

SETTING UP AND OPERATING IN VIETNAM

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PREFACE

We believe that the information in this booklet will be helpful during a company's review of Vietnam as a site for a factory, to provide a service, or otherwise as an investment venue. We have emphasized material that would normally be on a site selection team's check list.

While the information is only a summary, we believe that this summary provides a significant amount of information on which a company can rely to understand Vietnam's legal context.

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.

GLOSSARY

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	Enterprises Law
EP	Economic Police
EPZ	Export Processing Zone
FIE	Foreign Invested Enterprise
HCM City	Ho Chi Minh City
IC	Investment Certificate
IL	Investment Law
IPR	Intellectual Property Right
IZ	Industrial Zone
LFI	Law on Foreign Investment
LUR	Land Use Rights
MMO	Market Management Office
MOLISA	Ministry of Labor, War Invalids and Social Affairs
MOST	Ministry of Science and Technology
MPI	Ministry of Planning and Investment
NOIP	National Office of Intellectual Property
PIT	Personal Income Tax
USTR	US Trade Representative
VAT	Value Added Tax
VND	Vietnamese dong
WTO	World Trade Organization

Chapter One

BASIC LEGAL BACKGROUND

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

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

The legal framework for doing business in Vietnam changed significantly for foreign investors on July 1st, 2006. The prior system whereby there were different legal mechanisms for domestic and foreign investors has largely disappeared. The Enterprises Law (“EL”) has created a unified legal framework for investment by providing similar business structures from which both domestic and foreign investors can choose. They are:

- Sole traders: a private enterprise, which is owned solely by an individual, and the owner has unlimited liability for the business of the enterprise;
- Partnership: two or more individuals can set up a partnership; partners are jointly and severally liable for obligations of the partnership;
- Limited liability company: there are two types; a one member limited liability company and a two to 50 member limited liability company; and
- Joint stock company: this entity has shares and there is a minimum of three shareholders.

Appendices 1 and 2 of Chapter One provide comparison tables for these forms of business organization.

Licensing procedures are discussed in section 1.5 below.

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.

As is normal practice, the EL and the IL need to be supplemented by implementing regulations. To date, the Government has issued three Decrees that provide guidelines to implementation of the EL and the IL. They are: Decree 88/2006/NĐ-CP dated August 29, 2006 on Business Registration (“Decree 88”) which is mainly applicable to setting up a 100% domestic business entity; Decree 101/2006/NĐ-CP dated September 21, 2006 which provides guidelines for the re-registration, conversion and change of investment certificates of existing foreign invested enterprises (“Decree 101”); and Decree 108/2006/NĐ-CP dated September 22, 2006 which provides details and guidelines on implementation of several provisions of the IL (“Decree 108”).

1.2 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 as decided by the Prime Minister. The MPI is also the contact point for foreign invested enterprises (“FIE”)--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 investment certificates (“ICs”) for almost all types of foreign invested projects. Every investment project that involves foreign capital needs to have an IC. Some projects that are conditional projects or projects that are very large need to be approved by the Prime Minister before the IC can be issued.

The Department of Planning and Investment (“DPI”) under local People’s Committees is the contact point in the licensing process. The DPI plays an active role in evaluating an investment request for projects that must pass through an evaluation process.

If an FIE is located within an industrial zone (“IZ”)¹, it is under the administration of that IZ’s Management Board. That is, an FIE in an IZ will operate subject to the IZ’s rules on import/export, environment, labor, etc., in addition to the general rules of the Government and the MPI. A Management Board is authorized to issue an IC for a project that will be located within an IZ and that is within its administration.

Other, more specialized ministries are also involved in foreign investment. 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 in harmonization with the industry’s own rules. It is often consulted by the MPI prior to actual licensing.

1.3 Foreign investment guarantees and incentives

Through the IL, the Government commits to create 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 and assets of investors inclusive of foreign investors.

In addition, in the event that law or policy subsequently promulgated provide larger 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,

¹ 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.

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 the Commercial Code 2005, Law on Electronic Transactions 2005, Civil Procedures Code 2005, etc.

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 given more selectively, reflecting a more selective investment environment.

1.4 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. Further, 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.

1.5 Licensing procedures

Generally speaking, foreign investors are able to choose whatever form of business structure is available for Vietnamese investors to carry out their business. 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 more simple. Evaluation means that, in addition, the structure of the project will be reviewed.

- For an investment project in which investment capital is below 300 billion Vietnamese dong (equivalent to about US\$19 million) or which is not a conditional project², 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.

²A conditional project is a project that 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. Further elaboration is required.

Different projects are licensed by different licensing authorities, depending, again, on the specifications of the project. As discussed at section 1.2, 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 upon recommendation from the MPI and other ministries. Projects that need to be approved by the Prime Minister are listed in Appendix 5 of 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 issued for a foreign investor that invests for the first time in Vietnam. This IC will be treated as a Business Registration Certificate, a document necessary to set up an entity in Vietnam. This treatment is different as between domestic investors and foreign investors. Domestic investors are allowed to obtain a Business Registration Certificate before they need to obtain an IC. In addition, not all projects invested by domestic investors require an IC.

FIEs can at the same time perform more than one investment project. If an FIE has a new investment project, it will file another application for the issuance of an IC for that project and need not establish a new business vehicle. In other words, this means that an FIE may, at the same time, carry out more than one investment project.

The statutory time limit for a licensing authority to consider and issue an IC is 45 working days. The administrative system has been reformed, efficiency in the licensing process has been improved, and this time limit is usually observed. Some licensing authorities have significantly reduced the time in which they act.

The actual time limit will probably vary for each company, depending on the extent of special conditions requested by or being offered to the company. We would expect the time variables to occur before the application is submitted, not after. That is, the justification for special treatment should be carefully documented ahead of time, and informal discussions with the licensing authority beforehand are important.

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.

1.6 Forms of investment

As mentioned, foreign investors and domestic investors are treated equally in the choice of direct investment forms. However, there are some limitations and restrictions on the forms of investment as they apply to foreign investors, depending on investment fields and industries. The Government is drafting a list of fields and industries in which there will be

a cap on the percentage of capital contribution by foreign investors. We will update this booklet when the regulations regarding this matter are promulgated.

Generally speaking, investors, including foreign investors can choose the following forms to invest in Vietnam:

- a business entity in which foreign investors own 100% 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”), or Build-Transfer (“BT”) contracts;
 - reinvestment in the existing business;
 - purchase of shares or contribution of capital and participation in management of investment activities;
 - investment in the merger or acquisition of enterprises;
 - other forms of direct investment.
- a) The first two above forms of direct investment will result in establishing a business entity.
- A single investor can choose either to set up a private enterprise or a one member limited liability enterprise to operate its business;
 - Two or more investors may choose to set up one of the following forms of business structure to carry out their business activities: two to 50 member limited liability company, partnership or joint stock company.

See Appendices 1 and 2 at the end of this Chapter that compare the forms of business structures mentioned above.

- b) Investment through contracts.
- Investors may enter into BCCs to cooperate in production with an agreed form of profit-sharing or 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 domains of transport, electricity production and business, water supply and drainage, waste treatment and other domains as stipulated by the Prime Minister.
- c) Investors may invest in business development in the following forms:
- Expanding scale, increasing capacity or business capability of their existing investment;
 - Renewing technologies, raising product quality, reducing environmental pollution.
- d) Investors may also 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 will be specified by the Government.

- e) In addition, investors have the right to merge or to acquire existing companies and branches. The merger and acquisition of companies and branches must comply with the EL, the Competition Law and other laws. Each case may have its own set of conditions.

1.7 Fields, industries that entitle investor to investment preferences

An investor in several business fields and industries is entitled to investment preferences. These are preferential projects. It is important for a company, at the licensing stage, to satisfy the licensing authority that its project qualifies.

The IL provides a list of fields and industries that are entitled to investment preferences and those preferences apply equally to domestic and foreign investors:

- Production of new materials or new energy; manufacture of hi-tech products, bio-technology or information technology; mechanical engineering;
- Farming and processing of agriculture, forest or aquatic products, salt making; production of hybrids, new plant varieties and/or animal breeds;
- Use of high technologies or modern techniques; protection of the ecological environment; research, development and nourishment of high technologies;
- Employment of a large number of workers;
- Building and developing infrastructures, 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 domains which need to be promoted.

The Government is in the process of finalizing a decree to which a detailed list of areas that are entitled to investment preferences and special investment preferences will be attached. We will update this booklet when the list is adopted.

The application dossier for preferential projects must include a feasibility study. It is important, to prepare a solid feasibility study.

1.8 Conditional investment domains

Conditional investments must satisfy several conditions. The IL provides a general list of conditional domains that apply to every investment project involving either foreign or domestic investment, and the list includes:

- Domains that affect national defense, security, social order and safety;
- Financial and banking domains;
- Domains that affect public health;
- Cultural, information, press and publishing;
- Entertainment services;
- Real estate business;
- Survey, prospecting, exploration and exploitation of natural resources; ecological and environmental projects;
- Development of education and training;
- Some other domains as provided by law.

