

National and International Business and Tax Law

Successful investing in Vietnam

Dr. Oliver Massmann's investment guide in Vietnam

**1st Book
THE BASICS**

**Dr. Oliver Massmann
International Attorney at Law**

**DUANE MORRIS
Hanoi**

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TO THE SIXTEENTH EDITION OF THE INVESTMENT GUIDE

The volume “The Basics” should offer you an initial step into the Vietnamese investment law and its different areas. Here, you will find various possibilities of overseas investments presented in the context of Vietnam’s investment policy, still the main focus is laid on direct investments. However, for the first time, possibilities of other economic activities will be presented. In addition to this general and basic information, more specific problems will be addressed in specialized books. So far, the Book 2 on Taxes and Customs can be ordered at:

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HONG KONG LIMITED

Hong Kong, 11 February 2010

To Whom It May Concern

My name is Thomas Domanski and I am heading the Vietnamese operations of Bauer HK, which is a member of German based Bauer Group and a subsidiary of MDax listed ultimate holding company Bauer AG, specializing in foundation engineering, machinery and related services. A considerable part of Bauer Group's corporate activities takes place in Asian countries, among them Vietnam.

While we try our utmost to avoid entering into legal proceedings to enforce contractual rights, this is – unfortunately – not always possible. In this regard, we would like to highlight our satisfaction with the highly professional services rendered by Mr. Oliver Massmann of Duane Morris LLC, Hanoi, who successfully represented Bauer in a Singapore (SIAC) based arbitration proceeding concerning a dispute about payment for construction works provided by Bauer in Vietnam.

We would like to note that Mr. Massmann's successful handling of the case significantly contrasts with the performance of a well established Vietnamese office of one of the biggest international law firms to which we assigned the handling of the dispute initially. Mr. Massmann's services combined thorough legal analysis with a strong commercial approach, leading to a timely and efficient resolution of the dispute at hand. In addition, we would also like to mention that our Vietnamese staff confirmed that they have not yet met a foreign lawyer with comparably proficient Vietnamese language skills and the ability to use them so well in negotiations. Mr. Massmann has all the necessary background capabilities to be a real problem solver. We regard him and Duane Morris LLC as an excellent choice for dispute resolution services and would not hesitate to entrust them with further work.

Best regards

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I am Andrew Meyer, CEO of Nine Dragons Group LLC. We have been actively involved in Vietnam Real Estate since 1999. We have gone through many lawyers and law firms, and were disappointed by all of them. Lack of knowledge of the laws, the differences between buying and selling in specific cities, very slow response time and poor client service.

Finally, we met Mr. Oliver Massmann. The first project we did with him was the same as working with our attorneys in NYC. He has a very strong knowledge of the laws, procedures and intricacies of Vietnam. Speaks the language fluently (a rarity) and is a consummate professional who responds to my requests very quickly.

We continue to work with Mr. Oliver Massmann and are thrilled to have an attorney who brings so much to the table working on our team.

I highly recommend Mr. Oliver Massmann and his firm, Duane Morris Vietnam LLC. Should you have any questions, please feel free to contract me at any time.

Andrew Meyer

CEO

INTRODUCTION OF NEW BOOKS

While designing this Investment Guide, the needs of both potential investors and investors already active in Vietnam were the highest priority. As in previous editions of the Investment Guide, also this time the focus is laid on providing the most important information connected with the various forms of investment and all economic and legal issues that must be taken into consideration. Due to the rapid development of Vietnam's economy and investments and the related abundance of new legal regulations in both areas, the Investment Guide has grown to a considerable size in the recent years. In order to provide a clear presentation of the huge amount of information and to visibly distinguish specialist fields which are important only to certain types of investors from basic information which is important in general to all investors, starting with the seventh edition we have split the Investment Guide into "The Basics", upon which subject a specific book is based. At your request, we will gladly send you the specialized volume.

"The Basics" and the specialized volumes

This first volume is the main book of the Investment Guide Vietnam. It deals with general legal and economic developments in the area of the Vietnamese investment law and offers a general overview of the most important forms of investment and their anchorage in Vietnam's law. However, specific economic and legal facts that must be taken into consideration by an investor as well as specific laws and treaties that must be observed are described in the specialized volumes which build upon the information presented in the main book. While in case of the main book no special legal knowledge is a prerequisite, it is advisable to possess basic legal knowledge to better understand the subject specific books. We would like to point out that while developing the concept of the specialized volumes we resigned of explaining fundamental legal terms and assumed the readers' well-established comprehension of the fundamentals.

Presentation of the specialized volume

2. Book: Taxes, Export & Import Law

The second of the seven-book series of the Investment Guide, and in particular its first and biggest part, is dedicated to the Vietnamese tax law. This chapter is especially interesting for an overseas investor, because already while choosing the legal form of an enterprise or investment a question arises what fiscal implications this would entail. Vietnam has an extensive tax system for investments. The second volume of the Investment Guide describes all tax types which are relevant to foreign investors and all important laws connected with it. It also explains both the bases and methods of taxation. In this context you should note that Germany and Vietnam signed the Double Tax Treaty to relieve double taxation. Moreover, special attention is paid to tax abatements and exemptions from various tax types which are available in case of certain investments and, thus, of great interest to investors. The second part of the book focuses on import and export law and, in particular, on import duties and controls imposed by the government in order to control external trade. It also deals with licensing requirements and outlines the various consents that are required for imports and exports.

MAP OF VIETNAM



Electricity production acc. to source	1996	1998	1999	2000	2001	2002	2005	2007	2008	2009	2013	2015	2017
fossil fuels	-	-	12.95 %	40.74%	-								
General data													
Population (in millions)	74.3	-	77.58	78.55	-	(Jun.-Jan.) ca. 81.1	82.39	84.2	85	86.25	89.76	91.7	95.45
Hydropower	-	-	7.05%	9.26%	-	-							
Country size (sq. km)	331.7												
Nuclear energy	-	-	-0.0%	-0.0%									
Life expectancy				69.10		69.86	M: 68 W: 72	M 68 W 74	M 71.3 W 71.7 74.3	74.7	75.5	75.85	n.a
Other													
Industries													
CO2 emissions(in metric t per capita)	0.626	0.593	0.618.			0.89	1.19		1.38		1.64	n.a	n.a
Industrial enterprises	20.5	4 -											
Power consumption_180.09 (kWh per capita)	-8	252.2											
commercial	431.9												
public	1,879	1,821	454,21 .786										
Power consumption (in kg oil per capita)	623,7	590,2	615.45 3										
non-public	10	46											
Telephone (per 1000 FIEs)	15.75 40	-881	26,795 9	31.8		49 landline 17 mobile	136lan dline 106 mobil e	187 323 mobil e 7.1% landlin e					
Industrial production growth rate population)			10.3%		10.4 %								
Computer (per 1000 inhabitants)	3.3	-	7.6	8.8	-	-	15	41					
Agricultural products (VND)	67.33	361.0	11.540	914.4	215.1	7.250	8.4% 26.0 billion growt h	8.5% 48.07 billion growt h	5.5% growth	8.19 % grow th			
Exports (in million US\$, information from 2005	0 272.0 3	16 9,365	399.94 2	48 444.1 3	00 484.4 9	5.9% 250.6 61							

Purchasing power (in billion US\$)	10.483-	10.350-	143,111.622	15.635 -	168,16.000	8.400+ -	31.5 billion	221.452.28	-	-			
Imports (in millions)	-	4.8	5.5	4.7	6.78								
Actual growth – US\$ 9.3)					4%								
Number of state-owned enterprises				5,800				887					
Purchasing power per capita (in US\$)		1,850		2,10033,12	+27.4								
Number of private enterprises				0						631			
Debt (foreign)			US\$ 7.3 billion Western					21.69 billion		Not purch. power adjust.			
GDP acc. to sectors (in billion VND)		4.5 billion CEM A, mainly countries; US\$ 101.7 Russia; US\$ 9 billion to 1859 billion											
Agriculture, forestry, fisheries_75,514	93.072	101.7	107.913		+5.0%								
Industrial sector 80,876	117.29.9	137.9	162.595		+13.9%		+17.1%						

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**Negotiations on the Free Trade Agreement between Vietnam and the European Union:
At this Rate Vietnam Will Kill the Goose that Lays the Golden Eggs – Vietnam Needs a Sound
Strategy**

By: Dr. Oliver Massmann, Partner, Duane Morris Vietnam LLC,

1. Brief Historic Overview/Lessons Learned from the Past

Since the mid 1990s, Vietnam is engaged in international trade. The US embargo on Vietnam was lifted in 1994 and Vietnam joined the Association of South East Asian Nations (ASEAN) and subscribed to the ASEAN Free Trade Area (AFTA), including the Common Effective Preferential Tariff (CEPT) arrangements, in July 1995. During the same year, Vietnam signed the Framework Agreement on Partnership and Cooperation with the EU. However, the most important steps towards international trade relations so far were taken with the Bilateral Trade Agreement (BTA) with the US signed in 1999 and Vietnam's accession to the WTO in 2007.

To understand the trade negotiations between Vietnam and the EU concerning the Free Trade Agreement (FTA) and to develop a sound strategy, one has to have a look at the BTA and the WTO accession to avoid mistakes that have been made.

Consequently, the core points of the BTA and the WTO accession will be illustrated and the problems will be identified, before having a closer look at the negotiation process and the upcoming issues in relation to the FTA. The article will end with a final conclusion, providing some hypothetical advice for further negotiations addressed to Vietnamese negotiators.

a. BTA US - Vietnam

The US and Vietnam negotiated and concluded the BTA in 1999 and finally implemented it in 2001. It consists of over 100 pages of text, statistics and tables covering obligations on trade in goods, intellectual property rights, trade in services, development of investment relations, business facilitation and transparency. Clearly the Agreement covers a wide range of aspects and is complicated and comprehensive. Nevertheless, the Agreement was not only beneficial for the US in terms of concessions it was also an important step towards the WTO membership of Vietnam, although it did not cover all the WTO bilateral agreements with the US as the Vietnamese authorities anticipated. According to a study of Nguyen Quy Binh, the BTA was important to the Vietnamese for the following reasons: (1) It opened the US market for Vietnamese exports; (2) the BTA was a step towards the WTO accession; (3) it created more business opportunities; and (4) it signified that Vietnam's commitment to international rules.

It is important to mention the fact that the US benefited a lot from the BTA partly because of the massive post-signing implementation effort they did (e.g. STAR program). One should keep this in mind when assessing the aftermath of the WTO accession.

From an economical point of view, the BTA was a huge success and very important for Vietnam. From 2001 to 2005, the bilateral trade between the US and Vietnam increased tremendously from USD 1.4 billion to over USD 7.6 billion. The imports of products from Vietnam into the US increased from around USD 1 billion to over USD 6.5 billion over this period. US Foreign direct investment (FDI) increased by an average of 27% from 2002 to 2004.

b. WTO Accession

On 11 January 2007 Vietnam joined the World Trade Organization (WTO), becoming its 150th member. The accession process began in 1995 and within the following 11 years, 14 different multilateral and more than 40 different bilateral negotiations have been held. Vietnam paid a relatively high entrance fee in terms of WTO Plus obligations and special commitments in comparison to the founding members of the WTO, since Vietnam joined as a developing country with no market economy. However, another remarkable reason for Vietnam's high entrance fee is the fact, that Vietnam joined the WTO right after China, which had to deal with the same fees, but could offer greater economic power/potential.

Unfortunately Vietnam tries to change the terms of accession through sluggish implementation. Such bad practices are exchanged within the ASEAN community. Vietnamese authorities admit that they were naive to accept the terms of accession when joining, so now try to learn from other countries in the region how to evade the obligations and enforcement. Another reason for this behavior might be that Vietnam was forced to make law changes prior to its accession. Vietnam felt "hard done by" as a result of the pressure of the WTO members and dragged its feet even more implementing later.

On paper, Vietnam's concessions for market access liberalization is outstanding compared to other countries in the region. This is illustrated by the analyses below, where we compared the WTO commitments of Vietnam with other countries in the region. The different colors represent the restrictions of market access in the relevant country. Green stands for weak and very few limitations and red for extensive limitations while yellow stands for moderate restriction. The typical indicators are e.g. the number of open sectors, Joint Ventures requirements, limits on foreign owned shares and permission requirements.

Being the 150th member of the WTO, all eyes were on Vietnam at the time and the world acknowledged Vietnam's extensive WTO commitments together with its market access liberalization.

Unfortunately, Vietnam did not meet expectations, since they tried to evade the implementation of the otherwise very promising WTO commitments. Initially foreign investors expected Vietnam to implement and thus liberalize its market, but soon realized that there were still protectionist thoughts within Vietnam. Naturally, investors were reluctant to funnel money into the Vietnamese economy. Hence, the Vietnamese authorities almost killed the goose that lays golden eggs called FDI, when they refrained from market liberalization, because they thought their domestic market was a self sustaining gold mine.

c. WTO Agreement on Government Procurement

The Agreement on Government Procurement (GPA) is a multilateral agreement within the WTO legal system. A WTO Member will not automatically become a member of the GPA when joining the WTO. Vietnam did not sign the agreement yet. The concept of the agreement is based on transparency, openness and non-discrimination as is the whole WTO system. By signing the GPA a country accredits its commitment to an open and transparent procurement market. This attracts foreign direct investment and avoids the constraining effects of protectionism. It also opens up a whole new market for foreign companies and guarantees a fair procurement procedure. That way Vietnam can get rid of the influence of corrupt Chinese companies and prevent accidents like the collapse of the Can Tho bridge, with death tolls of about 59 persons and 140 injured.

Vietnamese authorities are aware of the importance of the agreement. The MPI even held a conference in 2011 in Hanoi dealing with exactly this topic. Vietnam should consider signing this agreement as soon as possible since it would appease the minds of foreign investors. Apart from that, a smooth negotiation in this regard and a fast signing would be a good signal to the EU, showing that

Vietnam is willing to adhere to international trading rules. Hence, signing the GPA would enlarge Vietnam's international credibility. It is also very likely that the EU diplomats will demand that Vietnam signs the GPA as a condition to conclude the FTA.

Finally Vietnam would benefit from the GPA in various ways hence the Agreement should be signed as soon as possible.

For now, Vietnam is an WTO member with an observer status in the GPA Committee. As an observer member, Vietnam is trying its best to become rapidly a GPA member.

2. Relations Between Vietnam and EU

Vietnam is the EU's fifth largest trading partner within the ASEAN and the 35th out of the EU's total trade. The ASEAN countries together are the 3rd largest trading partner of the EU. In 2010 the EU was Vietnam's 3rd largest trading partner, only after China and the US. The EU is Vietnam's biggest source of development assistance in grants, a large export market and one of its biggest sources of committed foreign direct investment. In 2013, EU investors committed a total 656 million USD in foreign direct investment. In 2011, the EU's exports (goods) to Vietnam amounted to 5.2 billion USD and the EU's imports to 12.8 USD. Important to mention is that the EU exports are dominated by high tech products (including electrical machinery and equipment, aircraft, vehicles, pharmaceutical products and iron and steel). In 2010 the EU and Vietnam concluded a Partnership Cooperation Agreement, which was meant to be the first step towards a Free Trade Agreement and to enhance the political and economic relationship.

In 2016, the EU's exports (goods) to Vietnam amounted to 9.330 billion euros and EU's imports to 33.078 billions euros

a. Negotiations Between Vietnam and EU

On 26 June 2012 the EU Trade Commissioner, Karel De Gucht, and the Vietnamese Minister of Industry and Trade, Vu Huy Hoang, officially launched negotiations for a Free Trade Agreement (FTA) between the EU and Vietnam. "I'm delighted to announce the opening of trade negotiations with Vietnam. The potential for both sides is enormous and the first negotiating round should take place just after the summer break", said EU Trade Commissioner De Gucht.

The scoping process was concluded in February 2012 after a period of almost 2 years. In this preliminary phase (scoping) an agreement was reached for swift negotiations (2 to 3 years) for an ambitious FTA, liberalizing a major part (90%) of trade within 7 years.

"On 1 February 2016, the [text of the EU-Vietnam free trade agreement](#) was published, following the announcement of the [conclusion of the negotiations](#).

The legal review of the negotiated text is currently on going and will be followed by translation into the EU's official languages and Vietnamese. The Commission will then present a proposal to the Council of Ministers for approval of the agreement and ratification by the European Parliament."

b. The FTA - Topics and Subjects

The aim of the FTA is to boost bilateral trade and resolve trade issues between the two parties. The EU will reduce its import tariffs and seek certain concession from Vietnam. Negotiations covered trade related subjects such as goods, rule of origin, customs, trade facilitation, trade remedies, technical barriers to trade, sanitary and phytosanitary standards, services, investment, intellectual property, public procurement, competition, sustainable development.

Following the negotiations, the agreed text in January 2016 focuses on national treatment and market access for goods, but also trade remedies, trade facilitation, technical barriers to trade, sanitary and phytosanitary standards, services, investment, e-commerce, intellectual property, public procurement, competition and sustainable development.

On this agreed text, the EU Trade Commissioner Cecilia Malmstrom said: *"I am glad that we now publish this agreement in line with our strong commitment to a transparent trade policy (...) When approved (...) the agreement will unlock a market with huge potential for EU firms. Vietnam is a fast-growing economy of more than 90 million consumers with a growing middle class and a young and dynamic workforce. Its market offers numerous opportunities for the EU's agricultural, industrial and services exports. The agreement will also help trigger a new wave of high quality investment in both directions, supported by our new investment dispute resolution system with an appeal mechanism."*

3. "Same Same But Different"

Having in mind the above painted picture, two questions arise: 1) Will the FTA have the same boosting effects on the Vietnamese economy as the BTA did; and 2) will the same problems concerning the implementation of the FTA as those mentioned in relation to the WTO accession.

a. Will the FTA Have the Same Boosting Effects as the BTA?

The BTA and the WTO accession already had a boosting effect on the Vietnamese economy and thus it is improbable that the FTA will have the same boosting effect. However, this does not mean that there will be no boosting effect at all. It is hard to predict the effect of the agreement since the economy in Europe has its own problems at the moment. Nevertheless, a good FTA could definitely attract investment from Europe and trigger trade with the EU, but Vietnam's hopes should not be too high. It is not possible to compare the effect the BTA had with the one the FTA might have, since the BTA was the most important trade Agreement after Vietnam opened its market. Hence it is not surprising, that the BTA had an enormous boosting effect.

The situation at the moment on the other hand is completely different since Vietnam already opened its market and joined the WTO. Thus, the opportunity to grow is not as big as it was more than 10 years ago. However, the EU is still interested in accessing the Vietnamese market. Due to the fact, that the EU wants to be a trading partner of Vietnam on a similar level as the US, it is very likely that the boosting effect of a mutually beneficial agreement will take effect.

b. Will the FTA Face the Same Implementation-Problems?

The same problems concerning a reliable prediction arise when asking if there will be the same implementation problems. Hence, it is more reasonable to point out to the Vietnamese Government, that if the same problems occur, the boosting effect will be inhibited. The economic potential of a FTA between Vietnam and the EU will vanish the same way expectations will vanish that Vietnam is fully committed to international trading rules.

This would be the worst thing that could happen, since it would not only slow down the potential boosting effect of the FTA, it would also affect international trade relations with other nations since Vietnam will lose credibility.

The Vietnamese authorities should keep the consequences of bad practice in mind, when negotiating the agreement. A protectionist aftermath, similar to the one after the WTO accession would be very

harmful for the Vietnamese economy. Thus, once again, the Government would kill the golden egg laying goose, called FDI and international trade.

4. A Mutual Beneficial Agreement?

One of the core questions when it comes to FTA negotiations between Vietnam and the EU is who needs whom?

a. Does Europe need Vietnam?

The first alternative of this question would be: Does Europe need Vietnam. From a European prospective one could argue: no, the EU does not need Vietnam. Despite the problems within the EU its economy is strong and powerful, with trade relations to all parts of the world. There is no urgent need to engage trade relations with a non-marked or transitional market economy like Vietnam.

However, this perception is too short sighted and a biased. The FTA between the EU and ASEAN will allow a full liberalization of services.

Hence, the member states of the EU will have full access to all ASEAN markets. As a developing country, Vietnam will be granted a grace period and must therefore open its markets only until 2023. Consequently, Vietnam will benefit from the open markets (free trade zone) without being obliged to open up their own markets until the end of the grace period in 2023. In December 2009, EU Member States gave the green light for the European Commission to pursue negotiations towards Free Trade Agreements with individual ASEAN countries.

Negotiations with Singapore and Malaysia began in March 2010 and October 2010 respectively. Vietnam is the third partner of the EU in the ASEAN region with whom the EU has a free trade agreement.

On 1 February 2016, the [text of the EU-Vietnam free trade agreement](#) was published, following the announcement of the [conclusion of the negotiations](#). The legal review of the negotiated text is currently on going.

While pursuing a bilateral approach, the EU is not losing sight of the ultimate goal of achieving an agreement with ASEAN as a whole, one of the most dynamic regions in the world.¹

Despite this upcoming FTA, the EU needs a foothold in ASEAN prior to the signing of the FTA between ASEAN and the EU. Thus, the fact that the EU needs a foothold in ASEAN is a reason why the EU needs Vietnam and this shows why the above made statement is too short sighted.

b. Does Vietnam Need Europe?

Although the EU needs Vietnam, it is obvious that Vietnam needs the EU even more.

The first reason is, the EU is one of the largest investors in Vietnam with an investment volume around 1.8 billion US. This represents more than 12% of the total committed FDI in 2011. These figures indicate that the EU is very important for Vietnam in terms of investment and it is very likely that the trade relations and investment opportunities between the two parties will extend after the FTA is signed. However, this will only be the case if the commitments are mutually beneficial and will be implemented properly.

¹ EC Press Release 26 June 2012

The second reason why Vietnam needs the EU is, because Vietnam approaches the so called “middle income trap”. Vietnam’s advantage in international trade is cheap labor, but in the course of becoming an industrialized country, living in Vietnam is becoming more expensive and thus the labor costs increase. This kills Vietnam’s advantage of cheap labor. Vietnam has to compete with countries like Cambodia and Burma and they do not only have cheap labor, they are also granted “everything but arms” status (EBA). The status is granted to least-developed countries (LDCs) by the EU, with the effect that all imports into the EU from these countries are duty and quota free. Those benefits are not granted to Vietnam. Thus, it is very hard to compete with these countries without having a special trade agreement with the EU. The FTA would level the playing field with the LDCs.

The third reason is the reform of the generalized system of preference (GSP). The GSP is a formal system of exemptions from general WTO commitments and obligations. In the course of the reform, the maximum average annual income per capita will be fixed at USD 4000 per year to obtain GSP. When a country exceeds this average income, it will be excluded from the GSP. This will happen to Thailand. Vietnam is approaching this level, but it has not reached it yet. The consequence of Thailand being excluded from the GSP and Vietnam still being part of the GSP is not beneficial as it might seem at a first glance. More precisely, the exclusion of Thailand will have negative effects on Vietnam in terms of graduation. Graduation is the temporary exclusion from the GSP when a country monopolizes in a preferable import sector. When Thailand is permanently excluded from the GSP, the chance for Vietnam to be graduated becomes higher, since both countries produce and export the same goods. The consequence would be that Vietnam has to compete with other countries which are benefiting from the GSP without benefiting itself. This is a hard task and thus Vietnam needs another “joker” - a “joker” called FTA. This would protect Vietnam’s market access on a permanent contractual basis.

5. Conclusion

This study clarifies that Vietnam needs the FTA and the EU to compete with other countries in its region. It also indicates that Vietnam made mistakes in the aftermath of its WTO accession not implementing all its WTO commitments. This almost killed all the accession benefits. Furthermore, it was elaborated that the BTA had a boosting effect on the trade relations of the US and Vietnam and that a boosting effect after the FTA can be expected. However, this effect will not be as significant as the one of the BTA since Vietnam is already a member of the WTO.

In summary one can say that Vietnam has to draw its lessons from the former trade negotiations (BTA and WTO accession).

The FTA is a big chance for Vietnam to attract more FDI and to engage trade, with the consequence that the whole country will benefit.

If we had to draft a sound strategy for Vietnam’s diplomats, we would advise them to:

- a. Not miss the chance to gain FDI again;
- b. Use the publicity and attention to attract investors;
- c. Preserve the present market and secure the access to this sector (e.g. textile);
- d. Adapt to new challenges - the textile market is not granted for ever;
- e. Do not solely rely on the advantage of cheap labor;
- f. Try to give the EU what they ask for to access their market - Vietnam needs the EU;
- g. Sign the GPA as soon as possible;
- h. Stick to your promises - implement what you have signed; and finally

- i. Do not kill the egg laying goose called FDI by using protectionist measures as you did in the aftermath of your WTO accession!

ANNUAL ECONOMIC REPORT VIETNAM 2009

German Embassy Hanoi, in January 2010 by Holger Seubert, edited by Dr. Oliver Massmann
(Report period January through December 2009)

I. Economic structure, economic situation

1. A brief characterization

The Vietnamese “economic miracle” began in 1986 as the country, severely suffering from war consequences and destruction and being on the verge of economic collapse, started its open-door policy (called 'Doi Moi') and entered the path towards ‘socialistic market economy’. Over the course of the following two years, the country experienced a fulminant economic recovery with growth rates exceeding 8%. After a short stance by the end of the 1990s (Asian recession 1997/98), Vietnam again had to face limits to its growth in 2008: Unlimited capital inflows resulted in overheated economy which reflected, among others, in hyperinflation (food prices +40%). The Government's package of measures which stipulated restrictive monetary policy, budget discipline and a flexible exchange rate regime proved to be an effective tool to prevent the Vietnamese national economy from an enduring macroeconomic imbalance. The 2008 economic overheating was followed by a year of stagnation in 2009. In the course of the crisis, very hesitant foreign investors and traders gave Vietnam a hard time in this period. The decline of exports (-12% as compared to 2008) and foreign direct investments (-17%) put a strain to the Vietnamese economy which largely depended on exports and investments. Considering this, the growth of 5,32% in 2009 can be rated as respectable – a higher growth in Asia in 2009 was achieved only by China. This growth is due - in no small part - to the Government's abundant economic stimulus package (in total 8 billion US-Dollars that equal 8,5% of the Vietnamese Gross Domestic Product) which showed tangible results in 2009. The Government has set the growth target at 6,5% in 2010. However, there are still significant macroeconomic risks in 2010, analysts warn that, due to a strong regulatory and fiscal interference of the state, the small and vulnerable Vietnamese economy might become unable to cope. The recovery might then be followed by a new imbalance with far-reaching impact on prices, trade balance, employment and monetary stability.

2. Economic structure

Since its accession to the World Trade Organization (11.01.2007), Vietnam is considered to be one of the world's most open economies. The export economy is responsible for ca. ¾ of the Vietnamese GDP. Measured by employment, Vietnam remains an **agrarian country**: The agriculture accounts for around 21% of the GDP, still 65% of the labor force work in this sector, though. The **industry** sector, just as the **services** sector, contribute nearly 40% to the GDP with the textile, footwear, steel, cement and automotive assembly sectors particularly developed. Vietnam's numerous private small enterprises are regarded as totally uncompetitive on the international market, which impairs foreign investors' interest in Joint Ventures. The most significant weakness lies in the thin capital base of most companies.

Excursus: “Equitisation²” of the state-owned enterprises

State-owned Enterprises (SoEs) make up a substantial part of Vietnam’s economy: Although one fourth of these companies are in the red, they generate 40% of the industrial output and are responsible for 35% of exports. The privatization of ca. 6.000 at that time state-owned companies was launched in May 1990 with a decree issued by the Prime Minister, over 3000 SOEs (mostly small ones) have been “equitized” by now. The Government will obviously miss the target set in “The Law on Enterprises” passed in 2006, which stipulates that by the end of 2010 the process of SOEs equitization will be largely completed. SOEs’ poor operational results are salient – according to a Report by the Ministry of Planning, these enterprises invest only some 60% in their traditional business areas, 40% of their investments are poured into non core-business areas in which they have no expertise. Big SOEs are to a great extent involved in credit-financed real estate projects and speculative shares trading – against this backdrop it is no surprise that they operate in the red and have a high share of bad loans. On the average, the State’s share in the already reformed enterprises amounts to 70% and only 30% of the shares are not controlled by the State. The Government allows for a real (100%) privatization only in case of small companies. Enterprises which operate in sensitive business areas (Defense, Media etc.) remain 100% controlled by the State. Moreover, the State has – and uses - the possibility of indirect control over equitized companies through appointing former or active state officials to supervisory boards. Foreign investors’ interest in such “reformed companies” naturally remains low. In the crisis year of 2009, the process of equitization, which dramatically slowed down already in 2008, nearly came to a deadlock. The gap between issuing prices proposed by the Government and the company value (low stock prices) is now simply too big.

3. Economic climate

Vietnam has overcome the crisis more lightly than other countries – the sharp decline of economic growth could be cushioned thanks to a determined governance. In 2009, the Vietnamese economy grew by 5,32% (previous year 6,18%³) which, considering the prevailing circumstances, can be regarded as significant. This is in no small part due to the economic stimulus plan: the Vietnamese Government provided a total of 8 billion USD (equaling 10% of the GDP) in order to support the national economy. The package included:

- interest-subsidized loans for small and medium-sized enterprises
- support for poorer income groups (interest-free loans, program for boosting agricultural production)
- stimulation of private consumption through increasing minimum wages and tax incentives (reduction of VAT on pivotal consumer goods, decrease of personal income tax and vehicle tax)
- a program for infrastructure focused on traffic/transport, health and social house building.

International observers’ heap praise on the successful Vietnamese crisis management, however they also raise voices of concern about the **growing national deficit** accompanied by recurring risk of inflation. Facing this, the Government announced to put limits to the Subsidized Credit Program and, as of 2010, to grant loans with subsidized interest for investments in the rural area and to export-oriented enterprises. The **inflation rate** (core inflation⁴) hit a 17-year-peak surging to 22,97% and was by far the highest in the entire Asia. Due to immediate action taken by the Government by the beginning of 2008 (systematic cutting state expenditure, restrictive monetary policy, flexible exchange rate) the rate of price increase could be considerably reduced in 2009. According to official Statistics,

² Equitization: transferring the ownership of state-owned companies or their parts, by way of sale or issuing share certificates

³ According to the General Statistics Office

⁴ Defined as price growth excluding food and energy

the rate stayed at 6,52% throughout the year – which is still a relatively high level in a recession year and well above the regional average. The interest-subsidized loans included in the stimulus package showed their downside. While prestigious international institutions have warned that Vietnam's inflation rate would be high again in 2012, domestic economists disagree. The EIU of The Economist in its May's report on the global economic prospect predicts that Vietnam's inflation rate in 2012 would be 13.8% while the World Bank forecasts the same with 10.15% to 9%. However, an economic research centre belonging to the Hanoi National University has affirmed in its report about the economic prospect in 2012 that the inflation rate would be abnormally low this year. In the most pessimistic scenario drawn up by the centre's economists, the inflation rate would be 6.2%. **The Gross Domestic Product (GDP)** of the 85,8-million nation⁵ amounted to 94 billion USD in the previous year. Therefrom calculated **Per Capita Income** equals **1.095 USD**. With this, Vietnam made a step toward becoming a 'middle-income country'⁶. The city-country divide remains big, the per capita income in the southern metropolis Ho-Chi-Minh City is nearly twice as high as the country average. Since the informal sector is not included, the official data on unemployment in Vietnam is hardly reliable: according to official statistics, unemployment rate in the cities stands at 5% and in the country at 2%. The real figures might be, especially in rural areas, far above it.

4. Openness towards the world economy

4.1 International integration

Since January 2007 Vietnam is **WTO's** 150th member. The country committed itself to non-discrimination, transparency (SEOs inclusive), removing trade barriers and quotas as well as to protection of intellectual property. The WTO-accession should be regarded as a political sign and a clear change of direction of economic policy with which Vietnam made a great headway towards international integration. Moreover, Vietnam is a member of all important world's economic organizations, among them the World Bank, International Monetary Fund, ASEAN (Association of South East Asian Nations), AFTA (Asia Free Trade Area), APEC (Asia Pacific Economic Conference) and the World Customs Organization (WCO). Vietnam plays a more and more active role in ASEAN, an economic zone with a total population of 560 mln (more than EU-27) generating a yearly GDP of over 800 billion USD. The 10 members of ASEAN – Vietnam, Laos, Cambodia, Thailand, Indonesia, Malaysia, Singapore, Philippines, Brunei and Myanmar agreed to resolutely pursue regional integration. By 2015 the "Asean Economic Community" should be established with a goal to create a EU-style common economic zone. In the face of the strengthening international competition for international investments, ASEAN's primary target is to remain competitive and emancipate from China. As of January 1, 2010 Vietnam has taken the rotating ASEAN-presidency for one year.

4.2 Relations with the EU

Vietnam's exports to the EU considerably surpass the imports, thus the European-Vietnamese trade relations have a positive impact on the –overall adverse – Vietnamese trade balance. In 2009, the EU was third largest trading partner after China and Japan, at about the same level as the USA. Nevertheless, without prompt signing of a **free trade agreement** between the EU and ASEAN or the EU and the particular ASEAN members (at the time being all signs are pointing to the latter – the negotiations on the regional agreement hit a deadlock in 2009) the EU might not be able to keep pace with other competitors in the region. A prerequisite for a bilateral free trade agreement is a Partnership and cooperation agreement (PCA), which both parties hope to sign in 2010. In 2006, the EU imposed anti-dumping duty on footwear imported from Vietnam. The Vietnamese Government perceives it as an unfair attempt to foreclose the EU-market and strongly advocates

⁵ General Statistics Office, 2009 Population and Housing Census, published 31.12.2009

⁶ The World Bank defines 'middle-income countries' as countries with a per-capita income of 1.000-10.000 \$.

abolishing it. After the EU-Commission had launched a review of the anti-dumping measure in October 2008, the majority of the EU-member states decided to extend the anti-dumping duties by another 15 months (for the last time, as Germany understood it). Vietnam also urges on a prompt granting of the **Market Economy Status** which is important in regard to the EU's anti-dumping and anti-subsidy measures. The EU-Commission produced a "Preliminary Assessment of Vietnam's Request for Graduation to Market Economy Status" which attests Vietnam's progress but also quite rightly sees much room for improvement in many areas (among others: state-owned companies, protection of intellectual property, finance system). In 2009, numerous consultation rounds between the EU Commission and the Vietnamese Government took place – nevertheless, the decision should not be expected shortly.

4.3. Germany's trading partner

In 2009, Germany could strengthen its position as Vietnam's largest EU-trading partner: Despite the economic crisis the **trade volume** reached **4,6 billion USD** (3,3 billion Euro) - a substantial increase over the previous year (just over USD 4 billion). Again the bilateral trade showed a surplus on Vietnam's side: Vietnam exported goods worth a total of 3,2 billion USD to Germany in 2009, and vice versa, the value of German products imported to Vietnam amounted to merely 1,4 billion USD. The most important Vietnamese products exported to Germany are footwear, textiles, agricultural products (especially coffee and pepper) and sea fruit. Germany is the world's second market for Vietnamese Robusta coffee (after Belgium) and black pepper (after the USA). Vietnam's principal imports from Germany are machines and equipment. Vietnam announced its goal to become an industrialized country by 2010. The trend for higher quality equipment spreads also in Vietnam, which should translate into growing demand for "made in Germany" machinery. The Delegation of the Association of Chambers of Industry and Commerce (DIHK) with offices in Hanoi and Ho Chi Minh City is headed by the Representative of German Industry and Trade. The Chamber is located in Ho Chi Minh City in premises shared with the German Business Association, in which more than 150 German companies are organized. A correspondent of Germany Trade and Invest (GTAI, formerly the Federal Office for Foreign Trade, bfai) has been working in Hanoi since 2008, which means that German foreign trade promotion is well positioned in Vietnam.

4.4 Foreign investments

In Vietnam, investments are currently governed by two laws: **The Law on Enterprises** and the **Law on Investments** - both effective since 2006. On 26 November 2014, the National Assembly of Vietnam has passed the new Law on Enterprises and the new Law on Investments, both will replace the old laws and take effect from 01 July 2015. The implementing documents are still pending. Although licensing procedures for new investors are still relatively time consuming, it should be noted that the legislative leads the way in the right direction: The broadly equal treatment of domestic and foreign investors, cutting red tape, better access to land use rights and the possibility of establishing subsidiaries are concessions which prove Vietnam's adherence to the policy of economic openness and a continuously improving investment environment. In 2009, **7.5 billion USD** in **foreign direct investments (FDI)** could flow into Vietnam, which was down on previous year by 1.5 billion USD. A large portion of foreign investments are located in the 1-million urban agglomeration of Ho Chi Minh City: in 2009 60% of Vietnam's FDI flew into the HCMC Metropolitan Region. In the face of many multi-billion worth projects, particularly in the area of infrastructure, which the Vietnamese Government could not shoulder without the involvement of foreign investors in economic tough times as they are today, the need of FDI-flows is huge. It will be important for Vietnam to enhance its attractiveness to foreign investors. The most urgent homework that has to be done includes development of traffic infrastructure, prompt implementation of legal regulations (which, on paper, are very investor friendly), addressing the lack of educated labor force (skilled workers, middle management) and eliminate bureaucracy and corruption. The Vietnamese Government has announced to incorporate

more **environmental aspects** into the FDI-licensing procedure. The Law on Environmental Protection passed in 2006 was 2008 followed by a decree guiding its implementation – in the future, projects on building hotels/resorts with more than 100 rooms, 18-hole-golf fields, hospitals with 50 beds or more and all investment projects in coastal areas will be subject to special environmental requirements. These requirements are robustly enforced, as these two examples show: The proposal by South Korea's Posco Group to build a steel mill (investment volume of 5.4 billion USD) near a coastal resort was rejected by the Ministry of Planning and Investment. The Taiwanese condiment company Vedan had to pay 7.7 mln. USD to 8,000 Vietnamese fishermen and farmers as compensation for illegal pumping wastewater into a river. The **comparison of FDI providing countries** puts Taiwan in the first place, followed by South Korea, Malaysia, Japan and Singapore. The majority of investments flow into the heavy industry, followed by urban development and hotels/tourism. **German Direct Investments** remind far below (Vietnamese) expectations. According to the official Vietnamese investment statistics, Germany only ranked 23rd in 2009. However, the statistics refers exclusively to real capital flows – because, for tax reasons, investments are not always made by parent companies but channeled through corporate structures, the informative value of the statistics is limited. Neither new investments of B. Braun Melsungen (a total of 50 mln USD) which are conducted through Malaysia nor investments made by Mercedes (through its regional headquarter in Singapore) and the wholesale chain Metro, Cash & Carry (Netherlands) are classified as German. This also explains why, according to the Vietnamese statistics, the Cayman Islands and Samoa are significantly more keen to invest than Germany. Nonetheless, also an adjusted statistics would also place Germany behind other European countries (UK, France) – a reason enough for the Vietnamese government representatives to raise this issue at every available opportunity during a German guest's visit. Against the background of the pending privatization, following areas are particularly attractive for German investors to engage their capital in: telecommunication, the processing industry, retail trade, infrastructure and renewable energy (see below). Currently, the biggest investment project with German involvement is the Ho Chi Minh City metro project. Another project– the building of a new Vietnamese Assembly House led by the German architectural office Gerkan, Marg and Partners, is also publicly visible. The foundation stone was laid in October 2009. The area of '**Human Resources**' in Vietnam has been increasingly considered as a hurdle to investments: Investors from all over the world complain that the supply of qualified labor force does not meet the demand by far. This applies to skilled workers as well as middle and upper management, where the supply has been unable to keep up with demand since long. From time to time, investors must engage skilled workers and managers from the neighbor countries (Philippines, Thailand, Malaysia). At least, the Government, under great pressure of international trade chambers (EuroCham, AmCham, AusCham), eventually scraped the regulation limiting the proportion of foreign workers in the total workforce of one employer to max. 3%. It would be desirable, if German companies showed stronger engagement in the area of labor force education and thus supported the Federal Government in its efforts (vocational education is one of the core areas of German-Vietnamese development cooperation). In 2008, on the initiative of the German Government a **National Manager Training Program** financed by the German Ministry of Economy was launched.

Excursus: Forms of investment in Vietnam

Foreign investors may choose from the following forms of investment in Vietnam:

- **Economic entity establishment;**
- **Business cooperation contract;** a contractual arrangement between two or more investors without creating a legal entity;
- **Public-Private Partnership;** a contractual agreement between competent state authorities and investors, an enterprise project in order to implement an investment project;
- **purchase of shares** or capital contribution.

-Enterprise forms under Vietnam's law:

- **Representative Office:** represents the parent company, no actual business operations. A suitable tool for market research;
- **Branch:** a branch of a foreign company permitted to conduct commercial activities;
- **Shareholding Company:** similar to the German;
- **Limited liability company:** members are liable to the extent of their capital contributed
- **Partnership:** established between two or more partners;
- **Business Cooperation Contract:** an agreement without constituting a legal entity and each party is individually responsible for paying taxes.

5. Economic development

In 2009, both exports (-12% in terms of value) and imports (-17%) registered a sharp decline.

5.1 Exports

Vietnam's economy is to a high extent dependent on exports which make up nearly 75% of the country's GDP. For the first time since the beginning of the economic reform (1986), Vietnam's exports revenue shrank in 2009, when Vietnam exported goods worth a total of ca. **56.6 billion USD**, a 12% decrease on previous year. In terms of volumes, the Vietnamese export economy performed creditably well in 2009: important export products such as rice (+40) and crude oil (+15) reported significant increases in volume in 2009. The fall of prices on world markets, however, resulted in the fact that despite increasing volume of central export product, Vietnam had to suffer losses in 2009. The USA could strengthen their role as the key market for Vietnamese exports in 2009, when nearly one fifth of the Vietnamese exports were delivered there. Next up are the European Union and Japan. Vietnam's key export goods include crude oil, textiles, footwear, rice, coffee and sea fruit. Vietnam remains the world leader in export of black pepper, cashew nuts and natural rubber.

5.2 Imports

Imports decreased even more than exports in 2009, the total volume reached **68.8 billion USD** (as compared to nearly 80 billion USD in previous year). The main origins of Vietnam's imports are traditionally Asian countries with China being the leader by a huge margin, followed by Singapore, Taiwan and Japan. The main import products are machines (incl. equipment) and oil products – the latter are decreasing due to developing Vietnam's own refining capacity.

Excursus: Oil refineries in Vietnam

Following a 44-month construction phase, Vietnam's first oil refinery in Dung Quat (middle Vietnam) with a capacity of 140,000 barrel per day was opened in February 2009. The Dung Quat Project was conducted by the State-owned company PetroVietnam and involved limited foreign participation. The main contractor was the French company Technip S.A., which subcontracted enterprises from Vietnam, Singapore, Japan and Holland. The investment volume of Dung Quat amounted to 3 billion USD. The second Vietnamese oil refinery located in Thanh Hoa Province in North Vietnam is currently under construction. Its capacity is planned at 200,000 bpd. While 25.1% of shares belong to PetroVietnam, the Japan Idemitsu Kosan Co. and the Kuwaiti Petroleum International hold a 35.1% stake each. The 6-billion-USD-worth project is co-financed by the Japan Bank for International Cooperation. Plans of building another three refineries by 2015 are currently discussed between PetroVietnam and investors from Thailand, UK, Russia, Singapore and Venezuela. Investment volumes range from 1.5 to 3.7 billion USD.

As imports declined far more than exports in 2009, Vietnam's **trade balance deficit**⁷ decreased: After it had reached nearly 17 billion USD in the previous year, it went down to some 12.2 billion USD in 2009. And respectively, Vietnam's **current account deficit**⁸ shrunk in the reference period and now, according to the IWF forecast, amounts to 9.7% (13% in previous year) of the country's USD 94 billion GDP. The deficit is financed by FDI flows, developmental aid flows and remittances of overseas Vietnamese. The latter really impressive: 3.5 million Vietnamese living abroad (called 'Viet Kieu') sent 6 billion USD to Vietnam in 2009 - although it must be taken into consideration that the above figures cover exclusively declared capital transfers and, beyond that, a hard-to-estimate amount of cash flowed into Vietnam. Considering all this, Vietnam's current account situation may be regarded as safe.

II. Economic policy

1. Fiscal policy

As a result of the economic crisis, the state revenue (taxes, customs, oil exports) considerably declined in 2009, whereas state expenditure (economic stimulus package) significantly rose. All this in combination with scarce monetary reserves and growing foreign debt really reduced the Government's room for action. According to the Asian Development Bank, Vietnam's **budget deficit** grew to the alarming level of 10.3% of the GDP (4.9% in previous year). Thus, the Government's target to slightly cut the 2009 budget deficit (to 4.8%) was missed by a wide margin. The International Monetary Fund (IMF) recommended to trim the budget deficit to 6% GDP in 2010 – and to considerably cut subsidized loans provided by the stimulus package. The sluggish progress in the restructuring of state-owned companies allows to anticipate further growth of sub- and **non-performing loans**: According to the National Bank, their share in total loans amounts currently to 3-4%. The World bank and the International Monetary Fund assume a higher share (15%). Other international experts hold the opinion that it would even reach 20%, if international accounting standards were applied and all overdue targeted loans were included. Due to the lack of generally binding accounting standards complying with international standards any reliable statements are not possible.

2. Monetary policy

The Government's monetary policy measures reflect the attempt to find the balance between economic recovery and macroeconomic stability. Starting in October 2008, Vietnam's central bank took many steps to ease its monetary policy and cut the base rate by 700 basis points to 7%. After a noticeable increase of the price index in November 2009 (+4,35% on previous month), the central bank felt compelled to raise the rate by 1 bp to 8% at end of 2009. The majority of commercial banks increased their deposit rates to 10.49% (close to the ceiling of 10.5% set by the central bank) and thus unveiled a huge liquidity shortage. As of December 1, 2009 the Vietnamese Dong was depreciated by 5.4% , this being the first **devaluation** since December 2008. The central bank changed the Dong fluctuation band several times within the last months: At the beginning of 2008 the fluctuation band was $\pm 0.75\%$, then it was widened to $\pm 5\%$ in March 2009, and narrowed to $\pm 3\%$ in December 2009. Vietnam's central bank – **The State Bank of Vietnam** has monetary policy instruments that are available to modern central banks –it lacks independence, though. While central banks in other places (also within ASEAN) are often powerful and to a high extent independent institutions, Vietnam's central bank may be regarded as an extended arm of the Government. A new law on the State Bank which would stipulate stronger independence of the central bank has been discussed for years and yet not passed. The National Assembly ordered the central bank to submit a draft law on the State Bank by the end of May 2010. Taking into consideration all these dependencies, it is no wonder that the state bank lost its most skilled and motivated employees. The majority of them moved into commercial

⁷ The trade balance is the difference in value between the total exports and total imports in an economy.

⁸ The balance on current account is the balance on goods, services and transfers.

banks. Lacking endogenous expertise, the Government was forced to recourse to international experts. The Prime Minister regularly invites experts from the International Monetary Fund, the World Bank, the Asian Development Bank and other developmental aid organizations to talks, in which Germany plays a noticeable role (an expert of the German Organization for Technical Cooperation (GTZ) who enjoys high esteem and is widely respected even by governmental leaders). It is assumed that the State Bank's **currency reserves** amount to 16.5 billion USD as compared to 21 billion USD in the previous year. Thus, Vietnam lacks foreign currency reserves to be able to finance infrastructure measures which are also crucial for the economic growth. This is one of the main challenges that the Vietnamese Government has to address in 2010 (probably much longer). A solution to this problem might be to create a 'sub-national finance system' – in which the Provinces (and not only the State) would have the possibility to issue bonds and thus get fresh money.

