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Doing Business in Vietnam

Abstract

[Excerpt] The legal system in Vietnam is developing rapidly with a large body of law being specifically implemented to govern and regulate foreign investment issued by various types of Government bodies. The rate at which these laws are being promulgated is rapid, which can sometimes cause inconsistencies and gaps in Vietnam's system of legislation. The National Assembly issues laws, its Standing Committee issues ordinances, and the Government issues decrees. The Government also instructs ministries having jurisdiction over relevant fields to issue their own administrative regulations and internal guidelines. As a result, in almost any project, the foreign party will have to familiarize itself with a range of regulations and a cross-section of government bodies which issue and interpret them.

Keywords

Vietnam, foreign investment, trade, commerce, business, law, imports

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Comments

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Doing Business in Vietnam

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Table of Contents

Doing Business in Vietnam	1
Introduction	1
Relevant Authorities	1
Preferential Investment Terms	1
Financing	2
Business Entities	2
Taxation	4
Land and Land Use Fees	5
Employment	5
Foreign Exchange	5
Mergers and Acquisitions	6
Domestic Investment and the Enterprise Law	6
Securities and the Securities Market	7
Agencies and Distributorships	7
Intellectual Property	8
Technology Transfer	9
Dispute Resolution	10
Visas and Travel Arrangements	10
Approaching Vietnam's Legal System	10

Doing Business in Vietnam

Introduction

In 1986, the Communist Party of Vietnam took steps to implement a reform program it designated “doi moi” (renovation). On the heels of this new policy, Vietnam’s first *Law on Foreign Investment in Vietnam* (“LFI”) was adopted by the National Assembly on 29 December 1987. Following its amendments in 1990, 1992, and 1996, the original *Law on Foreign Investment in Vietnam* has been revised once again on 1 July 2000.

Relevant Authorities

Under the *LFI*, the Ministry of Planning and Investment (“MPI”) is the Government Ministry in charge of both foreign and domestic investment. The MPI, which has offices in Hanoi and Ho Chi Minh City, issues Investment Licenses to foreign-invested enterprises and typically approves investment applications within 15-60 days. In 1996, the Government began decentralizing the approval process. Now, local People’s Committees also have the power to license investment projects within certain limits. The Hanoi and Ho Chi Minh City People’s Committees may license projects with an investment capital of less than US\$10,000,000 provided that they meet certain conditions. Similarly, other People’s Committees may license projects having an investment capital of less than US\$5,000,000.

The State authorities in charge of some of Vietnam’s special zones also have the power to approve investment applications. On the other hand, certain projects which are classified as “Group A” projects are subject to Prime Ministerial approval. This group includes projects in certain sensitive areas, such as telecommunications, gold mining, and oil and gas.

Preferential Investment Terms

On 26 March 1999, the Prime Minister issued *Decision No. 53/1999/QĐ-TTg on a Number of Measures for the Encouragement of Foreign Direct Investment* (“Decision No. 53”), which provides reduced prices for certain goods and services and other investment encouragement measures for foreign-invested enterprises.

Also, the Government issued *Decree No. 24/2000/ND-CP Setting Forth Detailed Regulations for Implementing the Law on Foreign Investment in Vietnam* (“Decree No. 24”) on 31 July 2000, which took effect from 1 August 2000. *Decree No. 24* offers various fiscal incentives for foreign-invested enterprises which invest in special zones, encouraged sectors or remote geographical areas.

Special Zones. The Vietnamese government has designated several types of “special zones” in which investors will receive preferential treatment, such as reduced tax rates and more relaxed import procedures. So far, approximately 50 Industrial Zones, Export Processing Zones, and High Technology Zones have been established. Vietnam’s various Industrial Zone Authorities have been delegated with the power to license certain types of projects. These Authorities are also authorized to approve labor and import plans, among other things.