For foreign investors, and apart from the foregoing, conditional investment domains include those listed in Appendix 6 of Chapter One.

One should note that an enterprise in which domestic investors own 51% or more of the charter capital will be treated as a domestic investment.

1.9 Operation of business entity

The procedures to set up an entity to carry out business are somewhat different as between foreign investors and domestic investors. After being set up, a business (regardless of whether invested by foreign or domestic investors) will operate within the same legal framework especially in relation to the form of business structure. The differences amongst forms of business structure are listed in Appendices 1 and 2 at the end of this Chapter.

Generally, the law requires that the legal representative of any business entity must reside in Vietnam. In his/her absence for more than 30 days, s/he must authorize another person to act as the legal representative of the entity.

The operation duration of a business entity can be indefinite unless the charter of the entity provides otherwise or the business entity is dissolved according to law. However, note that the duration of a foreign investment project may not exceed 50 years but may be reviewed. In case of special circumstances, the Government may grant a longer term, which, however, may not exceed 70 years. Presumably, upon expiration of the term of an investment project, foreign investors can continue to use their business entity to carry out other new projects.

A business entity is dissolved in the following cases:

- The operating duration stated in the company's charter expires without any decision to renew;
- A decision is made by the owners of the entity;
- A company no longer has the minimum number of members required by law for six consecutive months (ie, two members for a two to 50 member limited liability company or three members for a joint stock company);
- The business registration certificate is withdrawn.

An entity may be dissolved only after paying all of its debts and other liabilities. If an entity is unable to pay its debts when due, it may be subject to bankruptcy.

1.10 The US-Vietnam Bilateral Trade Agreement and high-tech industries and WTO

Vietnam's market is open to investment. 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. The BTA improved the framework for protecting intellectual property rights. We discuss the impact of the BTA on intellectual property in Chapter Six.

Furthermore, as a result of the BTA which in many ways anticipated Vietnam's accession to WTO, there has developed a general cooperative working environment among foreign investors, existing foreign invested business and Vietnamese authorities. There has been a greater level of willingness on all sides to discuss and implement new changes. This general positive atmosphere has benefited all investors.

The requirements of the BTA provided an introduction and road map to the terms that have been 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 available to all WTO members.

APPENDICES
For Chapter One

APPENDIX 1
COMPARISON OF A ONE MEMBER LIMITED LIABILITY COMPANY, A TWO TO 50 MEMBER LIMITED LIABILITY COMPANY AND A JOINT STOCK COMPANY UNDER THE LAW ON ENTERPRISES

	One member limited liability company (One member LLC)	Two to 50 member limited liability company	Joint stock company
Definition	A one member LLC may be established and owned by an individual or an entity--foreign or domestic. It is, simply, a company owned by one entity or person.	<p>A two to 50 member limited liability company is an enterprise in which:</p> <ul style="list-style-type: none"> • Members are organizations and/or individuals; the total number of members may not exceed 50; • Members are responsible for debts and other property liabilities of the enterprise within the amount of capital that they have committed to contribute to the company. <p>The company is not entitled to issue shares.</p>	<p>A joint stock company is an enterprise in which:</p> <ul style="list-style-type: none"> • Charter capital is divided into shares; • Shareholders are organizations and/or individuals; the minimum number of shareholders is three with no maximum number; • Shareholders are liable for debts and other property liabilities of the enterprise up to the value of the capital to which they subscribe. <p>A joint stock company is entitled to issue securities to mobilize capital--including common and preferred shares and bonds.</p>
Legal status	A one-member LLC is a legal entity separate from its owner; the owner is liable for the debts of the company up to the charter capital of the company.	A two to 50 member limited liability company has the status of a legal person.	A joint stock company is a limited liability company and has the status of a legal person.

<p>Required Charter Content</p>	<p>The Charter of the company must cover the following principle matters:</p> <ul style="list-style-type: none"> • Company name; address of the head office, branches, and representative offices; • Business lines; • Charter capital, method of raising charter capital; a one member LLC is not allowed to reduce its charter capital; • Name, address, nationality of the owner; • Rights and obligations of the owner; • Management structure; • Legal representative of the company; • Formalities for company decision making, principles for settlement of internal disputes; • Bases and methods to decide on remuneration, salaries and bonuses of managers, etc; • Principles to distribute after-tax profit and losses; • Circumstances/procedures to dissolve and liquidate the company; 	<p>The Charter of the company must cover the following principle matters:</p> <ul style="list-style-type: none"> • Company name; address of the company head office, branches, and representative offices; • Business lines; • Charter capital, method of raising and reducing charter capital; • Name, address, nationality of every member; • Share capital structure and the value of contributed capital by each member; • Rights and obligations of members; • Management structure; • Legal representative of the company; • Formalities for company decision making, principles for settlement of internal disputes; • Bases and methods to decide on remuneration, salaries and bonuses of managers, etc; • Principles to distribute after-tax profit and losses; • Circumstances where a 	<p>The Charter of the company must cover the following principle matters:</p> <ul style="list-style-type: none"> • Name, address of company head office, branches; • Business lines; • Charter capital, method of raising and reducing charter capital; • Name, address, nationality of every founding shareholder; • Number of shares held by founding shareholders, types of shares, par value of shares and total number of shares of each type for sale/offer; • Rights and obligations of shareholders; • Management structure; • Legal representative of the company; • Formalities for company's decision making, principles for settlement of internal disputes; • Bases and methods to decide on remuneration, salaries and bonuses of managers, etc; • Principles to distribute after-tax profit and losses; • Circumstances where a shareholder may request the company to buy back his/her contributed capital; • Circumstances/procedures to dissolve and liquidate the company;
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	<ul style="list-style-type: none"> • Formalities to amend and supplement the company's charter; • Full name and signature of the legal representative of the owner. 	<p>member may request the company to buy back his/her contributed capital;</p> <ul style="list-style-type: none"> • Circumstance and procedures to dissolve and liquidate the company; • Formalities to amend and supplement the company's charter; • Name and signature of every member or every member's authorized representative. <p>Besides the above, members may agree on other matters in the charter.</p>	<ul style="list-style-type: none"> • Formalities to amend and supplement the company's charter; • Name and signature of every founding shareholder or every founding shareholder's authorized representative. <p>Besides the above, shareholders may agree on other matters in the charter.</p>
<p>Capital Contribution</p>	<p>The sole owner of the company is responsible for the charter capital of the company. The owner is required to transfer ownership of the assets contributed to the company.</p> <p>In some business activities such as banking, insurance, etc., there are minimum capital requirements.</p>	<p>There is no minimum requirement for equity contribution by any member regardless of nationality. However, in some business activities (which will be specified by the Government), the maximum ratio of capital contributed by foreign member(s) will be specified.ⁱⁱⁱ</p> <p>In some business activities such as banking, insurance, etc., there are minimum capital requirements.</p>	<p>There is no minimum requirement for equity contribution by any shareholder regardless of nationality. However, in some business activities (which will be specified by the Government), the maximum ratio of capital contributed by foreign shareholders will be specified.^{iv}</p> <p>In some business activities such as banking, insurance, etc., there are minimum capital requirements.</p>

ⁱⁱⁱ At the time of writing this booklet, the Government has not issued regulations to specify ratios.

^{iv} At the time of writing this booklet, the Government has not issued regulations to specify ratios.

	<p>Except for the cases mentioned above, the owner can fix the charter capital of the company. The owner has to pay its capital in accordance with the payment schedule.</p>	<p>Except for the cases mentioned above, the investors can fix their capital contribution. Investors have to pay their capital in accordance with the payment schedule.</p>	<p>Except for the cases mentioned above, the investors can fix their capital contribution. Investors have to pay their capital in accordance with the payment schedule.</p>
<p>Internal Management</p>	<p>The internal management of a one-member limited liability company depends on whether the owner is an individual or an organization.</p> <p>1. If the owner is an individual, the management structure consists of the president and Director or General Director. The company owner is the company's President. The President may hold the post of Director or another person may be hired to take that position. The President is the owner of the company, whereas the Director is the person who manages the day-to-day business of the company. In other words, the Director plays the role of the chief executive officer of a company. Either the President or Director is the legal representative of the</p>	<p>A two to 50 member limited liability company has a Members' Council, Chairman of the Members' Council and Director or General Director. A company with eleven or more members must also have a Controller Board. A Controller Board may be set up in a company with fewer than eleven members. Rights, obligations, criteria, conditions and working rules of the Controller Board and its head must be provided for in the charter.</p> <p>Either the Chairman of the Members' Council or Director or General Director will be the legal representative of the company as stipulated in the charter.</p> <p>Legislation provides detailed rules on Members' Meetings, how to form a quorum, etc.</p>	<p>The management structure of a joint stock company consists of the Shareholders' Meeting, the Management Board, the Director or General Director; for a company with more than eleven shareholders being an organization holding more than 50% of total shares, it must also have a Controller Board.</p> <p>The Chairman of the Management Board or the Director or General Director is the legal representative of the company as stipulated in the charter.</p> <p>The Director or General Director of the company cannot concurrently be the director or general director of another enterprise. Legislation provides detailed rules on Shareholders' Meeting, how to form a Management Board, its powers, etc.</p>

