPRI”), has been established to consult on issues such as infringement. Others may follow. However, an opinion on infringement from such a body is not legally binding. Nevertheless, the existence of such private bodies will help fill the gap left when NOIP ceased to provide decisions on infringement.
- To follow administrative procedures, one cannot claim compensation for damages. Damages can only be determined by a court.
- Administrative sanctions are not strict enough to prevent new violations.

6.4.2 Civil procedures

If the problem cannot be solved through administrative procedures, an IPRs holder can bring an infringer to the Civil Court. The rights holder does not have to apply administrative procedures first. It can bring the matter immediately to the Court.

The IPR holder files a complaint against the infringer in a provincial court where the defendant is located. The complaint must be accompanied by documents that prove the ownership of the intellectual property right and the proof of infringement.

Before the hearing, the Court is required to attempt conciliation between the two parties. If the infringement cannot be resolved, a hearing usually takes place within six months from the date the Court receives the complaint. During the intervening period, both parties submit their written arguments.

If both parties attend the hearing, and there is no postponement, then the matter is usually heard and dealt with at that one hearing. A judgment is often issued at the same time, but in any event, an official written judgment will be sent to the parties a few days later.

A Court can levy damages. It can also force an infringer to cease its violation, to make a public admission, to apologize and to pay damages.

If one of the two parties does not agree with the Court’s judgment, then, within 15 days after the judgment is issued, that party may submit an appeal to the Supreme People’s Court, whose decision will be final.

Seeking civil redress takes more time and effort than following administrative procedures.

In most cases, however, the outcomes are no better. This is due, in large part, to the inexperience of judges who deal with intellectual property issues. In addition, in the past, judges usually based their judgments on decisions of the NOIP which are no longer available. The initial response from the NOIP would certainly provide a good indication of how the Court will decide. The only advantage of judicial over administrative procedures is that a court can require that the infringer compensate the IPR holder for its damages. However, under Vietnamese law, it is very difficult to establish damages.

6.4.3 Criminal procedures

6.4.3.1 Criminal liability for infringement

In serious cases, infringement of other people's IPRs is subject to criminal liability. The Criminal Code includes two articles: one on infringement of copyrights, and one on infringement of other types of IPRs. According to these two new articles, and depending on the severity of the infringement, the infringer can be fined from VND20 million to VND200 million, or be re-educated without detention for up to two years. If the infringement is done in an organized manner, or done repeatedly, or if the infringement causes serious consequences, the infringer can be imprisoned for a period of three months to six years.

Article 156 of the revised Criminal Code also provides that counterfeiters or persons trading in counterfeit goods can be imprisoned for 15 years. The death sentence can be imposed if the counterfeit goods are foods or pharmaceuticals.

6.4.3.2 Theft

One risk for a company is theft of products of high value. Briefly, persons who commit theft can be imprisoned for two to seven years if the stolen goods are valued from VND50 million to VND200 million; for seven to fifteen years if the stolen goods are valued from VND200 million to VND500 million; and for 20 years to life if the stolen goods are valued from VND500 million and up.

Vietnam is very law-and-order conscious. Generally speaking, Vietnam cannot be faulted for laxity in prosecution of serious crimes. Vietnam sees crimes like theft as a threat to security and as a vice that undermines society. For those reasons, prosecution for theft of large amounts is strong and the penalties are severe.

6.4.4 Enforcement of intellectual property rights at the border

An IPR holder can request the Customs Office to suspend normal customs procedures at the border for the import or export of goods it suspects violate its IPRs. The request is filed with the provincial Customs Office through which the suspected goods are being exported or imported. The request must be accompanied by documents that demonstrate ownership of the IPRs and proof of infringement. The IPR holder is also required to deposit an amount equal to 20% of the value of the suspected goods. If the IPRs are found to have been infringed, the deposit will be returned. Customs will suspend its normal clearance procedures relative to the suspected goods for 10 days from the date the provincial Customs Office issues a Decision of Suspension. This period of suspension can be extended for another 10 days.

If an IPR has been infringed, one of two principal penalties can be imposed on the infringer: a warning or monetary fine (up to VND20 million). Besides the principal penalty, depending on the severity of the infringement, the provincial Customs Office can also impose additional penalties, such as seizure of the infringing goods or facilities, revocation of an import-export license, or destruction of infringing articles which are harmful to health or detrimental to society.

Enforcement of IPRs at the border has several shortcomings: inadequate means to determine if goods are counterfeit, lack of detailed procedures, poorly motivated customs officials, corruption, and low penalties.

