

Vietnam in a Nutshell: An Historical, Political and Commercial Overview

By Andrew L. Odell and Marlene F. Castillo

I. Introduction

Vietnam is one of Asia's fastest growing economies, with 2008 GDP expected to grow eight to nine percent after eight years of GDP growth in the range of 6.8 to 8.4 percent.¹

As a result of Vietnam's low labor costs² and the benefits of its 2007 accession to the World Trade Organization, including greater access to foreign markets, increased attractiveness for foreign direct investment, access to international dispute resolution and an acceleration of domestic reforms, many U.S., European and other companies have established or are considering establishing manufacturing or legal, accounting or other service businesses in Vietnam.

This article is intended to provide a sketch of Vietnam's historical, political and economic development as well as of its present legal system and business environment.

II. Historical and Political Setting

For more than one thousand years, until A.D. 938, Vietnam was under Chinese rule. China exerted an influence on Vietnamese administration, law, education, literature, language and culture. During the period of Chinese rule, there were many revolts against Chinese rule, the most important one led by the noble women called the "Trung Sisters," who today continue to be revered as heroines and national symbols of Vietnamese women.³

Although nine centuries of independence followed Chinese rule, China's impact on Vietnamese culture was probably greater in the centuries of independence. During those nine centuries, local noble families ruled Vietnam by establishing dynasties, and warfare became prevalent, internally among the different noble families, each seeking to take control of the country, and externally against Chinese and Mongol invaders.

As Vietnamese kingdoms were expanding in the south, resisting the Chinese and Mongolian invaders in the north and conquering the south became major themes of Vietnamese history.⁴ During the period A.D. 1010 to A.D. 1527, more sophisticated governments and administrations were developed; a new system of taxation was imposed; a penal system was established; and the country's first university was founded.

Between 1627 and 1775, two powerful Vietnamese families divided the country, the Nguyen Lords in the south and the Trinh Lords in the north.⁵ After years of

bloody wars, the Nguyen dynasty triumphed over the Trinh Lords, and the Nguyen dynasty was established throughout Vietnam. Initially, Catholicism was tolerated and Europeans were employed in the court as advisors. However, Nguyen kings were conservative Confucians,⁶ who resisted "westernization" and perceived the westerners as a threat. Thus, Catholicism was slowly suppressed. At the same time, French diplomats in China began to express the view that France was falling behind the rest of Europe in setting a footprint in Asia; tens of thousands of Vietnamese and foreign (mainly French) Christians were persecuted, and trade with the West slowed; those circumstances provided the French with an excuse to invade Vietnam.

In 1858, under the rule of Napoleon III of France, French troops invaded and took control of the provinces of Vietnam. The southern portion of Vietnam became a French protectorate known as Cochinchina, where the Nguyen dynasty ruled. In the north, although it had a French Governor, local governments were run by Vietnamese officials.

In the early twentieth century, two parallel movements of modernization emerged in Vietnam: the Dong Du (Go East) movement, which promoted sending Vietnamese students to Japan to learn modern skills, with a view toward overthrowing the French, and the Duy Tan (Modernization) movement, which promoted the need to educate the masses and modernize the country as well as foster understanding and tolerance among French and Vietnamese to achieve a peaceful transition of power.⁷

The French suppressed both movements and Vietnamese revolutionaries turned to radical paths. Marxism was introduced in Vietnam. Three independent communist parties and a Trotskyist movement emerged, which in 1930, jointly formed the Vietnamese Communist Party.

During World War II, Japan invaded Indochina,⁸ keeping the "Vichy" French colonial administration in place.⁹ In 1941, Ho Chi Minh arrived from China to northern Vietnam to form a group called "Viet Minh," which started as an umbrella group for all parties fighting for Vietnam's independence as a means of attracting a broad coalition of people.¹⁰ Eventually, the Communist Party dominated Viet Minh.

With the Japanese surrender to the allies in 1945, British forces landed in Saigon (now Ho Chi Minh City) to disarm the Japanese, and French troops followed them, seeking to re-establish their rule. In 1947, war erupted be-

tween the Viet Minh and France. The Geneva Conference of 1954 ended France's colonial presence in Vietnam and temporarily divided the country in two states, pending free elections. However, only France and Viet Minh signed the Geneva Agreement, while the U.S. and South Vietnam refused to abide by the agreement.

In the 1960s, South Vietnam became extremely unstable, and no government could maintain power for long. In 1965, the U.S. sent troops to South Vietnam and bombarded North Vietnam.¹¹ After a long, bloody war, South Vietnam surrendered in early 1975, and in 1976 Vietnam was officially unified and officially renamed the Socialist Republic of Vietnam ("SRVN"), with Hanoi as its capital. The SRVN consists of the former Democratic Republic of Vietnam (North Vietnam) and the former Republic of Vietnam (South Vietnam).