	<p>company as provided in the charter.</p> <p>2. If the owner of the company is an organization such as another company, the management structure can follow one of the following forms:</p> <ul style="list-style-type: none"> • If the owner appoints <u>one authorized representative</u>, that person will be the company's president. In such case, the company management structure will comprise the president, the director (or general director) and the controller. • If the owner <u>appoints more than one authorized representative</u>, all authorized representatives constitute the Members' Council (in other words, Board of Management or Board of Directors). In such a case, the company management structure will comprise the Members' Council, 		
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	<p>director (or general director) and controller.</p> <p>The charter must specify that either the President, the Chairman of the Members' Council or the Director will be the legal representative of the company.</p>		
Transfer of capital	<p>The owner of the company is entitled to sell part or all of its capital in the company; if the transfer of capital leads to an increase in the number of investors, the company must convert to a two to 50 member limited liability company.</p>	<p>A member of the company is entitled to transfer part or all of its capital to a third party in accordance with the following provisions:</p> <ul style="list-style-type: none"> • A capital share must be offered under the same conditions to all other members of the company and in proportion to their share of 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 business registration is granted, with some exceptions.</p> <p>The transfer may be made in writing as usual or by mere delivery of the share certificate.</p>

APPENDIX 2
COMPARISON OF A PRIVATE ENTERPRISE AND A PARTNERSHIP UNDER THE LAW ON ENTERPRISES

	PRIVATE ENTERPRISE	PARTNERSHIP
Definition	A private enterprise may be established and owned by an individual, but that individual can establish only one private enterprise.	A partnership is an enterprise in which: <ul style="list-style-type: none"> • There are at least two partners who: are co-owners of the company, jointly conduct business under one common name (general partners); in addition to general partners, there are also limited partners. • General partners must be individuals who are liable for all obligations of the partnership whereas limited partners are liable for debts of the partnership only to the extent of their capital contribution to the partnership. Limited partners can be individuals or organizations (ie. companies).
Legal status	A private enterprise is not a legal entity separate from its owner; the owner is liable for all of its operations with his or her entire property. In other words, the owner of a private enterprise has unlimited liability for the private enterprise's obligations.	A partnership has legal person status as from the date of receipt of the business registration certificate.
Required charter content	A private enterprise is not required to have a charter.	The Charter of a partnership must cover the following principle matters: <ul style="list-style-type: none"> • Partnership name, address of the partnership head office, branches and/or representative offices (if any); • Business lines; • Charter capital, method of raising and reducing charter capital; • Full name, address, nationality of every general partner; • The value of each partner's contributed capital; • Rights and obligations of partners;

		<ul style="list-style-type: none"> • Internal management structure; • Legal representative of the partnership; • Formalities on how the partnership will make decisions, principles for settlement of internal disputes; • Bases and methods to decide on remuneration, salaries and bonuses of managers, etc; • Principles on distribution of after-tax profit and losses; • Circumstances of dissolution and procedures for dissolution and liquidation of assets of the partnership; • Formalities to amend and supplement the partnership’s charter; • Full name and signature of every general partner. <p>Besides the foregoing, partners may agree upon other subjects in their charter.</p>
<p>Capital contribution</p>	<p>The owner of a private enterprise is solely responsible for the whole investment capital of a private enterprise. The owner is not required to transfer ownership of his/its personal assets to the enterprise.</p>	<ul style="list-style-type: none"> • General and limited partners must establish a capital contribution schedule, and make payment as committed. • If a general partner fails to contribute capital in full and on time, thereby causing losses to the partnership, such partner must compensate the partnership for its losses. • If a limited partner fails to contribute capital in full and on time, the shortfall is regarded as a debt owned to the partnership; in that case, the limited partner may be expelled from partnerships by the Partners’ Council. • At the time of making his/its full capital contribution, a partner shall be granted a capital share certificate.

<p>Internal Management</p>	<p>The owner of a private enterprise has full decision-making power on any business issue, even though s/he may hire a director to manage the day-to-day business of the enterprise.</p>	<p>Partners shall form a Partners' Council. The Partners' Council shall select one general partner as its chairman, and that person shall concurrently be the director or general director, unless otherwise provided in the partnership's charter.</p> <p>The Partners' Council is entitled to decide all business operations of the Partnership. For important matters (listed in the Enterprises Law and also provided for in the charter), decisions shall be made by at least three-quarters of the total number of general partners. For other matters, decisions are made by at least two-thirds of all general partners; a special ratio must be provided for in the charter.</p>
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APPENDIX 3
CRITERIA FOR APPLICATION OF DIFFERENT CORPORATE TAX RATES FOR NEW BUSINESS ESTABLISHMENTS

Tax	Tax rate	Application Period	Criteria	Exemption Period (from year taxable income generated)	50% Reduction Period
Corporate income tax	28%	Entire investment period	Tax on every project unless the project qualifies for a lower rate.	None	None
	20%	10 years from commencement of the project (then the rate reverts to 28%)	Investment in a List A ^[*] business.	2 years	3 subsequent years
			Investment in a List C ^[**] location, regardless of the type of business.	2 years	6 subsequent years
	15%	12 years from commencement of the project (then the rate reverts to 28%)	Investment in a List A business that is situated in a List C location.	3 years	7 subsequent years

	10%	15 years from commencement of the project (then the rate reverts to 28%) Investment in a List B business, having a larger socio-economic impact, may entitle investor to a larger incentive. In such a case, the Ministry of Finance may suggest that the Prime Minister apply the preferential tax rate of 10% throughout the term of the project.	Investment in a List B ^[***] business. Investment in a List D ^[****] location.	4 years	9 subsequent years

In addition, investors are exempt from Corporate Income Tax on income earned from:

1. Performance of contracts for scientific research and technological development and contracts to provide scientific and technological information services;
2. Sale of products during a period of trial production done in strict accordance with trial production procedures, and for no more than six months from commencement of the trial production;
3. Sale of products turned out by applying technologies for the first time in Vietnam, applicable for no more than one year after the application of such technologies to production;
4. Performance of technical service contracts which directly serve agricultural development;
5. Job training exclusively for ethnic minority people;
6. Production and trading of goods or carry out services activities which are set up exclusively for disabled people;
7. Job training exclusively for disabled people, children in exceptionally difficult circumstances, and victims of social evils.

Of note, investors who contribute capital in the forms of patents, technical know-how, technical processes or technical services are exempt from Corporate Income Tax payment on income earned from such contribution.

[*] A List A--List of sectors entitled to investment preferences, Appendix 4.

[**] List B--List of sectors entitled to special investment preferences, Appendix 4.

[***] A List C location includes areas considered to have social-economic difficulties, Appendix 4.

[****] A List D location includes areas considered to have special social-economic difficulties, Appendix 4.

APPENDIX 4
LIST A

BUSINESS DOMAINS ELIGIBLE FOR INVESTMENT PREFERENCES ^v

Investment projects in the following branches, lines and/or domains are eligible for preferences:

I. Manufacture of new materials and production of new energy; manufacture of high-technological, bio-technological, information technological 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; specially-used 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, reservation of medicines for human use 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 experiment, assessment of the applicability of medicines; pharmaceutical establishments to satisfy GMP production standards; preserving, testing, and carrying out-clinical tests of medicines, landing, cultivating or harvesting and processing of 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 of eastern medicines and formulation of standards for testing of prescriptions of eastern medicines;
13. survey and statistics of types of pharmaceutical materials used to produce medicines; collection, inheritance and application of prescriptions for eastern medicines, finding, exploitation and use of new pharmaceutical materials.
14. Production of electronic appliances.

^v This list was issued together with the Government's Decree No. 108/2006/NĐ-CP of September 22, 2006 detailing implementation of the Investment Law.

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

II. Breeding, rearing, growing and processing of agricultural, forest 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 agriculture and aquacultural 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 nursery 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 and works; laboratories and experimental stations to apply new technology to production; investment in the establishment of research institutes.

IV. Labor intensive industries

1. Projects regularly employing between 500 and 5,000 employees.

V. Construction and development of infrastructures

1. Construction of infrastructure serving production and business of cooperatives and 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, roads, terminals, airports, seaports, railway stations, bus stations and parking lots; establishment of new railway routes
5. Construction of technical infrastructures in dense population areas in geographical areas with socio-economic difficulties as listed in List C of this Appendix 4.

VI. Development of education, training, health care, physical training, 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 level of pre-school education and tertiary education.
2. Establishment of private hospitals.
3. Construction physical training or sport centers, training facilities and physical training and sports clubs; establishment 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 for manufacture and repair of national musical instruments; maintenance and preservation of museums, national cultural houses and culture and arts schools.
5. Investment in the construction of national tourist sites, ecological tourist sites and cultural parks for sports, entertainment and recreational activities.