BOT Projects. In the summer of 1998, new regulations were issued to attract investment in the form of Build-Operate-Transfer (“BOT”), Build-Transfer-Operate (“BTO”) and Build-Transfer (“BT”) contracts. The regulations provide, among other things, that these projects will be eligible for the lowest enterprise income tax rate (10%) and the most preferential income remittance tax rate (now 3%).

Financing

Many of the world’s largest banks have established branches or representative offices in Vietnam and are able to provide financing to foreign-invested projects by means of single-lender or syndicated loans, in foreign or local currency.

Many multilateral and bilateral lending organizations are also active in Vietnam. These include the Asian Development Bank, the World Bank, JICA, EXIM, JETRO, NORAD, SIDA and ASEM. TDA grants have also been awarded in respect of a number of projects. OPIC has also begun operations in Vietnam and can provide investment insurance and project finance.

Business Entities

Representative Offices. The establishment and operation of representative offices of foreign merchants in Vietnam is regulated by *Decree No. 45/2000/ND-CP dated 6 September 2000 of the Government Stipulating the Regulations on Representative Offices and Branches of Foreign Merchants and Foreign Tourist Enterprises in Vietnam* (“Decree No. 45”). This Decree took effect from 1 October 2000. Representative offices are not permitted to engage in profit-generating activities. Rather, representative offices are

limited to activities in market research and functioning as a liaison with their parent company abroad. The Ministry of Trade and its local Department of Trade offices have State management jurisdiction over representative offices. Under *Decision No. 53*, the licensing fee for representative offices was lowered from US\$5,000 to US\$72, effective from July 1, 1999. More than 3,000 representative offices of foreign companies have been established in Vietnam.

Branches. The establishment and operation of branches of foreign merchants in Vietnam is regulated by the *Commercial Law* and *Decree No. 45*. Under *Decree No. 45*, a branch is a dependent unit of a foreign company set up to engage in commercial activities to generate direct profits. The State limits the scope of business of branches and their export and import of goods and services under this Decree, and they are subject to Vietnamese enterprise taxes. Branches are under the jurisdiction of the Ministry of Trade. Thus far, Vietnam has allowed branches in certain sectors such as the legal and banking sectors. Also, branches of several foreign tobacco companies have been licensed.

Foreign-Invested Enterprises. Under Vietnam's *LFI*, foreigners may directly invest in Vietnam through the following vehicles:

- **Joint Venture Enterprise (“JVE”).** A JVE is a limited liability entity with Vietnamese juridical person status. The foreign equity in a JVE must be at least 30%.
- **Enterprise with 100% Foreign-Owned Capital (“EFOC”).** An EFOC is a 100% foreign-owned limited liability entity with Vietnamese juridical person status.
- **Business Co-operation Contract (“BCC”).** A BCC is a contractual agreement between foreign and Vietnamese partners to carry out a common business undertaking. No juridical person is formed under a BCC. BCCs are most common in the telecommunications, advertising, and oil and gas industries where they are sometimes mandatory.

With respect to JVEs and BCCs, the Government places restrictions on the form of investment allowed in certain sectors, such as in the construction, telecommunications (only BCCs permitted), oil and gas, precious mineral exploitation, public transportation, cement and steel, afforestation, tourism, sports, and entertainment industries. Please note that the entering into force of the US-Vietnam Bilateral Trade Agreement (signed 13 July 2000) will eventually open most of these sectors to US investors through step-by-step phase-in periods.

Taxation

Tax System/Rates. Vietnam imposes various taxes on foreign business activity, with the most relevant of these being income tax on corporate profits, withholding tax, and value added tax.