Although the social order in South Vietnam was relatively well maintained during the post-unification period, many high officials and other important figures of the old South Vietnam were sent to hard labor prison camps. The SRVN government implemented a Stalinist dictatorship, and a security network controlled every aspect of people's life. Censorship was strictly and conservatively applied, and most music, art, and literature prior to 1975 were banned. Many people fled the South via a clandestine network.

III. Vietnam's Legal and Economic Development

A. 1940—"Collectivization"

Historically, Vietnam's legal system is a mixture resulting from its various invaders, including the Chinese, French and Americans, which impacted greatly Vietnam's own ancient tradition of law.¹²

The influence of Confucianism in the Vietnamese legal system and culture is evident in the discussion by some Vietnamese scholars of a "rule of morality" rather than the "rule of law." There was a tendency in Vietnam until recently to rely on morality, custom, kinship or politics, rather than on the formal rule of law. The Chinese Imperial Code also infused Vietnam's legal system with a strong criminal orientation, and a tendency for complex and detailed codification, often making law inaccessible to the common people.¹³

Vietnam's neo-Confucian system did not blend well with the legal system introduced by the French during the colonial period. The French imposed a parallel legal system in Vietnam, consisting mainly in a civil law system that governed French citizens, while the Nguyen Code and customary practice governed the Vietnamese.

From late 1940, Vietnam's political and economical policy was constituted by "collectivization," which included the taking of land by the State. Industry already in place was also brought under State ownership and

control, embracing a Soviet-style government-controlled economy.

In 1954, after declaring independence from the French, North Vietnam adopted a highly centralized Soviet-style legal system. In South Vietnam, the French legal system was supplemented when U.S. legal advisors arrived in the early 1960s. U.S. influence was most evident when a new constitutional framework was adopted, consisting of a presidential system and separation of powers between the executive, legislative, and judicial branches.

B. 1975—Rule by Decree

After the withdrawal of U.S. forces in 1975 and the communist assertion of control over the entire country, the legal system dramatically changed. There was an anti-legal and anti-colonialist attitude in the Vietnamese government. The government ruled by decree, and legality was at best a formality. In fact, the Ministry of Justice was eliminated in 1961 and did not re-emerge until 1981.¹⁴

During the postwar period, the rights of Vietnamese were closely controlled by the State, and any activity, particularly commercial activity, was unlawful unless expressly authorized by law.¹⁵ Legal interpretation was not based on legal precedent, but on the "guiding principles" set forth by the State.

As a result of those restrictive policies, there was an agricultural production crisis, no foreign investment and insufficient domestic financial resources for economic development and job creation. There were shortages of common goods and an annual inflation rate exceeding one hundred percent. To make matters worse, the former Soviet Union began to reduce economic assistance in the early 1970s. By 1975, the Vietnamese economy was dysfunctional: it had no heavy industry, and bureaucracy blocked all market forces, resulting in the emergence of a black market.¹⁶ A desperate measure to improve the situation was the adoption of a limited market-based system and policies to encourage foreign investment and stimulate the economy, which formally occurred at the Sixth Communist Party Congress in 1986.¹⁷

C. 1986—*Doi Moi*

In 1986, the Sixth Communist Party Congress announced that Vietnam would "virtually" abandon the centralized economy to adopt a market-based economy intended to encourage foreign investment. This movement is known as "*Doi Moi*" (or "renovation" in English). Five years later, the Seventh Communist Party Congress broadened *Doi Moi* to include legal reforms. The Central Committee of the Communist Party called the national legislature to amend the 1980 Constitution and to "improve the skills of lawmakers in promulgating and organizing the implementation of law."¹⁸

Nonetheless, even with *Doi Moi*, foreign investors still faced many problems, such as the lack of regulations or other guidelines, the absence of effective dispute resolution mechanisms or other measures of forcing Vietnamese officials to comply with the laws, and, perhaps most significantly, a continuing lack of competition in many sectors of the economy. The courts were dominated by officials who were not trained to solve commercial disputes, and were not independent from the executive branch. The Vietnamese Communist Party had its own crisis after the collapse of Communism in the former Soviet Union and Eastern Europe.

In the end, the success of the *Doi Moi* in stimulating investment was mixed, principally as a result of the continued influence of, and favoritism toward, the State sector, together with the fact that the initial package of business legislation maintained too many governmental controls and placed an insufficient emphasis on economic growth.¹⁹

D. 1992—Transition to a Market Economy

Vietnam's most dramatic legal reform was the adoption in 1992 of a revised Constitution, which, among other things, called for the State to "promote a multi-component commodity economy functioning in accordance with market mechanisms under the management of the State and following a socialist orientation."²⁰ The 1992 Constitution, in addition to replacing the main political bodies and reforming the government and political structure, was an important ideological change and constituted a shift in the focus of the State.²¹

The 1992 Constitution has a much more open and progressive concept of Vietnam's relations with the rest of the world and capitalism. The Constitution encourages the development of all sectors of Vietnam in an open-market economy, although always led by the action of the State. Private property and private enterprise are acknowledged and permitted. The market opened for foreign investors, granting them legal ownership of their assets as well as guaranteeing that such assets will not be nationalized or condemned by the State.