VII. Development of traditional trades and occupations

1. Build and develop traditional trades and occupations for production of fine-art and handicraft, 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 with socio-economic difficulties as listed in List C of this Appendix 4.
2. Development of mass transit including, transportation by ships, aircraft; railway transportation; road transportation of passengers by cars 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 to mobilize capital and lending capital to 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 for production of 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 of textile products; production of silk and fibers of all types; tanning and leather processing.
13. Investment projects on production in industrial parks established under decision of the Prime Minister.

LIST B

BUSINESS DOMAINS ELIGIBLE FOR SPECIAL INVESTMENT REFERENCES

vi

Investment projects in the following branches, lines and/or domains are eligible for special preferences:

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

1. Manufacture of composite materials, light construction materials, valuable and rare materials.
2. Manufacture of high-quality steel, alloys, special metals, porous iron and steel billets.
3. Investment in the construction of buildings 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, biotechnology for production of medicines for human use that meet international GMP standards, 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: production and manufacture of precision mechanical engineering equipment; equipment and machines for examination and control of industrial manufacturing safety; production of industrial robots.

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

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

^{vi} This list was issued together with the Government's Decree No. 108/2006/NĐ-CP of September 22, 2006 detailing implementation of the Investment Law.

III. Use of high technology and modern techniques; protection of the ecological environment; research; development and nursery 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 environment; production of equipment to treat pollution and equipment to observe and analyze the environment.
3. Collection and treatment of wastewater, waste gas and solid waste; recycling or reuse of waste.
4. Research, development and creating a nursery for high technology.

IV. Labor intensive industries

1. Project employing 5,000 or more persons on a regular basis.

V. Construction and development of infrastructure and important projects

1. Investment in the construction and commercial operation of infrastructure for industrial parks, export processing zones, hi-tech parks and economic zones or important projects as decided by the Prime Minister.

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

1. Investment in the construction of facilities to treat people with tobacco or drug addiction.
2. Investment in the establishment of facilities to prevent and control epidemics.
3. Investment in the establishment of geriatric centers or centers that provide relief and care of the disabled and orphans.
4. Investment in the construction of centers of training for high-achievement sports, for sport training for the disabled, construction of sport facilities that provides training and equipment to satisfy requirements to organize international tournaments.

VII. Other manufacturing and service sectors

1. Investment in research and development (R & D) which activity accounts for 25% or more of the revenue.
2. Salvage operations at sea.
3. Investment in the construction of apartment buildings for workers 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 beneficiaries of various forms of social policy.

LIST C

GEOGRAPHIC LOCATIONS WITH SOCIO-ECONOMIC DIFFICULTIES

(The List contains geographic names, and is quite extensive.
If you are interested in obtaining the List, please contact us)

LIST D

**GEOGRAPHIC LOCATIONS WITH SPECIAL SOCIO-ECONOMIC
DIFFICULTIES**

(The List contains geographic names, and is quite extensive.
If you are interested in obtaining the List, please contact us)

APPENDIX 5

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 dated September 22, 2006 Providing Guidelines for the Implementation of the Law on Investment)

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

1. Investment projects in the following sectors, irrespective of source and amount of invested capital (domestic, foreign):
 - (a) Construction and commercial operation of airports, air transportation;
 - (b) Construction and commercial operation of national sea ports;
 - (c) Exploration, exploitation of petroleum and rare and precious natural resources;
 - (d) Radio and television broadcasting;
 - (e) Investment in and the business 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 VND 1,500 billion or more in the following sectors:
 - (a) Electricity business, minerals processing, metallurgy;
 - (b) Construction of railways infrastructure, roads, internal waterways;
 - (c) Production and business of alcohol, beer;
3. Projects with foreign invested capital in the following sectors:
 - (a) Sea transportation;
 - (b) Postal and delivery services; telecommunications, internet and wave transmission net establishment;
 - (c) Press, publication;
 - (d) Establishment of independent scientific research establishments.

APPENDIX 6

**LIST OF SECTORS IN WHICH INVESTMENT IS CONDITIONAL
APPLICABLE TO FOREIGN INVESTORS**

**(Issued with Decree 108 /2006/ND-CP dated 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 network, transmission and provision of internet and telecommunications services;
6. Construction and operation of river ports, sea ports and airports;
7. Transportation of goods and passengers by railway, airway, roadway and sea and waterways;
8. Catching of aquaculture;
9. Production of tobacco;
10. Real estate business;
11. Import, export and distribution business;
12. Education and training;
13. Hospitals, medical clinic;
14. Other investment sectors dealt with in international treaties of which Vietnam is a member and which restrict such sectors to foreign investors.

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

Chapter Two TAXES

Both domestic and foreign invested enterprises are subject to several taxes including corporate income tax, value added tax, import and export taxes, and their employees are subject to personal income tax. Tax incentives in relation to tax rates and tax exemptions vary. They depend mainly upon the type of business in which a company is engaged. They also vary, based on the incentives which the Government grants.

2.1 Corporate income tax (“CIT”)

The bases for CIT calculation are taxable income and the CIT rate. CIT payable is taxable income multiplied by the CIT rate.

2.1.1 Taxable income

Taxable income includes business and other income. Taxable income from business activities is turnover minus reasonable expenses which relate to the turnover.

2.1.1.1 Turnover

Turnover is the total sum earned from the sale of goods or services, excluding VAT, whether or not the company has collected money from the sale of goods.

2.1.1.2 Expenses

Reasonable expenses, excluding VAT, which may be deducted to determine taxable income include:

1. Depreciation of fixed assets used for business activities. Depreciation rates are determined based on the value of the fixed assets and the term over which they are depreciated;
2. Expenses for raw materials, materials, fuel, energy, labor tools, and goods used in the business;
3. Salaries, wages, meals, allowances paid on the basis of labor contracts, excluding compensation for founders who do not directly take part in running the business;
4. Expenses for scientific and technological research; innovation; improvement; health care and corporate training for employees, and even financial support for outside educational programs;
5. Expenses for outside services: electricity, water, telephone, office supplies, property insurance; audit, legal consultancy, management companies; rentals and repairs of fixed assets; payments for the use of technical materials, patents, licenses of technology transfer, trademarks which are not treated as fixed assets; other expenses for outside services;

6. Special payments for women employees as prescribed by current regulations; payments for labor safety, cost of safety measures for the establishment, social and medical insurance, trade union fund contributions according to regulations;
7. Payments of interest on loans from credit institutions, financial institutions and other economic organizations; payment of interest on loans from other entities must not exceed 1.2 times the interest rate applied by commercial banks;
8. Provisions for bad debts, inventory, drop in securities prices;
9. Severance allowance paid to employees according to current regulations;
10. Expenses directly related to the circulation and sale of products such as packaging, warehousing and guarantee costs;
11. Expenses for advertisement, marketing, sales promotion, guest reception, commissions, external relations, conferences and other expenses. Expenses under this category must not exceed 10% of the first 10 items of this list;
12. Taxes, charges, fees, land rental which are related to business activities, but do not include CIT, and
13. Management expenses allocated to a permanent establishment in Vietnam by a foreign company.

2.1.2 CIT rate

The standard CIT rate currently applied to enterprises is 28%. The CIT rate applicable to business establishments conducting exploration and exploitation of oil and gas and other valuable and rare natural resources is between 28% and 50%.

However, preferential CIT rates of 20%, 15% and 10% apply if the enterprise meets certain specific criteria. Preferential rates apply if the investment is made in one of the activities or in one of the locations identified by the Government to be eligible for preferences. The tax incentive period starts from the date that business operations commence, and it does not include the basic construction period.

A CIT preferential rate applies in a specific way. Assume that a project receives a preferential tax rate of 15% with two full years of exemption and 50% reduction of the tax payable for the eight subsequent years. In such case, the period is calculated from the first profit-making year. Beginning in that year, and for two years, no tax is payable. Beginning in the third year, CIT of 7 ½ % will apply for eight years. Thereafter, the standard rate of 28% will be applied.

2.1.3 Loss carry forward

If an enterprise suffers losses after it completes tax finalization with the tax authority, it is permitted to carry its losses forward to the following year, and the amount of the losses

may be set off against taxable income for the purposes of calculating corporate income tax in accordance with the Law on Corporate Income Tax. The duration of loss carry forward may not exceed five years.

2.1.4 Tax exemption and reduction

Enterprises that qualified for preferential CIT rates, enjoy CIT exemption and reduction for a certain period of years. Depending on the nature of the investment, an enterprise can enjoy two to four years of CIT exemption, plus a 50% CIT reduction period of up to nine years.

2.1.5 No tax on income transferred abroad

Profits generated from investing (including CIT reimbursement due to reinvestment and income from capital transfer), can be transferred abroad or retained overseas, free of remittance tax.

2.2 Export tax and import tax

Under the Law on Export Tax and Import Tax of the Government dated June 14, 2005, the right of an enterprise to have incentives in the nature of lower export and import tax is specifically provided. 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. Enterprises have to pay export and import tax according to the Law on Export Tax and Import Tax, except for some cases of tax exemption.