- **Enterprise Income Tax (“EIT”).** Foreign-invested enterprises pay EIT at a standard rate of 25% on net income. Preferential rates of 20%, 15% and 10% are available for projects in encouraged fields or geographical areas. EIT refunds are available in respect of some re-invested profits. It should be noted that Vietnam has adopted the permanent establishment concept, as well as anti-transfer pricing measures, that extend the scope of the EIT.
- **Value Added Tax (“VAT”).** On January 1, 1999, Vietnam introduced a VAT regime. Vietnam’s VAT scheme has two calculation methods and a four-tiered rate structure that includes rates of 0%, 5%, 10% and 20%, with 10% being the standard rate. Several categories of goods and services are exempt from VAT.
- **Profit Remittance Tax (“PRT”).** PRT is a withholding tax imposed on income remitted abroad. PRT is imposed at rates of 3%, 5% and 7%. The higher the investment capital contribution of the foreign investor, the lower the PRT rate.
- **Customs Duty.** Vietnam has a complex system of tariffs that should be carefully scrutinized prior to importing goods. In 1999, Vietnam began implementing new changes to its duty system which allow it to extend a most-favored nation duty rate to those countries which have afforded Vietnam such status. In addition, Vietnam also applies CEPT rates on goods from ASEAN countries.
- **Special Sales Tax (“SST”).** SST is an excise tax imposed on goods and services that are considered to be luxuries. SST is imposed on, *inter alia*, automobiles, tobacco, alcohol, and golf, among other things.
- **Personal Income Tax (“PIT”).** Prospective investors in Vietnam must consider PIT implications. Vietnamese PIT ranks among the highest in Asia, with a maximum rate of 50%. Vietnamese citizens are also subject to social insurance and health insurance payments, as well as a 30% surtax on income above 15 million Dong/month.

Land and Land Use Fees

All land in Vietnam is owned by the People and is administered by the State, although land use rights may be granted for stable and long-term use. The administration of land including the granting of land use rights is carried out by the Government and the relevant People's Committee. Land use rights are granted for specified purposes. They can be transferred subject to the approval of the competent authority.

Foreign investors may lease land from the State, or the right to use land may be capitalized by a Vietnamese joint venture partner. A local party to a joint venture is required to obtain permits from relevant authorities before contributing the right to use land to the joint venture. A formula based on state-set rent rates and coefficients is used to calculate the value of the land contributed.

Employment

Legal Framework. Vietnamese citizens and foreigners working in Vietnam are subject to the *Labor Code of the Socialist Republic of Vietnam* ("Labor Code"), which was adopted by the National Assembly on June 23, 1994. The *Labor Code* is accompanied by a large body of detailed implementing regulations regarding salary and wages, labor contracts, trade unions and collective labor agreements, working hours, recruitment, labor safety, rights of female workers, and vocational training.

The minimum wage for the simplest types of labor ranges from US\$30 to US\$45, before statutory benefits and allowances, depending upon the locality and the sector. White collar and skilled labor will be more expensive. Local workers should be recruited through Vietnamese labor supply organizations for the time being. Their salaries can now be denominated in the local currency.

Foreign Exchange

The Vietnamese Dong is not freely convertible, though current account transactions are allowed. Export-oriented businesses which generate foreign capital are encouraged and all foreign investment enterprises must provide a workable plan for meeting their own foreign exchange requirements. The State Bank gives priority access to foreign exchange for producers of certain essential import substitute products and enterprises engaged in designated infrastructure and important projects. However, recently the system has moved in the direction of allowing considerably freer convertibility for current account transactions.

Mergers and Acquisitions

Vietnamese investment law as amended in May 2000, provides for acquisitions, mergers, and split-ups. In addition, foreign investors who wish to acquire interests in Vietnamese JVEs and EFOCs may do so in one of three ways:

- The original investor may transfer its “legal capital” (the rough equivalent of shares) to the new investor;
- The new investor may buy some or all of the shares of the offshore company that holds the interest of the foreign investor; or
- An investor in a JVE may purchase the legal capital of its JVE partner in order to convert the JVE to an EFOC.

In regard to capital transfers to third parties, the partner to a JVE will have a preemptive right of purchase. Gains on capital transfers are subject to a 25% capital gains tax. Lower rates apply if the capital is transferred to a Vietnamese-owned or controlled company.