E. 2001—Bilateral Trade Agreement with the United States

Many reasons led Vietnam to negotiate a Bilateral Trade Agreement with the U.S.: the mixed success of *Doi Moi* and the remnants of failed economic policies; the demise of the former Soviet Union; the Asian financial crisis; the increase in China's exports; and the normalization of its political relations with the U.S. in 1995. The increase in trade between China and the U.S. was likely the most important reason to convince Vietnamese officials to conclude the Vietnam Bilateral Trade Agreement (the "VBTA").²²

China's policies and influence were critical in shaping Vietnamese economic policies. China, even before

its World Trade Organization ("WTO") accession in November 2001, was successful in attracting foreign investment, more so than Vietnam or the other members of the Association of South-East Asian Nations ("ASEAN"). Vietnam had to find a way to compete, and *Doi Moi* proved not to be enough.

Between 1975 and 2001, Vietnam had only limited access to the U.S. market because Vietnam did not benefit from "most favored nation" ("MFN") treatment for its exports to the U.S., making its exports prohibitively expensive. For the reasons mentioned above, concluding a trade agreement with the U.S. was important to Vietnam for economic and political reasons.

From the beginning of its negotiations with Vietnam, the U.S. intended to negotiate a comprehensive agreement which could be an effective tool to open the Vietnamese market and would include not only trade in goods but also trade in services, protection of intellectual property, and investment. After more than five years of negotiations and deliberations by the Vietnamese Government, the VBTA was approved by the Vietnamese National Assembly and the U.S. Congress, and became effective 10 December 2001. The VBTA includes chapters on trade in goods (providing MFN treatment on the part of the U.S.), intellectual property rights, trade in services, investment relations, various business facilitation measures, extensive transparency obligations, and a series of exceptions and general provisions.²³

F. 2006—Accession to the World Trade Organization

Vietnam's accession to the WTO, like China's, Saudi Arabia's, and Russia's, was long, complex, and frustrating.²⁴ The application was initially made in 1995, but no progress was made until 2001, after the Vietnamese Government took the political decisions necessary to open its domestic market, initially by signing the VBTA. That decision was motivated, in part, by the anticipated conclusion in late 2000 of China's twenty-year pursuit of WTO membership, which would make it more difficult for Vietnam to compete with China for foreign investment and trade opportunities.

Once the negotiations for the VBTA started, the focus changed to the WTO accession. Vietnam had to enact legislation to implement its accession to the WTO before it was granted. Thus, Vietnam enacted many changes in many laws at the beginning of 2004, which included the Law on Enterprises, the Investment Law and many tax laws.²⁵

In addition to the requirements of the VBTA, many of which were incorporated into the WTO accession agreement, the accession package included, among others: the elimination of most tariff quotas; signature by Vietnam of the WTO Information Technology Agreement ("ITA"), allowing the importation of products covered by the ITA

duty-free no later than 2014; the elimination of agricultural export subsidies; and the limitation of trade distorting domestic subsidies of about U.S. \$246 million annually.²⁶

Major commitments in services, particularly telecommunications and financial services, were also made along with extension of export and import rights to all duly registered persons, including foreign firms and individuals. Vietnam also agreed immediately to comply with WTO disciplines under the agreements on customs valuation, rules of origin, pre-shipment inspection, anti-dumping safeguards, subsidies and trade-related investment measures, technical barriers to trade, sanitary and phytosanitary measures, and trade-related intellectual property.

IV. Vietnam's Current Legal System

Vietnam has experienced a significant development in recent decades, touching all areas of Vietnamese life. Vietnam's legal progress can be seen today in its renovated governmental institutions, and many new and reformed laws that continue to develop, responding to the needs of a modern Vietnam and the enthusiasm of foreign investors.

A. Current Legal and Political Framework

Vietnam is one of the few remaining countries in the world where the Communist Party is dominant and a socialist regime is established. As a communist country, Vietnam has the structure and institutions which are common in socialist countries.

Most of the power, ideology and policy making continues to rest today with the Communist Party of Vietnam (the "CPV"), led by its Politburo and Executive Secretariat. Many of the important executive positions of Vietnam's National Assembly and executive branch of the central government are held by members of the CPV Politburo, and the key positions of the Supreme People's Court, as well as the Chief Procurator General Attorney and chairs of the local administrations, are held by members of CPV Central Secretariat.²⁷

The National Assembly is the highest political body of the State, is superior to both the executive and judicial branches and is vested with constitutional and legislative power.

In general, the National Assembly has extremely broad authority including the power to: (i) pass and amend the constitution, make and amend laws; (ii) organize, grant authority and dictate the activities of the National Assembly itself, the State, Presidency, Supreme and Local People's Court, People's Procuracy, and local administrations; (iii) appoint and remove the President, Vice President, Chair and Vice Chair of the National Assembly, Standing Committee of the National Assembly, Prime Minister, Chief Justice and judges of Supreme People's Court and Chief Procurator; (iv) pass economic

and social plans, monetary policies and state budgets; and (v) approve and adopt foreign policies, among others.