3. Structural policy

The weakest part of Vietnam's economic structure (and, at the same time, one of the main drawbacks to foreign investments) is the **banking system**. The Vietnamese banking system consists of:

a) 6 state-owned commercial banks. The owner is the Vietnamese central bank that exercises influence over day-to-day operations and controls the appointment of executive staff. The share of the state-owned commercial banks is estimated at 60% of the loan market. Granting of loans is not always based on objective criteria but on political ones (relevantly high share of sub- or non-performing loans). The concept of public issue of Vietcombank and Vietinbank was a failure: During the Initial Public Offer (IPO) some 6.5 or 4% of shares were sold. As a result, the Government gave up its plans of equitization of other state-owned banks;

b) 37 foreign joint-stock banks, including the German Deutsche Bank (strategic partner of the Habubank). The market share of joint-stock banks in Vietnam stands at nearly 15%. As part of the WTO accession, Vietnam committed to remove access barriers to foreign banks by the end of 2010;

c) cooperative banks.

The involvement of foreign investors in a Vietnamese bank is limited to max. 30%, while a single 'strategic investor' is allowed to hold up to 20% or higher in case of a special permit of the Prime Minister). The year 2010 might be a challenging year for Vietnamese banks, as the risk of loan loss remains the main concern in a time of a crisis. Both the small banks which are not important to the system as well as the big state-owned banks face serious problems due to the quality of assets, thin capital base and small reserves. Another barrier to investments in Vietnam is the deficient **infrastructure**. It boost costs for many investors and traders, because warehouse chains must be build on the distributing way. Traffic jam (especially in big cities) and congestion in ports also drive up the costs. The Government undertook measures and hopes to attract foreign multi-billion investments in infrastructure through Operate-Transfer (BOT) contracts. The Government's priority is the construction of a 6.500 km highway network (to date, Vietnam has hardly 100 km of highways) on one hand and the construction of a few new ports (including relocation of the Saigon Port) on the other hand. Another obstacle is the insufficient **power production** which repeatedly translates into blackouts. Vietnam's overall power production capacity equals 13 GW (gigawatt). The country plans to increase it to 33 GW by 2015. Currently, nearly 40% of the electric power is generated by hydro power plants, 25% by gas power plants, 25% by oil power plants and 10% by or coal-fired plants.

Excursus: Renewable energy in Vietnam

In general: Vietnam has to cope with an increasing electricity shortfall. The energy demand grows annually by 15%. Hydro power plants provide some 40% of energy; however, their capacity is seasonally fluctuating which leads to rising supply gaps, especially during the dry season. For the time

being, the share of renewable energy (except water) in the overall power production in Vietnam does not exceed 1%. To date, the Vietnamese Government has not developed any system of incentives which would make the production of wind and solar energy profitable for investors. The price paid by the monopolist 'Electricity of Vietnam' (EVN) equals 5 US-cents/KW, while the break even point for energy generated by a wind or solar plant is at ca. 10 US-cents. Still: the Law on Energy, in effect since 2005, stipulates a higher share of renewable energy. Vietnam's target is to continually step up the share of renewable energies – from 3% in 2010, 5% in 2020 to 11% in 2050. The Draft Decree on Supporting Renewable Energy Development produced by the Ministry of Industry awaits the signature of the Prime Minister.

Wind energy: With its long coast (3.440 km) Vietnam has exceptionally great potential for wind power. According to the World Bank ('Wind Energy Resource Atlas of South East Asia 2001') Vietnam belongs to the countries with the highest wind power potential in the southeast Asia region: On 8% of Vietnam's territory the average wind speed is satisfactory or good (over 7 m/s). However, long-term, and therefore reliable, wind speed measurements have yet to be made. A prerequisite of making wind power production attractive and 'credible' would be a sound legal framework with guaranteed purchase price (feed-in tariff). While drafting relevant legal regulations, Vietnam is provided with consultancy by the German Ministry of Environment on the base of a cooperation project between GTZ and Vietnam's Ministry of Industry (Project: 'Establishment of a Legal Framework and Improvement of Technical Capacities for Grid-Connected Wind Power Development in Vietnam'). Germany's legislation, the Renewable Energy Sources Act (EEG) could serve as a model for Vietnam's legislative framework – however, Vietnam excludes a full transfer of costs to the end consumer but foresees establishing of a 'Renewable Energies Funds'. Taking into account the lack of incentives and the insufficient legal security, it comes as no surprise that only two wind farms have been put into operation so far. Wind turbines for the first wind farm that was connected to the grid in the central Province of Binh Thuan were supplied by the German wind turbine producer – Fuhrländer. According to its joint-venture partner, Fuhrländer should deliver a total of 80 turbines (total capacity of 120 MW) by 2011. In view of the prospective further orders, Fuhrländer plans in the mid-term to establish a local production capacity as well as a vocational school for wind technicians in central Vietnam.

Vietnam shows its great interest in building of (two at first) **nuclear power plants**. The Government's long-term target stipulates that by 2050 one fifth of the country's energy demand should be covered by nuclear power generation. During a meeting the International Atomic Energy Agency (IAEA) in May 2009, Vietnam's Government informed to have chosen two south Provinces Ninh Phuoc and Ninh Thuan as potential locations. Currently, on behalf of the Ministry of Science and Technology are being conducted 'Safety Reviews' on-site. So far, China, Japan, South Korea and Russia have expressed their interest in cooperation besides France. France started its efforts to become involved in this project at an early stage and, many years ago, sent experts with the French International Nuclear Agency (AFNI) to provide consultancy to Vietnam. After France and Vietnam had signed an agreement for cooperation in the development and use of nuclear energy for peaceful purposes during France Prime Minister's visit to Hanoi in November 2009, Electricité de France (EDF) has the best chance to be involved in the construction (from 2010) and operation (from 2020) of the first nuclear power reactor in Vietnam. On the Vietnamese side, the 4-billion-USD project will be supervised by the state-owned Electricity of Vietnam (EVN).

III. Summary and prospects

In 2008-2009 Vietnam shifted from one extreme to the other: 2008 was a year of economic boom and strong overheating, while the crisis year 2009 was affected by considerably shrinking direct investments and revenues from exports. The World Bank (Doing Business Report⁹) attested that Vietnam did not make enough in 2009 to prepare itself for the time after the crisis. Economic and regulatory policy shortcomings pushed the country down in international ranking for the first time in many years. The same conclusion was drawn by the World Economic Forum in its Global Competitiveness Report¹⁰, according to which Vietnam's international competitiveness worsened. In 2010, Vietnam's priority should be increasing its attractiveness to foreign investors and traders in order to be able to fully capitalize on the expected 2010/11 economic boom. The country faces difficult decisions, resolving inevitable macroeconomic conflicts of interest (growth vs. stability) will require a strong but cautious leadership. As soon as the tightrope walk is completed successfully and the course is set right, Vietnam should emerge from the crisis stronger than before. If, in addition to this, the awaited reforms are determinedly pursued, Vietnam will strongly attract the attention of international investors and traders. The coming year, according to the lunar calendar "The Year of the Tiger", will set the path for further development of this still quite small tiger – Vietnam.

⁹ World Bank/IFC (Publ.), Doing Business 2010: Reform in Difficult Times, September 2009 (in the ranking of 183 economies, Vietnam fell from the 91st to 93rd position).

¹⁰ World Economic Forum (WES), The Global Competitiveness Report 2009-2010 (in the ranking of 133 countries, Vietnam fell from the 70th to the 75th position).

INTRODUCTION

Vietnam made a huge turnaround in its economic policy in the last years, which was officially recognized on January 11, 2007 with Vietnam's WTO accession. After foreign investments had drastically declined in the mid-1990s as a result of the Asian crisis and Vietnam's economy experienced recession, the country attempted to create new incentives for overseas investors. Therefore, the non-transparent tax system was subject to a substantial reform with effect from 01.01.1999. Moreover, the Law on Investments was considerably amended as of 01.07.2000 in order to provide overseas investors with more flexibility, tax incentives and protection. With the implementation of the respective Decree No. 24 foreign investors were given more weight. As of July 2006, through unification of the Law on Investments and the Law on Enterprises, foreign and domestic investors have equal rights. Furthermore, Vietnam has begun to consolidate its capital market by enacting, for the first time, regulations aiming at establishing securities market that would be open to foreign investors. The first Vietnamese stock exchange was opened in Ho Chi Minh City in July 2000 and four years later the second one in Hanoi.

Without doubt, milestones in Vietnam's economic development are the Bilateral Trade Agreement with the USA on the one hand and the WTO accession on January 11, 2007 on the other. Under BTA, Vietnam committed to adjust its legal system to the WTO Standards. So far, Vietnam implemented the BTA provisions mostly in a timely and proper manner. Furthermore, new regulations were passed which, for the first time, open the Vietnamese market for foreign trade companies in the area of import, export, purchase, sale and trade. Vietnam's approach towards the West is accompanied by the country's established position in the Southeast Asia Region. Through its membership in the ASEAN and AFTA Vietnam gains economic advantage in the region.

The long-awaited WTO accession became now reality. On November 07, 2006 the General Council approved Vietnam's accession package. The National Assembly ratified the accession package on November 28, 2006. Eventually, Vietnam became the WTO's 150th member on January 11, 2007. Already in preparation for WTO, Vietnam met many requirements for a sustained economic growth and provided various incentives for foreign investors. Vietnam's favorable geographical location in the center of Southeast Asia, rich natural resources, stable political situation as well as labor costs that remain low despite the rising standard of living –they all create favorable conditions for overseas investors. After the commitments made by Vietnam in its protocol of accession are implemented, the Vietnamese market will become even more attractive for foreign investors. The market will further open and the limits for foreign involvement in areas, to which the access was restricted, will be slowly lowered. In particular, the service sector is expected to see extensive liberalization. What is more, due to the WTO accession, the Vietnamese market will become more stable and predictable in the long term.

The year 2007 - the first one after WTO accession – brought both a series of important economic achievements as well as some difficulties. Vietnam endeavors to keep afloat amid growing tension that comes along with the status of the second fastest developing economy in Asia and a beneficiary of considerable overseas direct investments on the one hand and ascending oil and gas prices as well as trading deficit on the other hand.

Inflation is obviously a reason for concern, though not limited to Vietnam. Many countries, including those highly developed, see a pick-up in the relative inflation rate. Additionally, the excess of liquidity due to huge foreign direct investments drives the inflation up. External factors such as high oil prices also play a role. Some of the relevant factors are temporary in nature and will be remitted with time.

Also Vietnam's trading deficit is temporary and is sometimes referred to as "importer of inflation". While, to a certain degree, that might be true, one should expect that as soon as several refineries are

built, the Vietnamese economy is stabilized and infrastructure developed, this deficit will turn into a surplus, particularly as oil, machinery etc. imports will drop, once this development process is finished.

Over the last 30 years, Vietnam has known a successful development in its country and has become one of the countries with the fastest economic growth. This growth had direct impact on the country and Vietnam went from one of the poorest country to a lower middle-income country.

This Investment Guide should provide German enterprises with an overview of the current situation in Vietnam with reference to political, economical and legal aspects. In the first place, this Investment Guide is intended for companies which want to invest directly in Vietnam. Therefore, import and export regulation applying to the bilateral trade are deliberately omitted.

The presented forms of investment should facilitate the market entry to potential investors as well as provide basic guidance for the planned projects. Due to frequent changes to Vietnam's law or its implementation, no responsibility for the accuracy of the information contained herein may be taken. Furthermore, we would like to emphasize that this Guide cannot substitute for a professional legal advice.

Hanoi, September 2017
Dr. Oliver Massmann
Attorney at Law

GENERAL INTRODUCTION

Historical view

1.1.1 Economy on the uprise in the last 40 years

1.1.1.1 Industrialization and economic crisis in the 1960s until 1980s

Since 1960s, Vietnam attempted to industrialize the country following the example of the Soviet Union. With this goal, the light industry as well as agriculture were neglected in favor of the heavy industry, which already by the end of the 1970s translated into supply shortfalls. Vietnam's Government responded with liberalization of the family-economy and 1979 allowed for a market-oriented second economy under which farmers were allowed to freely sell production surpluses.

The growing importance of the parallel economy led eventually to a dramatic economic crisis in the mid 1980s. The production stagnated and the inflation rose to dizzy heights (1986: over 700%); in 1988, northern Vietnam was struggled by a huge famine. In addition, Vietnam's enormous debt forced the country to declare its insolvency to the International Monetary Fund.

1.1.1.2 Doi Moi reformatory policy of the 6th Party Congress

Vietnam's Sixth Communist Party Congress adopted an economic reform policy called Doi Moi in December 1986. Vietnam gave up the industrialization model and encouraged the development of the light industry and agriculture. In order to be able to supply the population with food and commodities, the Government decided to strengthen private economy and partly transform the centrally planned economy to a market economy. In addition, the regimentation of the economy was planned to be reduced step-by-step and the market to be opened for foreign investors.

This reform yielded unprecedented success. After just a few months, the inflation rate went down to an annual average of 34.7% in 1989. Vietnam, earlier dependant on rice imports, managed to increase crop production by 12% and to achieve surpluses again. Today, the country is world's second largest rice exporter, ahead of the USA. Altogether, in 1986-1996 the country made a significant progress achieving annual growth rate of 9% (1993-1997).

Nonetheless, Vietnam's economy is still to a high extent centrally planned with the land and natural resources being state's property. However, individuals and organizations can at least obtain land use rights and rights to use natural resources.

1.1.1.3 The beginning of a political change

Although Doi Moi was originally intended as an economic reform, it initiated changes to the country's political system. Despite the country still officially pursued the Marxism-Leninism ideology, it also started to open towards the West. The Communist Party was made subordinate to law and the competences of the National Assembly (Vietnam's legislative organ) were extended. Moreover, a relaxation in international relations was noticeable. Since 1995, Vietnam is a member of ASEAN and in 2006 the country joined AFTA. The World Bank and the International Monetary Fund abolished the credit embargo and in 1995 the President of the United States of America announced the reestablishment of full diplomatic relations with Vietnam. Eventually, Vietnam's WTO accession on January 11, 2007 was a sign of a considerable opening of the country once tightly closed.

1.1.2 Developments in the investment policy

1.1.2.1 Constitution and CIL as the legal base for foreign investments

In order to strengthen the willingness to invest among foreign enterprises, Vietnam's Government provided a legal framework. Both the Constitution passed in 1992 as well as the new Enterprise Law (EL) and Investment Law (IL) which, as of July 1, 2015, replaced the Enterprise Law and Investment Law established in 2005, guarantee protection of investments. Under the rule of law, foreign investment capital and assets are protected from administrative arbitrary acts. The companies may not be nationalized. The possibility of international dispute settlement is normatively anchored and protection of intellectual property rights guaranteed.

1.1.2.2 Numerous multi- and bilateral agreements

So far, Vietnam has signed over 30 multi- and bilateral agreements which, beyond the investment law regulations, assure additional protection of investments. In 1994, Vietnam and Germany signed a Double Taxation Prevention Treaty. As of 1995, Vietnam is a part of the New York Convention on Recognition and Enforcement of Foreign Arbitral Award. Thus, overseas investors have the possibility to enforce a foreign judgment in Vietnam. The Bilateral Trade Agreement with the USA that was signed in July 2000 and came into force in December 2001 and its revolutionary effects will be expounded upon in a separate paragraph.

1.1.2.3 The beginning of the privatization of state-owned enterprises

In Vietnam, there are still many state-owned companies. Vietnam's Government intensified its privatization efforts and created new privatization tools. While between 1991 and 1998 solely 116 state-owned companies were privatized, the number of enterprises privatized since 1999 on the basis of the new legal framework stepped up to several thousand. The privatization accelerated in 2005 owing to the sale of shares and shortening the list of sectors inaccessible for investors. Nevertheless, the privatization process should be expected to take more time than originally planned.

1.1.2.4 Devaluation of the Dong and a temporary decline in investments

The Asian crisis significantly affected Vietnam's economy, too. In 1997, Vietnam was forced to devalue the national currency, the Dong (VND), in order to remain able to compete in exports with other countries of the Region. In this context, monetary experts estimated that the purchasing power of the VND was by 40% overrated. Foreign direct investments which rose from 366 mln USD in 1988 to 8 billion USD in 1996 went down to 4.53 billion USD in 1997/98. Reasons of the slump were high real property prices, red-tape during licensing and shrinking direct investments of southeast Asian investors. According to the Ministry of Planning and Investments (MPI), in the first half of 2000 the value of approved investment projects caved in again by 43% to 346 million USD year-on-year. The Government successfully addressed this issue with the Decree 24, the BTA and market liberalization.

Meanwhile, US-investments hit their peak and Vietnam's WTO accession in 2007 and the reorganization of the legal system which it entailed, positively affected the investment climate.

1.1.2.5 Growth of the investment volume and a change of investor type

The average volume of foreign investment projects picked up. In 1988-1990, these projects had an average volume of 3.5 mln USD, in 1993-1994 of 11.7 mln USD and 1995 of 13 mln USD. While in the first phase after Vietnam's opening, investors financed projects mainly in the area of oil production and tourism, recent years have seen a significant increase of investments in the manufacturing sector.

Currently, foreign investments in the manufacturing sector account for 40% of the total investment volume. The type of investors has also changed. At the beginning of the economic opening, middle-sized enterprises enjoyed the greatest interest among investors, while now the involvement of big multinational corporations is constantly on the uprise. At present, the biggest investors originate from the Southeastern Asia – Singapore, Japan, Hong Kong and South Korea. In 2006, the total value of foreign direct investments was at 9.9 billion USD. However, the investment activity of German companies still turns out to be small. For the time being, there are some 99 German direct investments in Vietnam. Hardly more than a half of them are 100% German owned. The rest includes joint-ventures or LLCs with an investment volume ranging from 70 to 118 mln USD and 3000-4000 people employed. Moreover, there are many (circa 85) German enterprises having their representations in Vietnam. 50 German firms have production plants in Vietnam. Nevertheless, Germany with an investment volume of 22 mln USD ranked 21st among foreign investors in Vietnam in 2006. In particular, there are relatively few German investors which produce for export (mostly in the area of footwear and garment manufacturing) in Vietnam. Investments are for the most part located in the areas of Ho Chi Minh City, Hanoi, Dong Nai and Bing Duong.

1.1.2.6 Change of the investment forms and reduction of direct investment

Foreign investors' preferences as to what form of investment to choose seem to have changed. By the beginning of the Doi Moi reforms still some 80% of all projects were a joint-venture, however in August 1995 only 63.7%. On the other hand, the share of 100% affiliates grew from 6% in 1988-1991 to 28.9% in 1995. All in all, the volume of direct foreign investments between 1996 and 1999 dramatically fell from 8.3 billion USD to some 1.6 billion USD. The reasons behind the decline were the Asian crisis on the one hand and wrong decisions of Vietnam's leaders, on the other. Instead of responding to the country's economic slowdown with reforms, the Government felt vindicated that the transition into a market-oriented economy would end in disaster.

However, after signing the BTA with the USA and in face of extensive obligations connected with the WTO accession these reforms were gradually carried out, as Vietnam committed to adjust its law under these agreements.

The aftermaths of the Asian crisis are not perceptible any more. In 2004, imports totaled 31.5 billion USD, exports amounted to 26 billion USD. In 2007, Vietnam recorded further increase in imports to 52.28 billion USD and in exports to 48 billion USD.

1.1.2.7 Lacking economic policy measures in the domestic policy

Vietnam's domestic economy still faces imperious problems with the strong Asiatic competition. Many domestic industries – such as the coal, cement, steel and paper industries- are exposed to increased pressure of competition. However, it is Vietnam's Government that slowed structural reforms in this area and thus failed to take necessary steps to give a fillip to the domestic economy and to support competitive, export-oriented industries. Despite these failures, Vietnam's economy experienced a positive development: Although the privatization of the state-owned enterprises is subject to a controversial political debate, the private sector is still short on finances and has little access to international markets, Vietnam's economy is in an upward trend.

1.1.2.8 Market overview 2017¹¹

Vietnam's GDP was boosted to 5.1 in the first three months of 2017, a much lower level than the 6.8% of the previous quarter and the 6.2% of the same period last year.

¹¹ Colliers International / Vietnam: Quartely Knowledge Report 2017 .

Different factors conducted to a lower level and a negative growth rate of agriculture around the country: unfavorable weather conditions, salinization affecting crop yields in Mekong Delta and Northern regions.

The whole country witness a big slowdown in agriculture-forestry-fishing sector with a modest growth rate of 2.3% y-o-y and a slowdown in growth rates in the electronics manufacturing, industrial and construction sectors at 4.1%, much lower than the 7.4% of the same period in 2016.

In addition, the total output of mineral and oil industry dramatically dropped due to Government requirements on sustainable development and balancing natural resources. The only highlight of the economy in the first quarter of 2017 came from the Service sector with the growth rate of 6.52% compared to the same period last year. To achieve the projected economic growth of 6.7% this year, the country must push its GDP to 7% in the rest of 2017, which would be a big challenge for the whole economy.

However, during the first quarter of 2017, Vietnam registered a USD1.9 billion trade deficit. Export volume reached USD43.7 billion, up 12.8% compared to the same period last year. Noticeable rises were seen in both the domestic and FDI economic sectors, achieving 12.3USD billion and USD31.4 billion, up 12.1% and 13% y-o-y respectively. United States (USD8.7 billion), Europe (USD7.9 billion) and China (USD6 billion) remained the top export destinations of Vietnam. Import turnovers reached USD45.6 billion, up 22.4% over the same period last year.

Ho Chi Minh City

Retail trade in Ho Chi Minh City is regarded as most profitable both by investors and by a study “Private equity – Vietnam Environment and Outlook Survey” of Grant Thornton Vietnam. Pursuant to the WTO’s commitments, the first wholly-owned foreign company in Vietnam, Sojitz Vietnam was established and received trade license in March 2009. Although the company operates in a non-food sector, food retailing will follow in 2010. This open door policy will attract new investors. The Ho Chi Minh People’s Committee approved the decision No.41/2009/QĐ-UBND for developing a modern retail and wholesale market in 2010 -2015 and further extensions till 2020. At the same time, the Government attempts to replace a number of traditional markets with retail centers. This could be particularly profitable for the investors thanks to the constantly growing group of young and modern consumers. According to estimates, the space for the retail and wholesale trade in Ho Chi Minh City will be increased by 350,000 square meters by 2011. As far as office buildings are concerned, there are some 75,000 square meters of net area of grade A and further 125,000 square meters of net area of grade B offered in the central business district of Ho Chi Minh City. The office market is now in a downward trend, after it had shown no reaction to the finance crisis before. The landlords remain however confident. In 2009, Vietnam’s first Green building in Phu Nhuan District was completed. The construction of the Kenton Residence next to the Saigon river is now in focus. The project is located in a residential area that guarantees high standards of living in harmony with nature. This will really raise the bar for the quality of residential developments in the future.

The year 2016 recorded a significant rental growth of 12% y-o-y across the market. HCMC is a hot spot for new international brands.

The year 2016 welcomed the opening of Golden Plaza, adding approximately 15,000sqm to the existing retail stock. Located in a strategic location of District 5 with four street frontages, the mall offers more than 600 kiosks with special considerations to fengshui design. The total retail stock increased 13% y-o-y, reaching nearly 900,000sqm

Hanoi

The real estate market in Hanoi is divided into:

1. the old central business district in Hoan Kiem and Hai Ba Trung.
2. the new business district in Cau Giay with large landmark high rise properties, and
3. the area comprising Tay Ho and Dong Da district.

The office space is planned to develop by some 175,000 square meters to a total area of 615,000 square meters. A high percentage of it is located in Cau Giay district, which has no rigorous height limits for buildings. The continually increasing number of expatriates entering Hanoi stimulates the demand for serviced apartments and thus 365 new units build by 2009. Thanks to promising prospects for the retail sector more and more investors entered the Hanoi market and the demand for retail space rose respectively. There are currently 12 shopping centers, which are usually located in a serviced apartment buildings or office buildings. Actual projects in Hanoi include Tam Da office building and a 4-star Sunway Hotel. In 2017, the total retail stock remained stable with approximately 848,454sqm NLA from 51 projects. Shopping malls dominate the supply, accounting for 78% of total stock, providing 664,290sqm NLA from 18 projects. Although retail podiums in mixed-use developments have become more popular, their total net leasing area is small at 106,117sqm from 29 projects. Department stores have the most modest leasing space of 78,047sqm from only 4 projects.

Altogether, three Government's packages are particularly important:

1. The Government implemented support measures for the agriculture, forestry, fishery and labor-intensive industries as well as facilitated access to the market, including the new export markets and the domestic market.
2. The Government released a Plan to back up investments, which stipulates providing state loans, establishing funds for important projects as well as accelerating foreign direct investments and improving public developmental aid. The support should be mainly targeted on infrastructure and high-tech projects.
3. To encourage consumer spending, the Government decided to boost the retail market. With this goal, Vietnamese citizens were exempt from PIT for the first six months of 2009, which will translate into higher purchasing power. Under its finance policy, the Government aims to maintain the monetary status quo, i.e. the stable exchange rate, by encouraging provision of loans and cutting lending interest rates.

The retail and real estate market offers good investment chances. Following the 2008 crisis, the economy shows the first signs of recovery. Taking into account all this data, Vietnam may be expected to offer excellent investment opportunities.

1.1.3 Interim results: Vietnam – an interesting place for investors

Considering the total volume of investments and the absolute number of projects with foreign involvement in the last 15 years, Vietnam, despite all difficulties that it has faced, seems to be an absolutely interesting alternative to the People's Republic of China. As a result of its market reforms and measures encouraging foreign investments, Vietnam attracted 2,501 projects with total capital of 36 billion USD. Several hundred companies of more than 60 countries all over the world were involved in these investments projects. Preferred locations are Hanoi, Ho Chi Minh City (Saigon), Hai Phong Province in North Vietnam and Song Be next to Ho Chi Minh City.

Surveyed German investors and vendors paint a positive picture of investment opportunities for German investors in Vietnam. The investment climate was rated good to satisfactory with a clearly positive upward trend.

In 2007, some 59,000 private enterprises were established in Vietnam. Business friendly regulations such as the Unified Enterprise Law (UEL) and Common Investment Law enhanced Vietnam's business environment and equal rights were granted to both foreign and domestic businesses.

Vietnam's strength as an investment location lies in the quality of manufactured goods and low labor costs, transparent political decisions and relatively good transport infrastructure. Disadvantages of investing in Vietnam are as follows: rampant bureaucracy, not transparent regulations, corruption and expensive telecommunication services as well as the tax system, in particular, a high personal income tax rates for Vietnamese national employees in the higher pay scales.

Current situation

1.1.4 Infrastructure¹¹

Vietnam makes every effort to improve its ground-based infrastructure. Though still at a early development stage, Vietnam's road network may be assessed as average. However, the existing deficiencies must be removed for a sustainable economic growth. Main issue is the financing. Relocation expenses are four times higher than the cost of the construction. Moreover, negotiations between the construction companies and the local and central administration can protract works and boost costs. Exactly this could, however, be seen as a chance for European companies to provide: consultancy, planning, supervision and feasibility studies of the works.

The railway accounts for only 2.7% of goods transportation. Projects in this field are also planned or even in progress, for example Hanoi and its suburbs should be further developed. In this area, contracts worth several million USD were awarded to overseas companies.

Vietnam's location lends itself to cargo transports on ships. Vietnam has a 3,260km coastline, a strategic position close to international shipping routes and favored natural conditions such as sea depth, current and channels. There are currently 119 seaports, of which only a few are able to accommodate big containers. The Government has announced plans to reform the marine sector by 2020 and develop it to be the leading industry. The plan stipulates building of further deep-sea ports and expanding the existing ones, implementing new techniques of container handling in order to transform the ports into international gateways. Port management and the regulatory framework for port administration should be improved. In order to ensure a stable economic growth, international economy should be stronger integrated into the system.

These projects hold opportunities particularly for experienced EU exporters in the area of architectural and financial planning and operation of port equipment as well as high technology security equipment.

Development of ports

Overview

The importance of exports and trade for Vietnam's economy was subject to numerous institutional discussions and was proven by the reduction of the trade deficit. Problems with insufficient capacity of Vietnamese ports will be addressed. On June 3, 2009 the first vessel of the direct service between Cai Mep/Thi Vai Port and the United States was welcomed. Further ports in the South of Vietnam have been already planned. However, there are still three areas of concern, which must be dealt with shortly, in order to stimulate economic growth through trade:

¹¹ EU Economic and Commercial Counsellors' report on Vietnam 2008

- development of the transport infrastructure in order to connect numerous focal economic zones with seaports in the South of Vietnam;

- optimization of customs clearance procedures;
- coordination and transparency in respect to the development of ports in the North of Vietnam and construction of transport infrastructure.

With the Trans Pacific Partnership and the European Free Trade Agreement, the creation of the terminal is essential to increase trade and reach the expected growth of 7 or 8% until 2020.

Review: Transport infrastructure – industrial zones – ports in the South of Vietnam

The highway 51 remains the most important transport route but inadequate for dense traffic of trucks which leads to traffic jams on a daily basis. The Focal Southern Economic Zone should enjoy highest priority and be completed in order to meet the requirements of the increasing traffic. The project of Highway 51 upgrading is necessary to address the growing truck-container-freight accompanied by private weekend trip traffic. Furthermore, the HCMC Long Thanh/Dau Giay Expressway needs a main arterial route. The 68km-long Bien Hoa -Vung Tau Expressway links important industrial centers in the Dong Nai Province with deep-sea reloading points.

Unnecessary costs for businesses result from the insufficient infrastructure:

- inadequate capacity of carriageways lead to overloaded roads and push up transport costs
- traffic bottlenecks on crossroads due to insufficient traffic regulations drag out delivery time;
- use of old and inefficient trucks translates into higher operating costs

Coordination of customs clearance procedures and transparency

Last year, an Investigating Commission consisting of officials from various ministries from China and Singapore came to the conclusion that the alignment of customs clearance procedures and high transparency in all provinces and districts are crucial for a competitive economy and blooming trade and thus act as a catalyst growth. In order to achieve alignment and transparency in the field of customs clearance, the following measures have been proposed on the base of studies:

- further development and wide spread rollout of electronic customs for alignment;
- implementing new technologies such as EDI;
- rationalization of customs procedures in all provinces and districts;
- unification and publishing of customs tariffs.

Harbors and transport infrastructure in North Vietnam

The development program for seaports in northern Vietnam must be accelerated, as the existing ports which are no deeper than 8 m and allow for unloading of small vessels up to 800 TEU and thus turn out to be ineffective. In order to avoid mistakes that were made in the South, attention must be simultaneously paid to the ground infrastructure, which links the harbors with economic zones, so that a synchronic development is possible.

Development of seaports and infrastructure should take into consideration the following recommendations:

- to build big, integrated ports instead of numerous small units
- to guarantee cooperation on the central and provincial levels;
- to use competence and expertise

- to build the whole infrastructure (roads, air traffic and sea connections as well as railways)
- projects should be open to foreign investors;
- regular assessment of cargo increase and port development

Vietnam's new Master Plan for seaport system development 2020-2030

I. Main content

Vinamarine has been assigned by Vietnam's Government to prepare a new Master Plan for ports for the period 2020-2030. Three reports have been produced so far and, after completion, the plan will be subject to Prime Minister's approval and then promulgated. The master plan focuses on development of seaports in order to foster Vietnam's economic growth. It should be regarded as a significant progress as the development of seaports played a secondary role to industrial development. The master plan stipulates six port groups. It must be underlined that comments and recommendation of various companies and of the VBF subgroup were taken into consideration and incorporated. More emphasis was put on enhancing the infrastructure and development of channels, access roads and connection of regional ports.

Management and administration mechanisms that are applied in Vietnam considerably differ from those in other countries. In other parts of the world, local governments take responsibility to manage and control local ports, in Vietnam however, it falls within the scope of responsibility of the central Government. Therefore, the connection of different terminals into a big port seems to be practically challenging and will take some time before relevant legal framework is ready.

Vinamarine and the *Foreign Investment Agency* declared their willingness to cooperate with the Port Subgroup and include their recommendations.

While drafting the plan, focus was laid on four key aspects:

- Development concepts
- Development objectives
- Development scale, and

Development concept

The main focus of attention was laid on synchronized planning and building the supported infrastructure, while the main stress should be consistently put on the construction of port infrastructure and logistic centers. Beside this, priority is given to the development of international transshipment and gateway ports with application of new advanced technologies.

Relocation of river ports into areas close to the coast in order to compensate for the lack of channels and passages.

Development of seaports means not only construction of terminals, but also building of supported infrastructure. The implementation of the plans stipulates mobilizing of domestic and international investments. In order to ensure sustainable growth, the developments should be consistent with environmental management and protection.

Development objectives

Development objective consist in coordinated development of seaports and port-related infrastructure in all regions.

Below you will find an overview of forecasted cargo volumes transiting through Vietnam's seaports:

- Until 2015, ca. 480-590 mln tones cargo annually (Container: 13-16 mln TEUS; 1.3 -1.6 mln international Tourists and North-South travelers passing through).
- Until 2020, ca. 820-1,080 mln tones cargo annually (Container: 24-30 mln TEUS; 1.9 -2.4 mln international Tourists and North-South travelers passing through).
- Until 2030, ca. 1.400-2,100 mln tones cargo annually (Container: 50-60 mln TEUS; 4.0 -5.9 mln international Tourists).

According to the 2008 statistics, the total cargo throughput gained 196.58 million tons (container: 5.023 million TEU).

The forecasts were made on the base of global market movements. The master plan should also contain analyses and projections for different types of cargo.

Development plan:

Vietnam's seaports are organized in 6 groups:

- Group 1: consists of seaports in the North (Quang Ninh and Ninh Binh provinces)
- Group 2: includes sea ports in the North of Central Vietnam: Thanh Hoa and Ha Tinh provinces)
- Group 3: covers sea ports of the middle region of Central Vietnam: (Quang Binh and Quang Ngai provinces)
- Group 4: includes seaports in the south region of Central Vietnam: (Binh Dinh and Binh Ninh Thuan provinces)
- Group 5: encompasses sea ports of the east region of South Vietnam: (Ho Chi Minh City, Dong Nai, Ba Ria - Vung Tau and along Soai Rap River in Long An and Tien Giang provinces)
- Group 6: covers seaports in the Mekong Delta region ((Mekong Delta, Phu Quoc Island and southwestern Islands).

Development scale:

* Group 1

- Estimated cargo volume for Group 1 ports by 2020 amounts to 95-150 mln tons annually (Container: 4.5-5.5 mln TEUS (0.6 -0.8 mln tourists); until 2030: 240-315 mln tons annually (Container: 10-16 mln TEUS; 1.4 -1.9 mln tourists).

- Hai Phong international gateway port:

- Lach Huyen – accommodates vessels of 50,000-80,000 DWT and 4,000-6,000 TEUS length. Every 600m there is a berth for two ships. Vinamarine will begin with construction work at Lach Huyen.
- Dinh Vu – accommodates vessels up to 20,000-30,000 DWT.
- Cam River – offers place for ships up to 5,000-10,000 DWT.
- Chanh River – accommodates vessels up to 10,000-40,000 DWT, this seaport specializes also in ship-repair and shipbuilding and is suitable for industrial purposes.

- Hon Gai is the regional focal port with Cai Lan terminals for vessels of 50,000 DWT, 3,000 TEUS.

- Other specialized ports are Cam Pha, Hai Ha, Van Gia, Mui Chua and Van Hoa

- Additionally, an oil terminal should be built in this region to replace the existing B2 at Cai Lan

* Group 2

- Estimated cargo volume by 2020 amounts to 140-160 mln tons annually (Container: 102,000-130,000 TEUS; until 2030: 210 - 230mln tons annually (Container: 180,000 -350,000 TEUS).

-Nghi Son the region's focal port with capacity of 25,000 DWT oil tankers and ships of 30,000- 50,000 DWT. Other ports are Cua Lo, Cua Hoi and Ben Thuy.

* Group 3

- Cargo volume by 2020 estimated at 80-105 mln tons annually (Container: 0.3-0.4 mln TEUS, 0.4-0.5 mln tourists); until 2030: 140-205 mln tons annually (Container: 0.6-1.1mln TEUS; 0.8-1.2 mln tourists).

- Da Nang is the region's focal port for ships of 20,000-30,000DWT. Other ports are Dung Quat, Thua Thien Hue, Quang Binh und Quang Tri.

* Group 4

- Cargo volume by 2020 forecasted at 160-210 mln tons annually (Container: 4.5-5mln TEUS, 0.3-0.5 mln tourists); by 2030: 270-380 mln tons annually (Container: 9.0-10.5 mln TEUS; 0.9-1.3 mln tourists).

-Van Phong, an international transshipment port for vessels of 9,000 TEUS und 30,000 DWT, oil tankers.

- -Quy Nhon is the region's focal port for ships of 30,000-50,000 DWT. Other ports are Ba Ngoi, Nha Trang, Ca Na und Ke Ga.

* Group 5

- Cargo volume by 2020 estimated at 250-310 mln tons annually (Container: 15-20 mln TEUS, 0.4-0.6 mln tourists); by 2030: 500-650 mln tons annually (Container: 35-52 mln TEUS; 1.0-1.3 mln tourists).

- Vung Tau is an international gateway with terminals:

- Cai Mep, Sao Mai- Ben Dinh for vessels of 6,000 - 8,000 TEUS
- Phu My-Thi Vai for vessels of 50,000 DWT, 4,000 TEUS
- Long Son for petrochemical complex, for vessels of 300,000 DWT and vessels of 30,000 – 80,000 DWT

- Ho Chi Minh City is the region's focal port with the following functional areas:

- Hiep Phuoc along the Soai Rap River for vessels of 50,000 DWT, 4,000 TEUS
- Cat Lai for ships of 30,000 DWT
- Can Giuoc (in the Long An Province) and Go Cong (in the Tien Giang Province) along Soai Rap River for ships of 30,000 DWT.

* Group 6

- Cargo volume by 2020 expected at 130-160 mln tons annually (Container: 92,000-125,000 TEU, 55,000-70,000 tourists); by 2030: 200-300 mln tons annually (Container: 180,000-350,000 mln TEU; 80,000-120,000 mln tourists).

Can Tho is the focal port for ships of 10,000-20,000 DWT. Other ports include ports along the rivers Tien, Hau and Cai Lon, Hon Chong in Kien Giang Province, An Thoi und Vinh Dam in Phu Quoc, and specialized ports to import coal for power plants.

Priority projects:

- deepen waterway in the ports of Haiphong, Cai Mep-thi Vai, Ho Chi Minh City on the river Soai Rap and Can Tho harbor on river Hau.
- buliding of the general and container terminals in Cai Mep-thi Vai harbor, Hiep Phuoc harbor, building terminals for export of goods and import of crude oil for Nghi Son and Long Son oil refineries, building harbors for importing coal for coal plants.
- completing of Phase 1 at the international transshipment port Van Phong and construction of the international gateway port Lach Huyen.

Comments to the Master Plan and Recommendations

In comparison to the 2008 draft, the master plan 6 shows that at some points a considerable progress has been made. Vietnam seems to have understood that ports are a vital driving force behind economic growth. The reviewed draft was prepared more effectively and aims to meet the growth of the economy and the development of business centers. Cargo volume forecasts require a more in-depth discussion and should be presented in more detail and their fundamental bases should be clarified.

Vietnam's production output surged rapidly and the existing ports are not adequate to support this growth either now or in the near future. Therefore, the Government should encourage more investors to build ports and supported infrastructure. Besides, the master plan should pay more attention to those ports which are able to accommodate big ships. Furthermore, dredging channels and passages to the depth of 16 m should be taken into consideration.

According to Nguyen Ngoc Hue, Deputy General Director, Vinamarine, the forecasts of cargo volume transiting through Vietnam's ports are based on forecasted macro-economic indicators and internationally recognized methodologies. As soon as the Master Plan is complete and approved, Vinamarine will plan the building of port groups in detail and open more workshops to discuss further the detailed forecasts of cargo volume. The Ministry of Transport has completed a Vietnam Transport Network Master Plan in cooperation with the Japanese government which provides technical assistance. The plan covers planning of roads, railways and waterways. According to Vitamarinem, focus must be primarily laid on the construction of access channels and passages at ports in Haiphong, Cai Mep-Thi Vai, Ho Chi Minh City and Dinh An. The biggest difficulty is to maintain the depth of the access channels.

According to Vinamarine, the Master Plan was made in consideration of the development of other economic sectors. However a in-depth analysis of its effects has not been made. The Master Plan takes into account Vietnam's geographical features such as Vietnam's long coastlines.

Details as to the methodology of developing the Master Plan and forecasts were discussed at the meeting with the Port Sub-group in September, 2008. Based on Vietnam's geographical features, locations are identified for development of ports. 24 ports are planned for development.

The Master Plan is built on the following principles:

- Development of ports will not negatively influence the development of other economic sectors.
- Development of ports must go in line with natural conditions and local demand.

According to Vinamarine dredging access channels too deeply would be too expensive. Therefore, the plan stipulates that, in the north, Lach Huyen port will receive ships of 4,000 TEUS; in the south, Cai Mep will receive ships of 6,000 TEUS. Ships of 9,000 TEUS and more will go to Van Phong international transshipment port.

In accordance to Power Plan 6, the Mekong Delta will have 4 thermal power plants and there will be built floating warehouses. Ships of 10,000 dwt will load coal into floating warehouses, and then coal will be transported to plants by ferries and small ships. According to calculations, this method would be the most economically efficient.

Vietnam's Government will mobilize both domestic and foreign investment sources to develop new seaports and facilitate port projects invested by domestic and foreign enterprises of all economic sectors in forms FDI, joint ventures, BOT, BTO and BT. State funds will be only involved in developing public utilities at focal ports and developing some infrastructure items at focal port projects. Foreign investors can establish wholly foreign invested enterprises to build ports in the forms of BOT, BTO and BT.

Focus must be laid on the implementation of the Master Plan. The plan should propose new incentives to private investors and facilitate the development of connections of ports with the national transportation network (road, railway, airway etc). The existing mechanism discourage the private sector from investing in supported infrastructure projects. New ports should be planned in harmony with the growth of other sectors to ensure that the ports will be effectively used.

Conclusion

The Master Plan 6 should have a wider and longer-term vision, based on the country's resources in each period of time.

Further discussion concerning forecasts in cargo volumes, especially containers transiting through ports, should be held between state agencies and enterprises in order to provide more appropriate and accurate forecasts.

The challenge to develop transport systems in order to connect ports with industrial parks and urban areas must be addressed by a synchronized transport planning strategy in Vietnam, and an appropriate mechanism to mobilize sufficient sources to implement the strategy.

To enhance the competitiveness of Vietnam's ports, channels and passages must be dredged to enable ports to accommodate big ships.

Measures should be proposed to mobilize sources to effectively implement the Master Plan.

It must be ensured that port development and the relevant management models do not negatively affect other economic sectors and the environment.

Closing remarks

Logistics costs associated with infrastructure investments account for 3.9% of the GDP in the USA, 11% in Japan, 21 in China and 25% in Vietnam and the lack of an adequate port infrastructure is costing Vietnam 1,7 bn USD in logistics costs per year because local companies transship goods via Hong Kong and Singapore.

More stringent tender procedures for construction projects

Circular No 03/2009/TT-KH issued on April 16, aimed at enhancing transparency in the bidding process. Now, Decree No. 30/2015/NĐ-CP dated 17 march, 2015 gives some guidelines for some articles on investor selection of the Law on bidding.

The laws on land use and bidding should be made uniform, as the they are inconsistent from place-to-place around the country.

According to the circular, investors in projects on the list using land and subject to publication must have legal-person status (institutional investors) or civil-act capacity (individual investors). Decree 30 confirms this requirement. They are required to reveal the total level of investment in their bid. On this base ownership stakes are calculated - for projects using less than 20ha of land it is at least a 15-percent ownership stake in the project, for projects using 20ha or more it is 20 per cent. For joint bidders, ownership stakes are be calculated according to the terms of their partnership agreement.

Investors have to evince capacity to raise capital and resources for their projects through financing commitments from banks or other financial institutions.

For joint bids, investors must confirm in writing the appointment of a single representative and specify the responsibilities of each member of the joint bid.

Under the circular, selected investors in projects which enjoy an increased coefficient of land use or increased area under construction work under an adjusted land use plan must pay the State an amount corresponding to the added value they have received.

According to the experts with the Ministry of Planning and Investment, these regulations aimed to increase the responsibility of investors using commercially valuable land or land under the management and use of the State or local agencies or State-owned enterprises.

These agencies pointed out that the capital ownership rate required of investors would enable the selection of financially viable investors while reducing the possibility that bidders would intentionally inflate total investment figures to win contracts. According to Nguyen Xuan Dao, deputy director of the ministry's bidding management, the new requirements were also aimed at increasing transparency in the bidding process and raising the efficiency of land use.

Altogether, by imposing a minimum quota of bidders at project reference value of 1:3, the Act makes provisions for securing the participation of investors in the tendering procedure. However, it is yet unclear what is meant by the so-called project reference value or what is the benchmark of the value. Insofar remains only the possibility to wait for a clarifying public letter of the government. Tendering participants need a blank credit or a tender guarantee that should amount to 5-10 percent of the total investment expenditure to be borne by the investor (In case of projects that may be divided into certain phases the guarantee is to be calculated according to the level of the particular phase.)

Should the implementation and realization of the project not come about in such a way as it was stipulated in the contract or the investor withdrew from the project before the works ended, it shall lose the project loan. Moreover, its investor certificate will be cancelled.

The same regulation applies to an investor who fails to make the payment to which it committed itself in its bid. It applies also to amounts resulting from an extended land-use rate or an extended building area on the basis of an adjusted plan.

Moreover, the circular decree requires from parties issuing the invitations to tender the publication of management committees in three successive editions of public journals in which the tenders for building projects are advertised, in an approved list of projects of ministries, management committees, municipalities and state-owned enterprises. The list has to be announced at least 30 days before tender opening, so that the investors have enough time to register.

The parties issuing the invitations to tender may select investors only when a detailed construction plan at a scale of 1:2000 has been approved and a justification of the plan with reference to compensation and resettlement has been prepared. Moreover, they have to announce the final list of bidders.

Comment:

The decree defines the time limits of the tendering procedure more precisely. Bids cannot be accepted earlier than 10 working days after the announcement of the invitation. Afterwards, the investors should have at least 30 days and in case of international bids 45 days at their disposal in order to prepare their bids and proposals for domestic invitations to tender. This period begins on the first day on which the invitation was submitted. The bids must be evaluated within 60 days in case of domestic bids and within 90 days in case of international bids. The time begins to run from the day on which the bid was submitted.

Altogether, the development of the building law is to be assessed favorably. The same applies to ensuring a minimum number of bidders. Nevertheless, the government has to be more specific about its projects and has to define the project reference value precisely.

Public Private Partnership (PPP) – Vietnam under close scrutiny

The basis

The *VBF Infrastructure Group* has been meanwhile the advocate of a greater participation of the private sector in the infrastructure for years, and now I would like to use the opportunity for an evaluation of the situation in order to present targeted recommendations.