Since Vietnam’s first *LFI* was issued in 1987, there has been an ever-growing number of acquisitions of capital in FIEs. Baker & McKenzie has represented clients in regard to a number of these transactions, including, *inter alia*:

- Dilution and buy outs;
- Sale of a foreign partner’s stake to a Vietnamese partner;
- Changing the foreign partner in a JVE;
- Conversion of a local company to a JVE, and a JVE to an EFOC;
- Asset acquisitions;
- Conversion of a local private enterprise to a joint-stock company with foreign ownership;
- Establishing an investment vehicle company for merger purposes;
- Issuance of convertible bonds in a local joint-stock company; and
- Acquisition of a commercial joint-stock banks.

Domestic Investment and the Enterprise Law

In addition to its foreign investment legislation, Vietnam has also adopted legislation governing domestic investment. This legislation is contained in the *Amended Law on the Promotion of Domestic Investment (“LDI 1998”)*, which was adopted by the National

Assembly on May 20, 1998 and which supplanted the original *Law on the Promotion of Domestic Investment* (“LDI 1994”) adopted by the National Assembly on June 22, 1994. The new features of the *LDI 1998* allow foreigners to purchase up to a 30% stake in Vietnamese companies and enterprises. As such, these amendments have paved the way for portfolio investment by foreigners. It should be noted that in a small number of cases, foreigners have been permitted to acquire shares in purely domestic joint-stock companies.

The establishment of enterprises invested by Vietnamese citizens is governed by the *Enterprise Law*, effective from 1 January 2000. The forms of enterprises provided for are partnerships, limited liability companies, and joint stock companies. In addition, a large number of State-owned enterprises now have been equitized, which may create opportunities for Vietnamese and foreigners to participate in their management.

Securities and the Securities Market

The first securities market in Vietnam was launched in July 2000. This will be a significant development for the current financial market of the country, facilitating the mobilization of domestic and foreign capital resources for the economic development of Vietnam. Foreign investors may participate in the stock market, subject to the limit of 20% of the circulating shares of a stock issuer (each foreign investor may not hold more than 7%), or 40% of the circulating bonds of a bond issuer (each foreign investor may not hold more than 10%).

The general legal framework for the operations of the securities market in Vietnam is set forth in *Decree 48/1998/ND-CP on Securities and the Securities Market*, promulgated on 11 July 1998. Pursuant to *Decree No. 48*, foreign investors may establish joint venture investment funds, foreign custodian companies, and JVE securities companies.

Agencies and Distributorships

Agencies. The *Commercial Law*, effective from 1 January 1998, provides a legal basis for Vietnamese companies to act as sales and purchase agents for foreign companies. Detailed regulations on agency are set out in *Decree No. 57/1998/ND-CP* promulgated on 31 July 1998. In general, these regulations give freedom to foreign companies and local Vietnamese companies to determine the terms of their own agency relationships. There are, however, some restrictions on agency activities. *Decree No. 57* contains lists of goods which are prohibited or restricted in terms of export and import, and thus barred from agency activities.

Circular No. 18 implementing *Decree No. 57* also contains detailed provisions concerning sales and purchase agents of foreign merchants. Sales and purchase agents are required to have a business registration in an appropriate line of business. Additionally, Vietnamese merchants acting as sales agents must open an account at a bank for the purpose of settling payment for the goods. If agency goods are not sold in Vietnam, they must be re-exported.

Distributorships. Foreign parties (without a licensed presence in Vietnam) may enter into distribution agreements with Vietnamese entities. In considering this type of arrangement, however, a number of important factors should be kept in mind:

As a preliminary issue, in some fields such as the rice and oil and gas industries, only licensed import/export companies and companies that have obtained an import quota from the relevant Vietnamese authorities have the capacity to enter into foreign trade contracts. Also, certain sectors are strictly controlled. For example, Vietnam requires foreign pharmaceutical companies that sell drugs to Vietnam to have a license (“product visa”) for the drugs issued by Vietnam’s Ministry of Health, even if the companies have no presence in Vietnam.