The President, appointed by the National Assembly, is the head of the State, and represents Vietnam in domestic and foreign affairs. The President has the authority to: (i) enact legislation; (ii) act as chief of armed forces; (iii) propose to the National Assembly the appointment or removal of the Vice President, Prime Minister and other key positions; (iv) appoint and remove ministers and other members of government; (v) appoint and receive ambassadors; and (vi) sign international treaties, among others.

The executive branch of Vietnam's government, consisting of various ministries, is headed by the Prime Minister, who is elected by the National Assembly. The executive branch promulgates decrees and clarifies rules and regulations. Local governments administer laws and control, adopt and develop policies for their localities.

The Vietnamese judicial system is comprised of several levels of courts, tribunals and a Supreme People's Procuracy. The court hierarchy has three principal tiers: Supreme People's Court; Provincial Courts; and District Courts. The Supreme People's Court, the highest court, is headed by a Council of Supreme Court Judges, and supervises the performance of the Provincial Courts and District Courts, which, in turn, supervise the corresponding People's Councils and the Military Tribunals.²⁸

The Provincial Courts and the District Courts, together with the People's Procuracy, are also responsible for preserving and protecting the socialist legal system, State assets and collective property, among other things. The Supreme People's Court may act as a trial court in certain circumstances.

B. Recent Legal Developments

As stated earlier, a reform process began in Vietnam with *Doi Moi* and was followed by Vietnam's 1992 Constitution with many new or reformed laws and regulations.

The changes in Vietnam's legal framework since the 1992 Constitution were motivated by a number of things. On one hand, there was the need to renew Vietnam and its economy, but more importantly, there was the desire for the betterment of the country through the opening of its economy by compliance with the VBTA and its membership of the WTO.

In order to comply with the conditions and provisions of the VBTA and the WTO, Vietnam had to make sweeping changes in its legal system. It had to draft new and effective laws, amend existing laws and create a legal framework not only to satisfy the VBTA and the WTO, but to build an open economy demanded by the West and to follow the trend of the other Asian countries, particularly China.²⁹

C. Goals and Expectations under the Current Legal Framework

In 2001, the Prime Minister ordered the formation of an agency with the purpose of conducting a needs assessment for the development of Vietnam’s legal system for the next ten to fifteen years. The report assessed Vietnam’s legal system, and most importantly, it outlined the future goals and strategy to achieve them.³⁰ Some of the principal goals set forth in the report, which provide insight into the direction of Vietnam, are below.

- New laws to create the necessary framework for Vietnam to accede to all international treaties necessary for the country’s economic development and international integration. Laws to promote a market economy with a socialist orientation, to establish clearly the hierarchy of the legal system, and to be comprehensive, consistent and transparent.
- Reforms relating to law implementation and enforcement mechanisms, encouraging State officials to recognize the supremacy of the law and develop a sense of respect for the law, and develop reforms in the judicial system to ensure independence of the courts.
- Criminal procedural laws to assure adversarial hearings and equality among the parties, as well as to improve and complete outside-court dispute resolutions (i.e., arbitration, conciliation and mediation), and to assure that all individuals and organizations in society have ready access to the judicial agencies, legal services and legal aid.
- Procedures to educate and train a sufficient number of judges, prosecutors, investigators and other

judicial staff and officials with qualifications and skills and ethical standards equivalent to those of the advanced countries in the region.

V. Business Enterprise in Vietnam

A. General Business Legal Framework

In Vietnam, as in every emerging market, entrepreneurs face challenges when establishing new businesses. Every country differs greatly in its regulation of foreign investment, particularly with regard to key sectors or industries deemed to be of national strategic importance. At this time, Vietnam maintains a policy of encouraging foreign investment and has experienced substantial economic growth in recent years. It offers investors, among other things, low wages, access to foreign markets and, much like China with respect to Hong Kong, access to the financial, professional and communications infrastructure available in Singapore.

Vietnam is currently going through a period of transition from a “state-controlled” economy to a “state-supervised” market economy. As a result, investors will encounter issues related to infrastructure, legal and financial inefficiencies, governmental bureaucracy, land ownership or the hiring of trained staff.³¹ As a means of dealing with such impediments and attracting foreign investment and moving to a market economy, Vietnam has enacted an extremely broad range of new laws in recent years, applicable to both foreign and domestic business, which portend, over time, the movement of the country toward a business environment of transparency and efficiency.