The concern

The fundamental, since ten years existing concern at VBF that the failure to develop the infrastructure will become a bottleneck for Vietnam's growth is meanwhile generally accepted.

On page 3 of the *Vietnam Investment Review* of 2 November 2009, the statement of the Prime Minister Dung is included that *"the infrastructure has not been developing in 2009. It will affect the economic growth for a long time. (...) Vietnam's streets are substandard and the power supply does not cover the requirements of the population. The city infrastructure as well as water supply and wastewater disposal are deficient."* This assessment of the Prime Minister corresponded with the opinion of the *World Economic Forum* according to which Vietnam came in last in the competitiveness index with regard to the quality of infrastructure compared to the neighboring countries.

The logistics costs, which are related to investments in the infrastructure, add up to 9.5% of the GDP in the USA; 11% in Japan; 21% in China and 25% in Vietnam, where the lack of suitable deepwater ports in Vietnam is to be estimated at approximately 1.7 billion US \$ of logistics costs per annum because the local enterprises have to handle their merchandise via HK and Singapore. In global terms, the trend before the world economic crisis was a general decline in government investments in the infrastructure compared to investments in the private sector.

In his speech before the VBF in December 2009, Minister Phuc (Minister of Planning and Investment “MPI”) referred distinctly to the matter that the cooperation of public and private sectors was stringently required in order to identify and implement the necessary measures – not only in order to come out of the macroeconomic recession, but also to solve the infrastructural problem.

In 2009, the infrastructural requirement in Vietnam was immense. The demand for energy grew constantly by more than 15% per annum and required expenditure of about US \$ 60 billion in 2025. Necessary investments in the telecommunications, ports, airports, roads, rails and air transport were immense. In 2009, the MPI estimated that in the next 5 years about US \$ 139 would have to be raised.

In 2016, the MPI announced before the VBF 2017 that it will take necessary steps to simplify investment certificate granting procedures and establish implementation of PPP according to market mechanisms especially with regards to interest for investors.

According to the MPI, about US\$68 billion of foreign investment is needed in the infrastructure sector in the next five years.

PPP

The question now is what is to be done in this respect in concrete terms. The *VBF Infrastructure Group* (and its predecessor in the *Private Sector Forum*) has been campaigning for more PPPs since 2001. Now it is understood in corporations (and in the subgroups of the VFB as well the M&D Group, from tourism through to financial market) that a stronger emphasis on the Public-Private Partnerships (PPPs) is desirable. PPP is also a tried and tested vehicle for the implementation of economic investments worldwide. Within the PPP model, the government pays in the long term for supply services to be provided. The private sector creates the basis for it by means of extensive loan financing and using investment capital. The profit of the investors depends of the kind of services provided (payments as royalties or connection fees). The private supplier is responsible not only for the provision of services, but also for the entire project management, implementation and operation over many years.

About the current status of PPPs in Vietnam

Where have PPPs been implemented in Vietnam and what can make them more effective? “PPP” consist in Vietnam of different loose structural elements: First, there are statutory regulations for BOT (Build Operate and Transfer) according to which private investors build the infrastructure at favorable terms and charge - within an agreed term - government-approved fees for its use. Regrettably, since the creation of legal prerequisites for BOT in 1993, only two internationally financed projects have been implemented. The BOT regulations were repeatedly revised, with the amendments being rather in terms of form, and not of content.

As a result, the government of Vietnam has improved the legal framework surrounding infrastructure development, including laws around privatization of the aviation and power and energy sectors and regulations on PPP.

In february 2015, the Decree No. 15/2015/NĐ-C of the government on investment in the form of Public-Private-partnership replaced Decree No 108/2009/ND-CP.

This Decree 15 provides regulations and procedures for execution of the investment projects developed in the form of public-private partnerships.

Besides, it includes the government's investment incentive and assurance policies, and government agencies' responsibilities for management of the investment projects developed in the form of public-private partnership.

However, the implementation of Decree 15 on PPP has shown certain limitations. After two years of implementing the Decree 15, there were no significant project being successfully tendered. Therefore, the government is discussing PPP amendment.

Regarding the bankability of the project, requirements for a project to be bankable differ from sector to sector or by jurisdictions. However, there are common factors that render the project bankability and raise its risk exposure such as restrictions on mortgaging land use rights to foreign lenders, complex investment approvals to investors (e.g., land acquisition process), and payment ability of an SOE off-taker. Therefore, practical preferential policies should be issued to strengthen PPP investment.

Besides, investment in the form of PPP is more complex than public investment. However, in the management of PPP projects, public investment laws and regulations have currently been applied, resulting in lengthy investment procedures. Furthermore, there is a problem regarding the limited resources allocated to authorized state agencies (ASAs). It is expected that Decision 522/QĐ-BKHDT on managing and using project development fund raised by Asia Development Bank and [Agence française de développement](#) (AFD) will help to support the ASAs in preparing for the project development.

With regard to infrastructure projects, the current legislation allows some flexibility regarding the use of incentives under the Investment Law.

Nevertheless, the principle of the PPP framework is to develop highly efficient projects through loans from private investors such banks or credit institutions and thus releasing the State from financial burdens. If local companies borrow from commercial state banks, this will not meet the PPP principle. In addition, the limited attractiveness of PPP framework also deter local and foreign non-State banks from offering loans.

It is worth considering a risk allocation framework that harmonizes with the general principle that risks should be allocated to parties that are in the best position to manage them or make reasonable determination of that risk.

Energy

In the energy sector, small successes can be reported: The Phu My 2-2 and Phu My 3 projects are exemplary for that what is feasible. A 1500 MW capacity was financed entirely by the private sector. After the period of further 12 years, these facilities will pass over into the ownership of the state without any burden for the public purse. However, the Phu My 2-2 and Phu My 3 projects remain an exception. Despite best efforts of numerous developers and despite good cooperation of IFC and MOIT with the invitation to tender for the Nghi Son 2 Project, no follow-up project was franchised.

Moreover, Hiep Phuoc, Bourbon Tay Ninh and Formosa are examples of successful models of electricity production for own requirements which enable private enterprises to produce self-generated electricity required in their factories or commercial areas and sell the surpluses to EVN.

Furthermore, permits for many smaller hydroelectric power plant projects are granted to developers without sufficient financial and operational efficiency for proper realization of the projects. As a result, the use of hydroelectric power remains well below its potential.

First PPA – Vietnam solar power

Vietnam is one of the countries with the most annual sunshine allocation in the world. This advantage combines to its efforts to develop a solar-power industry conduct Vietnam to finalize its first solar PPA. It is important to underline the establishment of this first PPA in Vietnam.

This new solar PPA takes back the Decision No. 11/2017/QĐ-TTg in which the FiT(Feed-in-Tariff) will be adjusted according to the fluctuation in the VND/USD exchange rate.

In addition, in this solar PPA the mentioned FiT for excessive power output generated from rooftop projects remains the same throughout the first year of operation, and the new FiT for the next year will be adjusted based on the announced VND/ USD exchange rate of the last working day of the previous year.

However, the rights of the investors are not fully protected in the following cases:

- when EVN is in the process of installing equipment, or making repairs, replacement, inspection or examination of the grid connection of the seller's power plant;
 - when the transmission grid or the distribution grid connected to EVN's grid has a problem or grid equipment directly connected to EVN's transmission grid or the distribution grid has a problem; and
 - when EVN's grid needs support to recover after the incident in accordance with the provisions of operation of the national power system and the standards, technical regulations of the electric industry.
- regarding the allocation of feeding points into the grid: In absence of clear indication of whether the Solar PPA is a 'take or pay' agreement, investors will find it difficult to secure and ensure the profits and revenue of their projects.
- Finally, there is no international arbitration dispute resolution clause.

This PPA does not look bankable due to reasons specified above. However, the bankability of each project has to be establish regarding the situation and the help of lawyers having already work on similar issues. Negotiations are the key to ensure good profits for investors.

There is an increasing interest of foreign investors in the sector, proven by the fact that there are many solar projects with total capacity of 10,000 MW registered with the MOIT. However, not many of them have submitted the pre-feasibility study to the MOIT for consideration. There are many reasons behind this, but the most important ones are the lack of Government guarantee of EVN's payment obligation in the PPA and currency hedging.

Thus, the Government should consider a mechanism where EVN has to fulfil its payment obligation and the investors are ensured that they will be able to remit their profits abroad in foreign currency.

Power project developments

Regarding power project developments, the main issue is the project implementation timeline in Circular 43/2016/TT-BCT.

The legal instrument requires project development commitments from investors and requirements to seek the MOIT's approval when there are delays in the project implementation.

According to Circular 43, if a BOT project falls behind the agreed timeline, the adjustments will only be approved under limited exceptions such as (i) *force majeure* events; (ii) the misconduct of competent authorities or (iii) the misconduct of a third party.

In practice, the schedule agreed between the MOIT and investors is difficult to meet because of complex project preparation process as well as involvement of many related parties.

The VBF Infrastructure Group 2017 recommend reviewing and amending circular 43 causing unnecessary administrative burdens on PPP power projects.

Ports

Presently, the private sector has also successes in port construction, as for example in case of Cai Mep and Hiep Phuoc. The public sector undertook to build roads and provide the infrastructure, but here exists only subordinated formal public-private cooperation – specifically in these projects – which is far from sufficient for the development of infrastructure as a whole.

The *VFB Subgroup for Ports* has presented a study (on the occasion of the VFB session in June 2009) dealing with the issues with regard to the involvement of private business in this sector. Most of the issues – especially the inability of the private sector to plan adequately without participating in the debate about the *Integrated Transportation Infrastructure Plan* (with benchmark data, time frames for completion and responsibilities) - remain urgent. The most important problems to the disadvantage of commercial port development by the public sector are:

- *HCMC – Long Thanh, Dau Giay Expressway* as an additional main communication route.
- Project to expand the Highway 51 as the core task aimed at dealing with the increased truck container freight combined with growing private weekend traffic.
- *Bien Hoa – Vung Tau Expressway* (68 km) connecting major industrial centers in the Dong Nai Province with deep-sea terminals.
- The works on deepening the waterways are in delay, so that the shipping companies cannot take advantage of an efficient, direct unloading and handling of big ships.
- The electronic clearing should be sped up and the custom offices should be prompted to better inter-zone and interprovincial cooperation in order to eliminate unnecessary formalities which cause increased costs for ship owners and importers.
- In the north of Vietnam, the *Lach Huyen Terminal* and its shore infrastructure could be well built within four years. A serious terminal overload may come about as early as in 2010, if the full economic recovery occurs then, as VBF hopes.

Telecommunications

There were several BCCs in the nineties – but, apart from state-owned enterprises, little investments in the infrastructure.

Water

There was a water supply project – the Thu Duc Project – that was supported with some government subsidies, but again in an unstructured way, so that it appears not to be readily repeatable to such an extent. Furthermore, there are examples of advancing into the problematic back country with projects of small-dimensioned water supply even in the area of water supply under contracts. Apart from the connection fees for the provision of treated water, the supplier generates revenues from the sale of water to private customers.

This model could be continued for the operators of commercial areas that endeavor to function equally as water supply companies. As water supply and wastewater disposal contractor of a province, they

could generate further income by offering these services to their own industrial parks as well as neighboring enterprises and private households.

Road construction

There were several commercial road construction projects, but the problem with the use of land in Vietnam is, in the absence of clear regulations, increasingly insurmountable.

Municipal waste disposal

It has clear priority for the government – but delays with permits and uncertainties with regard to official competencies have impeded the projects of private enterprises. There is indeed a model of waste separation and recycling, but it appears to be of no use for nationwide extension. A basic agreement concluded with the People's Committee as well as waste disposal fees secure the enterprise's basic revenue that is supplemented with the revenue from the utilization of recycled materials. This combination of public and private earnings makes the waste disposal more attractive for private investors.

Railways

In 2015, the Vietnam Railways Corporation put forward a proposal to allow private investors to build logistic facilities and associated services in a three railroad projects under the public private partnership.

Airports

Different BOT activities are underway – however, statements about their success cannot be made yet.

A pilot program

Decision 71/2002/QĐ-TTg of the Prime Minister on the Issuance of Regulations on Trial Public Private Partnership Investment Form dated 9 November 2010. It sets out a framework as a pilot program. Urban traffic and hospital projects have been added to the list of projects for which the trial PPP investment form is available. In order to be qualified as a PPP investment form, the project must fulfill certain requirements. Under decree 71 the maximum level of state capital is 30% of the total investment capital for the project, down from a 49% maximum for BOT projects under decree 118. Given the maximum 30% state participating portion, the private investment in any PPP project will need to be at least 70%. Investors' equity must be more than 30% of that total. In combination, these requirements mean that for any PPP project investors' equity must never be lower than 21% of the total investment capital. Decree 71 requires the final approval from the Prime Minister for the inclusion of any project in the List of Projects to be undertaken in PPP form. With the old decree 108 approval from the Prime Minister was only required for proposals of national importance, like using more than 200 or more hectares and projects in Group A with investments of VND 1,000 billion or more. Security is required in form of bank guarantee or other security prescribed in the civil law. The amount of the security must be at least 2% of the total investment capital for now all projects. During the projects commencement the enterprise has to report on its progress in January and July each year.

Recommendations for PPPs in Vietnam

The (partial) successes described above are not sufficient for currently required – in order to ensure healthy economic development - massive expansion of the infrastructure. How can PPPs be shaped more effectively? The recommendations of the VBF Infrastructure Group may be divided into the following categories:

Clear guidelines

Clearly defined guidelines for PPPs should exist in each infrastructure area, and they should be in each case recognized as binding. Diverse master plans are principally useful, but they are revised all too often to be reliable for the private sector. The *VBF Infrastructure Group* advises urgently as early as possible participation of the private sector in working out a new master plan in order to ensure the incorporation of business practice into this bureaucratic procedure.

Adapt guidance on different sectors

The government should issue guidance on government support and viability gap funding regime in each infrastructure sector.

Implementation

The VBF Infrastructure group reminds that the legal framework regarding PPP scheme has been in place since the BOT decree 78/2007/ND-CP on May 11, 2007. However, despite efforts to improve the legal framework and to promote foreign investment, the results remain limited.

Therefore, the VBF Infrastructure group underlines that implementation is critical to translate laws into projects.

Bankability

The VBF Infrastructure group suggests that government should focus resources to deliver few bankable flagship projects to prove the feasibility of this scheme.

Pricing

The second, extremely difficult issue is pricing. Without adequate return on invested funds, the commercial sector can implement no projects whatsoever; on the other hand, the population as customer is often not able to afford the prices asked by private enterprises. The government implements a project directly or through a state-owned enterprise. However, since it turns out to be uneconomical, at the end of the day the costs for citizens are even higher. The commercial sector proposes that the best response to this would have to be the attempt to develop a highly competitive PPP market. The tenders for Nghi Son 2 in which, after pre-selection, more than 20 enterprises participated, are examples thereof.

General conditions

For VBF infrastructure group 2017, the government should clearly define its interests. This should include a quality feasibility study reports to international standards that can put to tenders, transparency in selection of investors, clear and transparent risk sharing mechanisms with private counterparty.

The general conditions for PPPs must be unambiguous. It should not be a subject of all those generalities and uncertainties that have been incorporated into the BOT regulations pursuant to which even minor decisions fall within the responsibility of the Prime Minister and his deputy. There are *two main options*:

- ☐ Radical improvement of the BOT model as a basis for involvement of the state within the scope of commercial infrastructure.
- ☐ Parallel to this, working out completely new regulations in specific sectors of the infrastructure with targeted solutions of recurring problems.

In any case, there are main problem areas which should be included in the regulations in order to help infrastructure projects succeed. Namely:

Within each one subsector, the responsibility of a particular agency for awarding contracts should be clearly defined. Then, in case of doubt, all contracts and licenses should be issued by this governmental institution only.

Enactment of regulations, as a basis for issuing government guarantees with regard to availability and convertibility of foreign currency as well as limited guarantee regarding the capability of Vietnamese business partners.

Here, as long as the government does not have to commit itself, the lack of clarity will put off investors and lead to delays, and in the long run cause even higher costs.

Foreign governing law for the BOT contract and PPA, as well as other important conventions, are indispensable for international financing by a bank.

Pursuant to the BOT regulations, the choice of applicable foreign law is effective only if the agreement between two Vietnamese parties is guaranteed by the government and is just not possible outside of the BOT regulations. The provision safeguarding against changes in the law has to be made. In the light of the frequency of changes in the law in Vietnam, project developers need reliable arrangements.

Institutional framework conditions

No PPP framework can be successful without appropriate official support. As long as different institutional arrangement possibilities for PPPs exist, the *VBF Infrastructure Group* suggests

- that the government establishes a *PPP Infrastructure Investment Agency* along the lines of well-functioning Foreign Investment Agency of the MPI,
- that the PPP Infrastructure Investment Agency to be established ought to be divided into subsections, with each subsection being responsible for a single sector, as e.g. energy or water,
- that the PPP Infrastructure Investment Agency is to be formed as central state agency – this against the background of complexity of the procedure, even in local PPPs,
- that the PPP Infrastructure Investment Agency is granted decision-making authority even for areas which habitually fall within the responsibility of other ministries,
- that the government calls in relevant supporters to provide training for the staff of the PPP Infrastructure Investment Agency regarding the implementation of PPPs,
- that, during the training phase, clear guidelines for each individual area of the infrastructure are to be established.

Model projects

The development of a genuine institutional competence will take some time. Meanwhile, the *PPP Infrastructure Investment Agency* would propose developing PPP model projects. At first, pilot projects should be developed for less complex sectors (energy and water). Then, they should be reproduced in these sectors. If the model has proven itself, similar projects in other areas of infrastructure, in which the involvement of commercial sector is possible, should be developed.

It is crucial that the model actually functions and that the project is clearly defined in respect of distribution of risk, profit participation and chances for parties involved. Well-structured projects with balanced risk profile encourage many interested parties to compete, which results in cost reduction and in benefit for Vietnam.

Therefore, the VBF Infrastructure Group encourages the government to work out, with international support, required documents for the tender if it is realizable within an appropriate time frame. If it has been carried out once, the project may be reproduced any number of times.

In some sectors, it could be difficult to work out universal tender documents. Here, it may presently be sufficient to implement an agreed project well and to announce that its conditions would apply as a benchmark for future projects.

1.1.5 IT and telecommunications¹²

Although Vietnam is rather on a low level as regards technology and capacity, the IT and communications industry is booming. The weakness of the IT infrastructure has many reasons: The restrictions and limitations on investments and foreign ownership, the limited international connectivity and the firewall installed by the government, limiting the bandwidth and making confidential communication difficult. However, several companies are already allowed to evade the firewall.

The government plans to improve the infrastructure and has announced that 800,000 IT employees should be trained as a part of a master plan on improving the human resources development in Vietnam.

It is expected that the demand for IT and telecommunications services will continue to rise over the next 5 years, parallel to the development of disposable income. The accession to the WTO will enhance the competitiveness also in this sector by an increased number of possible investors and players.

Apart from the VNPT (Vietnam National Post and Telecommunications) that has operated quasi monopolistically thus far, further state-owned enterprises should come, and parts of it are even supposed to be privatized. Pursuant to the WTO regulations, foreign companies will be allowed then to hold up to 51% of shares, and from 2010 even to 65%.

As a result, telecommunications services will be cheaper and more easily available. Moreover, the government announced that the telephone and internet charges will be reduced nationwide.

The Ministry for Information and Communications sees a tendency that the growth rates in case of landlines drop indeed, but the rates in the mobile sector literally explode. In view of the most probably huge demand, the network has to be extended. Vinaphone, MobiFone (both subsidiaries of the VNPT) and the military-owned Viettel upgrade their networks with Enhanced Data GSM Environment Technology (EDGE) which provides greater bandwidths.

Decree 25/2011/ND-CP for Implementation of the Law on Telecommunications took effect 1 June 2011. It applies equally to both Vietnamese and foreign organizations and individuals investing in this sector. It stipulates that any organization or individual already owning more than 20% of the charter capital or shareholding of a telecom enterprise may not hold more than 20% of the charter capital or shareholding in another telecom enterprise which conducts business in the same telecom services market. It will affect directly Vietnam Post and Telecommunication Group (VNPT), which currently owns the entire capital of two of Vietnam's mobile phone giants. It makes specific provisions for foreign investment in the telecoms sector. Where a foreign investor invests directly in an entity which provides telecom services without network infrastructure, the investment may be either in the form of a joint venture or business co-operation contract with a Vietnamese partner. Where a foreign investor wishes to invest in the provision of telecom services with network infrastructure, again either a joint venture business co-operation contract must be established and in addition the partner must be a telecom

enterprise already licensed to establish a telecom network in Vietnam. All foreign investment projects must be satisfying the specified requirements for legal capital and the level of investment commitments. The requisite minimum legal capital and level of investment differ depending on the type of telecom business. Certain fees must be placed in an escrow account with MOIC to ensure implementation of telecom licenses.

In 2008, four new licenses for 3G (third generation) services were offered. Several European enterprises expressed their interest. However, 3G was introduced after 2009. Today, many companies invest in GSM (Global System for Mobile Communication) because it is more expensive to enter into 3G. However, this will change soon for competitive reasons.

Today, almost each district has at least limited access to the landline. In comparison: 10 years ago, it was less than 60%. The government plans to improve the quality of the access through a rural telecommunications development project which shall use the old CDMA (Code Division Multiple Access) network.

Since 2005, the number of internet users has more than doubled. Most obtain access via internet cafes which are widespread in urban areas. The connection is generally slow. Since the bandwidth limitation for servers all over the world is considerable, the quality of internet services is rather moderate. Mobile internet will be able to enter into the market only if the providers focus on it. Today, however, they focus on different lines of business with better prospects of profit. In view of increasing demand for internet services, the quality has to be enhanced. The focus in the next years will be on ADSL (broadband internet) that has been expanding rapidly in recent years, even if the quality can be described at most as poor. The number of ADSL customers has risen from 500,000 in 2006 to 1.2 million in 2007. The number of internet users is expected to rise further as well.

¹² EU Economic and Commercial Counselors' Report on Vietnam 2008

The software industry grows also rapidly and probably will still continue this growth. The software sales amounted to about US 240 million in 2007, an increase of 40% compared to previous year. And this despite the high proportion of pirated material which makes up about 90% of all software used in Vietnam. As a measure against software piracy, the government signed in 2007 an agreement with Microsoft that gives all Vietnamese agencies the possibility of using Microsoft software. In 2007, Vietnam became the fourth member of the Asianux Consortium. Asianux is an operating system and the consortium will assist Vietnam in the construction of software centers in Hanoi and Ho Chi Minh City.

1.1.6 Energy¹³

Introduction

The energy sector is still state-dominated, though the involvement of private enterprises has increased steadily. Since 1995, the energy industry is organized in three state-owned companies: PetroVietnam (oil), Vinacomin (coal) and Electricity of Vietnam (EVN, electricity). Main mineral resources and energy sources are coal, crude oil and hydropower. In order to satisfy the rising demand for energy, additionally, a program for the development of atomic energy has been initiated.

Decision 906/QĐ-TTg, approving the master planning orientation for development of nuclear power in Vietnam for the period up to 2030 and Decision 907/QĐ-TTg approving the master plan on overall development and application of nuclear power for peaceful purposes. It contained a step plan and milestones in 2015, 2020, 2030.

By 2015, approval of the first investment project for a nuclear power plant. By 2020 the first turbine should be completed and commence. Between 2020 and 2030 another 11 turbines shall go into operation. Vietnam aims to have by 2030 15.000-16.000 MW of power produced by nuclear, which is

10% of Vietnam's power supply. Contract values should be locally sourced between 20-30 % up to 2020, increasing 30-40 % up to 2030.

This master plan was prepared by the MOIT to submit to the Prime Minister. According to the minister of industry and trade, in order to ensure the energy security for the country, Vietnam needed diversifying power generation sources. However, local resources such as coal, oil and gas are depleting.

At this time, Vietnam had two different way to develop nuclear Energy, US or other countries. Regarding the US, the potential value of the Vietnamese nuclear energy market for U.S. suppliers was approximately \$10 billion to \$20 billion. U.S. companies from across the nuclear energy supply chain see commercial opportunities in Vietnam.

Regarding other opportunities offered to the Vietnam, in October 2010, Vietnam signed an agreement with Russia for Atomstroyexport to construct two nuclear power plants in Ninh Thuan. Russia's Ministry of Finance was prepared to finance at least 85% of the first plant, and Russia proposed to supply the fuel and remove the used fuel for the life of the reactor

In November 2011, Vietnam and Russia signed an agreement that will secure up to \$9 billion in construction financing from the Russian government. A second agreement for \$500 million financed a nuclear science and technology center.

Also in October 2010, Vietnam signed an agreement with Japan for construction of two reactors at a second site in Ninh Thuan. The agreement called for the plants to come online in 2024-25. In November 2010, the two countries signed an agreement for Japan Atomic Power Company and the International Nuclear Energy Development of Japan Co. Ltd. (JINED) to work on the power plant project. The plan was suppose to involve financing and insurance of up to 85% of the total cost.

However, as declared in november 2016 by the government, Vietnam's National Assembly voted to abandon plans to build two multi-billion-dollar nuclear power plants with Russia and Japan, after officials cited lower demand forecasts, rising costs and safety concerns.

Driven by a grow-ing population and expanding industrial base, annual electricity demand has grown an average 13% over the past decade.

Another important target that is already being pursued is the increase of efficiency in the energy sector. The percentage increase of energy requirement is even faster than of the overall economy, in 2008, the growth of Gross National Product almost doubled. According to estimates, the energy requirement will rise by 10% per annum until 2020. The government declared a master plan for energy saving and efficiency increase for the period from 2006 to 2015 which was implemented by the Energy Efficiency and Conservation Office (EECOV). Moreover, the Energy Efficiency Decree (Decree of the government No. 102, 2004) was enacted. Apart from already existing cooperation and engagements in the field of coal and crude oil, diverse investment possibilities for European enterprises present themselves, above all in such fields as nuclear energy and increase of efficiency of the power supply system. So it is certain already that the nuclear program and the renovation of the power supply system will not be realizable without foreign assistance with technology and project management. Korean and Japanese enterprises have already offered their knowhow in this field.

However, in view of an estimated total investment volume of US\$ 2 – 4 billion per annum, enough potential should still remain. Electricity of Vietnam Group's report on electricity supply situation in the first five months of 2012 stated that the electricity loss was over 5.3 billion kW/h, or 11 percent of the total electricity production and purchase. Vietnam's electricity loss ratio is at high level.

In particular, the following areas present themselves for investments in the energy sector:

- introduction or renewable energies

- development of new rules which allow taking renewable energy sources more into consideration;
- energy savings in major cities;
- development of a plan for power supply management;
- development of a national information program for energy conservation and efficiency

Along with adjustments in the electricity pricing policy and the expansion of the market for energy service companies, in September 2009 the GreenBiz took place, a fair and conference on the subject of renewable energies, which searched for solutions for Vietnam's problems with special emphasis on such fields as energy, water, infrastructure, transport and construction industry as well as effective methods of financing.

13 EU Economic and Commercial Counselors' Report on Vietnam 2008 p. 74ff.

Vietnam's energy sector

Overview

Vietnam's rapid development led at the same time to a continuous increase of energy requirement, both in the private sector and in the industry. Since then, the consumption of electricity has been rising by 15% per annum and, as a result, has considerably exceeded the economic growth rate.. According to the 6th Master Plan for the Development of Electricity, for the period from 2006 to 2025 investments amounting to VND 1,262,980 billion (US\$ 74.32 billion) are required, which means on average more than US\$ 3.7 billion per annum. However, the implementation of targets of the phase from 2009 to 2015 of the Electricity Plan were adversely affected by diverse unfavorable factors, as bottlenecks in power supply, difficulties in capital distribution, limited competences in the area of project management of many investors and contractors. In comparison to other countries in the region, the electricity market of Vietnam is far from being competitive and in particular has not yet solved the problems with regard to electricity selling price mechanisms. According to the 6th Master Plan, within the period from 2006 to 2015 investors should have developed, independently from Electricity of Vietnam (EVN), about 54 energy projects which will be implemented in the form of IPB/BOT investments. However, only six projects have been completed yet, and they include the capacity of 2,059 MW, thus 5.6 percent of the Plan. In case of nine bigger projects with a total capacity of 15,275 MW, no investor has been found yet. According to the estimate of the Economic Committee, the lack of investment capital could slow down the development of the electricity sector in the remaining years of the Master Plan.

The most significant financial resources for the energy sector come from the national budget and from Official Development Assistance (ODA). Another important source is the EVN, with the capital coming from own funds as well as from various kinds of outside financing, including a big share in ODA and independent investments of state-owned enterprises (SOEs) as well as domestic and international private sector. The reason for many of the problems in the electricity sector is project financing. The total requirement for capital investments and payment of debts on the part of EVN between 2009 and 2015 amounts to VND 647,038 trillion. However, EVN can finance only VND 264,108 trillion and other investors outside of EVN also have only limited financial resources. Especially projects with a total investment volume of more than \$ 1 billion often encounter financing difficulties.

In the years to come, the amount of foreign investments has to rise considerably in order to meet the growing demand: In consequence of the expected transition to a country with middle income status, the ODAs will probably be lower and for the period 2006 -2025 the 6th Master Plan envisages a necessary investment contribution by EVN of VND 665,389 billion (nearly US\$39.2 billion).

It results in a financing gap of estimated VND 597,591 billion that has to be filled by foreign and domestic private investors and other enterprises. The Master Plan already includes a list of projects that are to be implemented by way of private participation in the form of Build-Operate-Transfer projects (BOTs) or by way of Independent Power Producers (IPPs). At least in the short and middle term, until the conversion into a competitive energy market is completed, probably government loans, guarantees and subventions will be required as an incentive for investments and for a successful performance of a contract. The experiences with already existing project have shown that no-risk guarantees, including those for currency convertibility and performance risk on the part of Vietnamese partners are indispensable for raising of capital from bilateral banks, bilateral agencies and other private financing sources, thus for the creditworthiness of energy projects!

Recommendation:

In view of the fact that in the years to come private investments will be required, it is of great importance to continue working on a legal framework that is attractive to investors. In particular, Vietnam should reconsider the current dominance of EVN and, rather faster than planned before, establish (by 2024) a competition-based market with regard to generation of electricity, wholesale and retail industry. Until Vietnam's regulatory environment has reached an internationally competitive level, we recommend the adjustment of energy prices and the maintenance of government guarantees in order to encourage foreign-financed investments and to reduce high risks related to large projects. Furthermore, we suggest that it should be made possible by law for foreign investors to apply international dispute settlement mechanisms.

Energy production

1. Energy prices

Compared both to the world and the region, are comparatively low: On 1 January 2009, the average selling price amounted to VND 842/kWh (less than US\$ 0.05). In order to ensure profit and capital accumulation, the marginal price for development investments according to EVN in the long run must amount to 7.5 cent/kWh. For this reason, EVN is presently not able to make profits; it is rather principally dependent on loans from the budget. The enterprise has to cope with various difficulties, obtain domestic and foreign loans. It is due to low capacities to pay debts, as projects show low profitability and the electricity prices are low. In part, delayed privatization is to be blamed for this: At the present moment, only nine from 33 companies belonging to EVN have accomplished privatization, which had an impact on investments in projects under the 6th Master Plan for the development of electricity. As a result, EVN demanded the increase of electricity prices.

Recommendations:

Although the general public interest and the affordability in view of the current stage of development have also to be taken into account, the gradual increase of energy prices is indispensable in order to promote energy efficiency and private investments. Only the combination of higher, but realistic prices and increased efficiency of service providers will enable enterprises to generate surpluses in order to finance capital expenditure, thus to operate at a commercially profitable and sustainable level. The market-oriented adjustment of current low prices for electricity should follow a clear schedule in order to enable investors and enterprises to balance the costs and make profits on a medium- and long-term basis.

2. Competitive tendering.

Although the latest revised tender regulations, in the event that there are several interested parties, appear to regard the competition-promoting tenders for infrastructure projects as necessary, currently existing projects have been implemented for the most part without such tendering procedure that

promotes competition. However, the lack of tenders carries obviously the risk of a bad result, both for government agencies and for project partners and, besides, could lead to unfair distribution of risks.

Recommendations:

We recommend that the requirements for a clear and transparent competitive tendering procedure should be clarified in relevant statutes and regulations, and duly implemented. Moreover, clear and transparent complaint and dispute settlement mechanisms should be established in order to put potential disputes related to the acceptance of a tender out of the way. In view of complicated and arduous tendering procedure in case of large projects, we recommend to limit generally the extent of the projects.

3. The stability of statutory regulations and adherence to contract terms and conditions.

Projects in the energy sector tend naturally to be very complex and the costs of contract negotiation may reach millions, thus bring huge losses in case of failure of project implementation. Most common problems that arise after conclusion of a contract are in the majority of cases the failure of the Vietnamese partner to comply with provisions of the contract (as they have been approved by the Vietnamese government) in a timely manner as well as changes with regard to planned result of the contract and the time frame which arise due to frequent rapid amendments to the legal framework.

Recommendations:

In order to secure the interests of foreign investors, we recommend that the competent authorities make an effort to formulate the contract provisions clearly and to adhere to them within a reasonable period, in particular with regard to large and BOT projects in which the government agencies play a direct role. We also encourage the authorities to do their best in order to ensure transparency and to pay more attention to planning of statutes and regulations aiming at the improvement of advance planning of negotiations of major projects.

Electrical efficiency and safety

1. Safety with regard to electricity

In 2008, about 60% of fires in Vietnam caused by electrical defects resulted in serious damage to property and to persons. Such defects were caused by faulty electrical installations and by poor quality of electrical products/ equipment used. In the same year, more than 40% of electrical products sold in Vietnam were falsifications from China. In 2007, the Building Ministry made adjustments to the new Code TCXDVN394, inspired by the International Electro-technical Commission's (IEC) Standard 60364 on protection- and security-oriented electrical construction and installations for buildings. This set of regulations has been implemented in 2008.

Recommendations:

With the participation of major international players, an independent national committee for electricity should be established and entrusted with the following tasks:

- issuing "Electrical and Automation Installation" manual as a basis for certification of all electricians;
- conducting examinations, at least on a three-year cycle in order to check the licenses of the electricians;
- cooperation with insurance companies in order to establish a principle according to which a fire insurance policy can be issued only if the wiring in houses/buildings/factories has been done by a certified/licensed electrician;
- provision of consultations with regard to electrical standards.

The education of customs officials should be improved so that they are able to detect Chinese falsifications that are brought into the country. Moreover, measures should be introduced in order to

make uncovering of officials and companies that facilitate the import of Chinese falsifications and taking action against them possible. Power companies adopt readily methods from other Asian countries and are prepared to provide training measures aiming at the improvement of understanding and awareness with regard to the trade of product piracy.

2. Electrical efficiency

In the last five years, the national production of electricity in Vietnam has risen by averagely 13%; on the other hand, the consumption of energy has increased by 15% per annum. Even the optimistic prognosis with regard to the growth of production capacities does not provide a solution of the problem of electricity shortage in Vietnam in the next five years. It is due to the minimum lead time of three to four years which is available for planning/construction/implementation of power plants. In order to counteract such an energy dilemma and at the same time not to affect the economic growth, the realization of a productive electric energy sector is a necessary step for the private and the public sector in Vietnam. There are indeed solutions for all market segments aiming at short-term reduction of consumption by 20 to 40%, however, most enterprises hesitate to invest by way of a return on investment/capital return (ROI) of two to three years. Government agencies held numerous seminars in order to increase the public awareness of energy efficiency and its possible environmental effects (e.g. mass displacement in consequence of rising sea level) in the longer term. In 2007, a set of regulations for the development of Energy Service Companies (ES-COs) was introduced. The government decided to introduce incentives for enterprises purchasing energy-efficient products, but the decrees have not come into effect yet.

Recommendations:

We recommend establishing an Energy Efficiency Board reporting directly to the Prime Minister and responsible for advancing special action plans and standards with regard to this subject. The board should be responsible for establishing "Green Building" principles as well as propose measures for enterprises in order to limit the use of electricity in main duty cycles. Furthermore, it should be competent for the enactment of regulations on energy quality for energy users and providers. International companies are definitely prepared to put forward suggestions for the improvement of the energy efficiency market in Vietnam. In particular, reference to existing IEEE/IEC standards (IEEE 519 1995, IEEE1159-1995, IEC61000-4-30, etc.) should be made, as they are already used in neighboring Southeast Asian countries. Finally, we suggest that the government makes an effort to make the expansion of the energy efficiency market in Vietnam possible by increasing the number of ESCO and simplifying the administrative application procedure for the formation of new ESCOs as well as by establishing measures to support newly formed companies.

Fuel distribution

Since 1 January 2009, foreign invested enterprises are authorized to provide distribution services with regard to all legally imported and domestically manufactured products (in the commission, wholesale and retail sectors). The distribution services sector is opened for the distribution of the following nine product fields in the retail trade, but not for foreign enterprises: rice, sugar, tobacco, processed oil and crude oil, pharmaceutical products, gunpowder, journals and magazines, noble metals and rocks as well as audio and video equipment. The fuel supply chain in Vietnam is divided into three levels: (i) importers, with the Ministry of Trade determining import quotas; (ii) wholesalers; and (iii) retailers. Since 1 May 2007, wholesalers and retailers are allowed to fix fuel prices within a small trade framework that is regulated and controlled by the government.

Recommendations:

EuroCham recommends that the government reconsiders its position with regard to the distribution of processed oils and oil products by respectable international enterprises, so that it permits fuel

distribution. The exclusion of processed oils and oil products is unreasonable. Generally, the presence of foreign suppliers brought numerous advantages for Vietnamese consumers. Especially the admission of foreign fuel suppliers will also bring an increased benefit for Vietnam, namely, for the following reasons:

□ *Improved safety, reliability and quality of products and services*

Leading foreign suppliers have many years of experience in fuel distribution and have been continuously improving the safety of their services and products. For instance, correct additives used by these suppliers in petrol would clean the engines better, thus extend the life of the engines. Petrol is a volatile and dangerous product and can have disastrous effects in case of an accident. High safety standards of leading foreign suppliers will reduce the probability of such accidents. Moreover, the admission of foreign fuel suppliers will force domestic enterprises to improve the safety and quality of their own products and as a result bring benefits for domestic consumers.

□ *Economic benefit for Vietnam*

For different reasons, foreign enterprises bring economic benefit for Vietnam:

- o **Additional revenue/taxes:** Improved safety and product quality will boost the demand, thus increase the revenue of the Vietnamese government. For instance, most international airline companies currently do not refuel in Vietnam because of concerns about the safety and quality of domestically available products. Instead they refuel outside of Vietnam when they fly to or out of the country. It is not an ideal course of action for the airlines because as a result they are forced to fly heavy airplanes, which entails reduced fuel efficiency. The admission of fuel distribution by leading international enterprises would strengthen the confidence of airline companies that they can obtain high-quality fuel, comparable to airports of other countries, within Vietnam. This increased confidence would at the same time enhance the probability that in future the purchasers/dealers switch to Vietnamese suppliers.
- o **Prices:** Enhanced competition would cut prices, which would be advantageous for consumers. Vietnam will continue in the next decades to import oil products even for the few refineries which the country plans to build in the near future. Most international companies with internal supply networks, including high-class refineries in the region, have though the capacity to deliver fuels directly, i.e. without the involvement of a third party, to Vietnam, thus to reduce the fuel prices for local consumers.

Closing remarks

This is the first time that the subject “renewable energies” was mentioned in the Master Plan for the Development of Electricity; therefore, the Planning Committee had modest experience in the area of renewable energies. The Ministry of Industry and Trade has drawn up a detailed development plan for renewable energies that is to be added to the Power Master Plan. (Power Master Plan 6)

Wind power from the legal point of view

In February 2014, the Ministry of Industry and Trade and the “Deutsche Gesellschaft für Technische Zusammenarbeit GmbH” (GTZ; German Agency for Technical Cooperation) have agreed on a cooperation at a conference on the subject of legal and political framework of renewable energies in Vietnam. Before the Ministry of Industry and Trade and the representatives of international financial institutions (including ADB, the World Bank and IBIC) as well as other economic players spoke, Duane Morris (Mark Oakley) addressed the main political and legal obstacles which the developers of renewable energies are confronted with.

Duane Morris (Dr. Oliver Massmann, Giles Cooper and Mark Oakley) was entrusted with the task to act as legal adviser of GTZ. The underlying project for wind power and renewable energies is supported by the German Federal Ministry for Environment (BMU) and is implemented in cooperation with the Ministry of Industry and Trade in Vietnam (MOIT). In particular, the project relates to the introduction of a new statute promoting projects for renewable energies.

The project will probably need several months to be completely established. Its culmination should be the introduction of a statute for “supply tariffs”. It will considerably extend the viability of projects for renewable energies in Vietnam, a country that is blessed with a high wind occurrence and geothermal resources, as it is with suitable conditions for biomass projects.

During its assignment, Duane Morris will advise on the current legal and institutional framework conditions for the energy market in Vietnam. In the course of this, Duane Morris will highlight the information relevant for renewable energies. Long experience in the home energy sector is advantageous for Duane Morris in order to develop suitable strategies and present specific proposals to the decision makers in the government. Although many investors have already come to Vietnam in order to implement renewable energy projects, the inadequate legal framework conditions have successfully obstructed the development. The government has understood this factor. It compels (because of insufficient financial resources) to break the confidence in coal-fired power plants and utilize Vietnam’s undoubted potential as a leading location in Southeast Asia for wind power and other renewable energy projects.

This article takes the new interest in the wind power market in Vietnam into consideration. It mentions the main legal aspects that should be taken into account by the enterprises and their legal advisors for the development of wind power projects in Vietnam.

Vietnam’s wind power potential

In accordance with the growth of Vietnam’s economy and population, the country is thirsting for energy. Vietnam’s energy requirement increases by approx. 15% per annum. In 2008, the growth of the Gross National Product has almost doubled. It is expected that a further increase by at least 10% per annum will take place between now and 2020. It is clear that energy is an indispensable component for the reinforcement of Vietnam’s economic growth and particularly for the reliability of the economy in the production sector. The government oriented itself towards the global trend and is involved in finding alternatives to traditional energy sources. Now, it has put renewable energy at the top of the agenda.

In 2014, the MOIT published the 6th Master Plan for the Development of Electricity in Vietnam. According to the target of the government to increase, from 2010 on, the production of renewable energies by 100-200 MW per annum, a further plan is drawn up. The government’s target is to satisfy, from 2020 on, 5% of the Vietnamese energy requirement via renewable energies. The latest feasibility studies make clear that 8.6% of the whole country has wind power potential (i.e. with a wind speed higher than 7 meters per second). Vietnam’s wind potential is highest in the central coastal region (including Quang Binh, Quang Tri, Thua Thien, Hue and Binh Dinh) and in the south (including Ninh Thuan, Binh Thuan, Lam Dong, Tra Vinh and Soc Trang). Experts forecast Vietnam’s a total potential for wind power to be possibly more than 500,000 MW! It corresponds to 650 coal power plants!

Against these breathtaking forecasts, the present production of wind power is very small. Presently, it results mainly from the inadequacies in the integrated network related to the electricity prices – namely the current price paid by EVN for network-dependent electricity. It is considerably lower than that what is needed to make wind power project financially viable. Although the MOIT has issued a decision (“Decision 18”) where the presented electricity prices are based on avoidable costs, it is difficult to predict, just in the short term, how network-dependent wind power can be competitive

without capitalizing funds. (The presentation of calculation of avoidable costs would go beyond the scope of this article.) A possible source of the funds could be the introduction of various taxes. These could include an income tax on electricity, a carbon emission charge or a deduction of the mineral exploitation tax. The aim of the GTZ project in Vietnam is to examine the possibility of such options in order to eventually come to a viable closing of the tariff gap.

Electricity price discovery

Although the network dependence makes it harder for wind developers to enter the competition in pricing without the use of subsidies or cross-over financing, the network independence is another story. Latest feasibility studies in several regions Vietnam's have shown that network-independent wind projects can be cheaper than diesel alternatives. Moreover, they offer attractive profits for investors. However, network-independent developers should be aware of Vietnam's poor network facilities. It could have big influence on the bankability of the project. Besides, network-independent operators should also remember that the Vietnamese law does not provide clear framework conditions for other parties than EVN for (i) free negotiation of an electricity tariff and (ii) entering into a network-independent contract with an independent electricity producer. It is true, even though the development of a competitive electricity market is considered. In other words, the single-buyer model with EVN as public buyer is the standard.

Financing and bankability

Apart from the abovementioned electricity prices, Vietnam's lack of policy and legislative framework conditions contributed also to difficulties which the wind developers are confronted with. Although the current BOT (Build-Operate-Transfer) regime provides for several conveniences (including a long list of investment bonuses), a lack of "wind-specific" regulations for investors in this sector is to be reported. The introduction, incorporation and implementation of such regulations are necessary in order to ensure a comprehensive and long-term restructuring of Vietnam's tariff system. This is absolutely crucial for the development of secure wind power projects. The bankability (i.e. the ability to ensure financing and debt service and to pay profits to investors) is one of the keys to a successful wind power project in Vietnam. Project developers looking for investments for a wind power project in Vietnam have to ensure the bankability of the legal structure and documentation of the project first.

Legal problems

Main problems in the area of law related to a wind power project may be generally subdivided into the phase of development (development and financing) and the phase after the development (construction).

Development and financing

Currently, there are a lot of activities of developers of renewable energies in Vietnam. Many of them are small to middle-sized enterprises with limited financing capital. In principle they cooperate with bigger investors or even pension institutions, many of which hold big amounts of money for wind power projects.

As contrasted with usual market conditions and the lack of clear legal framework regulation, the political support for wind power projects and the obvious opportunity in the network-independent market have aroused the interest of a large number of investors for this sector. This, on the other hand, prompted the developers to begin the work on the projects before bringing investors on board.

In practice, the developers have to reach an agreement with EVN first. (As mentioned before, ENV will usually be the buyer.) For, only after such an agreement is reached, the developer is able to apply for an investment certificate. (Such a process requires the applicant to reveal its financial and commercial possibilities.)

Unfortunately, the developers are fully dependent on the discretion of the competent authority as regards the issue of investment certificates. A less oppressive approach for wind developers would be to issue the certificates first, and then to enter into negotiations with EVN. In order to offset the risk related to discretionary powers of the decision makers by clear criteria, the investment certificates for wind projects would have to be guaranteed alternatively. In order to save unnecessary expenses (in terms of time and money), the developers should contemplate signing a declaration of intent with EVN. Afterwards they should enter into a legally binding agreement on cooperation containing project details and benchmark data. These could be later simply copied to the final version of the project documents.

Before a project can be regarded as secure for the bank, the banks and investors will usually ask for at least 12 months of local wind measurements as well as wind studies of good experts in the field.

As soon as the wind project developer has completed the first steps (feasibility study, etc.), it will be necessary to secure the investor for the project (in some cases the developer will already have an investor at its side). In this time, the developer and the investor will necessarily negotiate with each other and draw up a lot of documents. The substance of the documents will probably depend on the structure of the investment. However, it can involve a participation agreement, a general framework for the development in the future of wind power projects or a contract of participation in which the parties agree on forming a new enterprise with the intent to develop more than one single project. The documents will typically fix the roles of the parties within the project, its financing in the future and its development. If the financing factors of the project reside in coal trading, the developers have to register their projects with a competent authority according to the Kyoto Protocol. It is possible in Vietnam, though everything is still nascent. On site, there are a lot of advisers who operate in this field.