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 cases:

- Goods imported to create fixed assets of projects for investment encouragement and of projects of geographical areas with either difficult or extremely difficult social-economic conditions ;
- First-time equipment imported to create fixed assets for projects eligible for investment encouragement;
- Plant varieties and animal breeds permitted to be imported for execution of investment projects in agriculture, forestry or fisheries;
- Raw materials and supplies in direct service of the manufacture of software which cannot yet be made in Vietnam;

- Goods imported for direct use in scientific research and technological development.
- Goods imported for export processing for foreign parties under signed processing contracts.

Besides, enterprises are exempt from import tax for five years after they commence production as follows:

- Raw materials, supplies and components 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 social-economic conditions; or in the manufacture of mechanical, electric and electronic components and accessories;
- Raw materials, supplies and semi-finished products which cannot be made in Vietnam and are imported for production under projects on the list of domains eligible for investment encouragement;
- Semi-finished products which cannot be made in Vietnam and 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 social economic conditions.

Enterprises will be reimbursed for import tax paid on goods temporarily imported for re-export and other cases as stipulated in 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 as stipulated by the Government.

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

Specialized equipment and machinery that are included in technological lines, that cannot be manufactured in Vietnam, and that are imported to create an enterprise’s fixed assets, are not subject to VAT.

2.3.1 VAT calculation bases

VAT calculation bases consist of two elements: taxable price and tax rate.

2.3.1.1 Taxable price:

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

2.3.1.2 VAT rates:

Currently, VAT rates are 0%, 5% and 10%.

The VAT rate of 0% applies to exported goods. Exported goods include goods that are exported to foreign countries, sold to enterprises in EPZs, or other specific cases prescribed by the Government. In the case of goods carried abroad for sale or goods sold at fairs and exhibitions, if there are sufficient grounds to conclude that those goods will be exported, the rate of 0% will apply.

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 VAT payable is output VAT (VAT received) minus input VAT (VAT paid).

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

Input VAT is the taxable price of goods sold or services rendered to a company by a selling entity, multiplied by the applicable VAT rate. Specifically, input VAT is the total amount of VAT paid by the company. The amount appears on the VAT invoices that a seller issues to the company.

2.4 Personal income tax ("PIT")

2.4.1 PIT payers

Vietnamese citizens living in Vietnam or working in foreign countries, and expatriates working in Vietnam and receiving income are subject to PIT.

2.4.2 Taxable income

The following are taxable:

- salary;
- bonus;
- housing allowance. The taxable portion of this allowance is the actual payment up to 15% of the regular monthly income;
- tax payments by employer;
- electricity and water usage paid by the employer;
- other allowances for which an employee receives a fixed amount in cash each month;
- some other benefits in kind.

2.4.2.1 Vietnamese staff

a. The tax on a Vietnamese employee's income is calculated on the basis of partially progressive rates and on average monthly income.

The minimum monthly taxable income is VND5 million. The current tax table is as below:

Level	Average monthly income Unit: VND 000	Tax rate %
1	5,000 or less	0
2	Over 5,000 to 15,000	10
3	Over 15,000 to 25,000	20
4	Over 25,000 to 40,000	30
5	Over 40,000	40

b. Employees can receive certain types of compensation which is not taxed, such as:

- Social and health insurance contributed by employers.
- Meals served at the work place (but excluding allowances in cash).
- Travel expenses for official business trips consisting of fares, hotels, and per diem.
- Night-shift allowances (excluding third-shift salary)
- Allowances given to employees who work under hardship conditions in remote areas, offshore areas, etc. and in toxic, dangerous environments.
- Training/education fees paid directly to training organizations.
- Severance pay or retrenchment allowance made to an employee in accordance with provisions of the Labor Code.

c. Following are examples of the PIT obligation which applies to several different levels of income. In Vietnam, total compensation is commonly fixed in net rather than gross terms. The following table reflects this fact. The presentation is on a monthly tax basis. We have converted Vietnamese dong to US dollars in this table at the current rate of US\$1 = VND 16,000.

Total paid By employer (US\$)	Employer contributions (US\$)		Gross income (US\$)	Employee deductions (US\$)			Net income (US\$)
	Social insu.	Health insu.		Social insu.	Health insu.	Income tax	
A=B+C+D	B=Dx15%	C=Dx2%	D	E=Dx5%	F=Dx1%	G	H=D-E-F-G
373.40	47.87	6.38	319.15	15.96	3.19	-	300.00
440.14	56.43	7.52	376.19	18.81	3.76	3.62	350.00
1,358.29	174.14	23.22	1,160.93	58.05	11.61	91.27	1,000.00
3,048.21	390.80	52.11	2,605.30	130.27	26.05	448.98	2,000.00
5,103.84	654.34	87.24	4,362.26	218.11	43.62	1,100.53	3,000.00

2.4.2.2 Expatriates

a. General view:

An expatriate is taxed with reference to the duration of his/her stay in Vietnam. The first taxable year is the first consecutive 12 months period beginning from the date the expatriate arrives in Vietnam. Subsequent taxable years are calendar years.

- If an expatriate stays in Vietnam for less than 183 days during a period of 12 consecutive months which starts from the date of his/her arrival in Vietnam, he/she is not considered to be an expatriate residing in Vietnam. The personal income of that expatriate is taxed at a flat tax rate of 25% of total income which is generated for work done in Vietnam.
- If an expatriate stays in Vietnam for 183 days or more during a period of 12 consecutive months which starts from the date of his/her arrival in Vietnam, he/she is considered as an expatriate residing in Vietnam. The personal income of that expatriate is taxed at partially progressive rates.

b. Calculation of the PIT of an expatriate who stays in Vietnam for 183 days or more in a given tax year:

b.1. For an expatriate residing in Vietnam, Vietnam taxes worldwide income. The tax on an expatriate's income is calculated on the basis of partially progressive rates and on monthly average income whether the income is received inside or outside of Vietnam.

The minimum monthly taxable income is VND8 million. The current tax table is as below:

Level	Average monthly income Unit: VND 000	Tax rate %
1	8,000 or less	0
2	Over 8,000 to 20,000	10
3	Over 20,000 to 50,000	20
4	Over 50,000 to 80,000	30
5	Over 80,000	40

b.2. A housing allowance, if any, is also taxed. However, it is treated differently from other income in kind. If proper documentation is provided to demonstrate that the allowance has actually been used to pay for house rent, then the housing allowance will be taxed as income, but only up to 15% of the total taxable income even though the housing allowance itself may be more.

b.3. Examples of the PIT obligation which apply to several different levels of income

Income excluding housing Per year (\$US)	Income excluding housing per month (\$US)	Housing Allowance (\$US)	Maximum taxable income on housing allowance (\$US)	Maximum taxable income per month (\$US)	Tax payable per month (\$US)	Remarks
50,000.00	4,166.67	No	0.00	4,166.67	754.73	The actual tax payable will vary a little, depending on the exchange rate. In this table, the exchange rate is assumed to be US\$1 = VND 16,000
50,000.00	4,166.67	Yes	625.00	4,791.67	942.26	
75,000.00	6,250.00	No	0.00	6,250.00	1,496.83	
75,000.00	6,250.00	Yes	937.50	7,187.50	1,871.83	
100,000.00	8,333.33	No	0.00	8,333.33	2,330.16	
100,000.00	8,333.33	Yes	1,250.00	9,583.33	2,938.16	

For example, if the expatriate’s annual income is US\$50,000 (US\$4,166.67 per month) and if the housing allowance is, say, US\$1,000 per month, the expatriate will be taxed only on US\$625 of the US\$ 1,000 per month for housing allowance, i.e. 15% of his/her monthly income.

b.4. Other types of compensation that will not be taxed are as below. However, entitlement to such benefits must be set out in the labor contract.

- Transportation allowance;
- Travel expenses for official business trips consisting of fares, hotel/rentals and per diem;
- Training/education fees paid directly to training organizations;
- School fees for expatriates’ children paid directly to schools in Vietnam;
- Annual return tickets to the home country.

c. Tax treaties:

Vietnam has signed treaties on avoidance of double taxation with many countries. Expatriates living in Vietnam who are residents of any such countries 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. Following is a list of countries that have signed treaties on avoidance of double taxation.

Thailand (23/12/1992), Australia (13/10/1992), France (10/2/1993), Sweden (24/3/1994), Singapore (2/3/1994), South Korea (3/5/2002), United Kingdom (9/4/1994), Poland (31/8/1994), India (7/9/1994), Hungary (26/8/1994), Bulgaria (24/5/1996), The Netherlands (24/1/1995), Japan (24/10/1995), Russia (27/5/1993), Norway (1/6/1995), Denmark (31/5/1995), Romania (8/7/1995), Malaysia (7/9/1995), Uzbekistan (28/3/1996), Laos (14/1/1996), China (17/5/1995), Ukraine (8/4/1996), Germany (16/11/1995), Mongolia (9/5/1996), Switzerland (6/5/1996), Belarus (24/4/1997), Czech-Republic

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(23/5/1997), Canada (14/11/1997), Taiwan (6/4/1998), Luxembourg (4/3/1996), Algeria (6/12/1999), Italy (1/1/00), Indonesia (22/12/1997), Belgium (28/12/1996), Iceland (3/4/2002), Finland (21/11/2001), Cuba (26/10/2002), Myanmar (12/5/2000), Philippines (14/11/2001), Bangladesh (22/3/2004), Korea (20/5/1994), Pakistan (25/3/2004), Republic of Seychelles (4/10/2005), Sri Lanka (26/10/2005).