These basic laws, which cover a basic and broad range of areas, include the following:

Law	Effective Date	Subject
Investment Law	1 July 2006	Regulates Investments
Law on Enterprises	1 July 2006	Establishes Forms of Legal Entities
Commercial Code	1 January 2006	Regulates All Forms of Profit-Making Activities
Civil Code	1 January 2006	Regulates Commercial, Business and Labor Relations
Code of Civil Procedure	1 January 2005	Dispute Resolution
Law on Bankruptcy	15 October 2004	Insolvency
Intellectual Property Law	1 July 2006	Regulates Rights to Intellectual Property
Securities Law	1 January 2007	Regulates Capital Market Activities
Ordinance on Exchange Law	1 June 2006	Affects Current Transactions, Capital Transactions, Foreign Currency Markets, etc.
Law on Real Estate Business, Land Law, Etc. ³²	1 January 2007	Regulates Rights in and Use of Real Property Rights
Competition Law	1 July 2005	Regulates Competition
Electricity Law	1 July 2005	Regulates Investment in the Electricity Sector

The Investment Law and the Law on Enterprises (“Enterprise Law”), both effective on 1 July 2006, were intended, collectively, to establish a clear legal predicate for doing business in Vietnam applicable to local and foreign parties. The Investment Law regulates investments in Vietnam, establishing or regulating (1) investment guarantees, (2) procedures for investment approval, (3) sectors where investment is sought, conditional or prohibited, and (4) investment incentives applicable to foreign and domestic investors. The Enterprise Law governs business formation, procedures, organization, management and dissolution. Those laws together endeavor to create a transparent and uniform environment for all investors, both domestic and foreign.

Foreign investors may invest “directly” through various business entities discussed below or “indirectly” through the acquisition of shares, bonds and other instruments and investment through intermediary financial institutions without direct participation in management or economic enterprise. Direct investments are regulated by the Investment Law and indirect investments are regulated by the Securities Law and other relevant laws.

B. Business Organizations

To carry out an investment strategy, a foreign investor may do so through a joint venture, sharing capital and profits, or a wholly-owned business (“WFOE”). In either case, the investor must form one of the entities described below and obtain from the government an “Investment Certificate” upon the formation of the entity. The Investment Certificate will constitute government consent for the proposed business. Joint ventures account for a significant portion of foreign investment to date because the local partners bring assistance in dealing with the government and provide access to land or other key assets that can be difficult to obtain.

The different models of business organizations provided in the Enterprise Law (considered methods of “direct investment”) are described below.

1. Shareholding or Joint Stock Company

A Shareholding or Joint Stock Company (“JSC”) is a corporation which may offer its shares to the public. The Enterprise Law requires a minimum of three shareholders to establish a JSC. JSCs may issue ordinary shares or preferred shares. Shareholders are liable for the obligations of the JSC up to the amount of contributed capital. Founding shareholders may hold preferred shares (upon prior authorization from the government) with greater voting rights than the holders of the ordinary shares. JSCs, in addition to shares, can also issue other forms of securities including bonds, convertible debt, among others, which may be freely assigned.

2. Limited Liability Company

A Limited Liability Company (“LLC”) is a privately held company. Except for certain activities, including those relating to real estate, securities and fund management, there is no minimum capital requirement to form an LLC. The members are responsible for the debts and liabilities of the company up to the capital contributed by each member. An LLC must have at least two members, but not more than fifty members, either individuals or entities. LLCs cannot issue shares of any kind. For tax purposes, an LLC is treated as a partnership, and the governance structure is less complicated than that of a JSC.

3. Sole Member Limited Liability Company

Another form of LLC is the Sole Member Limited Liability Company, which may be wholly owned by an entity or an individual. The sole member will be liable for the debts and liabilities of the company up to the amount of its contributed capital.

4. Alternative Approaches

The Business Cooperation Contract, an approach to investment that does not involve the formation of an entity, permits a foreign investor to pursue a business strategy with a local company by a contract, pursuant to which a sharing of capital, profits and losses, similar to a partnership, are agreed upon.

Build-Operate-Transfer Contracts, though not prevalent, constitute another avenue to foreign investment. In these arrangements, a foreign investor agrees typically to build an infrastructure project and to operate the same for an agreed upon time to recover costs and generate profits: after that time the project is transferred to the government. Other arrangements are also permitted, including Build-Transfer projects.

Branch or representative offices are also permissible, but the activities of such offices are extremely limited.

5. Partnership

A partnership under the Enterprise Law must have at all times at least two individual partners. The individual partners must have professional qualifications and will be liable for the debts and liabilities of the partnership without limitation. A partnership may have limited partners. Any limited partners in a Vietnamese partnership only contribute capital to the partnership and will be liable for the debts and liabilities of the partnership up to their actual capital participation in the partnership.

6. Private Company or Enterprise

The Private Company or Enterprise, much like a sole proprietorship, may be owned by one individual, who will be liable for the debts and liabilities of the company with all or his or her own assets.

7. State-Owned Companies

State-Owned Companies, different from business organizations mentioned above, are regulated by the Law On State-Owned Companies. A State-Owned entity is wholly owned by the Vietnamese Government and can be found in the most important sectors and industries. As instrumentalities of the State, they operate with a socialist view. Although foreign investors cannot invest in most of such companies, some of them are being converted into Shareholding or Joint Stock Companies to permit such ownership.