The phase of construction

Either before or after the investor is on board (but in each case before the construction) it is necessary to establish the project enterprise and to secure investment certificates issued by competent authorities. When applying for an investment certificate for a BOT project, it will be necessary to deliver the BOT agreement as a part of the application to the competent authorities. Finally, the project enterprise has to conclude negotiations with regard to a wide range of important project contracts including the land lease contract and the power purchase agreement (PPA).

In view of the renewable energy supporting policy which is also reflected in the Vietnamese laws on electricity, obtaining of the investment certificates is not as complicated as expected. Nevertheless, the investor should make sure that the investment terms are precisely stipulated in the license (preferably step by step investment against premium payments). Otherwise, time consuming adjustments will be necessary at a later stage.

The land or real estate lease contract in Vietnam should be kept rather simple, though the aspects of land sale approval and compensatory payments may be fraught with difficulties. Usually, the duration of such contracts should correspond at least to the loan repayment plan and, in addition, a considerable period for profit generation after the repayment of the loan should be agreed (as a rule 25-30 years). Furthermore, it is important to make sure that the land use rights of the project enterprise can be provided for the lender as security and are transferable.

The MOIT has introduced a standard Power Purchase Agreement (PPA) for small and middle-sized power plants for renewable energies. They have a capacity smaller or equal 30 MW. This Power Purchase Agreement should be signed before starting the construction. Under the Power Purchase Agreement, EVN (in case of network-dependent network) – or in rare cases also other buyers – undertake to purchase energy from a project enterprise for a definite period and at a specified rate. The PPA is probably the most important agreement to be negotiated because it determines the future

income from the project. It is crucial that, according to the PPA, the project enterprise cannot be burdened with a penalty if the power supply is affected by small amounts of wind. In view of the fact that at the moment there is only one buyer (ENV) for network-dependent power projects, the negotiations may be sometimes unilateral. Moreover, the electricity producers have to consider that the consumers (according to the Electricity Law) have a statutorily regulated right to renegotiate the purchase price in the medium term. They have to take it into account in their project planning.

The construction

The construction or EPC (Engineering, Procurement and Construction) agreement for wind power projects in Vietnam should be finally reviewed. Banks prefer in principle distributors having long experience (because they pay under guarantee and/or can provide securities of parent companies).

Conclusion

The renewable energy supporting policy of the Vietnamese government develops gradually towards introduction of a law providing for a tariff system. Especially as the government is searching for financial solutions in order to close the network-dependent price differences between non-renewable energies and power energies, we can expect to find an onrush of interests in this area. Many wind power developers watch the Vietnamese market narrowly, according to their capabilities in this sector.

Investors who enter the market at this early stage are destined with high probability to gain advantage over new entrants. The time spent for establishing contacts and complete understanding of the Vietnamese legal and practical environment is time well spent: Especially currently, in the time in which the interested parties are given the unique opportunity to play a role in the development of the policy and legislation.

Investments in the energy sector – the electricity price mechanism suffers from various problems

The mechanism for electricity prices continues to present numerous problems, which affects the capital accumulation for investment projects under the 6th Electricity Plan. This is one of the most serious difficulties with regard to the development of the power sector generally as well as with regard to the development of a competitive power market in Vietnam. This opinion arises from the temporary findings of the control report on the implementation of the 6th Electricity Development Plan under the guidance of the Economic Committee of the National Assembly encompassing the period until 2015.

In 2016, EVN generated and purchased 176.99 billion kWh of electricity. In 2017, EVN plans to supply 197.2 billion kWh. On March 2016, the Prime Minister issued Decision No. 428/QĐ-TTg, providing for the revised power development plan VII for the period of 2011 to 2020.

Moreover, numerous limitations and weak points have been pointed out, as e.g. the lack of emergency power supply, occasional blackouts which, especially in hot, sunny or windy years or when one of the electricity plants has to cope with difficulties, have effects on the production and the everyday life of the people. In opinion of the Monitoring Agency, the reason for this was the calculation of actual demand for electricity which was not oriented towards the economic growth. Further reasons mentioned in the report are difficulties with capital allocation, limited qualifications in project management of many investors and contractors as well as prolonged site clearances.

Furthermore, another highlighted reason consists in the slow development of competitive power market because the problems with regard to power purchase price mechanisms have not been solved yet.

According to the 6th Electricity Plan, within the period from 2006 to 2015 about 54 electricity projects in the form of IPB/BOT projects excluding the Electricity of Vietnam (EVN) and with the aid of investors will be developed. However, only six projects have been completed yet. They comprise a capacity of 2,059 MW, which corresponds to 5.6 percent of the plan. In case of nine larger projects with a total capacity of 15,275 MW, no investor has been found yet. According to the statement of the Economic Committee, the lack of investment capital could slow down the development of electricity in the remaining years of the 6th Electricity Plan.

The reason for delayed electricity development with the aid of investors to the exclusion of EVN is the weak financial capacity. Furthermore, from the report arises that projects with a total investment volume of over \$1 billion encounter difficulties with regard to financing. The current average electricity selling price of EVN of 5.2 cent/kWh may be characterized as very low. According to EVN, in order to ensure profit and capital accumulation, the long-term marginal cost for development investments would have to amount to 7.5 cent/kWh.

For this reason, EVN might not count on capital accumulation from profits for investment projects within the 6th Electricity Plan in the short term, but will have to rely to the greatest extent on loans from the national budget. Nevertheless, from the last report of EVN arises that the Group has to cope with different difficulties in order to obtain domestic and foreign loans: Again, it is to be put down to the weak capacity to pay debts, as projects show low efficiency/profitability and the electricity prices are low. The cross compensation principle with regard to electricity selling prices makes it difficult for EVN to differentiate between trading profits and the performance of tasks for the general public interest. This results partly also from the delay of the privatization process. At the present moment, only nine out of 33 companies belonging to EVN have completed privatization, which affected the stock issues for investments in projects within the 6th Electricity Plan. In view of the fact that the lower electricity price is classified as the key problem with regard to the development of the power sector, the Economic Committee has submitted the proposal to adjust the electricity prices according to the market mechanism. This should trace established paths in order to ensure that investors are able to compensate the costs and to generate profits.

As regards structuring and administration of the power sector, the regulatory authority has submitted the proposal to establish an authorized body which ought to be responsible for the macro calculation of the entire national energy security strategy in order to cope with planning, mechanism issues and other problems.

Investments in the energy sector

Future market development and opportunities for foreign players

- Vietnam's strategies and master plan with regard to the expansion of renewable energies by 2015 and visions for the year 2015

General overview:

Vietnam's requirement for renewable energies rises sustainably (in the past, in the present and in the future by an average of 10% per annum). The country becomes increasingly dependent on the world energy price because the growth of domestic energy sources is most likely not able to keep up with the economic growth rate. The high potential of the hydroelectric power will be consumed primarily in the next decade, with gas and coal supplies being limited, so that in the near future Vietnam will have to import coal for energy production. In this context, the Vietnamese government identified the

necessity that the available resources of renewable energies have to be exploited and expanded, and the currently existing obstacles gradually removed.

Potential and current status of the expansion of renewable energies:

Vietnam has potential resources of renewable energies. These sources, which can be exploited and actually utilized, include small-scale hydropower, wind power, biomass, biogas, bio fuel, energy from domestic waste, solar energy and geothermal energy.

- Small-scale hydropower: taking into consideration the economic efficiency and profitability, it is classified as the most viable form of renewable energies. More than 1 000 locations show a potential for the development of small-scale hydropower in the range from 100 kW to 30 MW and a total capacity of more than 4 000.
- Wind power: Vietnam's potential for wind power is classified as very high. However, as currently no reliable studies exist, the resources cannot be precisely quantified. In fact, available data on wind power potential show discrepancies. Figures from 1,785 MW up to more than 8 700 MW or even way above 100 000 MW are mentioned.
- Biomass: as the agriculture in Vietnam is widespread, so a high potential of power from biomass is available, too. The capacity for sustainable power production from biomass amounts to just 150 million tons per annum, 700 – 780 MW for electricity generation alone can be reached.
- Solar energy: Total number of sunshine hours up to 1400 – 3000 hours/year, the average total radiation amounts to 230 – 250 kcal/cm², and strengthens towards the south. Solar energy can be used for water boiling, power production and other purposes, as e.g. drying, cooking etc.
- Geothermal energy: the recent figures show that Vietnam's potential for geothermal energy amounts to about 200 – 340 MW.

Current status:

Currently, the consumption of renewable energies consists to the greatest extent in energy recovery from biomass in its original form. The proportion of energy from raw biomass to total energy requirement is high and amounts to roughly 38% of the entire final consumption of energy and about 30% of total initial energy consumption.

Power production for grid connection: There are only two kinds of small-scope hydropower with a capacity of over 300 MW; 30 MW from biomass (sugar cane waste) and 2.4 MW from household waste.

Network-independent power supply: Renewable energy sources have been utilized to supply rural areas, distant and remote territories as well as islands. 1.25 MW solar power, 1.2 MW wind power and more than 50 MW small and micro hydropower plants have been built and operated.

Biofuel: The government signed a decision on the approval of a project for "biofuel development". In the country, 6 projects for ethanol production have been established, with each project showing an average capacity of 100 million liter /year. Several of the projects will start the production in 2010.

Summary of the strategies for the development of renewable energies and development targets in Vietnam

Development perspectives:

- the development of renewable energy with economic feasibility is given priority;
- the development of renewable energy to supply rural areas with electricity is fostered and supported;
- support and investment in further development of certain technologies with regard to renewable energies which are not economically viable yet;
- the

development of renewable energies in cooperation with the government based on the principle of effective combination of market mechanisms; - the development of renewable energies in close relation to sustainable economic, social and environment-friendly development in order to reduce the effects of the climate change and the development of the environment.

Overall goals: - Improvement of the energy infrastructure, extension of energy sources, ensuring energy security, environmental protection and sustainable development, mitigation of damages with regard to the effects of climate changes; - to increase the national production and the national consumption of renewable energies; - Completion of the energy program in the mountainous region and contribution to the accomplishment of government objectives to provide electricity for rural areas.

Special goals: - to increase the share of renewable energies in the overall national energy production – from 1.3 billion kWh in 2008, by at least 7 billion kWh in 2015 and 20 billion in 2025; - by 2020, 100% of households in rural areas ought to be supplied with electricity; - increase of the number and the area of application of cooking devices which can be powered by solar energy, namely from the current very low percentage to 18 million m² (in 2015) and 9 million m² (in 2015); - increase and expansion of the area of application of biogas technologies from 0.12 million m³ of the current construction volume to 5 million m³ in 2015 and 15 million m³ in 2025; - to increase the number of households utilizing highly efficient biomass; - to increase the number of households using devices for conversion of efficient biomass (cooking devices with more than 30% efficiency) from the current low number to 1 million households in 2015 and 4 million households in 2025; - in 2015, the production of ethanol and vegetable oil should amount to 250 000 tons, which corresponds to 1% of the crude oil requirement. In 2015, the production of ethanol and bio-oil should reach 1.8 million tons and cover 5% of the crude oil requirement.

Solutions for implementation

General principles:

- all organizations, individuals, domestic enterprises, foreign enterprises and organizations have to be encouraged to participate; - promotion of projects concerning renewable energies in order to ensure better marketing;
 - the government should support the national grid connection at the same or lower cost compared to avoidable economic cost of projects within the scope of renewable energies;
- the government should simplify the operation of the market; - preferential prices for renewable energies should be fixed on the basis of cost effectiveness aspects; - the government should support the use of renewable energies for the supply of rural areas with electricity;
 - the government should support the initial phase for the promotion of installation and upgrading of technologies related to renewable energies for effective heat and fuel production and its use, based on the principles of standard and quality assurance.

Solutions and roadmap for implementation:

- establishing a national liaison body for the development of renewable energies; - preparation of a roadmap for organizational structure development; - preparation of a roadmap for supporting grid connection of the projects regarding renewable energies; - preparation of a roadmap for renewable energy development for heat and biofuel production; - preparation of most favorable terms of registration for CDM for projects based on renewable energies.

On financing of renewable energies in Vietnam: The basics

In order to be able to keep pace with growing requirement Vietnam's for energy, an increase of the production capacity by approximately 4,000 MW per annum and its supply into the national grid are required.

Based on rapid shrinkage of Vietnamese gas and oil reserves (which will be exhausted within coming 20 to 30 years), the experts predict that, from 2020, in order to ensure the operation of its power plants Vietnam will have to import a volume of 100 million tons of coal per annum. Consequently, Vietnam will be dependent on the import of fossil fuels, unless it develops its enormous potential of renewable energy. Despite the negligible current capacities of renewable energy plants, Vietnam is blessed with considerable potential in this area which can be developed as alternative energy sources for the benefit of Vietnam. In spite of the fact that the current legal framework is very underdeveloped yet, the government, namely the Ministry of Industry and Trade, has adopted a constructive and supportive course which, in combination with political and financial assistance on the part of international institutions, makes this sector increasingly attractive for foreign investors.

Rich sources of clean energy

Vietnam has countless clean energy sources: Its abundance of streams, sources and nine main rivers gives Vietnam a place among the top 14 of countries with the best conditions for conversion of hydropower into electricity; its first-class coastal locations can boast a wind force of 860 to 1410 kWh/qm per annum or 800 to 1000 kWh/qm per annum; the tropical climate provides solar resources with a solar radiation between 3 and 4.5 kWh/gm/day in winter and about 4.5 to 6.5 kWh/qm/day in summer. Against this background, some experts even claim that Vietnam can completely cover its requirement for electricity by the use of renewable energies.

The government has gradually created a legal framework for the promotion of development of renewable energies in Vietnam. This new legislation does not establish any restriction for foreign investors that invest in renewable energies and introduces a favorable tariff for renewable power plants with an installed generation capacity of up to 30 kWh. According to this legislation, Electric of Vietnam (**EVN**), the only electric power company (and the only electricity buyer), will acquire electricity generated by such plants at approximately 11 US cent per kWh during peak load times of the dry season. The corporate income tax (CIT) for these project enterprises is limited to a rate of 10% and granted for a time frame of 15 years; in special circumstances, it can be even extended to just under 30 years. The entire equipment and machinery which are imported as inherent parts of solar or wind power plants are duty-free. Moreover, CDM projects (Clean Development Mechanism) are entitled to subventions provided that the production costs exceed the selling price.

... but challenges lie ahead ...

Despite this country's undisputable potential of resources of alternative energy, investors bringing in funds for Vietnam's production efficiency within the scope of renewable energies are confronted with considerable challenges:

- 1 The lack of reliable legal framework conditions.
- 2 Protracted negotiations of electricity purchasing agreement with the EVN.
- 3 The lack of electricity supply tariffs which would be stringently required for successful renewable energy projects.

The supply tariff is a preferential price which is paid by power suppliers when purchasing electricity generated by an authorized producer of renewable energy for a timeframe from 15 to 20 years for electricity units fed into the grid. The payment for such renewable power plants is financed regularly by allocation of cost to all consumers as well as partly by government aid for renewable energies. The combination of preferential tariffs and the obligation to purchase enables feed-in tariffs to function in monopolistic or oligopolistic markets. Presently, the Vietnamese law does not provide for any feed-in tariffs. Article 31 of the Electricity Law provides principally that the producer price (i.e. the selling price ex power plant) must not exceed the tariff determined by the competent government agency.

EVN still refers to an out-dated rate according to Decision No. 2014/QĐ-BCN (of 2007) with a tariff for hydropower between 2 and 5 US\$ cent and for combined gas turbine power plants from 3.5 to 4.7 US\$ cent. Despite the fact that the preferential tariff was fixed for smaller renewable power plants, the price of 11 US\$ cent /kWh is applied only during peak periods in the raining season. Energy purchasing at other times costs about 11 cent/kWh.

The main obstacle for electricity purchasing by EVN at an increased price is the low retail price. Even though from 2010 the electricity rates will be based on market prices, the prices for households being ultimate consumers remain a matter of annually determined fixed prices. Meanwhile, a fixed maximum price for consumers from the industry and service sector is applicable. Against the background of the risk of social unrest, a substantial increase of the retail price in the short term is not realizable.

The monopoly of the EVN is one of the main reasons why investors are discouraged from entering the renewable energy market. EVN is currently de facto the only buyer and controls the electricity feed-in, transmission and supply to ultimate consumers. A free competition in electricity generation can hardly be guaranteed because EVN, being the only buyer, operates also enterprises just in this sector. It was criticized that the National Load Dispatch Center or A₀, a subdivision of EVN that is authorized to electricity feed-in for the entire national grid, does not draw on the capacity of expensive oil-fired or gas turbine power plants even in case of marginal underload of the power grid.

There is a great deal of administrative barriers which have to be broken down by investors when initiating a power project in Vietnam. A power plant project has to be in accord with the master plan at national level or at the level of a particular province. If a project is not listed in these master plans, it requires the approval on the part of the Prime Minister or the Ministry of Industry and Trade. Furthermore, before obtaining the investment certificate, foreign investors have to conclude a Power Purchase Agreement with the EVN. PPA negotiations and application for investment certificates as well as power plant operator's licenses may take months if not years.

Vietnamese CDM market –

The perspective of an emission certificate buyer

Overview of the CDM market in Vietnam

Certain projects for the reduction of emissions in Vietnam are suitable for purchasing certified emission reductions (CERs) under the Clean Development Mechanism (CDM). The buyers sign an agreement with local project owners in order to obtain rights to CERs from the project. Purchasers are usually ultimate consumers and speculators. Most CERs are eventually used by power companies and other purchasers from the EU area that meet the requirements as well as governments of developing countries etc. The buyers of primary CERs obtain at the European Climate Exchanges a discount compared to the secondary market price because they carry considerable delivery risks and typically have met CDM related expenses. Delivery risks arise typically through project execution, but also in

form of CDM registration- and validation-related risks. Validation-related risks are highlighted due to the fact that out of 85 projects which have been uploaded for evaluation in Vietnam only 8 have been registered yet. Over 40% of the projects have been under validation for a year.

Vietnam's market potential

Vietnam could have the potential to generate up to 10 million CERs. However, it is subject to acceleration of the validation process, i.e. the publication of standard CEF for the Vietnamese grid, the encouragement of required local approvals etc. Due to delays in project validation and construction, the scope will be probably smaller. The global recession has adversely affected the access to financing, which in turn affected particularly the hydropower sector (the main CDM project type in Vietnam).

Due to uncertainties with regard to the system after 2012, projects have to be registered or ordered as quickly as possible. Although the market price of CERs has decreased due to the impact of global recession, there is still a sufficient demand for Vietnam's CERs. Purchasers are prepared to change to new product fields and are particularly interested in projects with a high sustainable development value for the local community.

CER portfolio management

Compliance buyers have to administer their portfolio intensively in order to reflect their intended and actually provided loans. Higher prices are paid usually in connection with project types involving high registration and verification risks. Furthermore, higher costs could be incurred within projects which are well advanced in respect of construction, but it will be dependent on this and not on increased registration risks. In case of projects which have already been started, the earlier CDM consideration as part of an additionality analysis has to be proven. Distribution of risk is an important risk management instrument. For example, many buyers may have a big percentage of their portfolio in Chinese CERs, so it is recommendable to have a look at other markets, such as SE Asia etc. Distribution of risk extends right up to technology type.

Most important project types in Vietnam

- hydropower: most common project in Vietnam. Validation risks are named as medium and verification risks are low. Although in these projects are a long construction period and often numerous delays.
- wastewater used for generate energy: 7 projects are already applied for registration. Risk of validation is low to medium, construction time is low (often less than one year) and the risks of validation is medium size.
- other renewable energy types: wind is a high potential, so far only one project existing. Also bio energy project have a high potential. Risks of validation and verification are low to medium, even there is a long construction period.
- MSW-treatment- are only few projects so far, but there is a high potential for composting. Risks of validation are low to medium, medium risks of verification and medium period of construction.

Most important feasible project types in Vietnam

Case studies:

Binh Thuan: 30 MW wind farm project

This project, construction of the first wind farm in Vietnam, is run by the Vietnam Renewable Energy JSC. The first turbine group has been already installed on the construction site. In April 2009, the

project has been registered with the CDM EB. A production of electricity of 91.571 MWh/year is expected, whereas over 59,000 t of CO₂ emissions/year are to be reduced.

Case study – Cu Chi 1000t/d MSW processing plant

This project was developed by Tam Sinh Nghia (TSN) and includes composting of 1000 t/d of municipal solid waste (MSW). The expected emissions reduction of CH₄ avoidance is estimated at roughly 1 million tCO₂e (more than seven years of credited period).

1.1.7 Environment

In the field of environment, increasing loads in the future – not least because of anticipated economic growth - are expected. In order to confront it, several plans are already in effect. They concern, for example, water supply (National Strategy on Water Resources, 2006) or environmental problems altogether, such as the strategy for sustainable development (Agenda 21 Vietnam). Moreover, for the period until 2010, the following specific laws are being planned:

- the Land Use Law
- the Biodiversity Law
- the Water Resources Law
- the Minerals Law
- the Surveying and Cartography Law
- the Hydrometeorology Law
- the Law on Marine Resources and Environmental Protection

Eventually, the privatization in the water sector is pushed ahead with the objective to improve the efficiency of water supply and treatment. Here, diverse investment possibilities will arise in the future for European enterprises with experience in the field of water supply.

The Law on environment protection was revised in 2005 and 2014. The Ministry of Natural resources and Environment followed the recommendations for air, noise pollution, pollution of earth and water will investigate. The instruction No. 25 issued by the prime Minister emphasizes that environment protection is a main issue.

Law No. 57/2010/QH12 dated on 10 December 2010. Goods that affect the environment will be subject to a new environmental tax. Petrol is one of the goods which are adverse to the environment that will be subject to the new tax. The tax will be determined by applying a “per unit” absolute tax rate to the particular type of good. The rate will depend on the level of adverse impact on the environment and policy for socio-economic development from time to time. Plastics bag will have the highest per unit tax rate, somewhere between VND 30.000 and 50.000. Petrol per liter will be between VND 1.000 and 4.000. For petrol and oil the ordinance 38-2001-PL-UBTVQH10 will no longer be in effective.

1.1.8 Real property

In view of continuing high capital inflows from abroad also in 2007, the real property market in Vietnam grew further despite the subprime crisis. About 42% of foreign direct investments (US\$ 20.3 billion) flowed directly or indirectly in real property projects. The figures for the first quarter 2008 seem to confirm this trend. The growth is due in particular to investments of big international hotel chains such as Accor or InterContinental as well as large-scale real property investors, Japanese and Korean construction companies and finally internationally financed investment funds based in Vietnam. What is more, it is to be noticed that the activities orient themselves now away from large cities towards

future holiday resorts. The growth resulted in the recent past in a rapid rise in prices, so that the rents in Ho Chi Minh City and Hanoi reached US\$ 125 and US\$ 200, respectively, and as a consequence rank in Asian area only after Singapore, Peking, Shanghai, Hong Kong and Tokyo. The government took measures against it, such as the obligation of banks to cut back lending to speculators in the real property sector, as well as the regulation according to which state-owned enterprises are allowed to invest maximally 30% of their capital apart from their core business in real property, securities and financial operations. As a result, a drop in the capital available for speculations is reported, which, in turn, might have a cooling effect on the demand.

In 2015, Decree 71/2010/ND-CP was replaced by No. 99/2015/ND-CP of the Government providing detailed regulations on the implementation of the Law on Residential Housing dated October 20, 2015. Decree 99 totally replaces Decree 71. Decree 71 made changes to the investment and fundraising procedures. It set out a new requirement for Prime Minister approval for any housing development containing over 2500 housing units. The developer is required to obtain approvals for a 1/500 master plan and a feasibility study which must include a construction basic design for the residential development project. Decree 71 provides also clarity on the available fundraising avenues for residential developers and formally recognizes for the first time some of the fundraising methods being currently used in the market, like capital contribution agreements and investment cooperation agreements as a type of “presale contract”. Decree 71 abolished all the standard contracts in relation to housing transactions. Also the decree charges the Department of Construction with an important role in monitoring development fundraising and sales of housing units.

1.1.9 Retail sector – production and distribution

Good opportunities present themselves for investors in the production and distribution sectors. For instance, Vietnam was classified by the Japan External Trade Organization (JETRO) among the top 3 countries in the sector of processing and production where, compared to the years 2006 and 2007, the greatest economic growth was expected. Vietnam’s rate of 66.7% was the highest in the ASEAN countries and only just after India. It was due above all to the growth of exports and sales efficiency of the country. Based on these expectations, Vietnam was selected as one of two optimal production locations for the next 5 to 10 years. Apart from Thailand with 28.9%, Vietnam, with 21.4%, was classified by far better than the country ranking in the third place (China), with 11.1%.

However, in the context of the financial crisis, foreign investments have been reduced. According to BBC, in the first quarter of 2009 only US\$ 2.1 billion flowed to Vietnam. It was 70% of the previous year.

Guidelines for the implementation of investments

The investment and corporate laws have improved indeed in the course of time, but they still require amendments. The MPI has approached a number of complicated cases and gathered the arising issues in order to draw up guidelines in the future. They are to be announced in a circular.

The fact that several regulations with regard to Vietnam’s obligations arising from the accession to WTO have not been specified yet caused that the obligations were interpreted and implemented differently.

For instance, the lack of a definition of the term “foreign enterprise” caused that a Vietnamese enterprise is regarded as foreign investment if 1% of shares is held by foreign investors. The consequence of this is that the enterprises are subject to stricter requirements. It had to be adjusted, so that the MPI regards an enterprise as a foreign enterprise if 30% or more shares are held by foreign shareholders.

Subject to the Circular 09 of the Ministry of Industry and Trade entitled “Establishing retail outlets”, each further selling license apart from the first license is granted on the basis of case-by-case decisions. It depends on the number, the stability of the market, the population density in the province or the city and the general suitability of the investment project, etc. However, the WTO obligations require the license for a second retail outlet to be granted on the basis of a transparent procedure and objective factors. Against this background, some foreign investors complain that the provisions of the Circular 09 do not meet the WTO obligations completely yet, so that the approval agencies are still to be understood as a trade barrier against the expansion of the retail network. In the future, the MOIT has to deal intensively with this subject and enact further guidelines.

Foreign currency barriers

Many enterprises find it difficult to buy foreign currencies from banks. The authorities consider finding suitable solutions in order to cope with that problem. Enterprises are not allowed to quote prices in a foreign currency, as a result of which they suffer losses due to the exchange rate when importing raw materials. Vietnam has to solve this problem in order to remain competitive compared to the neighboring countries.

Refinancing and restructuring of loans

In the last year, a number of enterprises had to borrow at very high interest of up to 18% per annum. Presently, the interest rate for loans has dropped, so that the enterprises would have the possibility of refinancing as a result of which they achieve early repayment of the old loan by taking up a new loan. However, the loan regulations of state banks provide that each kind of financing has to comply with statutory regulations. Unfortunately, they do not provide for refinancing. Moreover, in practice banks refuse refinancing, which is connected with their fear of an increase of the credit risk. However, it is not justified, especially as many enterprises clear their loan debt in time at maturity. Insofar, Vietnam has to open up to well-known financial instruments which are still foreign to the country.

Trader's liability

Law 59/2010/QH12 passed by National Assembly on 17 November 2010 and will take effect from 1 July 2011. Till now the trader's liability to consumer considered loss or damage as a result of services which do not satisfy the standard. Now, the compensation applies when goods are not safe for consumers and endanger consumers' life or health or cause loss or damage to the consumer's assets. The liability arises even when the goods are manufactured in accordance with the applicable or registered standards or the trader is unaware of the defect. However no liability if the defect in the goods was undiscoverable by scientific or technical standards when the trader supplied the goods. Under the law 59 a recall shall apply to defective products. The law prohibits certain aggressive or harassing sales conduct by traders and provides a number of circumstances in which certain clauses of an agreement between a consumer and a trader will be invalid. Also it addresses specifically the issue of consumers' rights of safety and confidentiality of their information and the obligations of traders who collect and transfer consumers' information. It introduces new obligations and potential liability on third parties, including media organizations, which provide product information to consumers. Also now the parties can choose to negotiate or mediate their disputes or to take court action.

Labor costs

The cost of employees increases in Vietnam steadily. Subject to the Government Decree No. 28/2010/ND-CP which replaces Decree 33 of 6 April 2009, the minimum wage has increased from VND 650,000 to VND 730,000 to which yet an increase of the social insurance by 5% is to be added. This minimum wage guarantee is very important for the employees, even if it has a negative impact on the readiness of enterprises to invest in times of economic crisis. A possibility to pursue a policy supporting both the increase of minimum wages and the investments would be to provide financial support for the enterprises in order to cover the additional wage expenses.

Conclusions

In view of current decline in foreign investments, Vietnam must quickly adjust its policy, improve the negative aspects and highlight its competitive advantages in the international arena. The Vietnamese government has been already doing its best in order to create a favorable climate for investments in the production and distribution sector.

1.1.10 Mining and mineral industry

The pressure of mining investors in early nineties caused that the Vietnamese government with the aid of various “specialists” adopted the Mineral Law 1996 that entered into force on 1 September 1996. Subsequently it enacted yet various decrees.

To a large extent, this law was modeled on Australian and Canadian Mining Law that met the Vietnamese requirements. Apart from the extremely bad translation into English and the inconsistency in the terminology between the Law and the government decrees, there were yet other weak points. The processes of allocation of mines, for example, were anything but clear. To this day, various adjustments of the Mineral Law 1996 and the administrative decrees were made. A range of new ordinances were introduced which, unfortunately, worsened the climate for mining investments in Vietnam.

Amendments

Law 60/2010/QH12 of the National Assembly on Minerals, dated 17 November 2010 took effect on 1 July 2011. It replaced the old Law on Minerals dated 20 March 1996. The new Law has halved the licenses types, now prospecting will be done under the exploration license, while an enterprise with a mining license may also conduct the processing of minerals. The maximum duration is now 4 years, which the ability to extend for another 4 years. But the license holder must surrender 30% of the licensed site. The PC has less authority to issue licenses. The New law sets out all areas are subject to auction except those specifically exempted by the Government. In general there are stricter conditions for license application and transfer. The new mining right fee will replace the exclusive right fee. The new fee will be determined depending on the value, reserves and quality of minerals, the kind and category of minerals and the conditions for conducting mining in each case, with the Government tasked with issuing specific regulations on the method for calculation and the rates or fees.

Royalties payable on mining

Law 45/2009/QH12 sets out new rules on Royalties payable on mining in Vietnam. Followed by Decree 50, which came into effect on 1 July 2010. It contains detailed regulations and guidelines for the implementation of the law of royalties. Decree 50 refers to a royalty tariff issued by the Standing Committee of the National Assembly. It needs to be seen if they issue the tariffs after 1st of July 2010. Decree 50 makes clear that the taxable price of resources is determined in accordance by the selling price of a product unit of the natural resource by the entity exploiting it, excluding VAT. Where the selling price is not ascertainable, Decree 50 makes clear that the taxable price is determined by reference to the actual selling price in the regional market of the relevant geographical area. A key change is, that the taxable price for exported natural resources is the export price that is the free on board or FOB price. Previous the taxes were paid by reference to the price paid at the place of exploitation. If a natural resource is sold in Vietnam and exported the taxes which need to be paid is a combination of both.

1.1.11 Education

The area of education is of vital importance for Vietnam's economy. The level of education of many Vietnamese has improved considerably. Here, the development of general relations between Vietnam and countries with leading educational institutions played an important role.

In 2009, for instance, about 14,000 Vietnamese students were enrolled at a university in Australia. Moreover, an increasing number of Australian educational institutions in Vietnam operate either independently or in partnership with local institutions. Since Germany distinguishes itself from international point of view in both high-quality and affordable education, new opportunities present themselves for investors here.

Under AANZFTA, there is now a duty of education in Vietnam. Altogether, the government shows great involvement in improving the educational system in Vietnam.

In its socioeconomic development plan 2006-L0, the government set itself ambitious goals in order to promote higher education: Establishing private educational institutions, promoting education, cooperation with high-quality educational systems of foreign institutions and promoting a certain quality level. However, it is problematic here that there are still considerable qualification deficiencies.

Since the beginning of 2009, there was a range of favorable developments in Hanoi: The rules on awarding scholarships for studies abroad have been shaped transparently and non-discriminatorily. The MOET has uploaded criteria and information about awarding scholarships to its website. Moreover, Vietnam works on improvement proposals to facilitate inviting foreign visiting professors at Vietnamese educational establishments. Thanks to the issued MOLISAs Circular 08-2008 on implementation of the Decree 34, the process of obtaining a work permit for foreigners in the area of higher education has been simplified. Furthermore, it is to be evaluated favorably that the improvements concerning the transferability of local as well as international academic degrees have been made, but they still have to be extended.

These improvements obviously contribute to establishing favorable conditions for the private sector in order to enable effective investments in general and vocational education. However, there is still a range of crucial issues to be clarified:

According to the Decision No. 7 of the Prime Minister on the conditions and procedures for establishing, suspension of execution, merger, demerger and liquidation of universities, the conditions for establishing institutions of higher education on the one hand have to meet certain academic minimum requirements being in the interest of the public. On the other hand, there are also unrealistic conditions, such as the requirement to submit a campus master plan that is not yet developed at such an early stage. Insofar, the requirements for obtaining a "simple license" (prevention of fraud and lawlessness and a minimum feasibility) have to be improved yet. Moreover, the MOET can cancel a license afterwards. Here, it will be necessary not to put de facto too strict demands on the evaluation of educational institutions.

Furthermore, the decision requires that the institutions of a university comply with the national university network master plan. However, there is to be more flexibility for non-public universities if they are self-financing and bear the risks of their investment decisions themselves.

Generally, it is also problematic that the private universities are disparaged in public and do not enjoy a particularly good reputation. Recently, there was a range of articles criticizing bad quality and the equipment of the universities. Moreover, it was stated that there were too many universities in

Vietnam, which is why new institutions should not be supported. However, in response to this can be pointed out that the number of students enrolled in Vietnam compared to the relatively young population and to other countries such as Thailand or China is still low. Vietnam's Higher Education Reform Agenda (HERA) 2006 – 2010 provides for a further growth in the area of higher education and anticipates that the number of apprentices will increase threefold or fourfold. Insofar, the high number of educational institutions does not present a problem, but rather the quality and management are in need of improvement.

To achieve international standards education, Vietnam needs to improve the standard of education of Vietnamese institution.

The effective implementation of the National Qualifications Framework will be of great benefit to all levels of education, and in particular, TVET. The implementation of the new decree will be a major milestone in education in Vietnam and demonstrates the Government's great desire to improve education.

Finally, there is a draft decree on the cooperation and investments in the area of occupational education with foreign partners which originates from the EEC and the MOET and is still being revised.

Considering that the education significantly contributes to the development of Vietnam's economy, interesting opportunities for investors to establish exchange programs or independent private universities present themselves here, too.

1.1.12 Ownership of residential apartments and land use rights

This section deals with the ownership of residential apartments related to the land use rights for foreign organizations and foreign individuals in Vietnam. After outlining the problems first, the suggested solutions are presented in the following.

Introduction

Currently, we are confronted all over the world with the economic crisis to which some refer to as the heaviest recession at all. Vietnam, as an export nation, is also presented with challenges caused by decreasing consumption. However, there are first signals of economic rebound.

At the present moment, there is an oversupply of residential and commercial property caused by the economic downturn. Both local and foreign developers experience difficulties in selling and/or leasing or letting already built or planned property. A liberal policy allowing foreign property ownership in Vietnam would lead to an increase of liquid assets on the market. Furthermore, such an opening of the Vietnamese real estate market on the one hand would boost it, and on the other hand would contribute to a greater participation in the property market. The decisive factor is, however, that the Vietnamese government expresses clearly and distinctly to its own and international community that it is capable of reacting to the needs of the population.

Current legal framework

1. Non-resident foreign natural and legal persons

According to the current Vietnamese law, non-native natural and legal persons having their place of residence or headquarters abroad are not allowed to rent and /or to buy property in Vietnam. With the adoption of the 2014 Housing Law, which takes effect from 01 July 2015, there is an exception to this restriction. Non-resident foreign natural and legal persons are allowed to own houses in Vietnam if they are permitted to entry into Vietnam or they have a housing construction investment project in Vietnam respectively.

Advice: Non-resident foreign natural and legal persons should be allowed to purchase or to rent real property in Vietnam without any restriction. In our opinion, the current restriction is completely unnecessary because the property market is absolutely capable of regulating such aspects effectively using its own mechanisms. Namely, real property will sell only there where the demand exists as well, so that the inclusion of additional restrictions would be unnecessary.

2. Resident foreign natural and legal persons

Foreign natural and legal persons that have been granted an entry permit and the right of residence in Vietnam are allowed by law to rent residential properties in Vietnam from 01 July 2015.

2.1 Apartments for residential purposes

Law No. 65/2014/QH13 on Housing (“Housing Law”) enters into force on 1 July 2015 and enables certain foreign natural and legal persons to purchase apartment units for residential purposes. They are not allowed to purchase more than 30% of the apartments in an apartment building or 250 apartment units in an area with population equivalent to a district.

Resident foreign persons

The following foreign persons are allowed to purchase and to own residential houses in Vietnam:

- (a) Foreign entities or individuals investing in house construction under a project in Vietnam in accordance with the Housing Law and relevant laws;
- (b) Enterprises with foreign-owned capital, branches, representative offices of foreign enterprises, foreign-invested funds and branches of foreign banks currently operating in Vietnam;
- (c) Foreign individuals permitted to entry into Vietnam.

For foreign entities or individuals under point (a) above, they are currently required to produce an Investment Registration Certificate and to have houses constructed in a housing project. For enterprises under point (b), they need to show their Investment Registration Certificate or other relevant documents proving that they are permitted to operate in Vietnam. However, persons who, pursuant to the Vietnamese law, are subject to protection of diplomatic missions and enjoy consular privileges are excluded from point (c). Such persons ought to be allowed to own at any time an apartment in an apartment complex of a building project with commercial residences.

The Housing Law has stipulated that each resident foreign natural person is to be allowed to own an apartment for a timeframe of maximum 50 years with possible extension, counted from the date of issue of the certificate confirming the right of ownership of residential houses; afterwards, before the expiration of the period during which the right of ownership existed, this property ownership has to be sold or donated in Vietnam. Otherwise, this property belongs to the state.

Resident foreign legal persons

An enterprise held by foreign capital that operates currently in Vietnam, but not in the property business, and needs residential houses for its employees (so-called “resident foreign legal persons”) ought to be allowed to own one or several apartments in a building or in several buildings of a building project with commercial residences, provided that they are used as living space for its employees.

Each enterprise with foreign capital shall be put in a position to own apartments for residential purposes for a period corresponding to the stipulated period of validity of the investment certificate issued to it, including possible extensions.

Challenges

Currently, there is no implementing law with guidelines and forms for registration of rights of ownership of residential apartments subject to the Resolution 19. At this moment, it is impossible to tackle this matter.

Advice: Enactment of implementing provisions regulating the procedure and the form in order to ensure an efficient implementation of the right to purchase.

2.2 Commercial property

Resident foreign natural and legal persons are currently entitled to acquire property for commercial purposes by purchase.

Decree No. 46/2014/ND-CP regulating the collection of land and water surface rental took effect from 01 July 2014 and replaces Decree No. 121/2010/ND-CP dated 14 November 2005.

Decree 46 makes it clear that both land and underground are subject to rent. That means that if only used the underground and no use of the surface, rent must still be paid. Land rent is payable annually. The rent price will be 1% (standard rate) of the land price promulgated by the provincial people's committee for the particular piece of land. The PC may re-determine the land price based on the market price and a higher rate up to 3% for special land. Lower rate as low as 0.5% for areas with difficult or especially difficult socio-economic conditions. Where land rent is paid for the construction of purely underground works the rent will not exceed 30% of the normal land rent applicable to that land (surface) if used for the same purpose. Land compensation is set off against land rent. Where the normal land price increases by more than 20% compared with the maximum land price or decreases by more than 20% compared with the minimum land price in the land price frame over a 180-day period or more, the Government will amend the land price frame. The PC will then have the right to change the rent to match the new land price. Usually the lessee can decide if he pays rent annually or up front. But under some circumstances rent must be paid up front.

Decree 45/2014/ND-CP sets out new rules for land use fees (LUF) which took effect on 1 July 2014. Generally land allocated by the State is subject to the payment of land use fees by land users, while land leased from the State is subject to the payment of land rental. Both Vietnamese individuals and organizations and foreign invested enterprises are entitled to choose whether to have land allocated to them or lease it. Underground land is also only available for lease, regardless of the nationality of the user. LUF are paid to the State in two installments (50% of the LUF for each installment) of the land use. The price will now be published by the people's council. The price can be re-determined. The party paying the rent will also be entitled to the same deduction and credit of land compensation casts as would a party paying LUF. This demonstrates that in financial terms at least, foreign land users will be treated in the same way as Vietnamese land users, regardless of whether the Vietnamese users choose to pay LUF or land rent.

2.3 Landed property for residential purposes

Resident foreign natural and legal persons are currently not entitled to purchase landed property for residential purposes.

Advice: Since resident foreign natural and legal persons have been already granted the possibility to acquire apartments by purchase, this right should apply to landed property for residential purposes, too.

3. New LUR certificates

A new "Certificate of Land Use Right, House Ownership and other Assets attached to Land" was brought into being by Circular No. 23/2014/TT-BTNMT dated 19 May 2014. The Title Certificate is now

the only certificate to be issued to a property owner who has land use rights or ownership rights over assets on land. A standard form Title Certificate has been designed and distributed by the Ministry of Natural Resources and Environment (MONRE). It's a 190 mm x 265 mm document, printed on both sides and divided into four pages. Circular 23 stipulates that various changes may be recorded in the fourth section of the Title Certificate including new transactions, changed in land area, floor area, land use purpose, land use duration, land parcel number and land map number, and notation on land use fees owing to the State, etc. The changes over time made it impracticable to include them all on one page. Fortunately Circular 20-2010/TT-BTNMT ; replaced by Circular 23/2014/TT-BTNMT ; has remedied this by allowing a new owner to apply either a new Title Certificate with supplemental pages to expand this section to evidence a mortgage of the land use rights or assets attached to land or a lease or sublease of land by a developer of an industrial zone, hi-tech zone or economic zone. The registration offices of land use rights have the right to record changes in the fourth section of a Title Certificate and use its seal to certify the changes. Where a new owner applies for a new Title Certificate, the new Certificate will be issued by the provincial PC or the district PC, rather than the registration offices.

1.1.13 The pharmaceutical market in Vietnam

Vietnam's healthcare system is currently in general on the move due to the economic growth and the rapid development.

Twenty years ago, the healthcare was under sole control of the central government. Later it became clear that apart from government subventions yet further means were necessary in order to finance the system.

Meanwhile, a system consisting of three components exists. Since then, the healthcare is financed either via government funds, out of the own pocket of the population or by means of health insurance. Moreover, the poor were released from the obligation to pay the fees. Nevertheless, most hospital revenue comes from private payments.

In contrast to other Asian countries, Vietnam spends very much funds for healthcare. The expenses for this purpose amount to about 5% o 6% of the gross domestic product.

Particularly noticeable is the difference between public and private expenditure. While nearly three fourth of the expenditure are attributed to the private sector, the public sector generates only one fourth of it.

Although Vietnam is subject to a constant progress, it is urgently required to continue extending the healthcare system. The country claims to have eliminated many infectious diseases. Nevertheless, malaria, trachoma, tuberculosis and cholera, poliomyelitis and typhus still cause a high mortality rate. In 2003, SARS (Severe Acute Respiratory Syndrome) broke out and had grave consequences.

A reason for the diseases is the lack of hygiene and education of the population. The government spoke out in favor of making usual vaccinations against diphtheria, tetanus, pertussis, poliomyelitis, tuberculosis and even measles. Communal health centers were established and, in addition, the educational work was promoted. It included among other things the advice to ingest pure water and washed food and the adjustment of living conditions in general to usual Western standards.

Besides, the government launched a program for the eradication of rats, mosquitoes and flies.

Thanks to some improvements in the recent years, the life expectancy increased and the infant mortality rate dropped to 3.4%. Nevertheless, it is still a relatively high rate. Furthermore, a lot of cases of chronic malnutrition still exist, particularly in ethnic minorities in remote and mountainous regions.

Furthermore, HIV and AIDS present a big problem. It is estimated that 215,000 people are HIV-positive. About 8,500 of them are children aged between 0 and 15 years. There are about 22,000 orphans who lost their parents because of AIDS.

The spread of the disease is to be put down on the one hand to intravenous drug use and on the other hand to unprotected sexual intercourse, not least because it is what many women do by profession. Taking it into consideration, the government, the party and the National Assembly launched programs promoting the prevention and control. What is more, Vietnam is one of 15 countries that receive funds within a global AIDS control plan amounting to US\$ 15 billion.

There are still other communicable diseases in Vietnam. Among them are hepatitis B, parasitic diseases, acute inflammations of respiratory tracts, tuberculosis, dengue fever and Japanese encephalitis, etc. They cause about 30% of deaths. Moreover, non-communicable diseases, such as cardiovascular diseases, cancer and diabetes increase steadily. The abuse of tobacco, alcohol and drugs is more widespread than before. Such phenomena as suicide, violence and mental illnesses are on the increase.

Many differences in various populations groups are due to different living conditions, which are worse particularly in rural areas.

Some people still suffer from the effects of the use of dioxins that caused cancer, miscarriages and stillbirths. Moreover, a large number of not cleared explosive devices and landmines can still be found in rural areas.

Health promotion and health programs

Almost all hospitals in Vietnam are owned by the state. The insurance is too expensive for the majority of the population. The employer is indeed obliged to pay 18% of the income of an employee inclusive certain extra charges to a social insurance fund and, besides, has to pay 3% of the total amount of the wage or salary. Moreover, the employee has to pay 9.5% of the wage or salary and certain extra charges.

Altogether, the concept of health insurance in Vietnam is relatively new. Health insurances were introduced by the government as recently as 1992. Compulsory insurance applies to all active and pensioned employees in the public sector and all employees in private enterprises with 10 or more employees. The contribution rate amounts to 4.5% of the wage or salary, with the employer having to pay 3% and the employee 1.5%. Health insurances for children and farmers can be effected voluntarily. The government systems include also the issuance of free health insurance cards for the poor. At the same time, however, informal fees, which have a negative effect particularly on the less well-off in the population, are still charged. Naturally, the benefits of health insurances do not yet correspond to Western standards. The long delay in payments presents a particular problem. In 2001, the government developed a "Strategy for the Health of the Population" including two aspects: The reorganization of the health insurance system for the purpose of regulating financial relationships between the users and the providers and searching for new approaches to strengthening the quality and efficiency of nursing services.

As the Ministry of Health explained in its response to the EuroCham's Pharma Group, the National Assembly approved the law on Pharmaceuticals on April 6, 2016. "This Law regulates a series of provisions to improve access to medicine, ensure safe and effective medicine by encouraging its

professional distribution and circulation. Besides, requirements on re-licensing application have been simplified to shorten the process. Licensing agency is required to return the re-licensing result within three months.” (Opening remarks, Ministry of Health – Mr. le Tuan, Deputy Minister)

Market development

The public expenditure for the healthcare constitutes only 1% of the gross national product and no more than 20% of the income from the healthcare.