6.5 Current attitudes and prospects

While Vietnamese law on the registration of IPRs conforms with international norms, the protection of IPRs does not yet satisfy the expectation of manufacturers and IPR holders. In many cases, enforcement needs to be conducted promptly; however, delay is usually due to time-consuming procedures and to the lack of human resources of enforcement bodies. Those elements undermine efforts against counterfeiters, especially against small counterfeiters. Small counterfeiters with a small amount of equipment have mobility and often disappear before enforcement bodies discover them.

Even so, there are signs that Vietnam wants to deal more severely with IP violators. Monetary fines imposed on actions that infringe IPRs in respect of inventions, industrial designs, and layout designs of integrated circuits have been modestly increased. Governmental Decree 97/2010/NDCP (September 21, 2010) has increased the maximum fine from VND300,000,000 to VND500,000,000. Articles 156, 157 of the revised Criminal Law increased penalties for the sale and manufacture of counterfeit goods.

One matter that remains unresolved is the lack of a mechanism to recognize well-known (or famous) marks in Vietnam. The common way that an owner of a well-known trademark tries to have its trademark recognized is to file a complaint with the NOIP, when its application for the mark is rejected based on a prior applied/registered mark or when it wishes to oppose the application of a new mark. The complaint or opposition must be accompanied by several required documents or proof. If the complaint or opposition is successful, the owner's mark will be recognized as well-known. In that case, the application of the prior applied mark will be rejected and the registration of the prior registered mark will be cancelled.

APPENDIX
to Chapter Six

APPENDIX 6

SUMMARY OF THE AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

(Extract from WTO's website <<http://www.wto.org>>)

Overview

To become a member of the World Trade Organization ("WTO") in 2007, Vietnam agreed that intellectual property matters will be governed in accordance with the Agreement on the Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"), which comprises Annex 1C of WTO's Trade Agreement. The TRIPS Agreement covers all intellectual property subjects to which the international community has previously agreed and which are included in international multilateral treaties managed by the World Intellectual Property Organization ("WIPO"). The TRIPS Agreement requires WTO members to apply a high standard to protect and to enforce intellectual property rights. In addition, all disputes that arise from the application and implementation of the TRIPS Agreement will be resolved in accordance with general mechanisms established under WTO. Vietnam is not yet fully compliant with the TRIPS Agreement.

The TRIPS Agreement is divided into three parts:

PART I:

General Obligations

Part I of the TRIPS Agreement sets out general provisions and basic principles, notably a national-treatment commitment under which the nationals of other parties must be given treatment no less favorable than that accorded to a party's own nationals with regard to the protection of intellectual property. It also contains a most-favoured-nation clause, a novelty in an international intellectual property agreement, under which any advantage a party gives to the nationals of another country must be extended immediately and unconditionally to the nationals of all other parties, even if such treatment is more favorable than that which it gives to its own nationals.

ART II:

Part II of the TRIPS Agreement addresses each intellectual property right in succession.

1. Copyright

Parties are required to comply with the substantive provisions of the Berne Convention for the protection of literary and artistic works, in its latest version (Paris 1971), though they will not be obliged to protect moral rights as stipulated in Article 6 bis of that Convention. It ensures that computer programs will be protected as literary works under the Berne Convention and lays down on what basis data bases should be protected by copyright. An important addition to existing international rules in the area of copyright and related rights are the provisions on rental rights. The TRIPS Agreement requires authors of computer

programs and producers of sound recordings to be given the right to authorize or prohibit the commercial rental of their works to the public. A similar exclusive right applies to films where commercial rental has led to widespread copying which materially impairs the right of reproduction. The TRIPS Agreement also requires performers to be given protection from unauthorized recording and broadcast of live performances (bootlegging). The protection for performers and producers of sound recordings would be for no less than 50 years. Broadcasting organizations would have control over the use that can be made of broadcast signals without their authorization. This right would last for at least 20 years.

2. *Trademarks*

With respect to trademarks and service marks, the agreement defines what types of signs are eligible for protection as a trademark or service mark and what are the minimum rights conferred on their owners. Marks that have become well-known in a particular country enjoy additional protection. In addition, the agreement lays down a number of obligations with regard to the use of trademarks and service marks, their term of protection, and their licensing or assignment. For example, requirements that foreign marks be used in conjunction with local marks would, as a general rule, be prohibited.

3. *Geographical indications*

In respect of geographical indications, the agreement sets out that all parties must provide means to prevent the use of any indication which misleads the consumer as to the origin of goods, and any use which would constitute an act of unfair competition. A higher level of protection is provided for geographical indications for wines and spirits, which are protected even where there is no danger of the public's being misled as to the true origin. Exceptions are allowed for names that have already become generic terms, but any country using such an exception must be willing to negotiate with a view to protecting the geographical indications in question. Furthermore, provision is made for further negotiations to establish a multilateral system of notification and registration of geographical indications for wines.