C. Registrations and Governmental Approvals

In general, all Vietnamese companies, whether private or State-owned, must register with the Department of Planning and Investment of the People's Committee in provinces and cities to secure a "Business Registration Certificate," which evidences the good standing of a Vietnamese enterprise. Any modifications regarding the scope of permitted activities, registered capital, location of offices or opening of branch offices will require a registration application with the appropriate committee.

For foreign investors, in lieu of a Business Registration Certificate, the Investment Law requires that a foreign investor investing directly obtain an "Investment Certificate" for the relevant project and as a legally mandated predicate to the formation of the selected business entity. In the case of indirect investment, such certificate is not required, but the investor must comply with the applicable securities and other relevant laws in such regard.

Depending on the sector or industry, there are different permits or registrations issued by different governmental agencies in Vietnam for which investors need to apply. Some of the relevant registrations are, for example:

1. Registration for Import Rights

In general, most goods may be imported into Vietnam.³³ Foreign companies and companies with foreign investment that wish to import products to Vietnam must register with the Ministry of Trade within sixty days from the date of issuance of the "Investment Certificate."

2. Intellectual Property Registration

Industrial Property and Copyright are regulated separately. Industrial property is administered mainly by the Ministry of Science and Technology and copyright by the National Office of Intellectual Property. Registration is required except for copyright.

3. Registration of Pharmaceutical Companies or Products

Foreign pharmaceutical companies that wish to do business in Vietnam must register with Ministry of Health in order to distribute products in Vietnam.

4. Registration of Mortgaged or Pledged Properties

Any pledge or mortgage contract must be recorded with the corresponding authority, depending on the nature of the mortgaged or pledged property. Normally, relevant transactions must be registered with the Center for Registration of Secured Transactions under the National Office of Secured Transaction Registration.

5. Various Permits

There are additional permits or licenses required for foreign investors to carry out business in Vietnam. The most relevant licenses are:

- Work permit for a foreigner working in Vietnam who wishes to work in Vietnam for more than three months. This permit is issued by the Ministry of Labor, War Invalids and Social Affairs or provincial labor departments.
- License for a foreign law firm branch, issued by the Ministry of Justice.
- License to establish an insurance company, issued by the Ministry of Finance.
- License to establish a financial institution with foreign investment, issued by the Central Bank of Vietnam.
- License to establish a securities company or a fund management company, issued by the State Securities Commission.
- Accounting and auditing service permit, issued by the Ministry of Finance.
- Construction permit, issued by the Provincial People's Committee of the Ministry of Construction, depending on the nature, size and location of the construction.
- Foreign company resident representative office license, issued by the Department of Trade with the instruction and guidance of the Ministry of Trade and the Provincial People's Committee.

D. Real Estate

In Vietnam, the State does not grant fee simple ownership of land, but since 1988 the State has granted "land use rights." Rights to use land are evidenced by a land use rights certificate ("LUR Certificate").

There are four different types of LUR Certificates: (i) allocation of land use with payment of a fee; (ii) allocation of land use without payment of a fee; (iii) lease with an annual payment; and (iv) lease with one payment for the entire term.

The "allocation of land" by the State means the grant of an LUR by the State by way of an administrative decision to an entity which has requirements for land use. The

lease of land by the State as lessor means the grant of an LUR by the State on the basis of a contract with an entity which has requirements for land use.

Under the Vietnamese Land Law, only Vietnamese domestic enterprises and Vietnamese residing overseas implementing projects in Vietnam have the option of either an "allocation of land" or "lease of land." Foreign investors implementing investments projects in Vietnam are only entitled to a "lease of land" with payment of annual rent or a single payment for the entire term of the lease.

The entities to which the State allocates land without collection of land use fees do not have the right to exchange, assign, donate or lease the LUR, or to mortgage, guarantee or contribute capital using the LUR. The entities to which the State allocates land with collection of land use fees (provided that the fees paid are not sourced from the State budget) have the right to assign, donate or lease the LUR, or to mortgage, guarantee or contribute capital using the LUR.

The entities to which the State leases land have the right to (i) grant mortgages or issue guarantees using the assets owned by them attached to the leased land with credit institutions authorized to operate in Vietnam, (ii) sell assets or to contribute capital using assets owned by them attached to the leased land, and (iii) sub-lease land on which infrastructure has been completed in those cases as to which they are permitted to invest, construct and operate infrastructure in an Industrial Zone, High-Tech Zone or Economic Zone.

Generally, LUR Certificates are issued by the government for specific uses and may be rescinded in certain circumstances, such as, for example, where the land is not used for its licensed purpose or is not used continuously for a specified period or an investment project is not completed within a specified period.

The term of an LUR Certificate for foreign investors is usually fifty years. However, foreign developers of residential land may obtain seventy-year leases extendible without limitation for consecutive periods of seventy years.

E. Tax Matters

On 1 January 1999 Vietnam enacted significant tax reform. The major changes effected by the reform include a value added tax and a corporate income tax.