The healthcare system is insofar undermined by charging illegal fees. 80% of the turnover is sold out of the own pocket of the population, which amounts to about US\$ 23 per capita. Moreover, many medications and placebos are sold illegally.

Today, there are around 800 wholesale establishments. The cost of maintenance of these establishments is relatively high and amounts on average from 4% to 14% of the turnover.

Hospitals and pharmacies are in most provinces and larger towns. Private and public pharmacies are scattered all over the country. They sell usually both local and international products. Their number amounts to 41,500.

Depending on the educational system, the education to become a pharmacist takes 1 year, 3 years or 5 years. Unfortunately, no educational standards exist and each of these qualifications permits to open a pharmacy.

Market barriers

Despite the accession to WTO, some market barriers for investors still exist. Within these barriers fall for instance poor infrastructure, bad education of the population and not yet completed implementation of the WTO agreements.

Another problem is that the prices of pharmaceuticals do not vary. It induces the hospitals to buy from state-owned enterprises only.

The marketing of a product also poses difficulties. For instance, placing of an advertisement requires a special permission. Prescription drugs, which are usually sold only by the state anyway, may be praised in professional journals only. Other forms of advertisement may be made only after the participation in training courses and seminars. Since wholesalers are not allowed to advertise in hospitals, it is common that the advertisement is taken over by agents.

Natural and alternative medicine

Moreover, many Vietnamese trust only the traditional medicine. Basically, there are three kinds of alternative medicine: The northern medicine influenced by China (thuoc Bac), the southern medicine (thuoc Nam) and the western medicine (thuoc Tay).

The philosophy of the northern medicine is based on the Yin-Yang theory. The elements of this theory are of material and moral nature and represent the entire universe. Ying is the feminine, passive element whereas Yang is the active, masculine element. The human body is understood as microcosm in the universe that has to adjust its inner functions to external forces and to the nature. The underlying idea is to create harmony of a human being with the nature, which at the same time constitutes the basis of the medicine.

In the southern medicine, the treatment is performed using tropical plants and animals. Some of these traditional medicines proved to be extremely effective for curing dysentery, arthritis, gastritis, gastric ulcers, cardiac diseases, influenza and hypertension and, besides, have the advantage of being cheap.

The curing method of the western medicine is based on the contact with dangerous spirits.

Vietnamese physicians rely on a diagnosis consisting of four steps: examination, auditory perception, patient interview and pulse rate measurement. However, Vietnamese patients are rather suspicious of specific questions concerning previous medical history and symptoms.

The traditional medicine has a large share in the market. Almost 17% of the pharmaceutical and healthcare turnover comes from the traditional medicine. There are around 250 manufacturers of products for alternative medicine and 450 private enterprises practicing traditional medicine. The producers are successful even in the export.

Foreign investors should be always aware of the great mistrust towards modern medicine and the reverence towards traditional medicine.

Favorable development after the accession to WTO

After the WTO Agreement, a considerable relaxation of the so far limited rights of sale in Vietnam was expected and at least partly implemented in 2009. Prior to this, Vietnam's structure of distribution was distinguished by statutory restrictions and bureaucracy: Only enterprises operating in the country were allowed to distribute their products themselves. All imported pharmaceuticals had to be brought into the country via a local state-owned enterprise or via an enterprise authorized to import. Consequently, the import enterprises were allowed only to buy foreign products from state-owned enterprises. Afterwards they could resell the imported goods to pharmacies. Only in rare cases had they also the chance to distribute them directly to hospitals. It was due to the fact that hospitals – although they have a certain budget which is provided in 50% by the government – had only over 15% of the budget at their free disposal.

The newly passed law, at the same time as the accession to WTO in 2007, brought the first favorable development. It shall establish equal conditions for national and international enterprises in the country. Since 2009, the formation of fully foreign enterprises is possible. According to this, also foreign manufacturers and wholesalers have been recently in a position to distribute pharmaceuticals without the aid of brokers. Foreign enterprises can also set up branches in Vietnam that are entitled to import goods and to trade. In the context of the sale of placebos, it is to be welcomed that in 2005 regulations concerning the competition law were introduced and the intellectual property rights were put under better protection.

General conditions, advantages and disadvantages for foreign investors

Vietnam offers the following advantages for investors in the pharmaceutical industry: Apart from the very favorable geographical location of Vietnam at the center of Southeast Asia, the country is to be characterized as politically stable. The economic situation improves continually, with the labor cost being still very low.

In 1992, establishing of the ASEAN Free Trade Area (AFTA) was launched with the goal to create free trade areas within the ASEAN countries, China and possibly India. It will be implemented by 2015. Since 1995, Vietnam is a member of the ASEAN countries and in 1996 it became a member of the AFTA.

Another favorable development is the reduction of the tax rate on pharmaceuticals to 2.5% planned for 5 years after the accession to WTO. The tax rate on cosmetic agents has been reduced from 44% to 17.9%.

Vietnam still imports many medicines, as for example antibacterial agents and antibiotics. These pharmaceuticals play a central role in prevention and treatment of diseases as well as within the scope of supply of raw materials for the industry in the country. Specific pharmaceuticals are still very rare in Vietnam and come mainly from France, Germany and Switzerland. Therefore presents itself the chance for investors to undertake their production in the country. The number of local enterprises in the country increases, too. Vietnam has over 180 pharmaceutical factories and only 25% of them are foreign-funded. Another positive aspect for foreign investors is the fact that the government promotes the cooperation of domestic and foreign enterprises in order to ensure the compliance with international standards. Since this decision of the government, foreign investments in the sector are on the rise. The growth potential results particularly from the fact that Vietnam has a large population, but very low per capita expenditure for pharmaceuticals as yet, namely amounting to less than 10 US dollars per annum.

The economic growth rate of 2007 exceeded 8.5%. The industrial production amounting to US\$ 35.9 trillion has improved by 17%. Total exports amounted to US\$ 48.4 trillion, which means an increase by 21.7%, and the number of foreign direct investments almost doubled. Their maximum level was around US\$ 20.2 million. Taking it into consideration, the profit of the pharmaceutical market is expected to rise to about US\$ 1.5 billion by 2011.

Legislation and requirements for obtaining licenses

Opening of a pharmacy is cumbersome. The application for the license can take months. It is particularly problematic that each individual pharmaceutical to be distributed has to be registered and could be applied for only by local manufacturers and local importing firms as yet.

On the other hand, the fees for the license of only US\$ 2000 are relatively low. Two certificates have to be granted for the registration of an enterprise. For the sale, it is a so-called FSC certificate ("FSC") and for the manufacturing a so-called Good Manufacturing Practices ("GMP") certificate. The GMP can be replaced by the Certificate of Pharmaceutical Product ("CPP"). Besides, the product has to be subject to sampling at the Institute for Quality and Control.

The applications have to be submitted in English or French and additionally in Vietnamese. The Vietnamese administration has a separate Pharmaceutical Department that is responsible for granting and cancellation of licenses.

Compared to other Asian countries, the approval of pharmaceuticals is quite simply and quickly to obtain. Altogether, the validity of a license depends on the demand. Thus a license for 5 years is granted usually for a product that is not manufactured locally, but is in high demand. A 3-year license is issued for foreign products being in high demand which cannot be manufactured in adequate quantities at the local level. Altogether, 4 reports have to be submitted for the approval of a new pharmaceutical, namely a legal, a toxicological, an experimental and a clinical report.

The most important registration office for foreign investors is the Ministry of Planning and Investment ("MPI"). The MPI is responsible for granting licenses for substantial investments of foreign investors, but apart from that additionally the approval of other government agencies, as the Pharmaceutical Department, may be required.

Currently, there are over 300 foreign enterprises on the market. Most of them have only a representative office. Especially India and South Korea have a particularly big share in the market. However, the number of potential competitors increases by about 5 to 10% annually.

Especially as locally manufactured products belong mainly to state-owned firms, the prices are very low. Since the raw materials necessary for production have to be imported, also local firms are willing to cooperation.

Conclusion

The continuing economic upturn in Vietnam and the liberalization of the market after the accession to WTO could at the same time constitute a new profitable productive and distribution potential for Western enterprises. Except for the local industry, there are still not many competitors on the market. However, in order to attract investors, it is absolutely necessary to improve Vietnam's infrastructure. Fortunately, there are already plans for the implementation of a subway and a new airport in Ho Chi Minh City.

In order to promote the pharmaceutical industry in concrete terms, the government has to take yet further modernization measures for the sector. Among them are the development and expansion of the industry of pharmaceutical and chemical substances and agents from medicinal plants, the promotion of the healthcare system and of a reasonable and safe use of medicines. Moreover, efforts have to be made to take steps against illegal distribution of unregistered pharmaceuticals.

1.1.14 Administrative procedures

The complexity of administrative procedures and often uncoordinated and inconsistent application of laws and regulations by different authorities have a deterrent effect on many foreign investors. Therefore, the prospective reform of the Administrative Court Procedures Code (ACAFR), which is supposed to improve such administrative procedures posing difficulties and barriers for the business activity in Vietnam, is to be welcomed. Insofar as it is to be assumed that the Master Plan for the simplification of the administrative procedures in the area of public administration from 2007 to 2010 will promote the development of Vietnam as a favorable location for business activity and foreign direct investments.

Furthermore, it is necessary to simplify the approval process for the development of any branch of business in Vietnam. The participation of various government agencies in the formation process of a company still turns out to be time-consuming, so that the plan to achieve a better cooperation of authorities in Vietnam can be regarded as reasonable and effective.

1.1.15 Labor law

Introduction

The Vietnamese labor law is oriented employee-friendly to the greatest extent and in most cases is interpreted to the disadvantage of the employer. It has an effect particularly in labor law-related disputes which are in most cases decided in favor of the employee. The employment contract has to be based on the standard contract drawn up by MOLISA which, however, can and should be adjusted to individual requirements of particular enterprises in order to do justice to the interests of employers and employees. Here, a particular attention should be directed to non-competition clauses and such which ensure the protection of company secrets. However, the statutory provisions must not be violated in order to avoid nullity of the labor contract. Since the Vietnamese law is still immature, enterprises and subordinate agencies can by all means have a direct influence on its development by pointing to inconsistencies. Legal bases can be found in various statutes, but the core law is the Labor Code of 02 July 2012. Moreover, the labor law-related issues are regulated by the National Insurance Act, the Vocational and Further Education Act, the Trade Union Act as well as the Act on Vietnamese Working Abroad and numerous implementing regulations of the government and competent ministries. The Vietnamese law does not now industry-wide multi-employer agreements yet. Practice-oriented are rather collective work agreements in which the wage level, social security contributions, working hours and breaks, safety at work and rights to strike as well as the bonus system are regulated

and which have to be signed by a trade union representative and the principal of the company. Enterprises with more than ten employees are obliged to issue the so-called Internal Labor Rules and to register them with MOLISA. They have to regulate the following contents:

- working hours and rest periods;
- regulations within the company;
- health and safety at work;
- protection of the property and confidentiality of company secrets;
- specific examples of behaviors meaning a violation of these provisions;
- punishments to be expected in case of infringement (e.g. official rebuke)

Contract termination

In respect of contract termination it is advisable even in extreme cases to take the line of a reasonable amicable settlement. Moreover, the agreement to terminate a contract, contrary to termination according to the law, is the more common and most practicable variant and should contain the following items:

- the amount of the compensation to which the employee is entitled and possible benefits in kind;
- the commitment of the employee to retire from the company;
- the waiver of further claims on the part of the employee against the employer.
- The Vietnamese labor law knows also a distinction between a termination with notice (periods of notice of 3, 30 and 45 days, depending on whether a seasonal contract or a fixed-term or permanent contract is involved) and without notice (no periods of notice) and stipulates different reasons for termination: compulsory redundancy as well as individual- and behavior-related terminations.

The principal preference of employees is reflected in particular in the area of contract termination. A dismissal of an employee requires a termination notice and the adherence to appropriate periods of notice (which, however, in most cases does not even take place in practice). In such case, the employer is obliged to pay out a half of monthly salary per year of employment. If the employer wishes to give a notice unilaterally, then the trade union has to be involved as a rule. In order to mitigate against the strict termination procedure, it is advisable to use in most cases the contracts of employment for a limited period of time (they may, though, be extended once) or outsource certain activities completely.

Payments to the employee after termination of the employment relationship

According to Article 42 of the Labor Law, when unilaterally and illegally terminating the labor contract, the employer has to allow the employee to be back to work and pay salary, social insurance, health insurance during the period which the employee is not allowed to work, together with at least two-month salary according to the labor contract. If the employee does not want to continue working, the employer is required to additionally pay the employee job loss allowance. If the employer does not want the employee to continue working, and the employee so agrees, they have to negotiate on an additional compensation package but it must equal to at least 2-month salary according to the labor contract.

When formulating an individual contract of employment, a collective work agreement and internal company regulations, attention should be paid that apart from detailed description of the duties of employees, in addition, all reasons for termination coming into consideration are to be listed scrupulously because otherwise a termination turns out to be impracticable even in case of serious misconducts.

Examples of compulsory redundancies:

- organizational or technology restructuring processes
- changes in the company's ownership structure (mergers, transfer of ownership etc.); and
- economic reasons.

An individual- or behavior-related reason for dismissal is a repeated violation of duties defined in the contract of employment, but the personal fault has to be proven by the employer.

Furthermore, unauthorized absence from work (five days within a month or 20 days in total within a year) or absence from work due to a long-lasting illness, events of force majeure and absence from work after 15 days from the date of temporary delay in implementing the labor contract also entitle employee with termination. However, other disciplinary measures had to be taken before. The relevant amount of compensation varies depending on specific reason for termination.

Guidance for the implementation of unemployment insurance

Circular 28/2015/ND-CP replaced circular 32/2010/TT/-BLDTBXH guiding the Social Insurance Law relating to unemployment insurance issued on 12/03/2015. It provides details to when it whether a reason for refusing work offered is "plausible". Also it provides clarification around the strict requirements that a person must follow in order to be entitled to unemployment benefits. Circular 28 states, that where the number of 10 or more employees is reduced, the company still has to continue to pay unemployment insurance contributions. In case the unemployed moves that person is then required to submit a prescribed "request for transfer" to their existing labor body from where they are receiving benefits. That body contacts the new body who pays the benefits in the future.

Probation period

According to Article 29 of the Labor Code, the employer or the employee is allowed to terminate the employment during the probation period without notice and compensation.

Social insurance contributions

In 2009, the social and health insurance contributions amounted in total to 25% of the gross basic salary and were paid by both the employer and the employee. However, by 2014 the contributions are supposed to rise to 33.5%. The Vietnamese labor law grants maternity leave of 6 months. However, the work can be resumed four months after the birth at the earliest, but the ability to work has to be confirmed in health aspects by a medical certificate. The statutory retirement age is in principle 55 (women) and 60 years (men). Apart from the old-age security fund, since 1.1.09 an unemployment fund exists with the duty of the employers and employees to pay contributions amounting currently to 1% of the basic salary. The spirit and purpose of this fund is to abolish the obligation to severance payment. Furthermore, at the beginning of 2009 several amendments with regard to the Personal Income Tax (PIT) have been enacted. On the one hand, the PIT is calculated now from the gross salary, and on the other hand it has to be paid by the employer, which, at the end of the day, gives the enterprises more security. In order to save labor costs, some enterprises make recourse to an illegal trick. Two contracts of employment are concluded with an employee in order to pay social security contributions at a lower salary. However, be cautious of this practice. Moreover, foreign investors are advised to double-check whether the Vietnamese firm that is to be taken over has met its obligations to pay social security contributions in order to avoid being responsible for outstanding payments in the aftermath. The employer is obliged to pay the cost of treatment in case of an accident at work, but it is eventually borne by the social insurance, provided that it has been paid.

Wage costs and non-wage labor costs

Due to the inflation, the salaries leapt in 2008 indeed. However, meanwhile Vietnam can come up with comparably low labor costs again, which, in view of labor-intensive manufacturing processes particularly with regard to manufacturing clothes, shoes, toys or furniture is an enormous incentive for international investors to divert to the newly industrializing Southeast Asian country. Even the neighboring country China is not able to keep up with Vietnam's wage level and occasions even 50 – 70% higher costs, with the productivity being described as slightly lower or comparable.

Meanwhile, the wages in the capital Hanoi adjusted to those of the economic center Ho Chi Minh City which had always been highest throughout Vietnam. It is due primarily to the high number of foreign investors that group mainly around these both cities. In respect of low labor costs, particularly Da Nang (central Vietnam) is an extremely attractive location for foreign investors because, among other things, it has a big port and an international airport which is to be expanded yet in the future.

According to MOLISA, the minimum wages will be raised each year until 2015 in order to ensure adjustment to constantly rising prices. Current minimum wages (as of 01 January 2015) are different from region to region and range between 2,150,000 and 2,750,000 dong in the suburbs or Hanoi, Ho Chi Minh City, Hai Phong etc., whereas they amount to 3,100,000 dong inside Hanoi and Ho Chi Minh City. This minimum wages apply both to domestic and foreign-invested companies.

In practice, the minimum wages are usually higher, and in particular from Western employers a higher level is expected. According to HR Solutions Vietnam, the earnings of workers in the manufacturing industry at Western companies that want to retain their employees ranged between \$ 100 and 150 (2009). In Vietnam, it is quite common to change jobs several times in order to receive a higher income. However, only regular job changes every year to three years bring the employees actual salary increases. The remunerations rise sharply just in particularly searched-for areas, and the better qualified the faster. Studies of employment agencies such as Navigos and Mercer showed a salary growth rate of 16.5% or 15.3% (2008), and for 2009 an increase of 13.1% was forecasted. The highest rises took place in the real property and financial services segments. However, this development involves the danger for Vietnam to lose in the future its status of a country with low labor costs. Apart from political stability and security, it is one of the most important factors of the location advantage that Vietnam can currently offer. Principally, depending on levels of turnover, it is common in Vietnam to pay a 13th salary and, depending on performance, even a 14th salary which is paid out at the "Tet" festival in January or February. Most of the job changes take place at this time as well. Considering the high labor turnover rate, enterprises with foreign capital should definitely give thought to the subject of employee retention. Suitable for this purpose is e.g. the defrayal of both social insurance portions or the introduction of an additional health insurance. Furthermore, it is important to observe a respectful contact with each other and to encourage the sense of unity by uniform T-shirts etc.

Raising the bar for auditors

The Decree 16/2011/ND-CP amended changes in two areas. A. qualifications: now the auditors are required to hold a university degree specializing in economics, finance, banking, accounting or auditing, not just a Bachelor degree anymore. B. experience: the amendments require at least 5 years working in finance and accounting enterprises. Now clarifying that the experience must be gained after graduation and before the year in which an auditor registers for the exam to be issued with an auditor certificate by the Minister of Finance. It came into effect on 20 April 2011.

Workforce shortage

In principle, Vietnam has a young and diligent working population thirsting for education. However, there is a severe shortage of skilled workers. Whereas unskilled workers, due to small workload in some areas, are quasi forced to relocate in order to find work, skilled workers are reluctant to accept

greater distances to commute to work or even to relocate. The standard of education has still to be characterized as inadequate (frequent lack of foreign language skills, lack of communication of technical depth and lack of key qualifications, such as particularly quality awareness), and according to newspaper reports not even a third of working Vietnamese is educated. The motivation, even at the management level, leaves partly much to be desired – e.g. an extremely great stress is put in Vietnam to punctual work stoppage. Meanwhile, the country has to realize that the current situation in respect of the existing inadequate qualification is rather hindering the economic development. The requirements on the workforce will increase yet in the future so that quite a few things have to change in the education sector in order for Vietnam to be able to keep up with the needs of the industry and for the gap between supply and demand to stop to increase yet further.

The workforce shortage becomes apparent particularly in the booming IT sector and the service sector (legal services, banks and logistics). In particular, there are practically no local lawyers with international experience. As a general rule: The more responsible the vacancy to be filled the more difficult it is to find suitable personnel. Another problem appears in view of the fact that the job titles are not used uniformly, so that an accountant may quickly become a financial manager. That is why it is strongly advisable for employers to double-check before the recruitment whether the qualification profile of the applicant corresponds to the required skills; moreover, they should not rely on certificates only because their significance is very limited. Alternatively to the workforce educated in the country presents itself the possibility, depending on the area of activity (technical or management area), to divert either to workforces educated in the former GDR or to so-called Viet Kieus (Vietnamese who spent their life mostly abroad). Here, on the other hand, appears the problem that these highly qualified and cross-culturally educated people mostly aspire after self-employment and are less interested in an activity as an employed person. Furthermore, in case of short-term employments, the possibility for foreign employers to have own employees flown in from abroad presents itself. In case of permanent employments, however, this option could often prove to be too expensive because they would have to meet expenses for accommodation allowances, school fees etc. Currently, the foreign investors have no choice but to apply the “training on the job” method and to take care for the apprenticeship of the employees themselves. Since headhunting for qualified workforces is common practice in other enterprises, it should be prevented by means of suitable security mechanisms, although it can never be completely excluded despite all security measures, that an employee trained by the company leaves it early. However, already the obligation to refund the training cost is practically unenforceable. As the labor costs are indeed forced up as a result, but the number of well-trained employees does not increase, this strategy should be reconsidered. The number of qualified workers is far higher in the south in the area of the industry zones than in the north, not to mention Central Vietnam. It is due to already completed employee qualification by the enterprises. Since the restriction of the percentage of foreign employees at an enterprise of 3% at the maximum has been abolished in June 2008, it is definitely advisable to fill higher positions with expatriates. Here, the Vietnam-based foreigners who have started a new life in Vietnam are particularly suitable because in most cases no expenses for flights home or fees for international schools have to be defrayed. However, Vietnamese employees also can be extremely advantageous, especially if official and unofficial cultivation of contacts with relevant local authorities is involved. Considering the rigorous and complicated termination procedure, the enterprises should consult professional and experienced institutions when searching for personnel and negotiating contracts.

Another important issue which must not be underestimated is family ties. It is not uncommon that Vietnamese staff taking care of the recruitment of future employees readily gets relatives on board. However, since in case of doubt the family hierarchy remains the decisive factor, difficulties when establishing the internal organizational structure of the company are bound to occur. That is why the recourse to relatives should be avoided even if the qualification is correct. The current difficult

economic situation caused that the loyalty to the employer increased forcedly. The high labor turnover rate of 15% is, however, to be attributed not only to the wish for a better salary, but is rather due to dissatisfaction of the staff with the management style of some companies.

Industrial disputes

In 2008 came to between 750 and 1000 industrial disputes, most of which in industrial centers in and around Ho Chi Minh City and in the textile and clothing industry. However, in 2009 these figures plummeted, which is to be attributed to tense labor situation. In principle, foreign invested enterprises are generally not the target of strikes because they usually meet their obligations and as a rule pay a higher wage.

Strikes are indeed theoretically allowed under the command of the trade union; in practice, however, a very complicated and bureaucratic procedure has to be carried out, before a strike becomes legal. As a result, the industrial disputes take place in an illegal way, thus anonymously, and the employer is not aware of its negotiating partner. Theoretically, since 30 January 08, on the strength of a decree the enterprise has still the possibility to claim damages from the strikers for losses suffered as a result of illegal strikes. A new strike law is already discussed.

In principle, employers have to allow formation of trade unions in their factories. A mostly social function is assigned to trade unions in Vietnam. They have indeed to be involved in the negotiation of collective labor agreements and in case of a redundancy, but their role is comparable to the trade unions in Germany to a limited extent only.

General conclusion

The current labor law consists of a collection of decrees and circulars. On the one hand, numerous regulations indeed help make certain unclear passages in this collection more understandable. On the other hand, they can also create new difficulties, precisely because the labor law has far-reaching effects on the society. That is why it is advisable to urgently harmonize this partly fragmented and partly overlapping body of laws, thus to create more transparency. Furthermore, new bills in this regard should be limited.

Workforce reduction

According to the old labor law, the employer is allowed to lay off employees subject to two conditions only: (i) after restructuring or technical changes in the enterprise; or (ii) the enterprise has been taken over, consolidated, demerged or a change of owner has taken place or parts of it have been sold. The new Labor Code mentions yet another reason for workforce reduction, namely "economic reasons". It appears to be an improvement compared to the current labor law.

Recruitment of foreigners

The new Labor Code contains certain regulations with regard to the recruitment of foreigners and they appear to be more rigorous than the current ones. Particularly, Article 170 Paragraph 2 provides that employers that want to recruit foreigners have to give grounds and in addition obtain an approval of the employment agency. It is a tedious process and brings only administrative effort for the enterprise. Moreover, the Labor Code fails to mention the criteria for the decision of authorities.

When is a foreigner exempted from the requirement of work permit?

- Foreigner who has been **working in Vietnam for less than 3 months** to provide services or deal with complicated technical or technological incidents affecting or threatening to affect business operations, which Vietnamese experts or foreign residents in Vietnam could not handle
- **Member** of a multi-member LLC
- **Owner** of a single-member LLC
- **Member** of the Management Board of a JSC
- **Head** of Representative Office, projects of international organizations or non-intergovernmental organizations in Vietnam
- **Foreign students studying and working in Vietnam** (in this case, the provincial DOLISA has to be informed 7 days in advance)
- **Foreign lawyers** who have obtained a license to practice from the Vietnamese Ministry of Justice
- **Inter-corporate transferees** in enterprises doing business in 11 services in Vietnam's WTO Schedule of Specific Commitments on Services
- Persons permitted to conduct information and journalism activities by the Ministry of Foreign Affairs
- **Volunteers** (as certified by foreign diplomatic representative office or international organization in Vietnam)
- **Teachers** of foreign organizations selected by competent authorities of that country to do lectures in international schools under the management authority of foreign diplomatic representative office or international organization in Vietnam (as certified by foreign diplomatic representative office or international organization in Vietnam)
- **Persons with master degree or higher** doing consultant, teaching, science research activities in universities for less than 30 days.

What are the requirements to obtain a work permit?

- **Having sufficient civil capacities**
- **Suitable for the job in respect of health**
- **Being Managers / Managing Directors, experts or technical workers:**
 - Special requirements for all those who work in the health or education sector
- **No previous convictions, or criminal offences according to Vietnamese laws and foreign laws**
- **Being approval in writing** by competent authority of the use of foreign employees.

1.2. Major trade agreements

From the by now more than 30 bi- and multilateral economic agreements which Vietnam concluded in recent years, the BTA, the Cooperation Agreement with the EU (KA), the German-Vietnamese Investment Promotion and Protection Agreement, the Vietnamese-Japanese Investment Protection Agreement and the accession to the WTO should be presented in detail because these agreements have the widest-reaching impact also on German investments in Vietnam.

1.2.1 Trade Agreement USA – Vietnam (BTA)

On 10 December 2001, the Bilateral Trade Agreement between the Socialist Republic of Vietnam and the United States of America came into effect. That way, the long-time process of economic opening of the USA towards Vietnam reached its temporary peak. The BTA is an important agreement for both

parties. It gave a considerable advantage with regard to opening of the Vietnamese internal market over competing markets, such as in particular those of the EU. After decades of isolation, Vietnam had finally gained access to the American market, thus the chance to strengthen the economic recovery of the country.

The BTA is a comprehensive commercial agreement which, in contrast to the Cooperation Agreement between Vietnam and the EU, almost completely regulated broad areas of trade between the USA and Vietnam. It extended to such areas as trade in goods and in services, intellectual property and industrial property rights and includes trade facilitations and transparency regulations. Both states granted themselves bilaterally a most-favored-nation status and the status of equal national treatment which resulted in a farthest-reaching reduction of existing trade barriers, be it in the form of restrictive customs policy or indirect taxes for the protection of the domestic economy. That way Vietnam had an access to the US American market corresponding to the WTO standards already before its final accession to the WTO. It was important from Vietnam's point of view, particularly with regard to the economically strong People's Republic of China that was a full member of the WTO already at that time.

Although the BTA was controversial on the domestic front, was assessed by its opponents as renunciation of socialist values and feared because of imminent loss of hegemony of the Communist Party of Vietnam, yet it is evident that the majority of policymakers in the country were in favor of the BTA. After the collapse of the Soviet Union and the orientation of China towards a market-based economic policy, Vietnam faced the decision whether to isolate its market also in the future and continue to remain in global economic isolation or to open its market and to become integrated into the world economy. Considering the desolate economic situation of the country, the step towards integration into the global economy apart from all ideological concerns seemed to be the only reasonable step in order to relieve the distress of the Vietnamese people. However, the rise of unemployment forecasted by the critics of the BTA and the danger of social and political unrest related to it are not without any reason and raise the question whether Vietnam is currently already capable at all of meeting the obligations arising from the BTA. Here, the implementation of the agreement at regional and local level where, in the light of experience, the influence and control of the central government was low.

Apart from its specific trade-related advantages, from Vietnam's point of view the BTA presented also a significant step towards the planned accession to the World Trade Organization. The BTA contained many obligations corresponding to the WTO standards which Vietnam had to transpose and partly had already transposed into national law within agreed schedule. First successes, such as the implementation of a new customs valuation system, were reported as soon as directly after the conclusion of the agreement and they show Vietnam's serious efforts to make use of the economic advantages of the BTA and the now full WTO membership. In this context, the so-called Action Plan of 12 March 2002 in which the Vietnamese government adopted a catalogue of measures for the implementation of obligations arising from the BTA is to be mentioned, too.

Schedule G of the third chapter of the BTA is of particular importance. Therein, beyond granting the most-favored-nation treatment in the area of trade and services, extensive benefits for US American service enterprises were provided for.

The US benefited a lot from the BTA, partly because of the massive post-signing implementation effort they did. From an economical point of view, the BTA was a huge success and very important for Vietnam.

From 2001 to 2005, the bilateral trade between the US and Vietnam increased tremendously from USD 1.4 billion to over USD 7,6 billion. The imports of products from Vietnam into the US increased from

around USD 1 billion to over USD 6.5 billion over this period. US Foreign direct investment (FDI) increased by an average of 27% from 2002 to 2004.

Further details on this subject are contained in Volume 6 of the present Investment Guide.

1.2.2 Cooperation Agreement EU – Vietnam

A Trade Agreement (TA) between the Socialist Republic of Vietnam and the European Union exists, too. In this agreement, basically the regulations concerning the trade in goods are stipulated. However, it is by far inferior to the stipulations in the BTA. Particularly with regard to the service sector, the EU should press for an agreement corresponding to the BTA as regards content to be concluded with Vietnam in order to ensure a basis for equal competition between US American and European enterprises.

Apart from the TA, in February 2003 Vietnam and the EU concluded an Agreement on Textiles that came into effect on 10 September 2003. In the Agreement, Vietnam committed to reduce the customs duties on textiles imported from the EU to 5% for materials or 30% for clothes. In return, the EU committed to raise the import quotas for Vietnamese textiles by 50 – 75%.

The Agreement on Textiles fits into a range of liberalization measures taken recently by Vietnam with regard to EU products. So it reduced customs duties on wine and spirits from EU countries and took various measures for the facilitation of imports of other EU goods, such as scooters and pharmaceutical products. However, all these measures do not touch the benefits granted to the American enterprises by virtue of the BTA.

Furthermore, on 1 January 2005 came the so-called Early Harvest Agreement (“EHA”) into effect. The background of it was the abolition of worldwide customs duties on textiles according to the schedule of the WTO Agreement on Textiles negotiated in the Uruguay Round. In order not to expect Vietnam to put up with excessive disadvantages for the future of its textile industry in view of the fact that both its main competitors on the textile market, China and India, strongly benefit from this abolition of customs duties, the EU reduced the import duties on Vietnamese textile goods, too. In return, Vietnam committed to make numerous concessions with regard to investments of European enterprises in economic sectors (particularly in the service sector) which are still under strong protectionism.

1.2.3 German-Vietnamese Investment Promotion and Protection Agreement

This bilateral agreement between Germany and Vietnam came on 19 September 1998 into force and serves for protection of mutual long-term investments of private enterprises that are based in the territory of one party to the agreement and that undertake investments in the territory of the other party.

The investor protection in the agreement serves as protection against political risks and is supplemented with guarantees of the German federal government for direct investments. Further details in this regard can be found on the website www.agaportal.de.

If you are interested in the text of the agreement and the implementing regulations, you can receive them free of charge as PDF files. For this purpose, please send an e-mail request to Dr. Oliver Massmann at the address omassmann@duanemorris.com

1.2.4 Investment Protection Agreement Japan – Vietnam

On 14 November 2003, Vietnam and Japan signed an Agreement on Liberalization, Promotion and Protection of Investments (Vietnamese-Japanese Investment Protection Agreement, IPA). Japan is one

of the most important investors in Vietnam. The conclusion of the Investment Protection Agreement may be regarded as an effort to revive the interest of Japanese investors after the total volume of Japanese investments had dropped from more than US\$ one billion in 1995 to less than US\$ 60 million in 2001. At the same time, it counteracts complaints from the Japanese side about preferential treatment of other nations (such as the USA).

The IPA warrants Japanese investors the most-favored-nation status and the status of equal national treatment. However, it lists several areas in which it remains reserved for both countries to determine exceptions to the principle of the most-favored-nation status and the status of equal national treatment, i.e. to maintain or to create restrictions on investments (e.g. Vietnam has restricted Japanese investments in the area of fisheries and the operation of harbors and airports, in turn, Japan has restricted e.g. Vietnamese investments in power plants and maintained existing restrictions in the area of fisheries, agriculture etc. Moreover, the agreement includes regulations on dispute resolution, transparency of legal provisions, protection of intellectual property etc. Despite the agreed most-favored-nation status, the IPA allows both countries granting preferential treatment to third countries within free trade areas.

1.3 WTO

1.3.1 The accession to WTO

After 10 years of negotiations, on 11 January 2007 Vietnam became 150th member of the WTO. After the General Council decided on 7 November on the admission of Vietnam, the National Assembly ratified the relevant accession package. 30 days after the notification of adopted ratification was received by the WTO Secretariat, Vietnam became official member of the WTO. There is no need to explain in detail that Vietnam's accession to the WTO is of the utmost importance for the country for the purpose of achieving full integration into the global economy. At this point, particularly the expiration of quota regulations on import and export of different products among WTO members in 2005 is to be mentioned. The admission of Vietnam not only brings to the country important progress that it urgently requires, but also ensures its long-term competitiveness in order that it is able to keep up with other strongly emerging Asian nations, such as China. Vietnam had applied for the membership in the WTO at the beginning of 1995 as a developing country. Afterwards, a detailed memorandum on the Vietnamese foreign trade and the economic policy was delivered to the WTO Working Group for examination. A range of meetings between Vietnam and the Working Group took place in order to clarify issues concerning the trade in goods, services and rights to intellectual property. In May 2006, Vietnam concluded long-time bilateral accession negotiations with the USA, as the last negotiating party. In the course of implementation of the BTA, Vietnam already had to liberalize wide areas of its trading system. Insofar, the implementation of the BTA turned out to be an important mechanism smoothing the way to Vietnam's membership in the WTO.

Subsidies for the domestic economy, which were previously allowed, had to be abolished. Thus import duties for the protection against foreign goods and services are allowed only to a limited extent. Vietnam has already met this requirement and has determined most duties between 0 and 35%. Considering the still emerging economy, transitional periods until 2014 for certain products were determined. Just in the agricultural sector, which is the main source of income for a number of low-income Vietnamese, no reductions took place yet because otherwise the government thinks that the existence of entire villages would be threatened. The change from socialist system towards Western-oriented market economy cannot be pushed through without any transition yet.

As regards the transformation of the legal framework, Vietnam started the reforms aiming at the adaptation shortly after the date of accession. The uniform Law on Investment (LOI) and the new Law on Enterprises (LOE) of 01 July 2006 regulate to a great extent the equal treatment of foreign and

domestic investors as it is required according to the non-discrimination laws of the WTO. These regulations contain among other things the abolition of investment limits. For comparison: China joined the WTO in 2001, but only with the so-called “Administrative regulations for trading activities of foreign invested enterprises” of 01 June 2004 started to harmonize its laws with the Trade and Investment Standards of the WTO. Vietnam set about it as soon as 2006, in the year of accession, and already in the same year enacted the abovementioned revised laws.

The government and the ministries endeavor to accommodate investors and managers. Just in the area of trade and distribution, the relaxations and liberalizations are numerous: Decree 23 of 12 February 2007 and Circular 09 of 17 July 2007 determined the framework in this area according to the WTO standards, but in some respects went not so far as anticipated. In the Circular 05-2008-TT-BCT, the official side reacted to criticism of foreign merchants and abolished a restriction with regard to the selection of local distribution company. No registration is required now and the number of distribution partners is freely selectable as well. Since January 2009, the distribution is completely liberalized.

The direction is clear: the reform advances. A current government bill provides for further big steps towards international standards. The decree extends the area of application of the non-discrimination principle further and places Vietnamese enterprises with foreign ones on the same level. Furthermore, it is stipulated that, in case no specific regulations have been adopted by the Vietnamese side yet, the regulations contained in the accession commitments are to be applied. Should the bill be implemented in such form, it would be a further milestone on the way Vietnam's towards an internationally established market.

1.3.2 Overview of the implementation of the WTO Commitments by 2009

After two years of WTO membership, Vietnam had still to struggle against some problems with regard to the implementation of the WTO Commitments. It concerned for instance import laws for pharmaceutical companies. In this respect, the Ministry of Health should issue guidelines immediately in order to meet the deadline for implementation, i.e. 1 January 2009. In the pharmaceutical sector, a closer cooperation with the government could ensure a better access to life-saving pharmaceuticals. The approval procedures for distribution outlets have to be shaped yet more transparently and be contingent on objective criteria in order to reduce the wide scope of discretion of the authorities. The continuous improvement of the intellectual property rights and the penal code were of great importance for foreign investors. However, the implementation of WTO Commitments alone is not enough. More liberalism is required. At the end of 2008, the Eurocham issued recommendations for the development of 13 fields, including banking, building material supplies, branded articles, consumer products, distribution, electrical efficiency and safety, fuel distribution, electricity, staff, pharmaceutical, tax, telecommunications, transport and logistical aspects and the distribution of wine and spirits. Among the most important investment barriers are the infrastructure, the human resource development, the weak protection of intellectual property rights and the lack of consistency and transparency in the regulatory decision-making processes.

Overview of the implementation of the WTO Commitments by 2017

After ten years of WTO membership, Vietnam has grown and has maintained an annual economic growth of 6.29 % despite the crises.

Since its entry into the WTO in 2007, Vietnam is increasingly changing its legislation to fit international standards and market access has continued to open up as well as investment incentives.

WTO accession has created more advantages than disadvantages to the Vietnamese economy.

After the accession, the increase in economic growth was considerable due to great amount of investment. The import of heavy industry in Vietnam accelerated and Vietnam switched from

exporting primary commodities to exporting goods produced with high technologies. In fact, Vietnam has diverted from agriculture-driven economy to focus more on developing industrial sectors. The WTO also had impact on the society, creating several working opportunities. Besides, WTO had a positive impact on the economic growth through the trade liberalization, improvement of the market access, growth of foreign capital. According to those several improvement, the Vietnamese law became more transparent and uniform. The Vietnamese economy became more opened, creating flexibility in the market. However, it's important to note that WTO enforced inequalities among Vietnamese citizens.

Complying with the international trade law, the WTO promoted the integration of the Vietnamese economy into the international economy and it created similar opportunities for Vietnam in order to further develop its economy.

1.3.3 The Service Sector Commitments towards WTO

In the Annex you will find a list of specific commitments in the service sector (Service Sector Commitments) in English. These commitments arose from the negotiations between the Socialist Republic of Vietnam and the WTO members. Under item 528 of the Report of the Working Group on the Accession of Vietnam (WT/ACC/VNM/48), the list was already in the Annex to the Accession Protocol.

1.3.4 Vietnam and the AFTA

The ASEAN Free Trade Area ("AFTA") was established among Asian nations in 1992 in order to create a free trade area and to realize from 1993, within a period of 15 years, tariff cuts among the ASEAN members. In 1995, the timeframe for the implementation of the plan was shortened to 10 years. Vietnam joined the ASEAN as its seventh member in 1995. The AFTA is a milestone for the economic cooperation and integration among the ASEAN members. It meant for Vietnam the termination of the years of isolation by entering into economic relations with other Asian countries. Vietnam's participation in the AFTA facilitated the admission process to the WTO because the ASEAN members have to comply with AFTA rules which are in line with international trade practices. Nevertheless, Vietnam still faces some challenges. Various clauses and provisions on the protection of national products against the competition of foreign products on the domestic market will disappear due to the fulfillment of commitments in the AFTA. That is why local companies should develop strategies in order to remain competitive in the long term and to orient their enterprises in line with international and regional commitments. Further remarks on this subject are contained in Volume 6.

1.4 Banking

In 1990, in the course of restructuring the Vietnamese banking sector, the State Bank/Central Bank was separated from commercial banks and so the way for the entrance of private banks was paved. According to the recently issued reform plan, the State Bank will not hold the exclusive proprietary rights and at the same time be responsible for the supervision of state-owned commercial banks because not only the Vietnamese government sees a conflict here. After equitization, these rights and duties shall devolve to the shareholders that can be the State of Vietnam itself or private investors.

The banking and financial sector has now more participants, is more versatile and offers a wide range of financial services. There are numerous commercial banks, including 3 state-owned, 37 domestic joint-stock banks, 37 branches of foreign banks and 5 joint venture banks, and in addition about 45 representative offices.

The number of state-owned banks (currently six in number) is reduced step by step. The owner of all state-owned commercial banks is the Vietnamese Central Bank that has also a strong influence on the daily business of the banks and controls the composition of the Supervisory Boards and the executive staff. The equitization of these commercial banks is already in progress and is expected to be completed by 2010 at the latest, apart from the Bank for the Agriculture and Rural Development, the Agribank, complete equitization of which is expected to take place at a later time. According to present plans, the government share is to be reduced gradually to 51% by 2010. An individual investor may hold maximally 10% of shares and altogether maximally 30% may go to foreign owners.

Due to the equitization process, the Vietnamese banking sector has already changed and is changing to a great extent. All banks are put on a level and the formerly state-owned banks have to be in competition just as private banks. Furthermore, the WTO commitments will contribute to opening of the market because they bring close and adapt the rights of foreign banks on the Vietnamese market to the rights of domestic banks.

Circular 10 of the State Bank of Vietnam providing criteria for selection of strategic shareholders of State commercial banks undergoing equitisation dated 22 April 2011 and came into effect 1 June 2011. Circular 10 instructs State commercial banks undergoing equitisation to select strategic shareholders who are reputable investors with the financial capacity and ability to assist the State bank in the following areas: raising capacity in management, executive operation and risk management; applying modern technology; developing banking products and services; and developing other sectors consistent with the developmental strategy of the State bank.

Further Circular 10 requires that any potential strategic investor in a State commercial bank: provide strategic advantages connected with the developmental strategy of the particular State bank, not create a conflict of interest and not create a monopoly in the context of unfair competition as regards other clients and investors of the particular State commercial bank or other credit institutions. There are different requirements for the foreign investor depending on the whether intended bank for investment is State owned or privately owned. Circular 10 now provides that domestic investors who want to acquire a strategic stake in a State commercial bank must meet a number of requirements. Even though criteria for strategic investment in State banks have now spelt out, the actual requirements imposed on investors may not necessarily stop there. Specific criteria remain subject to the approval of the Prime Minister.

Following the Banking working group recommendations, the SBV should continue to build mechanisms and legal ground to offer sufficient derivative products to help business risk management.

Regarding short-term yield curve, the SBV is assessing the currency market to determine representative interest rates to build a short-term.

1.4.1 Monetary policy

At the present time, the financial sector in Vietnam passes through comprehensive structural reforms at high speed. The currency, the Vietnamese dong (VND), is in continuous up and down. It is closely related to the still volatile Vietnamese economy and equally is subject to fluctuations of the foreign trade balance. The current monetary policy has above all one objective: to combat inflation. This year, it reached the peak values of 27%. However, the fixed exchange rate constitutes a first step towards stabilization of the market. The dong presents itself as typical currency of a not yet developed market, with all advantages and disadvantages for entrepreneurs and companies concerned. The undeniable competitive advantage due to the relatively low value of the dong in relation to other currencies can be mentioned as a plus. In recent years, it was one of the main reasons for altogether low cost of production in Vietnam. It induced many companies to relocate the production to Vietnam; not only from the developed countries, but also from China or Malaysia, two of earlier “developed” new

markets. At present, the exchange rate is still to a certain extent subject to state control in order to prevent a sudden price drop. Therefore, the exchange rate of the dong cannot be discussed without having in mind that it is partly tied to the US dollar, even though the Vietnamese government refers only to a controlled exchange rate within a certain tolerance range. The tie is the main reason for the relatively low value of the dong and quite clearly aims at ensuring the competitiveness of the export industry, the still most important sector of the Vietnamese economy. On the other hand, it has to be considered that the tie to the US dollar leads to an undervaluation of the dong in the long term because the Vietnamese economy grows faster than economies of developed countries. It puts the dong under pressure because an appreciation in relation to other currencies such as dollar, euro and yen, is expected. In turn, it would have a negative effect on the Vietnamese export industry. In the end, it can be said that, by the standards of a still not developed market economy, the dong is a stable currency. The financial policy has indeed primarily the growth in mind, but it shows increasing tendencies towards better inflation control.

Decision 03/2011/QĐ-TTĐ issued for regulations on guarantees for loans of small and medium sized enterprises from commercial banks. Under Decision 3 SMEs are entitled to guarantees by VDB in respect of their VND denominated medium or long term loans from commercial banks if the certain conditions are satisfied like the investment project is feasible and effective, the SME does not have any bad debts with any credit institution at the time of the guarantee application. If approved, VDB will issue a guarantee to the commercial bank which provides funding to the SME to secure the SMEs performance under the loan agreement. The guarantee can cover all or just parts of the loan amount and interests, provided that the total guarantee amount in respect of a single SME does not exceed 5 % of the charter capital of VDB. Fixed interests rate of 0.5% per annum on the guarantee amount. Given its special status as a State development bank, Decision 3 grants VDB a number of exceptional rights which are not common for a guarantor, a. the right to require the commercial bank to cease lending and recover the loan before its maturity if the SME violates the law, the guarantee or loan agreement; b. the right to co-ordinate with the commercial bank in inspecting and supervising use of the credit funds in order to ensure that funds are used for the proper objective; c. the right to refuse to indemnify the commercial bank under the guarantee.

1.4.2 Opening of the stock exchange

After the Securities Trading Centers (STC) in Ho Chi Minh City and Hanoi, opening of the Vietnamese stock exchanges in 2000 in Ho Chi Minh City and in 2005 in Hanoi is another step in the course of economic change in Vietnam. The creation of a functioning stock market is expected to support the policy of economic regeneration and the global integration process. According to the Prime Minister Nguyen Tan Dung, the goal to “develop a market mechanism with socialist orientation” pursued in this way has the highest priority. Having established a modern stock market, Vietnam expects increased foreign investments and increased currency import. The stock exchange has an extremely important function of channeling indirect foreign investments. Therefore, investment incentives can be found in the Vietnamese securities trading as well. Since April 2000, tax benefits for securities trading came into effect and an order on more transparency and on the protection against expropriation was established. These tax benefits apply also to enterprises carrying out activities in the area of fund management and similar securities listed for issuers. Finally, the private investor benefits in this context from the exemption from income tax on profits from dividends, government bonds and trading in securities.