4. *Industrial designs*

Industrial designs are also protected for a period of 10 years. Owners of protected designs would be able to prevent the manufacture, sale or importation of articles bearing or embodying a design which is a copy of the protected design.

5. *Patent*

As regards patents, there is a general obligation to comply with the substantive provisions of the Paris Convention (1967). In addition, the TRIPS Agreement requires that 20-year patent protection be available for all inventions, whether of products or processes, in almost all fields of technology. Inventions may be excluded from patentability if their commercial exploitation is prohibited for reason of public order or morality; otherwise, the permitted exclusions are for diagnostic, therapeutic and surgical methods, and for plants and (other than microorganisms) animals and essentially biological processes for the production of plants or animals (other than microbiological processes).

6. *Plant varieties*

Plant varieties, however, must be protectable either by patents or by a *sui generis* system (such as the breeder's rights provided in a UPOV Convention). Detailed conditions are laid down for compulsory licensing or governmental use of patents without the authorization of the patent owner. Rights conferred in respect of patents for processes must extend to the products directly obtained by the process; under certain conditions alleged infringers may be ordered by a court to prove that they have not used the patented process.

7. *Layout designs*

With respect to the protection of layout designs of integrated circuits, the TRIPS Agreement requires parties to provide protection on the basis of the Washington Treaty on Intellectual Property in Respect of Integrated Circuits which was opened for signature in May 1989, but with a number of additions: protection must be available for a minimum period of 10 years; the rights must extend to articles incorporating infringing layout designs; innocent infringers must be allowed to use or sell stock in hand or ordered before learning of the infringement against a suitable royalty; and compulsory licensing and government use is only allowed under a number of strict conditions.

8. *Trade secrets and know-how*

Trade secrets and know-how which have commercial value must be protected against breach of confidence and other acts contrary to honest commercial practices. Test data submitted to governments in order to obtain marketing approval for pharmaceutical or agricultural chemicals must also be protected against unfair commercial use.

* * *

The final section in Part II of the TRIPS Agreement concerns anti-competitive practices in contractual licenses. It provides for consultations between governments where there is reason to believe that licensing practices or conditions pertaining to intellectual property rights constitute an abuse of these rights and have an adverse effect on competition. Remedies against such abuses must be consistent with the other provisions of the agreement.

PART III:

Part III of the TRIPS Agreement sets out the obligations of member governments to provide procedures and remedies under their domestic law to ensure that intellectual property rights can be effectively enforced by foreign right holders as well as by their own nationals. Procedures should permit effective action against infringement of intellectual property rights but should be fair and equitable, not unnecessarily complicated or costly, and should not entail unreasonable time-limits or unwarranted delays. They should allow for judicial review of final administrative decisions. There is no obligation to put in place a judicial system distinct from that for the enforcement of laws in general, nor to give priority to the enforcement of intellectual property rights in the allocation of resources or staff.

The civil and administrative procedures and remedies spelled out in the text include provisions on evidence of proof, injunctions, damages and other remedies which would include the right of judicial authorities to order the disposal or destruction of infringing

goods. Judicial authorities must also have the authority to order prompt and effective provisional measures, in particular where any delay is likely to cause irreparable harm to the right holder, or where evidence is likely to be destroyed. Further provisions relate to measures to be taken at the border for the suspension by customs authorities of release, into domestic circulation, of counterfeit and pirated goods. Finally, parties should provide for criminal procedures and penalties at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Remedies should include imprisonment and fines sufficient to act as a deterrent. Dispute settlement would take place under the integrated GATT dispute-settlement procedures as revised in the Uruguay Round.

With respect to the implementation of the TRIPS Agreement, it envisages a one-year transition period for developed countries to bring their legislation and practices into conformity. Vietnam became a member of the WTO in 2007, and has a 11-year transition period. Developing countries which do not at present provide product patent protection in an area of technology would have up to 10 years to introduce such protection. However, in the case of pharmaceutical and agricultural chemical products, they must accept the filing of patent applications from the beginning of the transitional period. Though the patent need not be granted until the end of this period, the novelty of the invention is preserved as of the date of filing the application. If authorization for the marketing of the relevant pharmaceutical or agricultural chemical is obtained during the transitional period, the developing country concerned must offer an exclusive marketing right for the product for five years, or until a product patent is granted, whichever is shorter.

Subject to certain exceptions, the general rule is that the obligations in the agreement would apply to existing intellectual property rights as well as to new ones.