As a general matter, the principal taxes in Vietnam currently include: (i) an income tax, consisting of corporate income tax and personal income tax; (ii) a value added tax; (iii) a capital gains tax; (iv) a special consumption tax; (v) a natural resources royalty tax; (vi) an agricultural land use tax; (vii) a land use right transfer tax; and (viii) import and export duties. There are also additional taxes that may apply to foreign investors.

To make tax collection more efficient, a new law on tax administration became effective on 1 July 2007. This new law governs both corporate and personal taxation.

1. Income Tax

The corporate tax rates and regulations were revised substantially in 2004 to unify the tax system for entities formed in Vietnam, regardless of whether they are foreign owned. The changes apply to entities with foreign investors whose Certificates of Investment were issued after 2004.

The corporate income tax in Vietnam has a uniform rate of twenty-eight percent, except for oil and gas businesses (for which the rate may increase to fifty percent). There are incentive rates at ten percent, fifteen percent and twenty percent available for a period of ten years, and in some cases, up to the duration of the project, subject to prior authorization from the government.

Companies or individuals who carry out business in Vietnam outside the permitted forms provided in the law are referred to as Foreign Contractors, and are subject to corporate income tax, value added tax, special sales tax, import and export duties and personal income tax.

The Personal Income Tax rate varies. For foreigners residing in Vietnam, standard rates apply based upon progressive scales and are based on worldwide income. For foreigners residing in Vietnam for less than 183 days, the tax rate is twenty-five percent, based on the number of days the individual actually resides in Vietnam.

All business organizations formed in Vietnam are required to use the Vietnamese Accounting Standards, which are based on the International Accounting Standards established by the International Accounting Standards Board based in London.

2. Value Added Tax

The value added tax is imposed on the supply of goods and services at three rates: ten percent, five percent or zero percent. The zero-percent rate applies to exports goods subject to special sales tax, exports of software, services to firms operating in export-processing zones, and goods processed by sub-contractors, among others. The five-percent rate applies to approximately forty-one types of goods and services. The ten-percent rate applies to sixteen specific categories of goods and services and a seventeenth catch-all group to "any good or services not subject to any of the other two" rates.³⁴

There are certain activities exempt from the value added tax, such as export services, banking, finance, insurance, stock exchange activities, certain import activities, technology transfers and registration, and insurance services for international transport.

3. Capital Gains Tax

Gains by foreign companies on the transfer of interests in a Vietnamese company with foreign investment are subject to a flat tax rate of twenty-eight percent. The taxable gain is determined as the excess of the sales proceeds less costs and transfer expenses.

F. Foreign Exchange Controls

The Investment Law provides that foreign investors may purchase foreign currency from financial institutions licensed to trade foreign currency in Vietnam for certain permitted purposes. Banks have the responsibility for foreign exchange compliance with respect to their customers.

The Investment Law provides that, after all local financial obligations have been met, foreign investors may remit the following from Vietnam: (i) dividends and profits from business activities; (ii) payments received from providing technology and intellectual property services; (iii) payments relating to the principal and interest on offshore loans; (iv) invested capital and proceeds from liquidation of investments; and (vi) other certain sums of money and assets owned by investors.

G. Dispute Resolution Mechanisms

Although compromise between the disputing parties constitutes the most common approach to dispute resolution, foreign and domestic parties may resort to Vietnam's judicial system or arbitration. There is a recent tendency to turn to courts or arbitration for commercial or financial disputes.

Economic courts have jurisdiction over business disputes, and administrative courts exist as a forum for review of government action. However, not only is there much skepticism about the transparency of the courts, the independence of the judiciary (many of whose judges are members of the Communist Party) and the ability of the judiciary to promptly render decisions that correctly apply the facts to the applicable law, but the influence of a party against whom a judgment has been rendered can materially impact on judgment enforcement.

For various reasons, including a lengthy appeals process, parties often opt for arbitration as a means of dispute resolution. There are various arbitration forums in Vietnam, but their competence to hear disputes involving foreign parties is not free from doubt. An alternative for foreign investors is the Vietnam International Arbitration Centre ("VIAC"), a non-governmental organization linked to Vietnam's Chamber of Commerce. The VIAC, as to which parties must agree to submit disputes, typically hears cases involving trade and investment and foreign parties. However, many questions remain about the VIAC, including about the use of foreign arbitrators, the applicable arbitral rules, its competence or transparency, and the enforcement of its arbitral awards.

With respect to governing law in arbitration, when a dispute is between Vietnamese parties, the applicable law must be Vietnamese law. However, when the parties are from different countries, the law governing the arbitration may be the law of the country agreed upon by the parties, provided that the application of such law is not contrary to the public policy of Vietnam.