At the same time, Vietnam strives to keep the urgently needed foreign currencies of foreign investors in the country. All stocks and investment funds listed at the stock exchange of Ho Chi Minh City have to be quoted and traded in Vietnamese dong (VND). 156 securities are listed so far (among others Refrigeration Electrical Engineering Co. and Cables and Telecommunications Material Co.). In 2005, the trading value amounted already to US\$ 3.5 trillion.

At the beginning, typical difficulties occurred. The first official trading had to be postponed several times due to technical difficulties. Trading takes place only on Mondays, Wednesdays and Fridays for 2 hours, respectively. Initially, only 2 companies were listed. In some cases, reports with sarcastic undertone of “stock exchange theater without actors” were given. In 2001, the trading value amounted to a total of VND 1 trillion. More than 17 million stocks changed hands. During 2001, the market index at the Vietnamese Stock Exchange reached a peak value of 571.04 points, but then declined again in the course of the year and closed with 235.4 points on 31 December 2001.

The stock exchange has increased the available capital and therefore ensures the stability of the national balance of payments of Vietnam. However, some enterprises, among them also state-owned, gave in to the temptation of instant riches and dealt with investments rather than concentrated on their core business, which had negative effects on the liquidity and in some cases even threatened the economic viability.

Recently, the VN index was in continuous turmoil, after in December 2007 the stock market valuation dropped from about USD 31 billion to USD 20 billion. Although many people regarded it as dramatic, the things should be considered in a context. Today, Vietnam’s stock market valuation is 4 times higher than 2 years ago.

Meanwhile, trading takes place for two hours, respectively, i.e. from 9 to 11 am. In April 2006, 35 companies were listed, in November 2006 already 56 companies and in June 2008 156. It is also due to other factors that Vietnam’s stock market is booming and ranks among the fastest growing markets in the world (about 7.4%).

Meanwhile, almost 400 former state-owned enterprises have been privatized and in some cases transformed to joint-stock companies (equitization) which come into consideration as future stocks. By 2010, further state-owned enterprises should be first transformed and then partly privatized. At first, however, a majority share of the state is planned. The State of Vietnam wishes still to retain control in the sensible sectors. A bottleneck constitutes the yet required approval of the State Security Commission (SSC) that decides on the suitability of stocks for stock exchange trading. New issues are related to a range of rigorous requirements. For instance, candidate companies have to show a minimum capital stock of VND 10 billion, that they have generated profits during the last two years and at least 20% of issued stocks are sold to more than 100 different investors. Moreover, the issuing companies have to undergo a special audit.

The Vietnamese government strives to cope with the difficulties by issuing numerous regulations. SSC and STC want to adhere closely to the guidelines of the party and the government. They want to cooperate closely with relevant ministries and organizations in order to continuously improve the legal framework. The staff ought to – not least through international cooperation – be better trained. What is more, the public attention should be increasingly directed towards the securities and stock market. The fees for trading houses and companies participating in the transactions in securities must not exceed certain statutory amounts. Already under the LFI, there was a government plan for admission to quotation at the stock exchange of foreign directly financed enterprises. Despite the readiness to implement foreign securities trading knowhow, for the purpose of ensuring certain autonomy of Vietnamese enterprises, foreign investors are allowed to purchase shares in them in a limited scale only in order to avoid majority shareholding.

Whereas foreign investors could purchase only up to 30% of shares in listed companies and up to 49% in unlisted companies as yet, the percentage has been increased to 49% now. Nevertheless, restrictions for foreign investors on the Vietnamese market still exist.

Since 2009, some innovations and successes in the area of capital markets can be reported.

For instance, from now on the enterprises are entitled to freely determine the ending date of a business year, which makes it considerably easier for them to prepare the financial statements, the general meeting and financial audits due to flexible organization.

Decree No. 58/2012/ND-CP as amended by Decree No. 60/2015/NĐ-CP provides details and guiding implementation of a number of articles in Law on Securities to investor protection through increased transparency. It raises for the first time the possibility for offshore companies to offer their securities to investors in Vietnam through listing on a Vietnamese stock exchange. In order to make an offer, the investor must have an approved investment project in Vietnam and the offer proceeds must stay in Vietnam. The offer must also be underwritten by a Vietnamese securities firm. One benefit for an issuer in pursuing a Vietnamese listing would be the relief from the foreign ownership restrictions associated with the public and listed companies in Vietnam. Other changes are in order to ensure a wide spread of shareholders, that a listed company has to have at least 100 shareholders who must hold a minimum of 20% of the total issued ordinary voting share. Beside ordinary shares, corporate bonds and fund certificates, also securities such as warrants, options, market indices or future contracts are now offered publicly.

Decree 108/2013/ND-CP provides tougher penalties for securities laws breaches, as well as providing new provisions, which will assist the SSC to determine appropriate penalties by setting out parameters for when a warning, fine or additional penalties (including the cancellation or suspension of an offer, recovery of proceeds or revocation of securities license) should be imposed.

Decree 83-2010-ND-CP came into effect on 9 September 2010. It introduces new developments as well as reiterating some of the provisions formerly scattered across various instruments. Decree 83 sets out in one place all the types of secured transactions for which registration is compulsory. The former requirement under decree 163 to register a mortgage of a single item of property as security for performance of several obligations has been removed. Commencement of registration where the secured property use rights or assets attached to land when a complete application is received by the registration office; where the secured property is an aircraft or ship, when the security transaction is recorded in the National Register of Aircraft or the National Register of Ships; where the secured property is any other movable asset, when the contents of the registration application are entered into the database of secured transactions. Decree 83 also sets out general regulations covering procedures for receipt of applications for registration of secured transactions and timeframe for authorities to process and respond to applications for registration. Also some provision for email and online registration. Decree 83 also provides individuals and organizations the right to request the provision of information on registered transactions. Only in few cases refusal is allowed.

In September 2017, Decree 83 has been superseded by Decree No. 102/2017/ND-CP, which specifies registration on security interests.

Law 62/2010/QH12 will become effective on 1 July 2011. Law on Securities now explicitly legislates for private placements of shares and convertible bonds issued by public companies (Companies with 100 or more non-institutional investors). Private placement is an offer to less than 100 non-institutional investors which is made without using any public information dissemination method, including the internet. Purchasers of newly issued shares or convertible bonds under a private placement are subject to a minimum lock-up of one year, during which time they are not allowed to transfer the shares or bonds, subject to various exceptions including the employees shareholders and sales to professional investors. It's designed to avoid pricing instability if investors seek to offload large quantities of shares or convertible bonds after issue. A new class of securities called "capital contribution investment contract" is introduced. It's like an investment contract under the U.S. Securities Act, however without further detail nothing concrete is known. The amendments have also revamped the rules concerning the mandatory offer or takeover process for public companies. While the amendments introduce the

concept of a real estate investment fund, akin to a REIT in other jurisdictions, extensive further regulation will be needed before these become a reality.

Circular on Disclosure of Information

Furthermore, the Circular on Disclosure of Information (“Guidelines for the disclosure of information in the securities market”) was revised to the effect that the respective input of market participants has to be disclosed. Particularly as the executives of enterprises usually do not regard themselves as owners of the enterprise, on the one hand, there is a problem that they treat financial reporting as a pure formality. On the other hand, the requirements on structuring annual reports are not high enough. It affects also the trustworthiness of the annual financial statements, the annual reports, the shareholder relations as well as the accounting and valuation methods. Mere quarterly reports are little informative and almost valueless for a layperson. Furthermore, there is no differentiation between audited and unaudited annual reports.

Moreover, the Circular makes almost no arrangements on insider trading and there are still no regulations on the number of stocks in circulation.

Unfortunately, there are only regulations on the disclosure of unrealized losses, but not on unrealized profit. This leads to a distortion of the picture of the market. In the future, the basis for reliable pricing ought to be created here.

Furthermore, a new Decree on the Activities of Foreign Investors has been enacted and there is a new, final bill of the Circular on Public Offerings. Finally, it was contemplated to penalize violations related to transactions in securities.

Altogether, a rapid development including the extension of the trading time, establishing a Fund Manager Club and the possibility for institutional investors to have several deposits can be reported.

Including VDB and the Treasury, today there are 500 open-end government bonds with an average size of just under US\$ 20 million. The absence of large tradable bonds results in an illiquid market. The simplest measure to solve these problems is the implementation of the re-emission technology which has been successfully implemented in the spring of 2007.

Treasury bonds (T-Bill Market – government bonds)

The T-Bill-Market has presented itself as a closed circuit. The government bonds were purchased by the SBV for members only. End-users, such as investment funds and insurances, are rarely involved. Nevertheless, the government bonds have an important function in the market and relevant for the liquidity and cash management, the interest curve and the entire capital market structure. Currently, a new bill in the banking law provides that commercial banks will be forced to participate in the market through their subsidiaries and to eliminate them as direct market participants. Although it would bring a certain degree of protection for the market participants, at the same time it causes the elimination of the only active market players. Further development in this regard remains to be seen.

Furthermore, it has been envisaged to establish a benchmark bond. The reason for this is that a better liquidity is achieved regularly via a stable or better interest curve which, in turn, could be achieved by benchmark bonds.

In most countries, the repurchase market constitutes the backbone for the money markets and the capability of the banks to manage funds. Currently, the repurchase market in Vietnam consists only of standard business segments. Foreign investors have been battered by the transaction tax. In this area, it would be positive to achieve the transparency of tax regulations.

In the area of securities (equity market), apart from the IPOs and SOEs, there will be more securities in the future. In the long run, the government will also try to establish a balanced structure of securities on the market and to achieve a balance between institutional and private investors. For this purpose, members of the government maintain a close contact to the market participants. The contact takes place via professional associations, such as the Capital Market Working Groups Club of Fund Managers, VAFI, the Association of Securities Firms, etc.

Decree 01/2011/ND-CP replaces Decree 141/2003/ND-CP on the Issuance of Government (international) Bonds. It introduces a new definition of the type of bonds which are eligible for government guarantee. Under the new rules eligible bonds will be those issued by enterprises, financial institutions or State-owned policy banks which conduct certain types of projects approved. Such projects include a. projects which are subject to in-principle approval by the National Assembly or the Prime Minister, b. projects using advanced technology or those in the energy, mining and export processing sectors; a. projects located in investment-incentive territories. This clarity will not only assist investors seeking financial support but is also consistent with the regulations on government guarantees stipulated in the Law on Public Debt Management. Decree 01 sets out the conditions for issuance of guaranteed international bonds. Enterprises may only issue guaranteed bonds to finance a maximum 80% of the investment capital of the project, 20% of the capital must be provided by the project investors. Decree 01 requires stricter criteria for the assessment of an application for the government guarantee. Also a lawyer has to be involved and the application has to be submitted to the Ministry of Finance. If it approves, it will issue the bonds. Debt needs to be registered with the State Bank.

An indirect stimulation of the capital markets and the liquidity at the stock exchange can be accelerated by stock exchange listing of big state-owned companies and banks, such as Sabeco, Habeco, Vietcombank.

Public investors

In some cases problems occurred when the state acted as stockholder with a share of over 51%. Insofar, conflicts of interests may hinder the market and enterprise development. These problems, however, could be prevented by a limitation of permitted state share to below 50% and the requirement to appoint independent Directors to the Board.

Transformation of the financial market management in Vietnam

Introduction

Vietnam is one of the most dynamic markets of Asia. Since the financial institutions and authorities are a part of the general economic system, they are not only strongly involved in the changes, but also have a more solid financial basis for the competitiveness of the country. The financial sector in Vietnam is subject to substantial structural changes. It occurs at a huge speed. These changes entail great challenges for the financial managers – for instance due to the pressure on the currency with regard to the exchange rate, the inflation and the daily stock exchange fluctuations between huge profits and losses.

At the same time, the foreign capital market is still underdeveloped. Consequently, it requires the attention of authorities and managers in order to foster the system and to deal with new developments. The most important challenges consist in the transformation of the state-owned banking sector and the development of a subnational foreign capital system.

This chapter deals with financial framework conditions, the most important topics and developments for the region. Organizationally, cases demonstrating a comparison between banks of different origin

that are now in competition on the financial market in Vietnam are presented. Case studies of individual managers constitute an additional “voice” with regard to the developments in this area.

Among the current topics and new developments are:

- the foreign exchange and monetary policy;
- the banking system;
- subnational foreign capital market and
- the stock exchange.

Foreign exchange and monetary policy

The monetary policy, a greater part of which constitutes the foreign exchange policy, has a considerable impact on the financial system of the country with regard to both the pace and the direction of the entire economic activity. That is why the foreign exchange and monetary policy is considered here along with its recent history and the effects on the managers.

The Vietnamese currency can be characterized as a typical emerging country currency with all advantages and disadvantages for enterprises and managers. On the one hand, a competitive advantage results from the relatively low value of the VND compared to other currencies in the developed world. It was one of the most important factors which altogether led to very low cost of production. As a result, the relocation of production to Vietnam, increasingly also from China or Malaysia, brings about a further development of the emerging country (Lung and Wagner, 2008).

As regards the currency, the Office of Foreign Exchange (OFE) established in 2005 for the purpose of control of foreign currencies became one of the most important institutions. The currency is closely tied to the US dollar. OFE endeavors to maintain the exchange rate at a high level and reacts quickly to global economic changes in order to stabilize the rate.

Vietnam uses a double exchange rate system: On the one hand, an officially determined and fixed rate for the officials and certain transactions (e.g. for banks), and on the other hand a free exchange rate applicable for all other market participants (cf. Canler, 2008).

This discrepancy was replaced by only one rate which illustrates the market forces. Nevertheless, the exchange rate is still under state control in order to prevent exchange rate shocks. Consequently, the exchange rate of the VND is de facto tied to the US dollar. This tie is the main reason for the relatively low value of the VND and is needed for strengthening of the competitiveness of the export industry as one of the most important economic sectors.

A break-out of the limited exchange rate determined by OFE occurred only with the depreciation of the US dollar in relation to all other currencies with the worldwide financial crisis that came about after 2008. The government endeavors to maintain the value of the VND which is still important for the country for the expansion of production and export economy. Managers and enterprises doing business in Vietnam can rely on measures of the government aiming at the achievement of this objective for two reasons:

For one thing, the economy is not sufficiently developed in order to rely on manufacturing of low-tech goods. It is due to the fact that there is not enough qualified workforce for the high-tech production. Therefore it is important to be competitive in respect of the costs.

For another thing, the great demand for imported goods requires considerable exports in order to be able to ensure balanced trade. Therefore, a financial manager of an enterprise in Vietnam may rely on the monetary stability in spite of the feature of emerging market.

On the other hand, according to absolute figures the economy is still small and in addition vulnerable to financial turbulences. The biggest disadvantage of an emerging country currency in the global economy and a monetary policy which is primarily geared to growth is the higher vulnerability to inflationary risks.

Considering the annual growth of the gross domestic product of about 7.5 percent since 2000, the government managed to bring the inflation until 2007 to a sustainable level. It has changed since the end of 2007 – when the inflation, as a result of the depreciation of the US dollar, increased in relation to most other currencies and a monetary expansion in Vietnam with simultaneous rise of food and energy prices occurred (Morgan Stanley, 2008).

The inflation constitutes a serious danger for the capability Vietnam's to attain the growth targets. Moreover, the growth is threatened in the short run, too (Qiao, 2008). Besides, Vietnam's own past and the general experience point out that the potential danger of inflation alone is enough to disturb the normal production and the consumption. This situation might deteriorate yet as a result of global financial crisis occurring after 2008. On the other hand, the drop in commodity prices, which was triggered by a low expected growth, could increase the inflationary pressure and thus stimulate the overheated economy.

Regardless of the mentioned financial crisis, the inflation is taken seriously by the government and the SBV. In reaction to the time after 2008, the authorities responsible for combating inflation have implemented some anti-inflation measures. Among them are for instance the increase of the interest rates by 850 basis points (discount and refinancing rate) and 575 basis points (base rate), a reduction of public expenditure by 10 percent (without salaries) as well as capping of the credit growth of 30 percent (Lee, 2008).

On the other hand, the managers must be aware that the currency tie to the US dollar will lead to undervaluation of the VND in the long run because the economy grows steadily and faster than the national economies of the developed world. This trend triggers the pressure on the VND to remain attractive against such currencies as the US dollar, yen and euro. It would, in turn, have negative effects on the competitiveness of export in Vietnam. The banking system was reorganized in 1990 and the Central Bank SBV (Ngân hàng Nhà nước) was separated from other commercial banks, which paved the way for the admission of private sector. The restructuring and strengthening of the SBV resulted in a modern and independent Central Bank that has been entrusted with the management of monetary policy and the supervision of the banking system. According to the Banking Reform Roadmap of 2006, the Central Bank will be relieved by 2010 from the responsibility for exercising proprietary rights to state-owned commercial banks (SOCB, Ngân hàng quốc doanh) because it would be contradictory to its function as regulatory authority of the same banks. In the future, these rights and duties will rest with a new stockholder – i.e. either the state or private investors. The monetary policy focuses basically on the growth, but at the same time the goals shift gradually towards inflation control so that the monetary framework conditions of the work for a company can be characterized as sufficiently safe.

As a result of the reforms, the banking and financial sector has now more participants, is more diversified and offers a widened range of financing activities. There are basically four kinds of "credit institutions": commercial banks, "political loan funds", credit financing banks (which are located mainly in the countryside) and finance companies. The commercial banks include three SOCBS, 37 domestic private joint-stock companies (JSBS, Ngân hàng cổ phần), 37 branch offices of foreign banks and five joint-venture banks which have been financed by foreign and Vietnamese funds and are in 100 percent

foreign controlled (VTO, 2008). Furthermore, there are 45 representative offices and foreign financial and credit organizations in Vietnam, more than 20 leasing companies and almost 1,000 folk credit institutions.

State-owned banks

The six SOCBS are all owned by the SBV that engages itself in their daily management and control, the appointment of members of the Supervisory Board and the Management Board. The banking sector in Vietnam is still shaped by the SOCBS. They account for 70 percent of total assets in the banking world as well as 70 percent of all bank loans; six SOCBS are to be reduced. The privatization of SOCBS is planned and is expected to be implemented by 2010, except for the Bank for Agriculture and Rural Development (Agribank, Ngân hàng Nông nghiệp và phát triển Nông thôn).

According to the roadmap of the government, the state share in banks will be gradually reduced to 51 percent. Individual institutional investors will have the possibility to participate up to a share of 10 percent and total foreign shares have been fixed at 30 percent. Furthermore, it has been planned to transform the development aid fund, i.e. one of two existing political loan funds, to a development bank. One of its functions will be, as export and import bank, to offer financial services for exporters and importers. The process of privatization of the Vietcombank, one of four big SOCBS which is dominant in the banking sector, started with initial public offering at the end of 2007. The government sold over 97.5 million stocks, which is an equivalent of a 6.5 percent share in the bank. The three remaining integral SOCBS – i.e. the Vietinbank (former Incombank), BIDV and Agribank – are on a similar path. However, the process is no longer within the schedule.

Joint stock companies

Considering that each SOCB is specialized in one area of financing, such as foreign trade, industrial development or within infrastructure projects, the at least partly privatized JSBS are represented as a rule in big urban areas and specialize in lending to smaller enterprises or financing of retail trade. The JSBS faster adopt new technologies, are basically easier to govern and more profitable because they depend on cost efficiency and yield ratios.

Foreign banks

Foreign banks, branch offices, fully foreign financed subsidiaries or joint-venture banks constitute the smallest percentage on the Vietnamese banking market. These banks are treated differently, depending on the country of origin. Since the Bilateral Trade Agreement has been signed and ratified, the US and EU banks enjoy the most favorable treatment.

As a result of the WTO membership, since 2007 international banks are allowed to establish fully foreign-owned subsidiaries under Vietnamese law. These subsidiaries of the banks have in principle the right to “national treatment”, which means that they are to be treated just like domestic banks. Thus, for instance, they are allowed to issue credit cards and receive deposits in local currency from enterprises as a borrower without limits.

In general, the banking world covered a long distance since 2000. The number of financial institutions has grown, and the trust of the people in the banks has increased. The rapid development of banks and credit organizations was attributed directly to the attractiveness of the Vietnamese monetary sector and the profitable structure of capital and ownership. Nevertheless, the banking sector is still underdeveloped and has a long way to go before it is capable of efficient financial management.

Moreover, there are great difficulties with loan portfolios. It is a result of the lack of a systematic practice of financial reporting, the weak legal regulatory framework, the poor disclosure requirements, a lack of qualified staff in the credit sector, the pressure on the part of local and central authorities and the state corruption.

The SBV now has 180 days from receipt the application to make a decision on issuance of a license. 60 days if a license application from the representative office of a foreign credit institution or other foreign organization conducting a banking operation. The new law expands the circumstances in which the SBV has power to revoke an issued license. The law introduces changes across a wide range of bank regulations. These include rules governing their boards of management and share redemptions. Further implementing legislation is likely. Now at least 5 members are required for the board of management of a credit institution and at least one must be “independent”. To be independent, the member must not be employed by the credit institution or hold certain levels of interests in the institutions. The new law does not expressly provide a permits level in terms of a percentage of shares (former at the most 30%) but instead sets out following preconditions.

New landscape for credit institutions

Law No. 47/2010/QH12 dated 17 June 2010 and became effective in 1 January 2011. The new law sets in stone a range of matters which have been, up till now, dealt with by lower level regulation. The law on Credit Institutions offer limited flexibility for corporate structuring in the banking sector. All domestic commercial banks must be in the form of a shareholding company. Domestic non-bank credit institutions may be in the form of a LLC or a shareholding company. A wholly foreign owned credit institution must be in the form of a single member LLC, while a foreign joint venture credit institution must be in the form of a multiple member LLC. A credit institution which is in form of a share holding company must have at least 100 shareholders. Means it must be a public company. Also it may only issue dividend and voting preference shares and there are limitations on how these shares are structured. The new law gives the Government the power to regulate the percentage of foreign ownership in a Vietnamese credit institution, as well as the transfer and issue of shares to a foreign investor. Limitations include interests held by affiliates of the relevant foreign investor. It introduces new maximum ownership levels for a single shareholder in a shareholding credit institution, a multiple member LLC can have a maximum of 5 members or owner and the maximum ownership limit that a member and its affiliate can hold is 50% of the charter capital. Also it states some restrictions on the transfer of interests in credit institutions. Still the State Bank approves any transfer of share transactions of a major shareholder (holding 5% or more).

Effective date for Law 47 was 1 January 2011. A shareholder will now fall within the definition of Major Shareholder were they directly hold 5% or more of the voting shares in that credit institution. This has been reduced from the previous threshold of 10%. Certain restrictions apply to them. Under Law 47 a charter and any amendments or additions need only be registered by a credit institution with the SBV within 15 days of the amendments or charter being approved. Previous it could only be adopted after approvals was granted by the SBV. Although for some items the prior approval still remains. The Law broadened the power of the GMS and reduced the autonomy of the board of management. At the same time, the Law provides that resolutions of the GMS will be passed in a meeting if approved by shareholders representing over 51% of the total voting shares of all attending shareholders (or any higher percentage stipulated in the charter). Decisions will be passed only when shareholders representing over 65% of the total voting shares of all attending shareholders vote in favor.

Subnational foreign capital

Another important area with regard to the financial world is the development of additional, private financing platform. Subnational foreign capital is descriptive of state independent loans which help

develop a broader basis for the financial sector. It comes from developed countries. The needs and requirements for the development of a subnational foreign capital system have been already elaborated (De Angelis et al, 2008). The government has realized the urgency of the improvement of physical infrastructure due to its importance for the social and economic development of the country. The infrastructure is to be enumerated as one of critical bottlenecks of Vietnam which undermines the economic competitiveness, thus the economy.

Different factors have been combined in order to stress the required improvement and development of infrastructure in Vietnam. They include:

- 1 the diminished trust in public development aid loans, particularly because Vietnam will no longer have subsidized loans from international financial institutions which constitute the key source of financing;
- 2 the size of public development aid on loans – above all, subsidized loans from international institutions are no longer an important source of financing in Vietnam;
- 3 the dependence on central public financial budgets for long-term financing of the infrastructure; and
- 4 the practice of the banking system in mobilizing short-term deposits for financing long-term investments.

These issues increase the capital costs and create financial burdens for the financial system. They emphasize the necessity of finding alternative sources as long-term financial resources for the development of infrastructure. The long-term availability of financial means for financing investments in the infrastructure is a significant condition for the improvement of economic development, the creation of incentives for foreign direct investments and domestic investments as well as for the support of authorities in coping with globalization.

The pressure on the government to extend bond options for regional administrative bodies increased considerably due to the trend to decentralization, privatization and globalization of financial markets, the Doi Moi policy and the WTO reforms. The foreign capital market offers bright prospects for a better access to capital and for lower borrowing costs of competing enterprises. Furthermore, a more efficient allocation of capital would be desirable. Thus the existing two-tier system of available capital from HCMC in the south and Hanoi in the north could be transformed to a comprehensive system of capital allocation. The implementation of local projects (e.g. development of the infrastructure) could be realized easier and in less time because there would be less administrative barriers.

Many political, institutional and legal changes are necessary in order to ensure financing of infrastructure projects. Among them are the development of capacities at the subnational level and an improvement of legal and regulatory framework conditions for them as well as the development of subnational capital markets. The lack of a comprehensive and uniform legal framework entails great risks due to uncertain commitments of the treasury (which had negative effects for example in Brazil and Argentina in the 1990s).

Legal and regulatory framework conditions may increase the demand because the investors would gain confidence in and familiarity with negotiable instruments, investment decisions and information about risks. Clear and binding regulations on bonds for subnational bearers would reduce the personal risk. Besides, the use of subnational bonds would contribute to the development of capital markets merely by adding further asset classes (as negotiable instruments on the market).

The new Securities Act of 2007 shows that now understanding has been developed for the fact that some efforts are necessary in order to check the legal and political framework for financing subnational investments thoroughly. It includes also securing bonds for the infrastructure, such as ports, bridges and roads.

On request of the Ministry of Finance and the Ministry of Planning and Investment to help Vietnam in working out a strategy for financing and development of the infrastructure, VCCI issued an assessment of the necessity of a comprehensive framework for subnational financing of the infrastructure. This study outlined a working plan comprising necessary steps for the attainment of the goal.

However, the promotion of subnational foreign capital market is not the ultimate goal. For financial managers it is important to bring to mind that in the long term subnational capital for financing outstanding items of current accounts will only increase the share of debts which have to be repaid later, without increasing the productivity and the funds for repayment.

Hasty issues of bonds bring further risks on the financial market, for instance issuing before a subnational enterprise has revealed its creditworthiness or its investment priorities.

The underlying objective of the subnational market is to increase local investments and to promote significant subnational services. A prudent allocation of bonds may extend the investment capacity. Well-conceived investments and credit plans may finance the required infrastructure, and the debts can be repaid from future earnings of the facilities generated from tolls or cost savings in service-oriented companies.

Furthermore, general obligation bonds and financing from revenue or combinations of both ought to constitute a source for sustainable growth of subnational lending in total volume of private sector rather than the use of physical collaterals (De Angelis et al, 2008). Moreover, if the debt repayment is pre-estimated on the basis of revenue or savings from the project, the subnational borrowers and lenders will tend to focus with more discipline on the economic costs and benefits of proposed undertakings.

The stock exchange

Important steps in the economic development were the opening of the shopping centers in Saigon and Hanoi as well as the Vietnamese Stock Exchange in HCMC (2000) and Hanoi (2005). The creation of a professional stock exchange promotes the policy of global integration and economic regeneration and serves the purpose of creating a market economy with “socialist character”.

In comparison, the Saigon Stock Exchange price index (VN index) is a more reliable indicator for long-term trends of the financial markets in Vietnam than the Hanoi Stock Exchange price index (HASTC). Whereas the Hanoi Stock Exchange includes about a third of the total stock exchange capitalization, it was very small until 2006. A great number of new listings increased its importance (IMF, 2007).

The establishment of a modern stock exchange has encouraged the inflow of foreign currency and foreign direct investments. Many incentives can be found in trading in securities. Tax incentives for securities trading and a transparency requirement for the protection against expropriations entered in 2000 into force. The tax incentives apply also to enterprises with the activity as fund managers and similar listed negotiable instruments for issuers. Finally, private investors benefit from the corporate tax exemption for profits from dividends, bonds and transactions in negotiable instruments.

At the same time, Vietnam endeavors not to keep foreign currencies in the country. All stocks and funds at the stock exchange in HCMC are traded in VND. Since 2008, there are 156 stocks and 39 bonds at the Saigon Stock Exchange. At the beginning, the stock exchange had some problems to overcome.

The first official trading was postponed several times due to technical difficulties. The stock exchange was open only in Monday, Wednesday and Friday for two hours, respectively, and initially only two companies were admitted to dealings (Jeffries, 2001: 4 L 7 ff.).

The first growth as regards the number of companies and the market capitalization developed rather slowly. At the end of 2000 only five JSBS were listed, then five in 2001 and further ten companies in 2002 were added (Truong, 2006: 138). The actual formation of the stock exchange took place in the late summer of 2006. At the end of 2005 the market comprised – including the securities trading centers in Saigon and Hanoi – still only 41 listed companies with a stock exchange capitalization of less than US\$ 1 billion. In April 2007, this number dropped to 193 listed companies, which corresponds to a market capitalization of around US\$ 20 billion (World Bank, 2007; Vuong, 2008). Almost 400 former state-owned enterprises have been privatized and transformed in JSCS. The companies come into consideration in the future as target companies both for domestic and foreign investors. Now there are also first stocks, thus privatizations of former state-owned SOS. Nevertheless, the majority of shares are in possession of the government because it wants to retain control in these sensible areas.

The required approval of the SSC (Uy ban chung khoan Nha nuoc) constitutes an obstacle for new candidates. The company data have to comply with a range of rigorous restrictions and requirements before the stocks may be issued at the stock exchange. According to Article 1 Sentence 2 of the Securities Act (No. 70/2006/QH11, 2007), the candidates have to show at least VND 10 billion as ordinary capital. Furthermore, the applicant has to show in compliance with subsequent decrees that it has made profits in the last two years. At least 20 percent of subsequent stocks have to be sold to more than 100 different investors. The issuing companies have to undergo a separate audit (Decree 58/2012/ND-CP of the Government of 20 July 2012).

The efforts of the government to overcome the difficulties resulted in a number of adopted decisions. SCC and the State Trade Commission (STC) want to adhere closely to guidelines issued by the government and the CPV. SCC and STC aim at improving the legal framework conditions gradually, in close cooperation with relevant ministries and organizations and establishing a register of international cooperation. Moreover, the attention of the public towards the stock exchange and the securities markets is to be strengthened. The determined fees for companies in general and for companies that deal with securities cannot exceed the statutory limits.

The LF1 comprises already a plan for the admission of foreign direct investment companies to quotation at the stock exchange. Despite the readiness to implementation of the foreign knowhow with regard to trading in securities, foreign investors are authorized to purchase only a certain amount of shares of Vietnamese companies. That way, the formation of a foreign superiority is to be avoided and a certain degree of independence ensured. Foreign investors are allowed to purchase 49 percent of stocks of listed companies and up to 100 percent of unlisted companies. Sensible sectors, such as telecommunications, energy and oil exploration constitute exceptions here. Consequently, the restrictions for foreign investors that want to make transactions at the Vietnamese Stock Exchange remain in force.

The stock exchange and the internal payments increased the available capital ensuring the stability of the national balance of payments. However, many organizations, among them also a number of state-owned enterprises, gave in to the temptation of instant riches. By the end of 2007, the SOEs invested 37 percent of their capital in securities, banks and real property, instead of concentrating on their core business. It had very negative effects on the liquidity and in some cases even threatened their economic viability (EU Counselors, 2008: 12).

Since 2005, the VN index is subject to fluctuations. Nevertheless, the stock exchange plays an invaluable role in channeling investments in listed companies that concentrate on the construction, industrial goods, services and the use of natural resources (EU Counselors, 2008).

Moreover, the IMF suggests in its Country Report to tighten the regulatory control of banks and to control the market and foreign exchange risks (IMF, 2007). The management of the HCMC Stock Exchange is aware of the problems and has implemented a program for further improvements of trading conditions. Among them are:

- 1 the creation of better conditions for the JSCS and their stocks at the stock exchange;
- 2 the development of information systems in which information is published fully, timely and precisely;
- 3 the improvement of software;
- 4 the detection and prevention of insider dealing;
- 5 the improvement of the IT system in accordance with market requirements and international standards, the application and accomplishment of the “remote terminal” project and the departure from mere floor trading;
- 6 proposals for establishing reasonable measures for market strengthening, signing memoranda of understanding with other stock exchanges and making cross-listings.

Although these items seem to be general and vague, they are an inevitable proof of the sensitization for and the understanding of the needs of enterprises, stockholders and investors.

Case studies

The following section with case studies adds details and comments on the development of the transition of the area of management in Vietnam. The organizational cases of a SOCB and a private JSB are very similar as regards the level of assets, incomes and deposits. In the comparison, the cornerstones of both banks are summarized, compared and considered in the context of state and private ownership. The comparison helps illustrate whether different positions of the banks (as regards the founders, owners and control systems) in the Vietnamese system are reflected in their balance sheets or annual statements.

There are also case studies of individual managers in this area which add the all too often missing voice on the development of management that is close to reality and practically relevant.

Case studies of organizations

Case study 1L Southeast Asia Commercial Bank (SeA Bank)

The SeA Bank, founded in 1994, was one of the first JSB merchant banks of Vietnam. Its long-term objective is to become the leading bank in Vietnam. The SBV rated the SeA Bank in four successive years with “A”. The bank is headquartered in Hanoi. At the end of 2007, the total number of the SeA banks, branch offices and subsidiaries was achieved. In 2009, 39 new banks and branch offices in both locations and new provinces have been established.

The SeA Bank endeavors to become a financial group (SeA Bank Group) with good reputation and capital assets in the Vietnamese market. It wants to achieve the same step by step in the regional markets.

The bank is geared towards providing a broad range of products, from conventional deposit business right up to investments. The SeA Bank provides loans, products for interest saving, flexible deposit withdrawals as well as financing funds for manufacturing, import and export trade, medium-term

financing loans, mortgages on securities and discounts of local enterprises as well as companies in different economic sectors operating in the areas of production and trade.

In August 2008, the Société Générale announced the takeover of 15 percent of the SeA Bank in order to gain access to the Vietnamese market via a reference bank. The SBV has approved the transaction. Source: SeA Bank (2008)

Case study 2: The Mekong Housing Bank (MHB)

The MHB is a SOCB, was established in 1997 and is headquartered in HCMC. The MHB has over 160 branches and subgroups. The branch offices are dispersed in 32 provinces and towns in Vietnam. It has business relations with about 300 foreign banks in 50 countries worldwide.

The bank wants to expand and establish another 30 subsidiaries in order to meet the growing need for banking services and loans and in order to react to the demand for housing and infrastructure development. The borrowing requirement of the country is big, thus it makes efforts to react to the demand for housing and infrastructure, particularly in the Mekong Delta.

The MHB is the youngest and fastest growing bank among the SOCBS. With its total assets of nearly VND 30 trillion, it ranks in the seventh place. The MHB provides loans and investments for the development of housing and the socioeconomic infrastructure. The enterprise acts also as so-called “bank for foreign affairs”, which means that the bank provides guarantees for branch offices of domestic enterprises abroad. It is a common practice in the industrialized countries in order to incentivize foreign enterprises to enter into business relations with domestic enterprises. The core business of MHB comprises granting loans to SMEs as well as to individuals and private households. In particular, MHB offers loans secured on assets for construction companies for the development of infrastructure and for housing, especially in the Mekong Delta region. MHB mobilizes capital of individuals and of domestic and foreign organizations.

In the spring of 2008, the government approved the partial privatization of the MHB. The bank is allowed to sell up to 31.9 percent of its stocks, including 15 percent to strategic investors, 13.11 percent to the public, 1.79 percent to employees and 2 percent to its trade union. The remaining 68.1 percent are kept by the state. The MHB commissioned the Deutsche Bank AG Singapore to draw up a privatization plan and to advise MHB on the initial public offering.

Comparison of the banks

Although they are different in their ownership structure, the banks compete in both cases because they have the same kind of customers, i.e. mainly private individuals.

By comparing the balance sheets and the profits, it can be analyzed whether the different structures have effects on the efficiency and profitability of the banks. The banks are almost equal as regards their total assets. It applies also to planned growth. Both banks want to raise their total assets to around VND 40 trillion. However the SeA Bank seems to have grown faster – for instance its “owner’s equity” has increased threefold while the growth of MHB amounts to about 10 percent only.

As regards customer loans, the MHB was able to increase the level from VND 9,976,585 million in 2006 to VND 13,756,662 million in 2007. It is a remarkable growth of 30 percent. At the same time, however, the SeA Bank managed to achieve a growth of 300 percent, namely from VND 3,353,998 million to 10,994,812 million.

This performance may arise from the more independent position of the SeA Bank. As a SOCB, the MHB has a planned and more or less fixed business field.

Whereas, on the one hand, it applies also to the SeA Bank, on the other hand it may also choose its special fields and concentrate on certain areas. Moreover, it is more flexible, thus faster in the position to react to requirements of the consumers.

The gap between the incomes of the banks becomes smaller and smaller, but the SeA Bank seems to have better control over its expenses, thus to make higher profits. There are big differences between the banks as regards specific sources of income. Whereas the SeA Bank concentrates more on securities, a greater part of revenue of the MHB comes from foreign currency trading.

As regards the staff, the MHB becomes bigger, whereas the SeA Bank grows faster. Whereas the MHB almost doubled the number of its employees from 2338 in 2006 to 2580 in 2007, the SeA Bank almost doubled its workforce and increased the number of employees from 498 in 2006 to 831 in 2007. As regards the education of employees, about 70 percent of the employees of both banks have a university degree.

Another similarity between the banks is the ability to attract more private customers. Both banks endeavor continuously to offer attractive services with regard to loans, to the availability of and access to banking services. It is carried through for instance by establishing more branch offices, issuing as many money and ATM cards as possible and providing e-banking systems. Considering that, the customers are not as different – as one could expect. It has been confirmed by the rapid increasing number of installed cash machines. That way the banks try to extend the access to and the availability of their services for the public – above all for private persons – because, for such customers, a higher number of cash machines may constitute an important criterion when choosing a bank.

To sum up, it can be stated that the SOCB and the private SeA Bank have more common features than one could expect with regard to the bank system and its origins. Even if a SOCB and another private institution are taken, there are no big differences in the annual balances with the SBV, both grow and both are positive. However, there is a considerable difference in the amount of SBV bonds.

Whereas the SeA Bank did not need such bonds at all, they were present at the MHB. Here, the inability of SOCBS to act as independent market player becomes apparent, in particular not as “bank for foreign affairs” because there the decisions in political, and not in economic terms are made, thus the losses are in the nature of things.

A SOCB should also develop and extend a business plan in order to be competitive for customers.

The equality in almost all benchmark data can be understood as a forerunner of the process of the banking sector in Vietnam which to a certain extent equalizes the private banks and SOCBS in competition. In the long run, the Doi Moi policy and the WTO Commitments will lead to a banking system in Vietnam that is more stable and more similar to the global market. This competition-driven environment together with the necessity of a reasonable management and planning are major factors on the way to create a state-independent banking service sector in the form of a subnational system.

Case studies of individual managers

1st case study

Mr. Flockhart was appointed to the Board in 2007. He gave his opinion on the development of the HSBC in Vietnam: “It is generally known among global investors that Vietnam, with a GDP of averagely plus 7 percent in the last years and a growth of foreign direct investments, is one of the fastest growing national economies in the region – a record amounted to \$20.3 billion in 2007. However, even more

exciting is the fact that the GDP per capita doubled in the last 10 years. 50 percent of the 87 million of people in Vietnam are under 30 years, and only 9 percent of the population has a bank account: These factors point to a very convincing growth history, particularly in the area of financial services.”

Mr. Flockhart takes the view that the financial and banking sector in Vietnam is still in the early stages of development, but the competition will become stronger because the government focused in the last years on a reform of the financial sector by gradual relaxation of restrictions for banks and creation of a “level playing field” for foreign banks. So the manager states: “Yes, the competition will increase as a result of this, but we think that it is a good thing because it is favorable for the promotion of the industry and the development of more competitive pricing and service improvements for the benefit of consumers in the banking sector.”

When outlining the growth strategy in Vietnam, Mr. Flockhart refers to a “two-pillar concept”: “It comprises both strategic investments and organic growth. Our investments in Techcombank and Bao Veit give us a stronger participation in the growth in Vietnam because through our partners we can get to big customers and established enterprises. The local involvement will give us a balance in the development of our own enterprise. It will enable us to operate on a larger scale and to expand the range of our services and products”.

As regards the comparative strengths and weaknesses of foreign and local banks, Mr. Flockhart outlines the restriction on industry networks for foreign banks which means a clear discrimination of foreign banks. For instance: “As you can see, we have only one branch office in Ho Chi Minh City and another one in Hanoi as well as a representative office in Can Tho, although we have a long history in Vietnam. The new decree, which allows foreign banks to establish branch offices locally, will bring foreign players on the field that will play on the same field as the local banks. The decree allows us - as foreign players – to expand our network countrywide on the Vietnamese market and to provide products and services that we have successfully provided in other parts of the world. On the other hand, local banks have a good understanding of the local market, including the consumer behavior. Moreover, the domestic players learn fast and recognize the advantages of cooperation with foreign institutions. Our alliance with the Techcombank, the fifth biggest bank in Vietnam, confirms it.

However, the growth strategy of the HSBC is also confronted with general problems to find and to retain qualified employees. That is why the manager said: “We as well as other foreign banks in Vietnam face a scarcity of workforce. It costs much time to recruit, train and groom a professional banker. Therefore, the highest priority for us is to take care of staff retention.” With regard to this Mr. Flockhart describes the long-term vision of development of the HSBC to an institution with the best workplaces. Furthermore, the HSCB cooperated with several top universities in the organization of workshops and seminars and in 2007 it opened its own training center in Vietnam. (Vietnam Economic Times: 2008A)

2nd case study

Mr. Sud is responsible among other things for SCVs (Standard Chartered Vietnam) franchise and strategic development in Vietnam. The SCV together with the HSBC were the first international banks which, as a result of Vietnam’s commitments within the accession to the WTO, obtained an approval to make local affiliations. The approval was announced during a visit of the Vietnamese Prime Minister Nguyen Tan Dung in the United Kingdom in 2008. Mr. Sud said that two things are reflected in this announcement: For one thing, the strong wish Vietnam’s to achieve further strengthening of the banks, which can be accomplished by allowing some selected international players to play a major role in this area; for another thing, the mental as well as actual fulfillment of WTO Commitments.

SCV intends to open between 20 and 30 branch offices all over Vietnam in the next three to five years. Mr. Sud thinks that the local banks – at least in numbers – will continue to dominate. Example: “Due to opening of the sector, rather qualitative than quantitative changes in banking services will take place. The local Vietnamese banks will continue to dominate the sector in the foreseeable future, namely in the next five to ten years, by retaining more than 90 percent of the banks.”

As regards the future development of the banking sectors, Mr. Sud holds that the SBV, due to its risk profile and the turbulent international environment, should have adequate capital resources.

In addition, considering the fact that less than 10 percent of the Vietnamese population has bank accounts, there is a clear demand for more banking services. The SBC is positive that it will be provided for in the regulations that licenses for new banks will be issued to those that have a strong track record in the financial sector. The experience in other developing countries showed clearly that only such banks survive in the long run. In view of global turbulences on financial markets after 2008, Mr. Sud describes the strategy of the SVC for a sustainable competitiveness as based on four key pillars:

The first two relate to a strong capitalization and the ability to create suitable products and services for local consumers. As the third pillar, he states the ability of the SCV to guide its corporate customers in the international financial market in order to increase financing. The reason for this is that in the near future it will be crucial for big companies in Vietnam to tap these international markets in order to survive in the long run. Standard securitizations will help these Vietnam-based clients to enter these markets with initially relatively small amounts. These, according to the experience in most Asian developing markets, may then grow to a substantial amount in the future.

As fourth pillar, Mr. Sud emphasizes the importance of staff in the banks: “Competitive advantages arise above all in the service industry, not least because of the quality and attitude of people involved.” (Source: Vietnam Economic Times 2008B)

Challenges

The financial environment of Vietnam bears difficult challenges both for the government and the financial managers in private enterprises. Some of the most important issues are discussed in the following sections.

Foreign exchange and monetary policy

The greatest challenge with regard to the monetary system is to maintain the stability in respect of the price and exchange rate. While the latter was the main objective of the monetary policy, the pressure triggered by inflation after 2008 was so strong that the inflation target policy became more important. Considering the fixed exchange rates, the authorities are limited to political measures for combating inflation. After the liberalization of deposit and loan interest rates, the SBV intervenes through the base rate, the rediscount rate and the refinancing rate. Due to the market expectations as regards the development of the VND, the Central Bank is anxious about attracting speculative money and intensifying liquidity problems by lifting the interest rate.

The SBV can supply or withdraw liquidity to/from the banking system by means of repo transactions, issue or redemption of Central Bank bonds and the adjustment of the equity requirement rate. Moreover, at the end of 2007, the Central Bank brought about a suspension of foreign currency activities in non-bank transactions in order to prevent further liquidity inflow through capital flows. Other non-conventional measures include issuing of short-term certificates of deposit (CD) in 2007 and involuntary issues of bond debts to banks (beginning of 2008).

Credit control

The financial authority has no direct control over the scale of loans of commercial banks (except by regulatory division of loans into specific categories, such as stocks).

The SBV officially maintains a controlled variable exchange rate. However, this regulation is understood by the IMF (International Monetary Fund) as a conventional and actually fixed tie on the basis of the fact that since 2003 the VND depreciated in relation to the dollar by less than 2 percent per annum with a daily trading corridor of +/- percent. Source: Qiao (2008). According to the World Bank (2008), Vietnam's monetary stock grew by 47 percent in 2007, which means a serious threat for the price stability. The reasons for that are the considerable increase of lending in connection with the steady influx of foreign direct investments and indirect investments due to a policy of free movement of capital. As a rule, a currency would become higher priced in such circumstances. However – with the exchange rate tied to the US dollar and the resolve of the authorities to keep the value lower – it was not an option. The expansion of money supply resulted in inflation (caused by the purchase of government assets made out in US dollars in order to prevent an appreciation of the VND) (World Bank, 2008).

Circular 13-2010-TT-NHNN came into effect October 2010 and replace Decision 457-2005-QD-NHNN dated 19th April 2005 of the State Bank and the following amendments. Circular 13 clarified some existing ambiguities in the law as well as introduces increased restrictions on lending that bring Vietnam's banking closer to banking safety referring to the Basel Committee standards on banking supervision. It states tougher rules on the maximum level of finance leases, which may be made to a group of related clients. The maximum was reduced from 80 to 50% of the equity of the finance leasing company. Circular 13 provides for specific limits on the percentage of charter capital that a credit institution may use to make capital contributions and share purchase, including in subsidiaries. Circular 13 has also introduced several changes affecting solvency ratios and capital adequacy ratio of only 8%.

Circular No. 36/2014/TT-NHNN dated November 20th 2014 and Circular No. 06/2016/TT-NHNN dated May 27th 2016 replace circular 13.