Most foreign distribution agreements relating to Vietnam are subject to the *Ordinance on Economic Contracts* and the *Commercial Law*. These legislative instruments contain provisions relating to traditional aspects of contract law, including contractual damages and the choice of governing law. Foreign companies that are considering setting up agencies and distributorships in Vietnam should also examine Vietnam’s rules on permanent establishment, to assess their tax exposure.

Intellectual Property

Trademarks. As only registered trademarks are recognized in Vietnam, it is very important for trademark owners to register their marks. Vietnam has a well organized national trademark registration system. In Vietnam, the responsibility for conferring rights of ownership of trademarks and other industrial property rights (and part of the responsibility for enforcing such rights) lies with the National Office of Industrial Property (“NOIP”) under the Ministry of Science, Technology and the Environment (“MOSTE”). Vietnam is a member of the World Intellectual Property Organization (WIPO), the Paris Convention for the Protection of Industrial Property, the Patent and Cooperation Treaty, and the Madrid Agreement Concerning the International Registration of Marks.

Copyright. The *Civil Code of the Socialist Republic of Vietnam* (“*Civil Code*”) contains 35 articles on copyright. In addition to issuing a detailed decree in regard to copyright, the Vietnamese Government signed the *Agreement on the Establishment of Copyright Relations with the Government of the United States of America* (“*Copyright Agreement*”). The *Copyright Agreement* entered into effect on December 23, 1998.

Technology Transfer

Vietnam imposes specific regulatory requirements on the transfer of technology. The concept of technology transfer is defined very broadly and includes the sales and licenses of:

- Objects of industrial property (patents, utility solutions, industrial designs);
- Know-how;
- Technical services and information in connection with the technology transferred; and
- Solutions for rationalizing production.

Furthermore, technology transfer contracts must, unless approval is obtained, contain a number of mandatory contractual terms. At the same time, the relevant regulations prohibit technology transfer contracts from containing certain terms such as:

- Restrictions on the use of technology by the Vietnamese party after the expiry of the contract;
- Restrictions on the ability of the Vietnamese party to source parts or products which are not necessary to maintain the quality of the transferee’s products from other entities; and
- Restrictions on the ability of the Vietnamese party to export any products created with the transferred technology to territories where the transferor does not already have exclusive licenses.

Almost all transfers of technology from abroad are subject to the approval of the MOSTE. The MPI also reviews transfers of technology in relation to foreign investment enterprises where the technology is being contributed as part of the capital.

Dispute Resolution

Under Vietnamese law, disputes between the parties to a JVE or a BCC must first be resolved through negotiation and conciliation between the parties. In circumstances where the conciliation fails, the parties in dispute may agree on one of the following forums to resolve the dispute:

- The People's Court of Vietnam;
- A Vietnamese arbitration body, foreign arbitration body or international arbitration body; or
- An arbitration body which the parties agree to set up themselves.

Vietnam has acceded to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and it has a domestic decree on the implementation of the same, but to date there is no case of a foreign arbitration award being enforced in Vietnam.

Visas and Travel Arrangements

Visas are required to enter Vietnam. The visa process normally takes one week or more and will require the relevant embassy or visa issuing office to liaise with the Entry/Exit Department of Vietnam. Accordingly, a foreign investor should plan well in advance in order to undertake a business trip to Vietnam.

Approaching Vietnam's Legal System

The legal system in Vietnam is developing rapidly with a large body of law being specifically implemented to govern and regulate foreign investment issued by various types of Government bodies. The rate at which these laws are being promulgated is rapid, which can sometimes cause inconsistencies and gaps in Vietnam's system of legislation. The National Assembly issues laws, its Standing Committee issues ordinances, and the Government issues decrees. The Government also instructs ministries having jurisdiction over relevant fields to issue their own administrative regulations and internal guidelines. As a result, in almost any project, the foreign party will have to familiarize itself with a range of regulations and a cross-section of government bodies which issue and interpret them.

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