Foreign arbitration is possible involving Vietnamese parties and foreign arbitral awards may be enforced in Vietnam. In this connection, Vietnam acceded in 1995 to the multi-lateral convention known as the Convention On the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").³⁵ Under the New York Convention, an arbitral award granted to a party must be enforced by the courts of a New York Convention member country without a review of the merits of a case. Under the New York Convention, an arbitral award may only be set aside or modified on very limited grounds, such as, for example, corruption or fraud in procuring the award or the partiality of an arbitrator. Nonetheless, there have been instances where Vietnam courts have undertaken a review of the commercial dispute underlying a foreign arbitral award on the basis of a narrow interpretation of "commercial activities" under the Vietnamese Commercial Code. This leaves in doubt the ability of a party to enforce a foreign arbitral award in Vietnam.³⁶ As a consequence, in February 2003 the Vietnamese National Assembly passed the Ordinance on Commercial Arbitration, which was intended to facilitate the enforcement of foreign arbitral awards. The legislation defines "commercial activities" broadly to include a range of commercial activities including, among others, leasing, construction, investment financing, banking, insurance, mining activities and transportation.

Endnotes

1. World Bank data.
2. The law in Vietnam requires the government to set a minimum wage, which is adjusted for inflation, among other considerations. In November 2007 the government raised minimum wages across all categories and locations, in part to account for rising inflation. Effective 1 January 2008, the official monthly minimum wage for unskilled workers at foreign-invested joint ventures and foreign organizations was set to be \$62 in the urban districts of Hanoi and Ho Chi Minh City; \$56 in the suburban districts of Hanoi, Ho Chi Minh City and several other industrial districts and towns; and \$50 elsewhere. United States Department of State, *2007 Country Reports on Human Rights Practices*.
3. Spencer C. Tucker, VIETNAM at 7 (1999).
4. *Id.* at 10.
5. Stanley Karnow, VIETNAM: A HISTORY at 71 (1997).
6. Confucius was a Chinese thinker and philosopher whose teachings of philosophy have deeply influenced Chinese, Korean, Japanese and Vietnamese thought and life.
7. *Id.* at 122.
8. Indochina is the region in Southeast Asia which lies roughly east of India, south of China. French Indochina includes Vietnam, Cambodia and Laos.

9. Karnow, note 5 *supra*, at 131.
10. Tucker, note 3 *supra*, at 50.
11. Karnow, note 5 *supra*, at 151.
12. Carol V. Rose, *The "New" Law and Development Movement in the Post-Cold Era: A Vietnam Case Study*, LAW & SOCIETY REVIEW at 2 (1998).
13. *Id.* at 2.
14. David A. Gantz, *Doi Moi, the VTA and WTO Accession: The Role of Lawyers in Vietnam's No Longer Cautious Embrace of Globalization*, THE INT'L LAW. at 4 (Fall 2007).
15. *Rose*, note 12 *supra*, at 3.
16. Phong Tran, *Vietnam's Economic Liberalization and Outreach: Legal Reform*, 9 LAW & BUS. REV. at 139 (2003).
17. Gantz, note 14 *supra*, at 4.
18. *Id.* at 3.
19. *Id.* at 5.
20. VIETNAMESE CONSTITUTION, art. 15.
21. Encyclopedia Britannica Online, *Vietnam*, at 2.
22. Gantz, note 14 *supra*, at 6.
23. Tilleke & Gibbins Consultants Limited, *2006 Vietnam Law Digest*, at 26 in MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST (2006).
24. Gantz, note 14 *supra*, at 11.
25. *Id.* at 14.
26. *Id.* at 14.
27. Tilleke & Gibbins Consultants Limited, note 23 *supra*, at 1.
28. Encyclopedia Britannica, note 21 *supra*, at 24.
29. *See*, Part V.A. for a list of recent laws.
30. Inter-Agency Steering Committee, *Report on Comprehensive Needs Assessment for the Development of Vietnam's Legal System to the Year 2010*, Section 3.1.2.1.2.
31. U.S. State Dept. Bulletin, Investment Climate Statement—Vietnam (2007).
32. Initially, effective as of 1 January 2004.
33. With regard to the Trading Rights (the right to import and export goods), Vietnam committed, under its WTO commitments, to grant such trading rights for all goods to all foreign individuals and organizations no later than 1 January 2007, except for various products reserved to "State-Trading" enterprises (e.g., tobacco, crude oil and petroleum products) and products for which the import right was phased in on 1 January 2009 (e.g., pharmaceuticals). Without a distribution license, the importer is not permitted to distribute directly the imported goods in Vietnam.
34. Tilleke & Gibbons Consultants Limited, note 23 *supra*, at 25 and 26.
35. The New York Convention, adopted by diplomatic conference on 10 June 1958, was prepared by the United Nations. The Convention entered into force on 7 June 1959.
36. U.S. State Dept. Bulletin, note 31 *supra*, at 7.

Andrew L. Odell is a partner and Marlene F. Castillo an associate in the New York office of Duane Morris LLP. The authors would like to express their thanks to Thuy Quang Ngo, an associate in Duane Morris's Ho Chi Minh City office, for his research assistance in preparing this article.

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