This situation constitutes the central problem of the monetary policy in Vietnam: The conflict of the so-called “impossible trinity” with its three elements:

- (i) free movement of capital,
- (ii) fixed or quasi fixed exchange rate and
- (iii) monetary policy independent of interests.

According to some exponents of the theory, a combination of these three elements is not possible. Vietnam decided in favor of fixed exchange rate and free movement of capital. It is comparable with Hong Kong, but accepts the fact that the interest rates, which are determined in Hong Kong and above all by the US Federal Reserve Bank, thus are not appropriately adapted for economic phases, constitute no option for Vietnam because its economy is much younger, underdeveloped and more varied. Vietnam determines its interest rates itself and separates the domestic market from the Western financial markets led by the USA.

However, the government has to consider that high interest rates make foreign capital more attractive for investors. This, in turn, would increase the pressure on the VND because then its value in relation to other currencies could drop fast, which would end in inflation. A subsequent increase of the money supply – for instance by a reduction of the interest rates – would only increase the inflation because the confidence in the stability of the VND would be limited. Accordingly, the SBV is not as independent in its policy on interest rates as it appears at a first glance.

The challenge is to appreciate the VND in relation to the US dollar gradually, which to a certain degree increases the inflationary pressure. Moreover, the authorities could contemplate a limitation of capital inflows (as e.g. China). Finally, the capital gains tax and a tax on assets could be introduced. In the long run, these measures would increase the price stability and have bigger effects than the short-term negative effects on the competitiveness of the export economy. Insofar, the inflation on a constant level can have equal long-term effects as a currency appreciation.

In the longer term – at least depending on how the entire economy develops – Vietnam could aim at introducing a fully independent Central Bank. For this purpose, a substantial amendment of the Law on the Central Bank would have to be made. SBV implements in fact the measures of the Ministry of Finance and the Ministry of Planning and Investment, but it could be changed by such step.

The financial situation constitutes a challenge for financial managers in Vietnam with regard to the reaction to possible changes. China is a good example to show that a gradual appreciation of the currency not necessarily means insurmountable problems for the enterprises concerned. In addition, Vietnam has a still significantly lower price level than China. It is due particularly to the shorter time of economic growth. Therefore Vietnam could make use of the competitive advantage of low costs, at least for some time. Depending on the size and activity of the enterprise, a hedging strategy would be helpful in order to reduce the risk of appreciation of the VND in the medium-term with regard to changes in the exchange rate.

Circular No. 29/2013/TT-NHNN; replaced by Circular No. 24/2015/TT-NHNN dated December 8, 2015 ; regulates lending in foreign currency by credit institutions and branches of foreign banks to borrowers being residents came into effect on 01 January 2014 and replaced Circular No. 07/2011/TT-NHNN. It has expanded the circumstances in which a credit institution or a branch of a foreign bank may lend foreign currency to a Vietnamese resident borrower. A credit institution or a branch of a foreign bank is now allowed to offer short-term loans to wholesale petroleum importer which are assigned import quota by the Ministry of Industry and Trade in 2014. In the case of loans for imports, borrowers must have sufficient foreign currency to repay the loan either from production or business revenue. In the case of export, loans are limited to short term loans and may be provided only where the borrower has sufficient foreign currency to repay the loan from export revenue. These requirements for sufficient foreign currency raise significant issues for lenders. Where a borrower wishes to rely on foreign currency from their projected production or business revenue or export revenue, a question arises as to what would happen if, when it comes time for repayment there is insufficient revenue. Arguably, the very fact of the insufficiency of funds would mean that the loan was not permitted in the first place, as the borrower did not fulfill the requirement to have sufficient funds to repay. The effect on the loan may be that it would be considered invalid from the outset raising difficult questions as to the lender's status, particularly in any debt collection or insolvency proceedings. Beyond examining the borrower's business plan to assess the likelihood of repayment, there is no clear way that the lender can be assured that any loan will in fact meet the sufficiency requirements. A further issue concerns the ability of a borrower to purchase foreign currency for the purpose of repaying loans at all. Currently, Vietnam's currency laws on foreign currency control severely restrict the circumstances in which a Vietnamese resident may purchase foreign currency from a credit institution. These circumstances are generally limited to cross-border transaction, such as borrowing in order to pay foreign contractors or to study outside Vietnam. Borrowing in order to pay foreign currency loans made by a Vietnamese credit institution or a foreign bank branch does not currently appear to be permitted, although the fact that this is explicitly contemplated by Circular 29 in relation to import businesses may indicate a willingness to permit such purchases in the future.

Banking system

Vietnam's risk in the banking sector was rated CCC (Economist Intelligence Unit, 2008). It was above all a result of the excessive credit growth after 2008, which escalates the danger that the number of non-performing loans ("NPL") will increase and the rising inflation will depreciate the real value of bank assets.

Despite remarkable improvements in banking services, other, new services such as trading in securities, financial consultancy, insurances and investments are not fully developed yet. Whereas the workforces of the SOCBS are deemed productive as regards the quantity, these banks suffer from a lack of qualified human resources department. Moreover, the SOCBS are dominated and controlled by state authorities and are exposed to difficulties with regard to poor ownership quality, financial reporting and profitable opportunities, too high costs and prices of irrecoverable debts (Vietnam Business Finance, 2008).

The government works on the removal of big portfolios of non-performing loans, tightening of standards for loans, ensuring of appropriate practice of provisions in case of loan defaults and on the increase of capital resources requirement in order to meet the internationally recognized minimum requirements. The latter was introduced in an attempt to furnish several, few strong banks in contrast to a large number of weak banks.

During the period from 2001 to 2005, the government invested VND 10 trillion for recapitalization of banks and encouraged them to establish their own asset management companies in order to facilitate the release of NPL. Market analysts are skeptical as regards the officially reported NPL figures because in their opinion the actual quotas in the SOCBS range between 15 and 30 percent. It is clearly above the reported quotas of 1 to 3 percent in 2006. Moreover, a fast growth in the retail trade and in the real property sector as well as in direct and indirect stock purchases can be reported, which could result in a possible development of the NPLs.

Some see an inherent interest conflict in a combination of both institutions of ownership and control of the SOCBS in one and the same agency – the SBV – with negative effects for regulatory control.

It is important that the management of the SOCBS will sometime pass from the SBV to the State Capital Investment Holding (Vietnam's holding company for privatized enterprises) whereby the daily control of the banks will be taken off SBV's shoulders. Moreover, the government draws up legal regulations granting the SBV more independence, including the reorganization of responsibility for banking supervision. Meanwhile, the Vietnamese authorities focus on further strengthening of the supervision and the improvement of the efforts of banks to operate within the legal framework (Mayeda, 2008).

Subnational capital market

The legislation in Vietnam is not adequate for the development of a sustainable capital market or the use of modern methods of financing, such as securitizations. Therefore, a stabilization of the legal and fiscal framework conditions is necessary. It could take place in this way that the legal prerequisites are created, and the foreseeable sources of revenue for international companies are provided by giving them a clear political control over a part of the finances. Potential participants in a subnational capital market – borrowers, banks and other interested parties – constitute a natural and important circle for these reforms. Recommendations with regard to the elements of a legal framework supporting the development of subnational bonds have been already proposed (cf. De Angelis et al. 2008).

A successful subnational market should be developed in two directions: From top to bottom, in the sense of a legal and political framework supporting the efficient capital market and from the bottom up, with regard to practical experience for banks and other lenders in borrowings for investors in

securities and for international institutions as borrowers for financing of investments and in rescheduling of debts. Both directions, the development of supporting legal and political framework conditions and the increasing practical experience in the subnational capital market, could be pushed ahead at the same time. In various countries, in which the subnational capital markets developed, running of pilot projects proved to be effective, particularly in order to create patterns for the final implementation. Moreover, pilot projects are very useful in detecting possible problems which have to be addressed in order to advance the development of the capital market.

As in many developing countries in which a subnational capital market has been developed, Vietnam's regional administrative institutions face the challenge to maintain the underlying infrastructure and buildings and to bring about a more rigorous control of the exploitation of the environment. A proper regulation of the subnational capital market access could result in an increase of efficiency of expenses and reveal alternative local sources of financing within the macroeconomics for urgently needed investments in the infrastructure. These regulations could contribute to explicit harmonization of local budgets with the national standards of budget systems. It is a crucial step in the institutional reform process.

Vietnam has the opportunity to develop a well-conceived legal framework for subnational markets which can help avoid arising of problems with which other transformation countries had to deal afterwards.

Low subnational creditworthiness and capital market losses are no indicators for municipal bond issues. Such low current subnational borrowings can be also seen as an advantage. Many other countries were confronted with the reality of extensive subnational borrowings and had to try afterwards to develop a legal framework for a sound credit business in order to establish a credit business that curbs emerging excesses on the capital market.

In view of the future development of the market, Vietnam is able to implement first the legal and political framework conditions at a reasonable pace. Vietnam can also learn from the risks of other countries. Excessive borrowings and lending by subnational institutions in the absence of a suitable legal framework caused economic crises in the past. That is why the legal framework should be shaped in such a way that crucial aspects are considered – such as the status of guarantees and legal remedies which are available for the issuer in case of a failure of the subnational institution.

The promises with regard to solid subnational bonds are great. However, the same holds true for the risks connected with them. Bad experiences at the early stage of development of the subnational market can considerably obstruct the development of the loan market. (For instance, more than 10 years passed since the failure of a US\$ 25 million bond of Odessa in the Ukraine in 1998 before the investors again showed readiness to lending to subnational bodies without receiving a central government guarantee in return. It was a municipal, ill-designed and poorly structured bond.)

All parties (subnational enterprises, the state, banks and potential investors in subnational bonds) have a common interest, namely that the aspects concerning the development of the loan market are understood. Furthermore, a suitable legal framework has to be established before the market enters into trading and makes substantial lending operations. To put it briefly, a subnational loan market fits into a public system that passes considerable decision-making powers and responsibility with regard to financing to the local government levels. However, functioning of the national system is an important prerequisite for the development of a subnational capital market. Particularly important are the efforts to make the revenue flowing to subnational entities more predictable by better incentives for the increase of local turnover fees and tolls and by creating a clear and transparent transfer system.

The experience has shown that – if certain significant elements of a comprehensive legal framework are provided and the key actors and institutions are prepared – the development of a subnational credit market can progress very fast.

Romania: The law on local public finances was adopted in 1999. The first two municipal bonds with a short term of two years and high interest (37 percent) were issued in 2001. They had been pilot projects and had proven themselves both as procedural and documentation models which were then applied by other issuers. Within three years, the annual amount of municipal bonds increased and reached a quota of 14 percent. Several hundreds of bond issues and bank borrowings were issued and no failure was reported.

The legal and regulatory framework constitutes tolerant, but cautious guidelines for bank loans and bonds. Most bonds were for water supply, sewage systems, roads and housing. The issuers are mostly major cities, but also smaller towns that have a good economic potential due to the tourism or the industry. Source: Qiao (2008)

The legal framework conditions granted the local authorities in these countries the right to pledge certain parts of the distributed income received from the central government. They can keep the securities on behalf of the creditors.

Once the legal basis for pledging of these financial resources had been implemented, the local authorities were able to access the capital market, to realize the financial means and in addition be secured via guarantees of third parties. This structure did not extend the obligations of the central government to financial liability and gained the trust of investors.

Source: Author's research

Stock exchange issues

The price-to-earnings ratio (PE) of a share is a measure for the price of a share in relation to the annual net income or profit generated by the company per share. It is used as valuation factor: A higher PE means that investors have to pay more net income per unit, so that the unit is more expensive compared to a lower PE. The PE rate has annual units which may be understood as "number of profitable years for purchase price redemption". It ignores the time value of money. PE quotas show that the current investors' demand for company shares in the biggest listed companies departed from reasonable valuations of expected earnings and growth potential of these companies. A risk arises from the lack of current, clear control systems. A number of observers argue that the stock market was overvalued.

The nascent stock market is dominated by two groups of investors: The big foreign investors with huge amounts of supporting capital and the inexperienced domestic investor with mostly limited capital resources. Both groups are very sensible to downward trends. This development may lead to pooling, which was observed in the markets all over the world: When one or two major players on the market sell large packages, a proportional development occurs with regard to the remaining participants. The authorities are particularly anxious that a rapid reversal of portfolio inflow after 2008 could result in heavy losses for domestic investors and threaten the financial and social stability. These concerns resulted in the implementation of a range of already mentioned measures. The possibility of introducing some controls of capital inflows was also taken into consideration.

The IMF appreciates that the Vietnamese authorities have taken at an early stage the following five measures for tightening the stock exchange, the regulation and supervision as well as for limitation of failure on the banking market in order to minimize the consequences of a possible stock exchange crash (IMF, 2007):

The first of these measures is the new regulation of the SBV (Decision 03/2007 issued in January 2007) on the adequacy of banking capital, the liquidity coefficients as well as the borrowing and investment limits. It limits the possibilities of new bank loans for the purchase of stocks. In particular, credit institutions are not allowed to give loans to their hedging companies or to grant unsecured loans for investment financing or for trading in securities. Moreover, the risk of securities in relation to loans is weighted from 10 to 15 percent. The credit institutions were granted a year to comply with these requirements thoroughly.

In the second place and at the same time, the implementation of various provisions of the Securities Act was issued in order to ensure the supervision of market activities. These regulations relate to disclosure requirements, more severe penalties for violations and requirements for the improvement of management. Organizational structures of securities and fund management companies are included here.

In the third place, the SSC (also in January 2007) issued a range of letters to securities companies and fund managers requesting information about their recent stock exchange activities and requesting the representatives of foreign funds to register with the SSC, which is required according to the Securities Act. In addition, WLA has tightened the enforcement of regulations with regard to market transparency and prompted listed companies to improve their determination.

In the fourth place, the Prime Minister instructed (in a letter of 29 January 2007) the Ministry of Finance, SSC and SBV to improve the supervision of stock exchange activities in relation to foreign investors and banks, to tighten the enforcement of existing market regulations and to improve the dissemination of information with regard to risks of stock exchange investments. Besides, the SBV was instructed to consider possible amendments with regard to imminent implementation of regulations of the foreign currency control for the purpose of strengthening controls of capital inflows and / or capital repatriation by foreign investors.

In the fifth place, in May 2007 the SBV issued the Guideline 3 which, apart from other provisions, has limited the total securities-related credit risk of banks to less than 3 percent of their credit portfolio.

That is why the banks have to submit to SBV reports presenting their total outstanding securities-related credit risks as well as the measures taken and planned in order to comply with the 3-percent regulation. The reports have to be submitted monthly. The Auditing Department of the SBV will undertake a rigorous supervision of all banks with securities-related total risk exceeding 10 percent of total loans.

Another challenge for Vietnam is the inflation rate. The rising inflation rate was accompanied by the jump of the VN index at the beginning of 2009. Profits and dividends grow nearly as fast as the inflation. The interest revenue is not able to keep up with the inflation rate yet, even though they correlate strongly (Clariden Leu, 2007). Therefore, stocks cannot fully offset the inflation, which diminishes their attractiveness in times of high inflation. Finally, it can be stated that combating inflation is the principal task in order to maintain the young stock market attractive.

Conclusion

The present chapter points out chances and challenges of financial markets in Vietnam. It deals with the specific developments that have to be carefully examined by the managers, in particular with regard to the immature character of financial framework conditions.

Due to the phenomenon of “impossible trinity”, it is of crucial importance for the management to be informed about imminent changes with regard to the monetary policy. Vietnam’s banking sector will

change because the government generates revenues from the privatization of the SOCBS. The WTO Commitments will also play an important role because foreign banks are allowed to participate in the Vietnamese market with many new liberties and rights. Since the boom of stock quotation fueled to a large part by bank-financed retail transactions and institutional domestic investors, well-considered regulatory measures were implemented as the first response.

The steps of SBV taken after 2008 in order to tighten the financial conditions have already brought about an effect. Whereas other countries had recourse to capital controls, the effectiveness and benefit of such measures have to be carefully weighed against anticipated costs. Since the beginning of 2007, the stock exchange went through a phase of consolidation, which, however, can be still regarded as *prima facie* evidence for the overvaluation of some stocks. The authorities responded politically. The conditions certainly changed with unfolding worldwide financial crisis after 2008. As a result, the danger that the volatility at the stock exchange could have spillover effects on the entire financial system and the economy is greater than ever before.

In a general view, the look of the financial markets in Vietnam has changed and approaches the worldwide standards step by step. The decision-makers in the Vietnamese authorities are still subject to a hard learning process, even though the efforts and developments show that Vietnam is able and ready to abolish the existing structures and to try in its own way to achieve the transition of the socialist economy to a competitive economy with respect to its own history, culture and traditions. The Vietnamese reaction to the global financial crisis that emerged after 2008 and to other obstacles shows that the requirements and necessary instruments of banks and systems of financing are recognized and used.

1.5 Purchase of shares in Vietnamese companies

For few years, an increasing interest of foreign investors not only in the area of direct investments, but also in purchasing shares in Vietnamese companies was reported. Whereas a concealed “phantom” funding of Vietnamese enterprises by foreign capital was a known phenomenon already in the 1990s, a formal legal basis for this was created in recent years.

On 11 March 2003, the Prime Minister issued the Decision No. 36/2003/QĐ/TTG which was put in concrete terms by the Regulations on Contributing Capital to and Buying Shares from Vietnamese Enterprises by Foreign Investors (“2003 Regulations”). In 2009, this Decision 36 was replaced by the decision No. 88/2009/QĐ-TTg which took effect on August 15, 2009.

Since “2003 Regulations”, purchasing of shares in Vietnamese enterprises considerably is easier. For one thing, the right to sell shares to foreign investors or to acquire capital from them was extended to other types of Vietnamese enterprises. For another thing, the need of an approval of the PM to purchase of shares in some areas, which had to be specified in a list beforehand, was abolished in favor of a simple registration. The branches of industry involved are published from time to time by the PM or the MPI.

This decision 88 on buying shares in Vietnamese enterprises modified some aspects of the previous regulation.

Now, Vietnamese enterprises whose shares can be purchased are economic organizations doing business in sectors, domains or trades in which investment is not banned by law.

It includes enterprises with 100% state capital which undergo equitization or are otherwise transformed in their ownership. But it includes also Joint-stock companies, limited liability companies, partnerships and private enterprises established and operating under the Enterprise Law.

Besides, regarding article 3 of the decision 88, foreign investors may now contribute capital to purchase shares from Vietnamese enterprises unlimitedly. Exceptions of this rules are specified in article 3 of the decision 88.

Decision 88: Mergers and acquisitions in Vietnam – limitation of foreign shares in companies abolished

On 18 June 2009, the Prime Minister issued the Decision 88/2009/QĐ-TTg which deals with the contribution of capital and purchase of shares by foreign investors in the enterprise law. It includes interesting amendments particularly in the area of mergers and acquisitions (M&A).

The most important amendment is that this decision has abolished the 30-percent limit of foreign interests in domestic enterprises which was previously stipulated in the Decision 36/2003/QĐ-TTg. The Decision No. 36 was abolished earlier by a paragraph in the investment law and Vietnam's WTO Commitments 2005. However, in absence of a new regulation replacing the Decision No. 36, the limit was preserved on the one hand in the law, and on the other hand in the practice of many local authorities granting the licenses.

The WTO Commitments have been confirmed by the Decree of the government No. 139/2007/NĐ-CP in September 2007. Decree 139 was replaced by Decree No. 96/2015/NĐ-CP dated October 19, 2015. They permit, apart from four exceptions, foreign investors to buy shares in domestic enterprises without limit: Foreign interests in incorporated domestic companies; foreign interests from certain special fields (e.g. banks, crude oil, education, etc.); foreign interests in state-owned enterprises; and foreign interests in domestic enterprises operating in the service sector and regulated in the WTO Commitment Schedule on Services.

Meanwhile, the 30-percent limit stipulated in the Decision No. 36 remained in force, unless competent local authorities allowed exceptions on a case-by-case basis. It resulted in uncertainties in some service sectors.

Therefore, the Decision No. 88 replaces formally the decision No. 36 and affirms officially that now foreign investors may purchase up to 100 percent of share capital in a non-public enterprise, as long as such investment is in accordance with the regulations on the securities, the regulations on "privatization" of state-owned enterprises and international agreements which Vietnam signed or to which it acceded. The enterprise should not operate in specially regulated sectors (e.g. banks, crude oil, aviation, publishing company, education, securities, etc.). The Decision No. 88 confirms also the WTO Commitments which provide that the most rigorous limitation is to be applied if Vietnamese enterprises are involved which operate in several sectors in which the regulated limitations for foreign investors vary.

Both the capital contribution for formation of new companies in Vietnam and mergers & acquisitions are not covered by the Decision No. 88. Although the Decision No. 88 does not define the term "acquisition" ("mua lại" in Vietnamese), it is defined in the competition law as "the full or partial purchase of shares in another company which is sufficient to control or dominate at least one business of the purchased company."

The Decision No. 88 comprises a specific definition of foreign investors. It includes their foreign legal form and branches; individuals without Vietnamese citizenship; legal entities with foreign interests of more than 49 percent that have been established and operate in Vietnam; as well as investment funds and securities of enterprises with more than 49 percent of foreign interest. However, the Decision No. 88 does not address the effects of foreign interests of a domestic enterprise on its company organization or legal status. It is debatable whether an enterprise may maintain its legal status as domestic enterprise or is regarded as an enterprise with foreign interest if a foreign investor purchases shares in a Vietnamese company. This issue remains important because the number of regulations imposed on companies with foreign interest extends. In addition to regulations imposed on domestic enterprises, differences with regard to licensing procedures, land use rights etc. arise.

This difference is also important because, if such company is regarded as “Vietnamese enterprise”, it is no longer subject to any limitations concerning foreign interests. Finally, the Decision No. 88 goes back to the disclosure requirement in the Decision No. 36. It is no longer necessary that Vietnamese companies publish information about all purchases of shares or capital contributions, unless it is required by Law on Securities or elsewhere.

It helps Vietnamese companies and foreign investors in non-public companies reduce administrative obstacles and to some degree maintain the business matters.

Prospect

Vietnam obviously endeavors to carry on the reforms initiated since Doi Moi towards a market-based economic system. In this context, the diverse bi- and multilateral economic agreements concluded in recent years by Vietnam should be pointed out. Vietnam’s accession to ASEAN as well as the accessions to the WTO and to AFTA should be mentioned as the most important agreements. Besides, the Bilateral Trade Agreement (BTA) between the Socialist Republic of Vietnam and the United States of America, which entered into force on 10 December 2001, should be regarded as a milestone on the economic relations between the USA and Vietnam. Together with the planned constitutional reform and the new Enterprise Law (UEL) as well as the unified common investment law and its implementing decrees, a clear trend of the Vietnamese government is perceptible to continue to open up to the West and to accelerate foreign investments. In this regard, opening of the Vietnamese stock exchanges in Ho Chi Minh City in 2000 and in Hanoi in 2005 can be considered as a step in the right direction.

The percentage of non-governmental investments increases steadily, recently to over 60%. It reflects the growing impact of the private sector in the economy. Besides, Vietnam has been acknowledged as a good option for risk distribution and as a useful alternative to China.¹⁵

The already mentioned WTO accession is very beneficial for the economic development of Vietnam, and Vietnam’s opening in the areas of economy and politics brought a clear boom in recent years. The final accession on 11 January 2007 has made further investment areas available for foreign investors and opened up new markets for domestic enterprises. For instance, since 1 April 2007 foreign banks are allowed to operate on the Vietnamese market in the form of enterprises with 100% foreign-owned capital.

The accession strengthened the investors’ confidence in Vietnam’s economic environment and meanwhile brought about the situation that the sum of foreign direct investments (FDI) reached in 2007 an all-time high of USD 20.3 billion, almost as much as in the entire period from 2001 to 2006. Moreover, the competition requirements have been adapted to those of domestic enterprises and the legal framework has been refined and made more transparent.¹⁶

The influence of the conservative socialist forces in the country should indeed not be underestimated. However, the facts that after long disagreements within the government the BTA was ratified after all and on 12.12.2006 the National Assembly ratified the final WTO Accession Protocol have proven that the reform forces in Vietnam are able to prevail. Furthermore, it must not be ignored that in this context also saving of face on the part of political leaders, who cannot offhandedly change to a contradictory system, is involved. With the succession of new generations, this aspect will become less and less important. On the other hand, it might apply in the long run: What the party has once granted as liberties, it will be very hard to take back.

¹⁵ EU Economic and Commercial Counselors’ Report on Vietnam 2008

¹⁶ EU Economic and Commercial Counselors’ Report on Vietnam 2008

INVESTMENT POLICY

Legal bases: 2014 Investment Law and UEL

Until the 01 July 2015, the “Common Investment Law”/”CIL” passed by the National Assembly on 29 December 2005 and entered into force on 1 July 2006 together with the implementing regulations, in particular the Implementing Decrees No. 194/2013/ND-CP of 21 January 2013 and 118/2015/ND-CP of 27 December 2015 constitute the legal basis for foreign investments in Vietnam. On 26 November 2014, the National Assembly of Vietnam adopted the Law on Investment (“2014 Investment Law”) and this new law will replace the CIL by 01 July 2015. Possible types of companies and the requirements for their formation are the subject-matter of the Unified Enterprise Law (passed on 29 November 2005 – UEL), which is also to be replaced by the Law on Enterprises adopted by the National Assembly on 26 November 2014 (“2014 Enterprise Law”). Further guidelines on the 2014 Investment Law and Enterprise Law are still pending. Currently, provisions of the CIL and UEL and their implementing documents still apply. Implementations of Decree 43 (references to online registration) in the form of Circular 01/2013/TT-BKH, became effective on 15 April 2013 and was superseded by Circular No. 20/2015/TT-BKHĐT dated December 01, 2015. Circular 01 provides that an electronic registration application will be submitted via the national enterprise registration information portal and will consist of all documentation required for an application form in hard copy, converted into electronic form. Approved digital signature is required. A hard copy must still be sent to the registration office even where a compliant digital signature is used, in order to comply with the Enterprise Law. Circular 01 refers back to Decree 43, where the business line is only to be selected out of the listed ones. Any other must be discussed first, which will take a long time. However, under the 2014 Enterprise Law, enterprises are not required to specify their business lines in the Business Registration Certificate. The 2014 Enterprise Law also no longer combines the tax certificate with the business registration certificate, so called enterprise registration certificate.

1.6 CIL and UEL

The CIL

In the following, significant aspects of the CIL are presented.

Enterprises are now allowed to invest in different economic sectors, with investments particularly in the area of infrastructure development being strongly promoted. The number of possible investment sectors increases steadily. After Vietnam’s WTO accession, the implementing decree of the CIL was appropriately adapted and lists sectors in which investments can be made without restrictions, under special conditions or not at all.

Article 6 of the 2014 Investment Law narrows down the list of prohibited business activities to six activities instead of 51 activities in the CIL, namely: doing business in drugs listed in Annex 1 to the Investment Law; doing business in chemicals and minerals listed in Annex 2 to the 2014 Investment Law; doing business in samples of wild plants and animals as listed in Annex 1 to the Convention on International Trade in Endangered Species; samples of endangered species under Category I with natural origin as stipulated under Annex 3 to the 2014 Investment Law; doing prostitution business; trading human, human tissues or parts; and doing business related to human cloning. The number of conditional business activities also decreases from 386 to 267 activities.

Notably, Article 5.1 of the 2014 Investment Law clearly stipulates that investors have the right to do investment and business activities in fields not prohibited by the Investment Law. This is a new methodology compared with the old one, which only allows investors to do businesses specifically allowed. In practice, for example, there are certain business activities which foreign investors would

like to do in Vietnam; however, because such business activities are not specified anywhere in the old law, government officials usually take the view that they are not allowed to do such activities in Vietnam. It then prevents investors from doing business in Vietnam. Thus, the new rule creates more transparency and opportunities for investors.

Moreover, under the 2014 Investment Law, the term “foreign-invested enterprises” is replaced by the term “economic entity with foreign owned capital”, which is defined as an economic entity which has any member or shareholder which is a foreign investor.

Law 61/2010/QH12 dated 24 November 2010 amending and supplementing some articles of the Law 24/2000/QH2010 on Insurance Trading dated 9 December 2000. The changes reflect the position arrived at through government regulation in the intervening years, including changes in the investment laws generally and pursuant to WTO commitments. Changes took effect from 1 January 2011. It states the expanded role for foreign insurers in the Vietnamese insurance market. Cross-border insurance trading is confirmed and foreign insurers and reinsurers may provide reinsurance without any domestic reinsurance. One new element is a fund for the protection of the insured.

Neither minimum nor maximum amounts of investments nor the percentage of foreign capital are regulated. A 100% foreign participation is allowed. The number of sectors reserved for state-owned enterprises was reduced.

Foreign investors have been granted the following “guarantees”:

- Legitimate assets of foreign investors are neither confiscated nor expropriated pursuant to applicable administrative law; enterprises with foreign capital interests are not nationalized. Exceptions exist according to Article 9 of the 2014 Investment Law in cases the national security or the national defense is involved.
- Different assets can be transferred abroad. Among them are investment capital, proceeds of the investment liquidation; trading profits, money and other assets which are the lawful property of the investor. The following investment benefits are available:
 - Exemption from import taxes on imported equipment, raw materials and components;
 - Income tax exemption and reduction;
 - Possibility to carry forward business losses for a period of 5 years at the maximum.

All reliefs for foreign investments have to be negotiated with the MPI beforehand and explicitly laid down in the license.

Real property is owned by the state; nevertheless, foreign investors can acquire land use rights under the condition that a real property rent is paid.

In principle, foreign enterprises have to be able to cover their requirement for foreign currencies themselves. However, an exception exists for such foreign enterprises which participate in infrastructure projects. In such case the National Bank of Vietnam will grant the investors the permission to convert the VND generated from the project into foreign currency during the entire duration of the project.

Foreign enterprises and private persons may transfer their profits and dividends from economic activities abroad, after they have paid Vietnamese taxes (including profit remittance tax).

The policy of the government is oriented towards importing foreign technologies.

In case of disputes between the Vietnamese government and foreign investors with regard to BOT agreements, the parties may decide themselves who takes care for dispute resolution and how it ought to proceed. International arbitration is possible. Foreign investors whose projects are located in mountainous regions of in undeveloped areas have currently yet additional advantages, such as the profit remittance tax at a reduced rate of five percent (otherwise 7%).

Foreign invested enterprises may, on request, cease the operation of their enterprise (temporarily) if they are able to justify it convincingly. Financial liabilities during the period of shutdown can be either fully cancelled or reduced.

A new uniform application procedure for investment licenses for domestic as well as for foreign projects is implemented.

The Vietnamese government provides currency exchange guarantees for projects for the development of infrastructure and for projects of particular importance on condition that the commercial banks cannot satisfy the demand for foreign currency.

Finally, despite mentioned advantages it can be observed that these provisions and principles are not always actually carried into effect and implemented in accordance with the wording of the law. Rigorous controls with regard to foreign currencies as well as other administrative obstacles still exist. As regards reliefs for enterprises granted for investment projects in special economic zones, it has to be pointed out that after Vietnam's accession to the WTO on 11 January 2007 they can no longer be granted because they are regarded as non-permissible subsidies which do not comply with the WTO rules.

The UEL

The UEL basically no longer limits the share which can be held by foreigners in a company, though it is specially regulated. However, the government determines which sectors are to be prohibited or restricted for foreigners. Restricted sectors are to be capped with 49% whereas unrestricted sectors receive no cap.

Depending on the Articles of Association of the company, the legal representative may be the Chief Executive or the Managing Director. Limited liability companies and joint stock companies may have more than one legal representatives depending on the need of the companies. The company's charter will specify the number, management title, rights and obligations of the legal representatives. If the enterprise has only one legal representative, he has to reside in Vietnam. This person must authorize another person to perform his rights and obligations when he is out of Vietnam, irrespective of the absence duration. This formulation can be found more often in the Vietnamese Investment Law and is not completely clear. Admittedly, pursuant to the wording the principal residence could be meant by it. Both the Vietnamese version of the laws and the English translation ("reside in Vietnam") are, however, very vague at this point. It is expected that this requirement will be clarified by the government in the near future.

Further requirements on persons exercising the management capacity of an enterprise can be found in the UEL.

The criteria include among others:

- Legal capacity
 - 10% shares in the business or special skills and experience that qualify him for the specific business segment in which the enterprise operates, unless the Memorandum of Association provides otherwise.

The UEL differentiates between the charter capital, the legal capital required for some projects and the investment capital. The investment capital, in contrast to the charter and legal capitals, comprises the total capital raised in connection with the investment including, apart from the charter capital, also other equity capital and borrowed capital of the company.

New Enterprise Decree

Decree 102-2010-CP-NP is providing guidelines on implementation of the Enterprise Law and became effective on 15 November 2010. In 2015, Decree No. 96/2015/ND-CP replaced Decree 10. Decree 102 gave the members of LLC and shareholding companies the right to institute legal proceedings in the name of the company, against the chairman of the members' council or a member of the board of management or director. Also decree 102 added some clarification about the issue of timing of payment for capital contributions. But also opened new issues for sectors with minimum charter capital requirements. It provided a new definition of "charter capital" in the context of newly registered shareholding company. Also decree 102 recognized a new method of capital contribution in the form of intellectual property rights. The level of foreign investment in a Vietnamese established entity is above or below 49% is significant under the both the Law on Enterprises and the Law on Investment, as well as their implementing legislation. Conversely, if the level of foreign ownership in the parent is above 49%, the subsidiary must be established following the regulations applicable to foreign-invested entities. Decree 102 permitting investors in both LLC and shareholding companies to initiate action against directors, in the name of the company. Law on Enterprise defines a manager and sets out manner in which such a manager must perform their duties.

The Law on Enterprises passed by the National Assembly on 26 november 2014 and entered into force on 1 July 2015 with the the Implementing Decree No. 96/2015/ND-CP of 19 october 2015 constitute the legal basis for Law on Enterprises in Vietnam.

Decree No. 96/2015/ND-CP, which replaced Decree 102-2010-CP-NP, provides guidelines for article 10, article 44, article 189 and article 208 of the Law on Enterprise No. 68/2014/QH13. It applies to joint-stock companies, limited liability companies, partnerships, and private enterprises that apply for enterprise registration.

It provides policies on development of social enterprises, aid, sponsorship, but also registration and rules for those social enterprise.

The Law on Enterprises No. 68/2014/QH13 maintains the essential content of the previous Law on Enterprises. However, there are many new articles in the New Law on Enterprises. Pursuant to the New Law on Enterprises, a new definition relating to the ownership ratio of foreign investors has been added.

The New Law on Enterprise has removed the requirement to submit a document certifying the satisfaction of legal capital and practising certificates at the registration stage. It also requires that a foreign investor must obtain an investment Registration certificate before it applies for establishment of an enterprise in Vietnam.

1.7 Investment incentives

Since market opening, investments of foreign enterprises in Vietnam in almost all branches of economy are possible. However, the investments were limited as yet almost exclusively to a few industrial locations in Vietnam so that huge areas of the country are still underdeveloped today. Therefore the Vietnamese government has attempted for several years to create incentives for investments in these regions by granting special reliefs. The investment law contains some instruments for this purpose. For instance certain regions in Vietnam, but also specific individual projects, are classified by the government as particularly worthy of promotion. Numerous benefits in fiscal and administrative terms apply to such regions or projects.

However, the current investment incentives in Vietnam were considerably diminished by some problems. For one thing, it often remains unclear which investor has generally a right to financial assistance. For another thing, the enforcement of the right turns out to be often difficult, particularly from the point of view of the ultimate application of the funds. The meanwhile missing goal setting resulted in a system that pursues several goals in an unfocused way and is either contradictory or in conflict with other political goals. Consequently, it cannot be reconciled with the aspiration of the Vietnamese government to increase the number of foreign investments by creating new investment incentives. The government is also well aware of the fact that investment incentives are an important factor for foreign investors when making decision on an investment. Here, there is thus a further need of action in the future. However, a comparison with countries like Bangladesh, China, Malaysia, Philippines and Thailand showed that for the time being these five Asian states do not have a considerably better system of investment incentives that could serve as a model for Vietnam.¹⁷

In recent years, numerous reliefs for foreign investors have entered into force and brought in particular a range of reductions of fees for electricity, telecommunication and water. Moreover, the Prime Minister announced that he will take action against illegal fees which are charged in some cases by provincial authorities or the administrative bodies in the Industrial and Export Processing Zones.

Since the LFI and the Decree 24 have entered into force, the demerger, merger and reorganization of enterprises with foreign capital is allowable. Articles and memoranda of association may be amended afterwards without further official approvals. The Supervisory Board or the Management Board may now decide on adjustments of the share capital. On certain conditions, foreign investors are allowed to raise mortgages, thus capital, on land use rights.

Furthermore, the Decree 45 with effect from 01 October 2000 allowed the branch and representative offices of foreign enterprises further liberties for the marketing of imported goods as well as for services. In August 2006, the Decree 72/2006/ND-CP superseded the Decree 45. Decree 72 had slightly limited the liberties for representative offices again and had allowed foreign enterprises to establish commercial branches with more powers, only in theory as yet. It remains to be seen what is provided for in corresponding implementing regulations.

Since 25 January 2016, Decree No. 07/2016/ND-CP replaces Decree 72 and provides detailed regulations on the establishment, operation, rights and obligations of representative offices and branches of foreign traders in Vietnam.

This decree applies to foreign traders, representative offices and branches of such foreign traders in Vietnam. However, Representative offices and branches of foreign-invested enterprises incorporated in Vietnam shall not be governed by this Decree.

The Prime Minister issued Decision 21 providing for deferral of corporate income tax (CIT) for certain small and medium sized enterprises (SMEs). The MoF subsequently issued implementing Circular 52/2011/TT-BTC on 21 April 2011. The CIT deferral is for one year from the date on which payment of CIT would otherwise be due and applies to CIT payable on finalization of CIT for 2011. It includes any CIT payments for 2010 which have been legitimately carried forward from 2010. The deferral does not apply to certain types of income such as that derived from real estate activities, securities trading, finance and insurance. That generated income will need to carve out of their total income when calculating the amount of CIT eligible for the deferral.

1.7.1 Promoted sectors

Within the scope of regional structural promotion, primarily underdeveloped regions have been classified as particularly worthy of promotion. Besides, the Vietnamese government promoted so far principally export-oriented investments because they contribute to currency supply to Vietnam and in

addition do not constitute a competition for domestic products. Since Vietnam's accession to the WTO, however, such investment incentives, as impermissible subsidies, are no longer granted.

Furthermore, trading in securities is expected to bring more foreign currency into the country. That is why in June 2000 new regulations for issuers, for trading companies operating in the securities business and for private investors with considerable reliefs entered into force in order to stimulate the stock exchange in Ho Chi Minh City opened in July 2000.

The CIL contains among other things investment incentives for the following branches of industry:

- development of new energy sources, production of high-tech products, biotechnology, information technology;
- agricultural and forestry products, salt production, cultivation of new species of plants;
- promotion of traditional handicraft;
- projects due to which many workplaces are created;
- investments in research and development and
- development of infrastructure and important industrial production centers.

¹⁷ Foreign Investment Advisory Service (FIAS), Report on Investment Incentives and Investor Protection in Vietnam – Opportunities for introducing investment friendly change, November 2004.

1.7.2 Special economic impact zones

The Vietnamese government had established special economic impact areas as early as in the 1960s. Such economic zones offer a modern infrastructure and a good logistics as well as necessary services. Besides, through low labor costs and rents, through a simplified licensing procedure as well as through numerous tax reliefs, they currently provide additional investment incentives for foreign enterprises. Vietnam attempts to gain foreign investors with the aid of economic impact areas in order to receive in this way urgently needed foreign currency and to create more workplaces. There are three different kinds of economic impact areas: Industrial Zones (IZ), Export Processing Zones (EPZ), High-Tech Zones (HTZ) and Economic Zones (EZ).

Currently, 130 Industrial and Export Processing zones can be reported. In the last years the Vietnamese government has created a range of reliefs for investments in economic impact areas. In this respect, among other things:

- the administrations of major cities and provinces as well as the Industrial Zones have been authorized to approve themselves foreign investment projects up to a volume of US\$ 10 million;
- the processing time for investment applications in the Industrial Zones has been shortened to 30 days (investment projects with an export ratio of over 80% are processed within 15 days, but it is tied in with the completeness of documents at the date of submission);
- the tax rate on profits transferred abroad has been reduced from previous 15% to 5%;
- the following tax reliefs have been created:
 - enterprises in **High-Tech Zones** pay only a 10% tax on earnings based on generated profit; besides, they obtain a four-year exemption from tax on earnings starting in the first year of profit;
 - manufacturing enterprises in **Export Processing Zones** pay a 10% tax on earnings and obtain a four-year exemption from tax on earnings starting in the first year of profit. Service enterprises in Export Processing Zones pay a 15% tax on earnings and obtain a two-year exemption from tax on earnings;
 - enterprises in **Industrial Zones** are taxed depending on the export ratios specified in investment licenses (tax on earnings). The tax rates range from 10% to 15%. In this regard, principally a two-year exemption from tax on earnings is granted, and additionally for further two years a 50% reduction of the tax on earnings is allowed. Service enterprises in Industrial Zones pay a 20% tax on earnings and are exempted from this tax for one year.

1.7.3 Investment promotion measures

For the purpose of promotion of investments in sectors worthy of promotion, the investment law provides for low tax rates, other tax reliefs and in some cases even tax exemptions. In case of investment projects worthy of promotion, in particular a reduction of the corporate income tax or the import duties come into consideration. The government has a wide discretion in granting tax reliefs on a case-by-case basis.

Enterprises with foreign capital received previously, on certain conditions, the same tax reliefs that are granted for particularly promoted projects. These tax reliefs were granted to enterprises that showed a high export quota (50 – 80%), intensively used Vietnamese raw materials and/or employed predominantly Vietnamese workforce. However, such tax reliefs which were previously granted to enterprises due to their high export quota alone disappear with Vietnam's accession to the WTO. Since

01 August 2000, enterprises with foreign capital are entitled to carry forward their losses in the subsequent year. However, this loss carryforward is limited to 5 years. The abolition of this limit is admittedly desired by the industry, but it has not been implemented yet.

Moreover, the CIL allows establishing Export Processing Zones and Industrial Zones in which special tax reliefs and customs regulations apply. For instance, no customs duties on imports of goods which are required for the construction of a foreign investment project in these special areas are raised there. However, foreign investors have shown little interest in these special areas yet because the necessary infrastructure (transport routes, development of the land etc.) is often still missing. Since 01 July 1999, enterprises in Export Processing Zones are allowed to sell goods on the domestic market. Furthermore, enterprises in Industrial and Export Processing Zones will receive in the future land use rights guaranteed for the period of concluded contracts.

FORMS OF INVESTMENT

The basics

Under the 2014 Investment Law, two possibilities to pursue economic activity in Vietnam: (i) through direct investment, by way of other economic activity; or (ii) through indirect investments, are no longer mentioned. The 2014 Investment Law only refers to investment in general.

1.7.4 Forms of investment

There are currently the following forms in investment in Vietnam:

- **Economic entity establishment;**
- **Business cooperation contract;** a contractual arrangement between two or more investors without creating a legal entity;
- **Public-Private Partnership;** a contractual agreement between competent state authorities and investors, an enterprise project in order to implement an investment project;
- **purchase of shares** or capital contribution.

Since 01 July 2006, foreign and domestic enterprises are treated as equal. Pursuant to the previous law, the joint venture company (JVC) was the standard form of investment. Pursuant to the new law, this form of investment is no longer predetermined. Now foreign investors may choose between the LLC and the JSC as respective form of investment.

Enterprise forms under Vietnam's law:

- **Representative Office:** represents the parent company, no actual business operations. A suitable tool for market research;
- **Branch:** a branch of a foreign company permitted to conduct commercial activities;
- **Shareholding Company:** similar to the German;
- **Limited liability company:** members are liable to the extent of their capital contributed
- **Partnership:** established between two or more partners;
- **Business Cooperation Contract:** an agreement without constituting a legal entity and each party is individually responsible for paying taxes.

Moreover, individual projects are also possible. At the end of this chapter, advantages and disadvantages of different forms of investment are analyzed and discussed.

Irrespective of the kind of economic activity, each foreign enterprise has to apply for a license for planned projects either at the Department of Planning and Investment (DPI) of the People's Committee

or at the Ministry of Planning and Investment (MPI). The MPI prepared model contracts and model articles of association for company formations in order to simplify and to accelerate the approval procedure. Apart from the required investment license, yet further approvals are necessary for certain projects, e.g. land or building permits as well as currently yet import licenses, in order to be allowed to pursue an economic activity in Vietnam.

Pursuant to the 2014 Investment Law, the People's Committees are no longer authorized to license investment projects. However, there are certain projects subject to investment decision by the People's Committee. The investment application dossier has to include:

- a request for the implementation of the investment project;
- a copy of the ID or passport of individual investor; a copy of Certificate of Establishment or equivalent document certifying legal status of investors being organizations;
- subject matter, cost and location of the investment project to be implemented;
- proposal of the investment project;
- financial report of the investor;
- proposal of land use demand;
- explanation on the use of technology for projects using technology under the List of technologies restricted from transferring.

The People's Committee is composed of representatives elected by the People's Council and constitutes the leadership of the administration at the municipal, district and province level.

Sectors in which investments are not allowed include:

- doing business in drugs listed in Annex 1 to the 2014 Investment Law;
- doing business in chemicals and minerals listed in Annex 2 to the 2014 Investment Law;
- doing business in samples of wild plants and animals as listed in Annex 1 to the Convention on International Trade in Endangered Species;
- doing business in samples of endangered species under Category I with natural origin as stipulated under Annex 3 to the 2014 Investment Law; and
- doing prostitution business; trading human, human tissues or parts; and doing business related to human cloning.

The transition of the foreign direct investment management (FDI) in Vietnam

Introduction

There are various crucial aspects and areas within the scope of the FDI management. It includes those who occupy themselves with the role, the impact and the importance as well the growth and levels of the FDI. There are often big differences between promise and actual realization. The sources of FDI funds and sectoral provisions are also of importance. Moreover, foreign direct investments (FDI) face numerous challenges. In consequence of its recent industrial development, Vietnam shares many common characteristics with China, though the transition of the country from a centrally controlled national economy through to a market economy was slower than that of its neighbors. Vietnam made a great progress and became Thailand's biggest rival in respect of exports of rice and products in the area of aquaculture and meanwhile is the greatest rival of Brazil in respect of coffee products and possibly could soon become India's greatest rival in the area of software development (UNCTAD, 2006). The country has one of the most opened economies of Asia: the two-way trade amounts to nearly 160 percent of the GDP, more than twice as much as the ratio in China and more than four times as much as in India (UNCTAD, 2007a). The economy reported a growth of 7-8 percent per annum, with

a peak of 8.5 percent in 2007. A key role and significant effects within this development are assigned to foreign direct investments. The role of the FDI growth in Vietnam is discussed in the following sections. Key issues, such as the WTO membership, FDI access forms and procedures are considered. Case studies of organizations and managers as well as outlines are brought in as well, and the imminent challenges are described in detail and include such subjects as labor productivity, real property, industrial facilities and industrial relations.