Vietnam has not 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 much 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 economic integration. In anticipation of accession to 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 requires implementing regulations. There are a number of implementing documents. Decree 80/2006/ND-CP of the Government dated August 9, 2006 ("**Decree 80**") detailing and guiding the implementation of a number of articles of the Law on Environmental Protection, Decree 81/2006/ND-CP of the Government dated August 9, 2006 ("**Decree 81**") on sanctioning of administrative violations in environmental protection, and Circular 08/2006/TT-BTNMT of the Ministry of Natural Resources and Environment dated September 8, 2006 ("**Circular 08**") implementing Strategic Environmental Assessments, Environmental Impact Assessment Reports and Environmental Protection Undertakings.

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 strategic environmental assessment reports and environmental impact assessment reports and registration of environmental protection undertakings nationwide; organize the evaluation of strategic environmental assessment reports; organize the evaluation and approve environmental impact assessment reports; guide the registration of environmental-friendly establishments and products and grant environmental standard conformity certificates;

While it is MNRE that is primarily responsible for regulating protection of the environment, a number of other agencies, including various ministries, 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, and so it endeavors to find a balance. 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. There is a difference between an EIAR and an EPU. 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 DPI--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 more simple than an EIAR. An EPU is registered with the district-level people's committee. That body, when necessary, may authorize commune-level people 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. Foreign 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 operations 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, and as mentioned above, the investor must prepare either an EIAR or an EPU depending on the importance of the project.

The types of projects for which an EIAR must be prepared (total of 102) are listed in Appendix I to Decree 80, and include:

- Projects that are of national importance;
- Projects that exert an adverse impact on, natural sanctuaries, national parks, historical and cultural relic sites, natural heritages or landscapes which have been formally recognized;
- Projects that potentially exert an adverse impact on a river watershed, coastal area or areas of a protected ecosystem;
- Projects to construct infrastructure works in economic zones, industrial parks, hi-tech parks, export- processing zones or craft village areas;
- Projects to exploit and use groundwater or natural resources on a large scale;
- Other projects having a potential risk or adverse impact on the environment.

Specific examples include: project to construct a tourism/entertainment zone with an area of five or more hectares; golf courses with 50 or more holes; hotels with 50 or more guest rooms; hospitals with 50 or more patient beds. We do not discuss EIAR considerations in great detail, but a number of projects will be affected.

Investors in projects other than those in which an EIAR is required, are required to register an EPU. An EPU registration includes: location, form and scale of manufacturing-business-services 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 Law on Environmental Protection”. Unlike the procedure of 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 design, construction and operation.

According to the expired Circular 490/1998/TT-BKHCMNT of the Ministry of Science and Technology dated April 29, 1998 (“**Circular 490**”), investors in projects that were located in an IZ or EPZ were only required to submit EPUs. Issues of environmental protection in an IZ were satisfied when the IZ itself was licensed. An investor whose project was located in an IZ was not required to produce its own EIAR, but had to follow commitments of the IZ on environmental protection. However, Circular 08 replaced Circular 490. Now, even investors whose projects are located in an IZ or EPZ must prepare an EIAR if their projects are listed in 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 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 that they are more strict than standards issued by MNRE. Vietnam’s environmental standards are mainly in air quality, water quality, noise, vibration and soil quality.

In case some standards are not specified by Vietnam's environmental standards, an investor may apply environmental standards of advanced countries after it has obtained written permission of MNRE to apply those standards. 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 environmental protection measures required in an EIAR or EPU and comply with 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 the environmental protection, supervision and inspection regime;
- 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

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 product in the following cases:

- Machinery, equipment, means of transportation that do not meet environmental standards;
- Machinery, equipment, means of transportation that are intended for scrap;
- Materials, fuels, chemicals and products that are on a list of substances that are prohibited from import;
- Machinery, equipment, means of transportation that are contaminated with radioactive substance, pathogenic microbes or other poisons.
- Foods, medicines, animal and plant protection drugs that 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 and individuals that are engaged in activities that have the potential to cause large environmental damage.

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

Polluters and violators of Vietnam's environmental laws may also face criminal penalties. These penalties are stated in the Penal Code, and their seriousness 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, and imprisonment from three months to two years. The penalty for violations that have an extremely severe adverse environmental impact is imprisonment from one to five years. In addition to these penalties, polluters are answerable 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, etc.

Chapter Four

LAND AND CONSTRUCTION

Legislation on land is complicated. Land and construction issues are related. In this Chapter, we discuss a number of both legal and practical issues on acquiring land and on constructing a factory.

4.1 Enterprises with foreign invested capital (“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 of Vietnam and that the State administers the land for the people. 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 is 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 transferred from others, the land user is entitled to receive a certificate of land use rights (“CLUR”) granted by a competent State agency. A CLUR permits land users to protect their legitimate rights and interests. Even though individuals and entities do not have ownership of land, when they are granted a CLUR, they have basic control over the land and are entitled to exercise many rights such as the right to use, transfer, mortgage, lease, and many such 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 who is allocated land by the State are different from those of persons who are leased land by the State or who lease 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. By comparison to Vietnamese citizens who reside in Vietnam, overseas Vietnamese and foreigners have limited entitlements to the right to use land.

Generally, an FIE with an investment project in Vietnam may select either to be leased land and to pay rent annually or it may lease land and pay rent in a lump sum for the entire term of the lease. The way that an FIE can get land to implement the FIE’s project varies slightly depending on the location of the project, as follows:

- An FIE that requires land (located 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; lease or sublease land from overseas Vietnamese or domestic economic entities that are permitted to sublease land, provided there is already construction work or infrastructure affixed to the land; or sublease land (on which infrastructure has already been built) from other individuals and/or foreign entities.

- An FIE that has a license to develop an industrial zone can lease the land from the State; an FIE that puts its factory in an industrial zone may choose to lease land from the State or lease or sublease land from 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 hi-tech zone management board or the economic zone management board; an FIE that puts its factory in a hi-tech zone or an economic zone may choose to lease land from the hi-tech zone management board or the economic zone management board, or lease or sublease land from the hi-tech zone developer or the economic zone developer.
- There is another way by which a foreign investor may have land to implement its project in Vietnam. That is to form an enterprise with a Vietnamese company or a Vietnamese individual and the Vietnamese company or individual contributes its LURs as capital for use by the new enterprise.

An FIE will be granted a CLUR if it leases land from the State or leases 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 CLUR of an enterprise coincides with the term of the investment certificate. If an FIE leases land in an industrial zone, the duration of the lease may depend on the duration of the investment certificate of the industrial zone.

Besides being the most vital document on land that the enterprise must possess, the CLUR brings an added value to the FIE. The FIE can mortgage the value of its LUR with a Vietnamese credit organization, a branch of a foreign bank, or with a joint venture bank operating in Vietnam. There are specific provisions of law which detail the method of calculation of the value of LURs and which discuss mortgage procedures, and there are certain limitations, but we do not discuss these details here.

4.2 Choosing and renting a land site: outside vs. inside an IZ

A foreign investor may lease a piece of land for its project inside or outside of an IZ. There are advantages and disadvantages attached to each option.

4.2.1 Location outside of an IZ

If an investor decides to locate its project outside of an IZ, 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 advantages. 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 the land clearance issues in more detail below, but it is a difficult exercise, and strong support of 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 this case, investors must ensure that the lessor has ownership of the factory or that the lessor is allowed by law to lease that property especially in case the lessor is an organization.

In addition, before negotiating to lease a piece of land or a factory outside an IZ, especially from a private person or a company, investors should check with the licensing authority to ensure that the location of the factory will be accepted. Factories likely to pollute the environment or cause noise may not be allowed to locate in populated areas.

Furthermore, there are infrastructure issues to look at such as: clean water; stable power; waste disposal, 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, etc.? Good Internet facilities, of course, are essential.

4.2.2 Location inside an IZ

On the other hand, if the investor chooses to locate inside an IZ, it does not need to worry about the problems of land clearance. The IZ infrastructure is more developed and complete. In certain cases, investment in an IZ is encouraged, with various incentives, mainly tax incentives, applied. Moreover, there is no concern whether the factory fits into the local development plan.

Usually, IZ developers issue standardized lease contract and they do not want to change the terms and conditions of the contract. IZ developers may construct factories upon request of investors in accordance with specifications given by the investors. However, it may be hard to find a small-sized piece of land or small factory in an IZ, and land within an IZ is more expensive.

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 most important task is land clearance. By law, it is the State's responsibility to relocate residents in the area and to clear the land in order to lease it to investors. Relocation requires paying relocation compensation. In such cases, once the land intended for lease is approved by the State, the local People's Committee has the responsibility to organize both the compensation and the relocation process in order to clear the land. In reality, the cost of land clearance in many cases is advanced by the investors. That amount will then be deducted from the rent that investors have to pay to the State. The basic unit price for relocation compensation is fixed according to the State's provisions, but negotiation may often still be required.

In practice, problems, if they occur, will most often occur during the land clearance stage: the main problems are usually that residents do not want to move because they are not satisfied with the compensation, because they do not like the new location assigned, and sometimes because the new location is not ready, etc.

A foreign investor should be sure to look at the land clearance situation for each site it considers. If the local people's committee plays a strong and active role, as it should, these problems can be mitigated. It will be important to try to secure the People's Committee's commitment.

However, leasing land directly from the State may result in lower rent. Leasing land from the State is not always easy, especially for small projects because the State tends to reserve land for large and more important projects. There are criteria that the investors must meet if they want to lease land directly from the State.

If investors want to lease land from other enterprises, the investor must negotiate directly with the CLUR holders. This is a pure economic negotiation. It is important to ensure that the lessors are allowed by law to lease the land and that there is infrastructure built on the land.

4.4 Obtaining a construction permit

An investor must obtain a construction permit before building its factory. The investor may authorize its contractor to obtain the permit on its behalf, and this is often done. If the factory is to be built in an IZ, assistance from the zone authority is normally available. 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 issue a construction permit. A construction permit can usually be expected within 20 days from submission of an application.

4.5 Selecting a contractor

A 100% foreign invested enterprise is not required to invite bids in order to select a contractor. It is merely encouraged to do so. According to the bidding regulations, there are different ways to select bidders, such as: unrestricted bidding, restricted bidding, appointed bidders, competitive sale offers, direct procurement, self-performance and special procurement. Amongst these bidding forms, an unrestricted bid is the most popular, as it allows an unlimited number of bidders to participate. A 100% foreign invested enterprise may select any contractor it wishes. However, the contractor must be qualified as required by the law of Vietnam.

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

4.6 Construction agreements

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

The 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 track record for recognizing foreign arbitral awards. Foreign court judgments are generally not enforceable in Vietnam except in cases where the country in which the court judgment is issued and Vietnam have signed or acceded to an international treaty on judicial assistance in civil procedures. It is also possible if judicial assistance in civil procedures is accepted by the two countries on the principle of reciprocity. 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. The comprehensive minutes of commissioning and acceptance upon completion of the whole project is a legal document, and allows the investor to bring the project into operation. In addition, it serves 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 Registration of ownership of a factory

The registration of ownership of a factory is not a legal obligation. However, when construction of the factory is completed, the FIE has the right to register its ownership. The application for such registration is made to the local People's Committee. The FIE will receive a Certificate of Ownership of its factory. Such Certificate establishes the fact of contribution of the investment capital. The FIE may also mortgage its factory at 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, its can mortgage the LURs and the factory affixed to the land--but, again, only at a credit institution licensed to operate in Vietnam.

Chapter Five

LABOR

This Chapter highlights several basic concepts from the substantial body of law that governs the workplace relationship 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. Vietnamese youngsters are dynamic, eager and fast 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. It is responsible to formulate and enforce 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 are responsible to 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 at their level. Trade unions have been an (allegedly) essential part of Vietnam's political system. Their current task is to represent and protect workers' rights and interests. However, in reality, 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 carry out inspection with regard to compliance and investigation of 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 business community) to promote employers' interests in domestic and international labor relations. Any employer can register to be a

member of the VCCI. As one of VCCI provides services to members regarding labor issues e.g. labor disputes, wage determination, work safety. It liaises with the State by forwarding employer's opinions to the State to try to create and maintain a good labor environment for employers.

5.4 General employment conditions

The Labor Code sets forth rules for the employment of workers. It also provides for rights and obligations of both employees and employers. There is a large body of independent regulations which implement the Labor Code.

5.4.1 Minimum wage

The minimum wage is the monthly wage that must 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 applicable to employees who work for employers are enterprises with foreign-invested-capital, foreign organizations, international organizations. The other system applies to employees who work for non-foreign-invested enterprises such as state agencies, state-owned enterprises and other enterprises. The latter system fixes the minimum wage at VND450,000 (around US\$28) per month.

The minimum wage that applies to employees who work for enterprise with foreign-invested-capital and other foreign organizations is grossly different:

- Level 1: VND870,000 (around US\$54) per month, applies to employees who work for enterprises in the urban districts of Hanoi and Hochiminh City;
- Level 2: VND790,000 (around US\$49) per month, applies to employees who work for enterprises in rural districts of Hanoi and Hochiminh City, urban districts of Hai Phong, Ha Long, Bien Hoa, Vung Tau and a several towns in Binh Duong Province; and
- Level 3: VND710,000 (around US\$44) per month, applies to employees who work for enterprises in other locations.

Of note, if an employee has gone through a "vocation training or apprenticeship" (that is s/he is a trained employee), s/he is eligible for at least the applicable minimum wage plus 7%.

An enterprise will pay wages in line with its business conditions, based on the above minimum wage structure. A worker's wage may be denominated in either US dollars or Vietnamese dong. If it is in US dollars, it must be paid in Vietnamese dong at the average exchange rate applicable at the time of payment. Most employers opt to denominate wages in Vietnamese dong.

While the situation with factory workers is different, many administrative staffs working for enterprises with foreign-invested-capital are quoted salaries in net, rather than gross, amounts. This practice, however, is changing. Tax and social costs are high and must be taken into account. In this connection, see the table at section 2.4.2.1(c) in Chapter Two.

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 not exceed four hours per day or 200 hours per year. In some cases, it may reach 300 hours per year.

For workers who work night shifts, the Labor Code requires them to be paid at least 30% more than those who work normal hours.

Application of the rules on overtime tends to be flexible in practice, if not in law, with the employees' own desire to exceed the minimums given consideration.

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/her 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 determination, 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/her first year may be entitled to a portion of the annual bonus corresponding to the time he/she has been with the enterprise.

5.4.5 Social and medical insurance

Social insurance and medical insurance are compulsory for any employee who works for at least three months. Both the employer and the employee are required to contribute to the insurance funds. Contributions are based on the entire salary. That is, the entire contracted salary that an employee receives.

Nevertheless, under the new Law on Social Insurance, which came into effect on January 1, 2007, a ceiling of the salary on which contributions will be calculated is set, and beyond which no contribution need be made. In particular, if employee's salary is higher than twenty times the Government's minimum wage, then, for the purposes of calculating

social insurance contributions, employee's salary will be deemed to be fixed at twenty times the minimum wage. Therefore, social insurance maximum contributions will depend on the minimum wage fixed by the Government from time to time. The current legal minimum wage is VND450,000^{vii}, and twenty times the minimum wage is VND9,000,000.

The government also contributes and provides additional funds. 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. 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 is responsible to pay a retrenchment allowance. The Labor Code provides for the payment of a retrenchment allowance for employees who have worked for the employer for more than one year.

Depending on the particular circumstances of a retrenchment, the allowance varies. By way of example, it could be one-half month's salary for every year of employment, in case, say, the employer unilaterally terminates an employee for poor performance. 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 retrenchment allowance of one month's salary for every year of employment, or two months' salary, whichever is greater. Other benefits, such as accumulated leave or bonuses must also be paid.

The Labor Code lays down specific rules on how to determine the number of years of employment, how to calculate the monthly salary for these purposes, when retrenchment allowances must be paid, and how disputes regarding retrenchment are settled.

5.4.7 Retrenchment allowance and unemployment insurance

For the first time ever, unemployment insurance has introduced in Vietnam under the new Law on Social Insurance. It will apply to most employers and employees as from January 1, 2009, i.e. two years after the effective date of the Law.

Unemployment insurance provides unemployment compensation to an employee when he loses his job or terminates his labor contract with the employer. Employers who employ ten or more employees and their employees will be obligated to participate in the unemployment insurance regime. The contribution rate is small, which reflects the limited

^{vii} Art. 1 Decree 118/2005/ND-CP regarding adjustment of minimum wage.

benefits of the program: the employer, employees and the State, will each contribute 1% of the salary on which contribution is based, which does not exceed the maximum contribution salary.

The characteristics of the unemployment compensation are somewhat similar to those of the retrenchment allowance. On closer look, the unemployment compensation will partly replace the severance/redundancy allowance regime that exists under the labor law. It is provided that the period for which an employee contributes unemployment insurance will not be counted for the purpose of determining the retrenchment allowance of employees. This seems to mean that, in the future, upon termination of employment with the employer, an employee will be entitled either to a severance/redundancy allowance or unemployment insurance.

It is possible that Vietnamese law makers are going to amend regulations regarding retrenchment allowance. The relationship between unemployment insurance and retrenchment allowance is still to be defined.

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 agreement recognized by law, namely an agreement for an indefinite term, an agreement for a definite term of one to three years, and an agreement for a specific task which will last for less than one year.

Insofar as the second and third types are concerned, if such agreement expires without being renewed, or if no new agreement is executed for the employee's continuation of work, 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 two consecutive times, including renewal, for a single employee. 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 employee's employment continues, but no new labor agreement is executed, the current labor agreement will automatically be considered 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, insurance, etc. Additional terms may be added. The employer and the employee must each keep one original.

For a definite term, and to perform a specific task, one labor agreement may be used for a group of employees. Such agreement is signed between the employer and a representative of the group. It will be effective and enforceable as if signed by each employee.

5.5.2 Collective labor agreement

An employer employing 10 or more persons may enter into a collective labor agreement with its employees. 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 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 has to be registered with the relevant labor department within 10 days after it is executed, 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 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, and, indeed, to assist, if requested, in its formation, and to provide facilities in order for the trade union to function. An employer may not prejudice an employee because s/he has formed or joined a trade union.

5.7 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/her 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.

5.8 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 Labor Court under the relevant People's Court. The time limit for an employee to file a request to resolve a dispute with the court if conciliation fails, mainly ranges from six months to one year, depending on the nature of a particular dispute. DOLISAs and Labor Courts tend to favor the employee, but they are not dogmatic.

5.9 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 with foreign-invested-capital is no longer required to provide an explanatory statement for the need to recruitment of an expatriate. Also, it is generally required that the enterprises 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.

Employment of expatriates is generally limited the in another way. In particular, the right of an enterprise with foreign investment to employ the first expatriate is an automatic right; however, the employment of the second expatriate onward is possible if the addition of additional expatriates does not cause the number of expatriates to exceed 3% of the total number of employees of the enterprise. In case the enterprises wish to employ a number expatriates accounting for more than 3%, approval of presidents of provincial/municipal People's Committees is required.

Despite the existence of limitations, the authorities' view in this regard has been fairly relaxed. Many enterprises with foreign-capital-invested fill many positions with people recruited from abroad.

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:

- S/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;
- S/he is a member of the Management Board of Vietnamese enterprises;
- S/he is chief of a Vietnamese representative office or branch;
- S/he is a lawyer who has received a Certificate of the practice of law in Vietnam granted by the Ministry of Justice.

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

Chapter Six

PROTECTION OF INTELLECTUAL PROPERTY

Vietnam has made a late start in protecting intellectual property rights (“IPRs”) holders. However, the need to do so, as stimulated by foreign investors, the BTA and WTO, is resulting in positive action to recognize and protect 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, comprise 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, 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;
- Decree 100/2006/ND-CP of the Government dated September 21, 2006, detailing and guiding the implementation of a number of articles of the civil code and the intellectual property law regarding copyright and related rights;
- Decree 103/2006/ND-CP of the Government dated September 22, 2006, guiding implementation of several provisions of the Intellectual Property Law;
- Circular 01/2007/TT-BKHHCN of the Ministry of Science and Technology dated February 14, 2007, guiding implementation of several provisions of the Decree 103/2006/ND-CP.
- Decree 104/2006/ND-CP of the Government dated September 22, 2006, guiding implementation of several provisions of the Intellectual Property Law in respect of plant varieties;
- Decree 105/2006/ND-CP of the Government dated September 22, 2006, guiding implementation of several provisions of the Intellectual Property Law in respect of protection of intellectual property rights and of State management in the field of intellectual property;
- Decree 106/2006/ND-CP of the Government dated September 22, 2006 on sanctions against administrative violations in the field of industrial property.

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;
- Hague Agreement Concerning the International Deposit of Industrial Designs;
- Trademark Law Treaty;
- Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure;
- Washington Treaty on Intellectual Property in Respect of Integrated Circuits;
- International Convention for the Protection of Plant Varieties;
- 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;
- 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

In order to provide adequate and effective protection and enforcement of IPRs, the BTA requires Vietnam to accede to the following additional Conventions:

- a) Geneva Convention for the protection of producers of phonograms against unauthorized duplication;
- b) Convention relating to the distribution of program-carrying signals transmitted by satellite.

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 IPRs and any benefits derived therefrom.

6.3 The TRIPS Agreement

To become a member of the WTO, Vietnam agreed that intellectual property matters will govern in accordance with the TRIPS Agreement. As a matter of interest we attach a copy of an Appendix, summarizing the content of the TRIPS Agreement.

6.4 Enforcement of IPRs in Vietnam

When the intellectual property rights (including patents) of an owner that is an entity are infringed, it can follow either administrative or judicial procedures in order to enforce its rights. Each procedure has its advantages and also its shortcomings. Please see discussion 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 letters to infringer.

Procedures for enforcement are as follows:

6.4.1 Administrative procedures

The State bodies involved in administrative procedures include:

The State bodies involved in administrative procedure 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 apply enforcement measures: to seize, confiscate or destroy infringing products. The MC can also impose administrative fines on infringers.
- Economic Police (“EP”) are under the Ministry of Public Security, and 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 intellectual property rights holder files with either 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 up to VND300,000,000, is imposed. Besides the principal penalty, and depending on the seriousness of the infringement, one or more additional penalties may be imposed: 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 act on a decision on infringement. Such decisions on infringement have been issued by the National Office of Intellectual Property (“NOIP”). However, after the effective date of the Intellectual Property Law (“IP Law”) from July 1, 2006, the NOIP no longer issues decisions on infringement. According to the IP Law, issuance of decisions on infringement is now made by independent licensed examination agencies. However, so far, regulations to show how to establish such an agency have not yet been issued. So far, the question on how to use administrative procedure to enforce intellectual property rights without the NOIP’s decisions on infringement, is still open. It is true that there are laboratories and testing centers to help determine infringement, but the rules on their role are now unclear. It may be that now the MOST is the authority which issues decisions on infringement.
- To follow administrative procedure, one cannot claim compensation for damages. Damages can only be determined by a court;
- Sanctions are not strict enough to prevent re-violation.

6.4.2 Civil procedures

If the problem cannot be solved by administrative procedures, an intellectual property right holder can bring the 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 intellectual property rights 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 solved, a hearing usually takes place about six months from the date the Court receives the complaint. During the intervening period, both parties submit their written arguments.

If the parties attend, 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 an official written judgment will be sent to the parties a few days later.

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 is final. 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.

Following civil procedures takes more time and effort than following administrative procedures; however, in most cases, 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 (now maybe the MOST) which is an administrative body. See our discussions of the current problems above. The initial response of this body will 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 IPRS holder for its damages.

6.4.3 Criminal procedures

6.4.3.1 Criminal liability for infringement

In serious cases, infringement of another's IPRs is subject to criminal liability. The Criminal Code includes two articles: one on infringement of copyrights, and one on infringement of other IPRs. According to these two new articles, and depending on the seriousness of the infringement, the infringer can be fined from VND20-200 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 from 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 from 2-7 years if the stolen goods are valued from VND50-200 million; from 7-15 years if the stolen goods are valued from VND200-500 million; and from 20 years to life if the stolen goods are valued from VND500 million and up.

Vietnam is very law-and-order conscious. 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 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 suspected goods. 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 prove ownership of the IPRs that have been infringed and that prove infringement. The IPR holder is also required to deposit an amount equal to 20% of the value of the suspected goods (if the IPRs have been infringed, the deposit will be returned). Customs will suspend its normal procedures 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 the 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 seriousness of the infringement, the provincial Customs Office can also impose additional penalties, such as seizure of the infringing goods or facilities; it can revoke an import-export license, destroy infringing articles which are harmful to health or detrimental to society, etc.

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, and, finally, low penalties.

6.4.5 Parallel imports in Vietnam

Parallel imports -- the importation of goods from a foreign market where the goods have been legally produced or distributed by the IP rights holders and/or lawful licensees -- are not considered to be an infringement of IPRs. Article 8.1.d of Circular 825/2000/TT-BKHCMNT dated May 3, 2000 states “parallel import is the importation of goods or products which contain elements under industrial property protection, from a source which is not supplied by the industrial property owner, but from a source which is supplied by the licensee, or the distribution recipient, or an affiliate, or a branch...and will not be considered a violation”.

6.5 Current attitudes and prospects

While Vietnamese law on the registration of IPRs is in conformity 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 make the war against counterfeiters, especially against small counterfeiters, ineffective. Small counterfeiters with small 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 IPR in respect of inventions, industrial designs and layout designs of integrated circuits have been increased from VND100,000,000 maximum to VND300,000,000 (Article 12 of the Governmental Decree 106/2006/ND-CP dated September 22, 2006). Also, there are signs of change. Articles 156, 157 of the revised Criminal Law which increase penalties for action of 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 as a well-known trademark, is to file a complaint with the NOIP, when its application for the mark is rejected based on a prior applied/registered mark. The complaint must be accompanied by several required documents or proof. If the complaint 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
For Chapter Six

APPENDIX 7

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"), 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.

PART 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.

The TRIPS Agreement would establish a Council for Trade-Related Aspects of Intellectual Property Rights to monitor the operation of the agreement and governments' compliance with it. 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. Developing countries and countries in the process of transformation from a centrally-planned into a market economy would have a five-year transition period, and least-developed countries would have 11 years. 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.