Key issues and new developments

There is a range of key issues and developments which have effect on the area of FDI management. They include the following factors. Since the beginning of the *Doi Moi* reforms in 1986, the foreign direct investments performed excellently with almost 10,000 FDI projects and a total investment capital of more than US\$ 100 billion (Vietnam Economic Times, 2008). In 2007 alone, the FDI commitments amounted to US\$ 21.3 billion and the combination of foreign and domestic investments accounted for 44 percent of the GDP. Vietnam has a balanced share structure attracting FDI capital in order to facilitate further economic growth, with 50:30:20-50 percent of private sector, 30 percent of public sector, 20 percent of FDI (Ming, 2008).

However, by 2007, only less than the half (45.6 percent) of the complete registered capital of FDI was implemented. (see table 6.1) (GSO, 2009). According to observers, this slow speed is a direct result of the small ability of the country to absorb the funds and, besides, is due to poor conditions for the support of the implementation of projects. The three biggest bottlenecks are (a) poor and insufficient infrastructure; (b) a serious shortage of workforce and in particular of skilled personnel as well as inexpedient administrative regulations, including lengthy procedures; and (c) harassment and corruption (Minh, 2008). In consequence of such deficiencies, many of large projects as urban development, housing construction, office construction, in the chemicals and tourism sectors cannot be implemented, especially in central Vietnam. The inflows of FDI, ODA and transfers from overseas for 2008 have been estimated at US\$ 30 billion. The figures exceed the trade deficit of US\$ 20 billion. FDI commitments for 2008 reached in the first eight months a new record high of US\$ 47 billion, an annual growth of 300 percent (GSO, 2009). However, the economic and business risks existing in Vietnam, such as inflation, corruption and lack of infrastructure, could upset and frighten off foreign investors, thus modify these capital inflows. Nevertheless, the World Investment Report (UNCTAD, 2007) presented an optimistic forecast with regard to Vietnam's FDI. About 11 percent of surveyed transnational groups confirm that in the next years Vietnam would be the country with the most attractive market. Vietnam was classified in the sixth place as target country, behind China (52 percent), India (41 percent) and the USA (36 percent), Russia (22 percent) and Brazil (12 percent). The contribution of Asian countries constitutes the main part of the FDI in Vietnam (see Table 6.2). In 2007, South Korea was the biggest investor with a total number of 240 projects (almost 15 percent of the total amount), Singapore ranked in the second position and another six Asian countries were among the first ten, thus constituting over 59 percent of the total amount. Registered future projects amounted to US\$ 50 billion and consisted of over 50 projects. They included a US\$ 3.8 billion worth power plant under the leadership of the Japanese Sumitomo Group, a US\$ 2.5 billion worth culture and trade center Kumho Asiana, a US\$ 9 billion worth Trustee Swiss Group Project on Phu Quoc and a US\$ 3.5 billion worth international campus in HCMC implemented by Malaysia's Berjaya Land Bernhard. These projects will be implemented within the period from 2008 to 2020 (Vietnam Economic Times, 2008). In the first half of 2008, Taiwan took the lead with US\$ 8.2 billion of promised FDI, followed by Japan (US\$ 7.1 billion) and Canada (US\$ 4.2 billion). However, again the mega projects lag behind such high commitments and include projects in the steel, oil refinery and real property sectors (Vietnam Economic Times, 2008). Less than 50 percent of Vietnam's officially published FDI figures find their way to real payments. Table 6.1 (below) shows that in the last ten years South Korea, Singapore and Taiwan are the main investors, but the actually made payments are well below 50 percent (see Table 6.1) (UNCTAD, 2007a). The protection of investors has improved and the legal framework conditions have developed in a more advantageous and more comprehensive direction. Consequently, FDI are among the most significant driving forces for the economic transformation process as well as with regard to

the fight against poverty and, besides, play an important role in the industrialization process (UNCTAD, 2006). In September 2010 the Ministry of Finance issued Circular 131 to implement Decision 88 of 2009. Decision 88 left open several uncertainties concerning the opening and operating of capital accounts by foreign investors who invest in Vietnamese companies. Unfortunately Circular 131 which took effect in 21 October 2010 does not resolve many of the uncertainties, in general following the same path as Decision 88. In principle the a foreign investor who contributes capital to, or purchase capital contributions or shares in a Vietnamese company must open up a capital bank account in Vietnam through which to make any payments associated with those transactions, but still the details stay unclear. These regulations do not apply on an investment carried out by way of “merger and acquisition”. The regulation does not apply to Viet Kieu. In several legal instruments, including the Law on Investment there is a distinction between direct and indirect investments. But it is still uncertain and complicates the capital account rules. Payment for the acquisition of shares or capital contribution may be made in any of Vietnamese dong. So the incoming investor will not be able to pay the purchase price directly to an offshore bank account of the initial investor. The result is, that the initial investor will also likely need to open a capital account in Vietnam in order to receive the payment in Vietnamese dong.

Effects of the WTO membership

Vietnam joined the ASEAN in 1996 and the WTO in 2007 and, while the reforms of the legal framework conditions towards market economy started formally in 1986, it was only the beginning of the WTO accession negotiations in 1995 that eventually initiated substantial changes. The WTO membership was the result of a long process, beginning with the implementation of the Doi Moi principles and continued in numerous changes with regard to theoretical foundations on which the Vietnamese economy and the legal system are based. The lengthy accession process of eleven years for a country with relatively little political power reflects the interest in the Vietnamese market as well as the high degree of required reforms. Moreover, the failure of other accession countries (particularly of China) to successfully implement the WTO Commitments put Vietnam under pressure, thus resulted in numerous reforms before the WTO membership.

Changes made as a result of the WTO membership had effects on numerous areas related to FDI, such as trade. The most important changes for enterprises were distinguished by the introduction of the LOI and the LOE (in 2005), which resulted in a common framework for foreign and domestic investors. These laws put private and state-owned enterprises on equal footing. Furthermore, there are challenges in practical terms and the reform process with regard to establishment and maintenance of management based on market economy is not yet finished. In particular the legal system is still cumbersome and complex and the focus is currently on ‘regulating and controlling’ rather than on ‘regulating, monitoring and enforcing’ as in other market economies. Another important problem is the correct implementation of the existing laws and decrees (UNCTAD, 2007b). Despite the fact that the WTO does not require any special investment regime, investment provisions on various agreements having effect on the regulation of investments are common. The Agreement on Trade-Related Investment Measures (TRIMS) regulates the applicability of the GATT rules on equal national treatment and the ban on quantitative restrictions in certain investment measures (De Sterlini, 2005). Foreign investors, particularly in the automobile industry, will benefit from this change. For instance, local content requirements have been abolished, but, on the other hand, a special consumption tax with regard to completely disassembled motor vehicles has been increased from 5 percent to 50 percent. In economic terms, it is not reasonable for most motor vehicle manufacturers to manufacture locally because the market shows annual sales of 120,000 cars only. According to the statement of Mr. Tran Duc Kien, Supply Operation Manager of Ford Vietnam, more cars were sold within five days in the USA than within a year in Vietnam.

The WTO accession resulted in a range of investment opportunities for foreign investors, in particular also with regard to politically sensitive areas, such as in the financial services sector. Further positive effects were the result of the Circular of 2008 which involved an improved protection of intellectual property rights. Although the borderline for violations of the law still remains very high, the

punishments have no appropriate deterrent effect and an efficient enforcement system does not exist yet. All things considered, the accession to the WTO has reinforced the confidence of foreign investors in Vietnam. FDI Commitments from 2006 to 2008 were higher than in the previous 20 years. In turn, foreign investors contributed to continuing integration Vietnam's into the global economy.

Decree 99/2013/ND-CP took effect from 15 October 2013. The decree sets up the potential for a double pecuniary punishment for infringing industrial property rules, imposing fines at a maximum of VND 500 million and requiring the return of any illegal obtained profits. Also the decree addresses electronic-based infringements such as the misuse of domain names. In total, there are 7 bodies empowered to deal with the breaches of industrial property laws.

Entry methods

Whereas great progress with regard to opening for FDI was achieved, obstacles continue to exist and the FDI entry system is still a long way from being liberal as compared with other developing countries. The government decided instead consciously in favor of a gradual approach towards further liberalization and continues to steer investments in certain areas. That is why rigorous conditions for many sectors were maintained, an approach that reflects the artlessness of the former planned economy system. The conditions for the FDI access are laid down in LOI and in its implementing decrees as well as in the sectoral laws and regulations and in the WTO roadmap regarding services and legal regulations with regard to mergers and acquisitions (M&A). The LOI defines four comprehensive categories of investment projects: (a) prohibited sectors; (b) sectors which are subject to restrictions both for foreign and domestic investors, (c) sectors which are subject to restrictions only with regard to foreign investors; and (d) sectors which do not fall within any of these categories are regarded as free of restrictions.

Most sectors which are listed as under restrictions are also subject to rigorous conditions in most other countries. Important sectors which are interesting for foreign investors and are characterized as strategically important (*chien luoc*) include the telecommunications, banking and financial sectors, trade and distribution, education, media as well as the real property sector. A clear definition of conditionality is in most cases laid down separately for each sector in special laws and regulations and includes limits for foreign rights of ownership, cooperation requirements and restrictions with regard to operation/implementation as well as restrictions with regard to the provision of services for other FIEs. However, many restrictions on services which are currently in force are subject to clear gradual periods for abolition within the WTO Commitments in the service sector.

Initially, many foreign investors decided on entering the Vietnamese market through a representative office (RO). The process of registration for ROs is the easiest and fastest of all registration procedures, but the allowed range of business activities is accordingly very limited. The ROs may be primarily used to identify opportunities on the market and to prepare foundations for businesses with foreign enterprises. As soon as an investor decides on being formally active on the Vietnamese market, it has the possibility to establish a 100% or only partly foreign-owned enterprise (FOE) in the form of a LLC or a JSC (see figure 6.2). The LOI does not mention the form of a JVE; it regulates LLCs with foreign or domestic shareholders instead. A LLC with only one shareholder is the most common enterprise for an investment project being fully in foreign hands and belongs either to a natural person or an organization. A JSC is defined in the Enterprise Law as follows: an enterprise whose registered capital is divided into equal parts and is also referred to as stock. Like the LLC, the JSC is a legal person with its own articles of association. JSCs can be either formally listed at the Vietnamese Stock Exchange or operate as unlisted companies. The provisions in the Enterprise Law can be equally applied to both forms. Shareholders may be organizations or natural persons, with the minimum number of three shareholders. Debts and other liabilities of the JSC are at the same time the liabilities of the shareholders themselves, at least up to the amount of provided capital. A JSC is authorized to issue bonds or additional stocks in order to mobilize capital. This complex process is shown in figure 6.2.

Apart from the formation of a Vietnamese company, a business cooperation contract (BCC) also constitutes a suitable investment instrument. BCC is not a form of enterprise, but a contractual

relationship in which a foreign and a domestic investor agree to undertake a special investment project in Vietnam and to obtain a license for this purpose. The BCC is a very flexible instrument: the distribution of profits can be regulated discretely by the parties in the BCC agreement itself and does not have to correspond to the proportion of capital brought in. The disadvantage is that the liability of investors within a BCC agreement relationship is not limited. However, the investor may form a LLC abroad and enter into a BCC agreement, thus limiting its liability.

The investment form of a Build-Operate-Transfer (BOT) project is still the most common variant in case of investment projects in the area of infrastructure. Like a BCC, a BOT project is not a form of enterprise, but rather a contractual partnership for the implementation of a special project. The background is that the foreign investor declares to build an infrastructure project, obtains the license for the operation of the project for a limited period, as a rule 50 years, in order to generate profits and afterwards transfers the project without compensation to the Vietnamese state. The partner within a BOT project is the competent Vietnamese authority. BOT projects allow the state to develop the infrastructure with the aid of foreign capital while maintaining a high level of control. Vietnam has a huge requirement for investments in the infrastructure; it is estimated that in the energy sector alone between 2007 and 2017 about US\$ 1.5 billion annually are required (EAI, 2007). That is why investors in BOT projects have the most advantageous investment conditions, among others land use rights free of charge and the lowest tax rates. Although the need for opening the market for investments in the infrastructure definitely exists, the BOT contract will continue to be an important form in the foreseeable future. Under the 2014 Investment Law, a BOT project is now included in a so-called Public-Private Partnership project.

The right to establish foreign companies is strongly regulated or is in the planning phase for regulation. For all forms of investment, the intended range of business activities should be defined as broadly as possible because the firm is allowed to operate only within this defined range and the extension of the scope is a cumbersome process. Moreover, it is important for foreign investors that the possibility exists to stipulate also foreign law as applicable law in the project agreement and other agreements with regard to the project, provided that the respective foreign law is consistent with the underlying principles of the Vietnamese law. Furthermore, the arbitration by an international dispute settlement body, such as the Singapore International Arbitration Center, may be applied. Currently, the participation of foreign investors within the SOEs, in the form of strategic partners during the privatization process, is discussed. In such sectors as telecommunications, memoranda of understanding (MoUs) on partnerships were signed. Under WTO rules, foreign companies providing services in mobile and other sectors without their own network structure are authorized to establish LLCs with domestic telecommunications providers. Generally, obtaining investment licenses became easier. In order to encourage further FDI, Vietnam wants to open new investment promotion offices in Japan, Singapore and in the USA.

Types of FOI

LLCs and former JVEs constitute an effective instrument of FDI. JVEs running a business were often confronted with problems arising from an ineffective legal system, bureaucracy, constant changes of regulations, protectionism and corruption. (Swierczek et al., Quang, 1998; Sheridan, 1998). Additional problems resulted from the lack of managerial ability, cultural differences, distrust and opposed interests. That is why in 2006 almost 1,000 FDI projects (20 percent) were terminated early. (UNCTAD, 2007a). A study encompassing 554 JVEs in Vietnam came to the result that goal clarity and associated management are the key factors affecting the success of JVEs (Thuy, 2005); cultural sensibility and information exchange have, however, no significant effects. Furthermore, the study has shown that flexibility with regard to the will to modify the agreements in response to unforeseen circumstances constitutes the most important success factor of JVEs. Trust is also an important element. One of the reasons for the existence of JVEs is the fact that foreign investors were for a long time not allowed to

have proprietary rights to land, it was though possible through SOEs in the sense of a capital contribution. Moreover, foreign investors perceived investments in the protected SOE sector as more secure. In 2004 for instance, 821 FDIs in the form of JVEs were made. However, foreign investors increasingly preferred extensive proprietary rights. Between 2000 and 2004, the proportion of FIDs in the form of JVEs declined from 44 to 26 percent, with regard to the number of foreign capital syndicates from 70 to 53 percent and with regard to the number of employment in FDI enterprises, a decrease from 30 to 17 percent was reported (GSO, 2007). Under the new LOI, JVEs with more than 51 percent of domestic capital ownership rights are subject to the same rights and restrictions as domestic investors.

In order to avoid the pitfall of LLCs, some enterprises pursue M&A as entry strategy (Zhan and Terutomo, 2001). The acquisition of an existing firm is an investment option both for foreign and domestic investors striving after a rapid increase of their share in the market. Asia Pacific Breweries Ltd for example, a firm invested by Singaporeans, which owns the Viet Nam Brewery Ltd (VBL) has expanded its capacities by acquiring a share in the amount of 80 percent in Quang Nam VBL Ltd whereas Viettel satisfied its requirement for the development of a sales network by acquiring the existing networks of Nettra. M&A research institutions such as Thomson Reuter and AVM Vietnam forecast that growth rate of M&A activities in 2012 would be about 40 percent. Sectors of banking-finance and consumer goods continue to be the most attractive targets, of which Japanese investors are tending to heavily invest in consumer goods and finance fields.

There is a variety of factors inducing a firm to buy up another one. Some takeovers are opportunistic and motivated by a cost-effective price of the target enterprise or the buying enterprise expects to increase the output earnings by the takeover. On the other hand, other takeovers are regarded as strategic necessity for the entry into a new market in order to establish or capture a new enterprise or a new business segment, respectively, without excessive risks or the waste of time and money. Reduction or destruction of competition may also constitute goals. Furthermore, M&A may also constitute the only practical instrument permitting to operate in several sectors. For instance, the Law on Real Estate Transactions (2006) defines conditions for legal persons with regard to legitimate capital which they have to meet if they want to operate in this sector. However, a few found a way to avoid the obstacle by taking over an already existing enterprise which is authorized to pursue business activities in that sector.

Procedures for the takeover of an enterprise are defined in the Law on Competition (2004), in the Decree No. 116/2005/ND-CP (2005) as amended by Decree No. 119/2011/ND-CP and in the Decree No. 118/2015/ND-CP which describe in detail the implementation of the LOI. The existing M&A legislation in other countries divides takeovers in the following categories: (1) share deal by which the target company itself is acquired and (2) asset deal by which the assets of the target company are acquired, but not the target company itself. The Vietnamese law on M&As is not perfected yet and even the definition of a takeover is still very vague. Article 17.3 of the Law on Competition comes closest to it and lies down the following: 'Takeovers refer to an act in which an enterprise takes over the whole or a part of the ownership of another enterprise, which is sufficient in order to control or to dominate all or one of divisions of the acquired enterprise. Pursuant to Decree No. 116/2005/ND-CP, control or domination exists when the acquiring enterprise holds more than 50% of voting rights in the General Shareholders' Meeting, in the Management Board or otherwise, according to the Articles of Association of the acquired enterprise or can control or dominate the financial strategies and transactions of the acquired enterprise'. In other words, the law does not include any statement on the subject of takeover by way of an asset deal.

However, the Decree No. 118/2015/ND-CP fixes some procedures for foreign investors required to obtain an official approval for the takeover. Though, the approval procedure for obtaining an investment license has proven to be ambiguous. Some foreign investors could face problems when

authorized state or local authorities delay the approval of takeovers while waiting for guidelines bringing clarity. Under the 2014 Investment Law, M&A procedures are mentioned for the first time. Accordingly, foreign investors making investment by contributing capital, purchasing shares or contributed capital must register their investment with the local Department of Industry and Trade if (i) Foreign investors contribute capital, purchase shares or contributed capital in economic entities in conditional business activities applicable for foreign investors; or (ii) Capital contribution, purchase of shares or contributed capital results in 51% or more ownership of charter capital of certain economic entities in the targeted economic entities. These certain economic entities includes those which have (i) A foreign investor holding from 51% of its charter capital or the majority of its partnership members are foreign individuals (for economic entity being a partnership enterprise); or (ii) An economic entity in (i) holding from 51% of its charter capital; or (iii) Foreign investors and economic entity in (i) holding from 51% of its charter capital.

Furthermore, M&A transactions could be assessed critically in respect of rules of competition, creation of a monopoly or economic concentrations, a process which could be impeded or delayed in view of lacking official data with regard to the market and the market shares of the enterprises. Regardless of whether an enterprise decides on a LLC or on M&A, in both cases it needs financial resources and HRs. As a matter of fact, comparable “capital”, defined as trust, mutual respect, understanding and close ties between individuals are important factors of success in a business relationships (Thuy and Quang, 2005).

FDI flows

In geographical terms, FDI are concentrated around Ho Chi Minh City and Hanoi. In 2007, US\$ 12 billion FDI were channeled into 900 new projects whereas US\$ 9 billion and remaining capital were invested in 250 already existing projects. The industrial sector attracted the largest amount of FDI, US\$ 5 billion in total (Vietnam Economic Times, 2008). Vungtau, a coastal town near HCMC attracted the largest amount of FDI of more than US\$ 1 billion. Hanoi and HCMC, with nearly US\$ 1 billion of FDI, hold the second and the third position. It can be observed in HCMC how fast the speed increases: in the first six months of 2008 alone, the city attracted US\$ 1 billion.

Foreign direct investment (FDI) in Vietnam for the first nine months of 2017 hits a record \$25.48 billion, up 34.3 per cent year-on-year, according to the Foreign Investment Agency (FIA) at the Ministry of Planning and Investment.

There were 1,844 new projects in the total, with registered capital of \$14.56 billion, up 30.4 per cent year-on-year, while 878 projects invested additional capital of \$6.75 billion, up 28.3 per cent.

FDI projects disbursed \$12.5 billion in the period, an increase of 13.4 per cent.

Foreign investors are investing in 18 sectors, with manufacturing and processing attracting the most, with total capital of \$12.64 billion, accounting for 49.6 per cent of the total.

Power production and distribution followed, with \$5.37 billion, accounting for 21 per cent, then wholesale and retail, with \$1.58 billion, or 6.2 per cent.

Not surprising, Ho Chi Minh City was the most popular FDI destination, with capital of \$3.74 billion, followed by north-central Thanh Hoa province with \$3.15 billion and northern Bac Ninh province with \$3.14 billion for this year. (Vietnam Economics Times, 2017)

From 1988 to 2007, HMC received a total value of nearly US\$ 20 billion of FDI projects. The entire Red River Delta, including Hanoi and Haiphong, received a similar amount, followed by the south of Central Vietnam with Danang and Quangngai (GSO, 2009) (see Table 6.3). There were hardly any FDI in the northwest, in the north of Central Vietnam, in the south of Central Vietnam, in the Central Highlands as well as in the areas of the Red River Delta and only a limited number in the northeast, mainly in Quangninh. Together with the cities HCMC, Binhduong, Baria-vungtau and Dongnai, the southeast constitutes the center of FDI with US\$ 42 billion (see Table 6.3).

As regards the target sectors for FDI, the following should be taken into account. As a result of its fast economic growth, Vietnam has to struggle hard to generate enough energy in order to cope with the growth. The half of the Vietnamese domestic energy consumption originates from oil; hydroelectric power (20 percent), coal (18 percent) and natural gas (12 percent) provide for the remaining demand.

Table 6-3 Licensed FDI projects within major cities/provinces, 1998 – 2007 (US\$ million)

ranking city/province	Project capital		shares
1 Ho Chi Minh City **	2816	0,174.2	20.2
2 Hanoi	1183	15,085.6	15.1
3 Dongnai	986	12,824.2	12.9
4 Binhduong	1607	8,958.1	9.0
5 Baria-Vungtau	222	7,520.1	7.5
6 Haiphong**	321	3,188.1	3.2
7 Danang**	148	2,478.0	2.5
8 Quangngai**	21	2,191.9	2.2
9 Vinhphuc	164	2,060.9	2.1
10 Hatay	97	1,991.7	2.0
Total		99,596.2	

Table 6-3bis Licensed FDI projects within major cities/provinces, projects having effect as of 31/12/2016 (US\$ million)

city/province	Project capital	
Ho Chi Minh City **	6762	45,293.4
Hanoi	3960	25,748.8
Binhduong	3050	26,599.7
Dongnai	1368	25,871.5
Baria-Vungtau	345	27,089.3
Haiphong**	561	14,464.5
Danang**	450	4,398.8
Vinhphuc	266	3,874.7
Quangngai**	40	1,097.5

In order to improve the situation, the government invited foreign enterprises to invest in this politically sensible sector (EAI, 2007).

Case studies

The following case studies and outlines prove that Vietnam as a result of the *Doi Moi* policy genuinely attempts to open up to FDI, in particular when it comes to economically critical sectors (such as the financial and energy sectors). Furthermore, they show the costs which a centrally planned economy needs in order to boost or to speed up the economy. The case studies of individual managers show how foreign investors deal with the reality on site in order to achieve their FDI goals.

Case studies of organizations

In the 1860s, three Swiss entrepreneurs sailed eastbound to Asia. Independently of each other and in different years, Wilhelm Heinrich Diethelm set off towards Singapore, Edward Anton Keller towards the Philippines and Hermann Siber towards Japan. Over the years, they established flourishing trading

houses which over decades developed to important players in Southeast Asia, China, the East Asia & Pacific Region and Japan. With the reputation of reliable business partners, who showed excellent understanding of their business segments, they gained the respect and trust of major international enterprises and local branches at the same time.

The Diethelm Group and the Keller Group pooled forces officially in 2000. In 2002, Diethelm Keller Service Asia and Siber Hegner joined forces in order to create a global market in the area of trade, logistics and distribution companies with a unique Pan-Asian network: The hour of birth of DKSH.

DKSH is a market and business expansion services group. They support enterprises in the expansion of their businesses in existing and enable capturing of new fields. They combine financing, marketing, trade, distribution and customer services and their partners are provided with essential expertise and on-site logistics. Furthermore, the globally most complex and demand-strongest growth markets are covered. They provide market, product and application information and knowledge as well as a network all over the region. DKSH generates an annual gross income of more than CHF 8,700 million and employs over 22,000 specialized personnel, consisting of 48 nationalities. The Group operates in 35 countries and has a coordinated network of 440 business locations all over Asia and another 15 in Europe and America. Classified on the basis of the sales figures and the number of employees, the DKSH (with its headquarters in Zurich) ranks among the top 20 Swiss firms.

The Asian history of the company dates back to the year 1890 when DKSH started business activities in Saigon and Haiphong. However, they withdrew in 1954 from the north and in 1955 from Saigon. In these more than 60 years, the enterprise operated in the import business for consumer and pharmaceutical products and, besides, represented shipping companies and insurance enterprises.

More than 100 years after its first entry, in 1991 the enterprise reentered the Vietnamese market. The opening-up policy of the government in the early 1990s attracted the enterprise again and it succeeded in the same period in obtaining a business license. From then on, they operated in the form of a fully foreign invested enterprise (fully FIE) and provided trade, marketing and logistics services. 'The first positive change took place through the Doi Moi Policy, followed by the WTO accession and the new Law on Investments' asserted the DKSH. Particularly since the 2000s, the business activity of DKSH in Vietnam developed rapidly. Besides, the WTO brought a number of changes. The trade develops far easier than before. 'On the other hand, it resulted in more competition from abroad', says Mr. Trinh Quang Thanh, Manager of the DKSH. In 1997, the enterprise invested more than US\$ 4 million in order to expand its business activities comprising logistics and trade. The Swiss parent company of DKSH employs 10,000 persons in Thailand, 3,000 in

Malaysia, followed by Singapore and Vietnam with more than 2,000.

DKSH operates mostly in four business sectors, namely logistics, finances, HRs and IT.

Case study 6.2: Organizations in the energy sector

Due to the fact that the government was forced to import electricity, it opened the energy sector for FDIs in the form of LLC agreements. Such energy cooperation was established between Petrovietnam and the American oil company Chevron (former Texaco).

Vietnam's energy sector is to the greatest extent dominated by Petrovietnam and Electricity of Vietnam (EVN) which are both under control of the Ministry of Industry. In practice, however, both

state-owned enterprises are also steered by the politburo and by other centrally controlled planning authorities constituting a part of the government.

Petrolimex, a unit of Petrovietnam, operates 300 miles of oil pipelines, though the most fuel supply of the country takes place by road. Vietnam exports its entire crude oil production and has to import all mineral oil products for the domestic consumption. The complete dependence of the country on imported mineral oil products is expected to diminish, as soon as Vietnam's first oil refinery is put into operation in 2009. The DungQuat oil refinery will be able to refine more than six million tons of crude oil. Petrovietnam exported 15.72 million ton of crude oil, thus generated in 2007 the revenue of US\$ 8.8 billion. Chevron, which holds 43 percent of shares in the offshore development of the southeastern coast of Vietnam, plans a US\$ 4.3 billion worth project and is prepared to acquire shares in all areas of integrated gas development, from crude oil exploration through to power plants.

Such a business would mean a turnaround from the usual reluctance of Chevron to invest beyond its core business. Chevron was criticized recently because of human rights violations and neglecting environmental protection.

In historical terms, the government pressed upstream enterprises, as Chevron, to invest in downstream infrastructure. In return, foreign partners could expect securing their shares in the market for their resources through investments in power plants and other downstream facilities. The state-owned EVN dominates currently the downstream production, the transmission, the distribution and the sale of electricity in Vietnam. This fact makes a partnership difficult. The participation of foreign and private enterprises is admittedly allowed since 2002, but the lack of a legal framework prevented investments. In the future, coal power stations and hydroelectric power plants supplied a greater part of electricity in Vietnam. However, natural gas-fired power plants emerged increasingly as new sources of electricity. EVN worked out plans to build 74 new power plants by 2020. The relationship among the two SOEs, EVN and Petrovietnam is very complex and is strongly influenced by politics. For instance, the retail selling prices of EVN are fixed by the government and the enterprise has to supply at all specified costs. In 2008, in a tender for the reduction of the energy scarcity at the beginning of the dry season, EVN had to buy back the electricity produced by Petrovietnam and sell it on to customers with a loss of VND 3 billion (US\$ 17.2 million) – due to the fact that Petrovietnam profited from drastic oil price increases. Only recently Petrovietnam entered into the power production business and competes now with EVN. It is estimated that the Chevron-Petrovietnam project should produce more than 500 million cubic feet of gas per day, and this amount is expected to be reached within five to seven years from the beginning of operation. It would amount to 70 percent of the Vietnamese gas production.

The costs of US\$ 4.3 billion projected at the beginning include the offshore part and the pipeline to the power complex, but not the power plant itself. The construction and engineering costs of upstream projects increased significantly in recent years together with the costs of work and steel.

Sources: Tegel and Koenig (2007); EAI (2007)

Case studies of managers

One of the reasons why SSM from Australia decided for Vietnam constituted its HRs. According to Mr. Schiller, SSM's Managing Director, the abilities, the work ethics and the attitude towards life of Vietnamese people go with the corporate structure of SSM that can be characterized as family enterprise. According to his observations, the Vietnamese culture is distinguished by the family life and the readiness to work hard.

As regards the Ba-Ria Vung-Tau Province as a place for investments, Mr. Schiller emphasizes particularly the local authorities that he describes as very welcoming and cooperative as regards

carrying out necessary procedures in a short time. Moreover, his enterprise was offered various attractive options. The acceptably qualified personnel was available in the region, which he traces back to the oil industry from which, according to expectations, some potential customers for SSM could come. Having started with an initial total investment of US\$ 25 million, SSM employs 1,100 persons on full-time basis and has promised a considerable contribution to the economy of the region and of Vietnam as a whole. Apart from the offer of considerable job opportunities for the local population, SSM has over 100 sub-suppliers and suppliers for materials, machines, clothing and shipyards. SSM makes a huge contribution to the transfer of technology because it has a strong management system as well as implementation and handling and, besides, an extensive technical knowhow due to top engineers who were delegated from Australia. Mr. Schiller said in an interview 'There is no doubt that our engagement for Vietnam not only now, but also in the future, will be of use because in the long run we will develop abilities and technologies around Vietnam.' SSM's intention is to form a mixed management team composed of 20 Vietnamese and 10 Australian managers in order to support the process of the transfer of managerial abilities and technologies to Vietnam and at the same time maintain international business activities and safety standards.

The initial five-year investment plan of SSM assumed the construction of the project in 2009. Two years afterwards, according to the medium-term plan, the construction of the dockland is planned in order that the shipyard is able to carry out repair works within three to five years. In order to prepare for it, SSM established a company-internal two-year T & D program in order to equip its 50 local employees with special knowledge for its future business development. SSM was certainly also affected by the global economic crisis after 2008, but Schiller is convinced that the core products and services of the enterprise occur in such special areas where the demand always exists. SSM carries on businesses at the international level and concentrates on the market for high-tech-quality high-speed ships for the oil sector that is still strong. National security and the ships that are needed for it are also a part of the business area of SSM because the governments worldwide still want to protect their countries and their people, as Mr. Schiller emphasizes.

Source: Adapted from Tu Tam (2009b)

Case study 6.4: Mr. Takashi Fujii, General Director, Dai-ichi Life Insurance Company of Vietnam Ltd (DIIVN)

The global credit crisis which started in 2008 had effects on Vietnam's economy, but, compared to other in the region, the General Director Fujii of DIIVN thinks that his enterprise was not so strongly affected. The local financial sector is indeed still at the development stage and is sure to suffer from it just as the rest of the world.

According to Mr. Fujii, insurances constitute in reality a tool for hedging; as a result, the role of insurances can become an important and better hedging tool for investors when the market is in a downwards trend. That is why the crisis is a suitable moment for investors to become aware of the actual function of insurances. Mr. Fujii thinks that the domestic downturn may even stimulate the market growth for his enterprise.

Mr. Fujii's line of thought has a reinforcing and reasonable tone. In 2008, DIIVN reached a liquidity of over 1,200 percent. Due to new contracts, DIIVN's sales amounted to VND 190.9 billion, a growth of 51 percent compared to 2006 when the enterprise started its business activity. Between 2007 and 2009, the growth rate increased through exploration of new markets by nearly 30 percent per annum on average, which enabled DIIVN to increase the number of its offices in the country to 52.

Mr. Fujii is quite optimistic as regards the future business opportunities for his enterprise. Due to a population of more than 85 million, of which only about 5 million people have insurance, he believes firmly that there is still much space for business expansion. Moreover, the industry is expected to grow

by 20 percent annually on average. In order to fully exploit these business opportunities, Mr. Fujii plans in particular to enhance the recognition of his company's name on the market, to guarantee fair treatment of its customers as well as to achieve an expansion of office networks in order to get to potential customers in distant regions, to provide further training for employees and offer a wider range of products in order to satisfy the increasing demand in these areas.

Source: Adapted from Tu Tam (2009)

Challenges

Vietnam will have to face the following challenges in the future in order to make the country an attractive location for FDI. They will occur particularly in such areas as labor productivity, real estate, industrial centers and within employment relationships.

Labor productivity

Foreign investors invested readily in Vietnam, though, as previously mentioned, the expenditure ultimately made did not accord with the funds promised. In some areas, as the construction of real property, conflicts between FDI projects, local projects and peasants exist. For instance peasants, although occupational T&D programs are available, are often regarded as not sufficiently qualified in order to be employed in hotels or as skilled workers; or the peasants themselves do not want to work in factories due to low wages. FDI projects are hindered as a result. The labor costs are of considerable importance for FDI. However, the relative advantage of Vietnam with regard to low wage costs does not necessarily apply to all other cost categories. Vietnam has e.g. higher transport costs than Thailand – dispatching a 40-foot container from Vietnam to Europe costs US\$ 4-500 times more than from Thailand or China. Thailand is also considerably more attractive as regards office renting and accommodation costs for expatriates. The country still has lower electricity and water costs. Compared to Vietnam, the infrastructure, transport, electricity and water supply in Thailand are more stable and better managed. The power supply constitutes a problem child for all industrial centers of Vietnam and is an issue to which the government pays a considerable attention due to a predicted energy scarcity. In view of the electricity demand, at peak periods the EVN is short of between 1,500 and 2,500 MW daily. EAI, 2007). However, the legal regulations, intellectual property protection and a generally better quality of life are for foreign managers factors which attract firms to Vietnam, and not to Thailand.

Real property

The real property sector attracted a wave of FDI interested parties. The construction of hotels and real property was initially the prevailing area for investments in the early 1990s, but it was the property bubble which was the cause of the decline in FDI between 1997 and 2004 (Masina, 2006). In 2008, however, many new real property projects were signed, such as the construction of the small university town in Hanoi. Property prices increased continuously, driven by stock exchange fluctuations. Living conditions improved and revised legislation opened the sectors for foreign investors. An example of it can be found in the text box 6.1. Furthermore, FDI played an important role in view of the growing demand for high-quality property, in particular in the office sector. The difficulties encountered by the property developers are in the areas of the land clearance and the lack of adequate infrastructure.

Text box 6.1: North Red River new housing area, Hanoi

A consortium of three investors, led by the Swiss Tradco Global Engineering and Construction SA, plans to invest US\$ 3 billion in a residential and commercial complex in Hanoi. The complex shall include a 6-star hotel and several 4- and 5-stars hotels connected with offices and shopping centers. At the first stage, the 6-star hotel, an 18-hole golf course, a water park and modern villas. The housing area, which is expected to be finished in 2012, will provide approx.

2 million m² of housing space. Schools and a hospital will be built at the last stage around 2013. The urbanization process in Hanoi created better living conditions for nearby inhabitants, but they were also robbed of agricultural land. As a result, many peasants became unemployed. From 1998 to 2003, around 7,000 ha of agricultural land have been converted into urban areas. The official plan for 2020 provides that further 12,000 ha of agricultural land will be used for the construction of new residential buildings, roads and industrial areas. 75% of the 12,000 ha will be taken from the north side of the Red River. Sources: GSO (2007).

Industrial centers

Many SOEs, such as EVN, are still able to survive thanks to shielding from international competition and through the provision of low-interest loans. The government did not succeed in investing in SOEs in order to upgrade the technologies, thus make them more competitive. From foreign investors, in particular from those located in the industrial areas, the establishment of T&D programs and an upgrade of the technologies is expected. 'We provide not only buildings and infrastructure, but also vocational training. That way we contribute to the improvement of the abilities in the area of human resources', says Mr. Pham Van Tinh from the Corporation for the Development of Bien Hoa Industrial Zone. The Vietnamese government granted many legal and financial benefits for industrial centers and firms located there. An example is given in the text box 6.2.

Text box 6.2: Amata

Amata is a Thai company that established its Vietnamese JVE in 1994. The company is located in the Dong Nai Province, very near to the Bien Hoa City, and was built on land that belonged to the headquarters of the Long Binh Base of the US Army during the Vietnam War. The JVE has existed for 50 years with a statutory capital of US\$ 17 million which was provided by both parties as follows: The Vietnamese side paid US\$ 5 million of statutory capital in the form of land use rights for an area of about 100 ha; the foreign side contributed US\$ 12 million in cash. An advantage of the Amata location consists in the fact that the company is situated near a new deepwater port which will be opened soon as well as near a new airport the opening date of which has not been fixed yet. The government provided benefits with regard to the business tax for new service enterprises. As compared with a tax rate of 28 percent which has to be paid outside of the industrial zones, the tax rates within the industrial areas range between 15 and 20 percent. Moreover, new factories within industrial areas are entitled to pay a rate of 15 percent instead of normal 28 percent. Whereas enterprises outside of industrial zones often have to go to different authorities in order to deal with the licensing procedure, such as to the Department of Trade for import licenses, to the Department of Investment and Planning for key personnel, the provincial governing bodies of industrial areas are authorized to deal with and to decide on all issues related to the licensing process, from granting and amendment of the investment license and the approval of import plans through to granting work permits for foreign short-term workers. In contrast to industrial areas in Thailand supervised by the Board of Investment (BoI), an enterprise in Vietnam cannot own land; it is a clear disadvantage because land usually increases in value whereas leaseholds constitute a property losing in value.

Many well-established enterprises decided on the Amata location – namely Akzo, Nobel, Bayer, Bosch, Kao, Nok, San Miguel and Shiseido. Dr Phien of Amata Vietnam points out that most foreign enterprises seem to be satisfied with the quality of work performed by the Vietnamese workforce and, as a rule, grade the quality of work higher than in similar Thai or Chinese plants. Vietnamese employees are very fast and willing to work overtime.

Labor conditions

The FDI invested sectors are the most dynamic in respect of the GDP growth rate, and the exports are also strongly dominated by FDI enterprises (GSO, 2007). The fastest growing sector is the low-paid, export-oriented manufacturing sector in which female workers dominate. Actually, studies have shown that women are the real workhorses of the Vietnamese economy (Desai, 2000). The proportion of women in the workforce in FDI sectors has increased, while it has dropped in SOEs and in non-state local firms.

Strikes are common in labor-intensive industries, which concerns primarily sub-suppliers from South Korea, Taiwan or Hong Kong. (Quang et al., 2008). The most common reason is the low pay. Facilities owned by South Koreans provoked considerable anger, not only because of poor wages, but also due to earlier incidents in which South Korean managers behaved insensitively towards Vietnamese employees and took disciplinary action that was not adequate to the offence committed. These incidents resulted in an environment with little trust on both sides, thus small differences are quickly blown up to big disputes. (Quang et al., 2008).

According to statistics of the General Confederation of Labor (2008), between 1995 and 2006 came to 1,290 strikes countrywide and most of them arose spontaneously and were not organized with the aid of trade unions. The peak periods for strikes were mostly the first two months of each calendar year, which coincided with the lunar New Year festival (*Tet*). Just at this time, the dissatisfaction of employees with the wages and the bonus policy grows. The first quarter of 2007 alone showed a participation of 62,700 employees in 103 strikes (in 14 provinces and towns), including 79 within FIEs, 23 in domestic PEs and one in SOE. Most strikes took place in textile, clothing and shoe enterprises. In text box 6.3, an example is presented.

Text box 6.3: Nike

Nike's Taiwanese suppliers manufacture about 10 million pairs of shoes in Vietnam. Due to a low pay (about US\$ 60 per month), in April 2008 20,000 employees demanded a pay rise of 20 percent and better canteen food. Since their demands were not satisfied, they began to strike. Such unorganized labor disputes occur more and more frequently, since the inflation rates (15 percent in June 2008) and the cost of living increased. In 2007, similar strikes in other Nike factories took place. A report mentions the violation of labor law and bad working conditions as well as the lack of health and safety regulations and sexual harassment. 'Workers cannot go to the toilet more than once per 8-hour shift and they are not allowed to drink water more than twice per shift. Excessive overtime is currently the normality in order to achieve high quotas (VLW, 1998).

Source: World Bank (2008); Vietnam Labor Watch (1998).

Conclusion

Vietnam undertook a long way from an isolated communist country destroyed by the war to a market-oriented economy. Vietnam has the potential to attract far higher levels of FDI (UNCTAD, 2007b), e.g. by encouraging investors to expand in sectors which are not developed yet. The WTO Commitments in the service sector will ensure here that further opportunities will be provided, as soon as the gradual implementation stages have expired. Special attention should be paid to sectors for further liberalization, and particularly the infrastructure and education may benefit from a further opening to FDI (UNCTAD, 2007b).

However, just like other emerging countries, Vietnam can no longer assume to remain an attractive country for investors in all sectors of the economy. The country has rather to find its market niches in the global market (Michalet, 1997). Vietnam has already tried to position itself against China, India and

Thailand. A draft law proposes to reduce the corporate tax from current 28 percent to 25 percent – a step which is expected to make Vietnam an even more attractive location for foreign investors than its neighbors in the ASEAN region.

MNCs move their portfolios of movable assets (e.g. intellectual property, knowhow) continually around the globe in order to find matching components to their immovable assets in different regions (Lall, 2000). The ability to provide the required immovable assets is a crucial part of an inviting FDI strategy. Immovable assets of the host country include workforce, infrastructure, supply networks and the legal system. Vietnam, with its excessive and often contradictory regulations, its bureaucracy, inadequate infrastructure, weak legal enforceability, weak banking system, privileges still enjoyed by the SOEs, high land and lease costs, corruption, weak protection of intellectual property rights and currency control, is not in the best position to provide such immovable assets, although progress was made in recent years. Vietnam still has a long way to go in order to “be a patch” on such country as Singapore. In fact, the scarcity of qualified HRs is a critical factor. For this reason and quasi in response, in 2008 the 3% limit for the proportion of foreign employees was abolished in order to open the labor market.

The attraction of FDI based on cost-efficient workforce causes industrial disputes and is not a good strategy in the long run. However, Vietnam has a young workforce and a strong economic growth; through respect for intellectual property rights, it could position itself against China; with a more flexible labor market and political stability, it could compete with Thailand, and with an altogether stronger market-oriented strategy and less bureaucracy it could stand out against other Asian countries. Even if not all registered capital is spent, Vietnam’s FDI growth rate can be characterized as impressive. To put it briefly, the transformation of the management in this area is very complex.

1.7.5 Decrees 194 and 118

Two long-awaited decrees giving directions to the CIL require detailed explanation. The Decree 194/2013 of 21 November 2013 regulates the registration and conversion of foreign enterprises pursuant to the CIL. In 2015, the Decree No. 118/2015/ND-CP replaced Decree 108/2006 of 22 September 2006. The Decree 118 contains guidelines for the implementation of the Investment Law. The Circular No. 83/2016/TT-BTC of 17 June 2016 guides the implementation of investment incentive programs under the government’s Decree No. 118/2015/ND-CP.

However, the decrees have the weak point that the forms of investment BOT, BTO and BT are not included. In fact, pursuant to the CIL, a separate implementing decree has to be issued for the mentioned investment models, which has not happened yet.

Decree 194

Under Decree 194, an enterprise with 100% foreign-owned capital may reregister as one member Limited Liability Company. Foreign-owned enterprises with several owners as well as joint-venture enterprises may reregister as multi member Limited Liability Company.

The following documents are required for the application for re-registration:

- an application letter, together with a list of members (for limited liability companies with more than 2 members) or a list of shareholders (for joint stock companies);
- a valid copy of Investment Certificate, amended Investment Certificate or Certificate of Amended Investment Certificate (if any);
- revised Articles of Association being in accordance with the Enterprise Law;
- minutes of the meeting of Board of Management/ investors/ Shareholders on agreeing to re-register the enterprise and adopt the revised Articles of Association;

- Decision of the Board of Management/ investors/ Shareholders on agreeing to re-register the enterprise and adopt the revised Articles of Association;
- Certified documents of individuals or legal entity being members of the enterprise and the legal representative of the enterprise after re-registering the enterprise; and
- Financial reports of two preceding years prior to the date of re-registration.

The Investment Certificate will be issued within 15 days after receiving the required documents. FIEs which were established before 01 July 2006, its operation period has expired after 01 July 2006 but failed to carry out liquidation procedures, may request to continue operating and must re-register before 01 February 2014.

What is more, each change of the number of investors or members results in company conversion into one of newly created types of company regulated in the CIL and the UEL. Decree 194 determines that joint ventures of enterprises with at least two investors may be converted into one-member LLCs and an enterprise with one investor into a multi-member LLC.

A risk, however, may constitute such Articles of Association of foreign-owned enterprises which contain regulations referring to the CIL, thus for example regulate voting pursuant to the CIL. Since the voting regulations of CIL and the UEL vary clearly, as a result it remains unclear in Decree 194 how such Articles of Association are to be ultimately construed. For this reason alone, it could be necessary for foreign-owned enterprises to register.

Furthermore, the position and the legal status of the representatives of the old enterprise are disputable. Pursuant to the preceding law, a Managing Director of a foreign enterprise was not obliged to have residence in Vietnam. The CIL and 2014 Enterprise Law, however, obliges now the legal representatives of a LLC or a JSC to a residence. Should the representative be absent from Vietnam more than 30 days, he has to authorize another person in writing to exercise the powers of a representative. It is doubtful whether the representatives of enterprises that won't carry out the re-registration will comply with the new regulation.

Decree No. 118/2015/ND-CP replaced by Decree 108/2006 of 22 September 2006

Whereas Decree 108 distinguished between domestic and foreign investors in the licensing procedure, Decree 118 targets at foreign investors.

In Decree 108, a domestic investor was required to carry out two different procedures: for one thing, the registration of the enterprise pursuant to the Enterprise Law, and for another thing the application for approval of the investment project. The domestic investor may demand from the licensing authority to take both steps at the same time.

Decree 108 provided from the outset for only one licensing procedure for licensing investment projects of foreign investors. It comprised both the company registration pursuant to the Enterprise Law and the registration of or application for the respective investment project. Investment Certificate was thus at the same time the business registration certificate. More detailed requirements regarding the application for investment projects were regulated in Decree 88.

However, already the definition of the term "investment project" is disputable. The Investment Law defines it as "a set of agreements for medium- and long-term capital and for investment activities within a specific area and a specific objective". However, the implementing decree does not define broader what is meant by "medium-term capital" and how much capital is required in order to register an investment project.

Furthermore, the Decree 108 listed all restricted investment sectors among which are broadcasting, production and sale of cultural products, exploitation and exploration of minerals, construction of telecommunications infrastructure, telecommunications and internet service, formation of public post networks, construction and operation of ports, commodities, passenger transport, sea fisheries, tobacco production, real property trade and related sectors, import, export and distribution as well as education and training, the health system and other sectors which are restricted by international agreements. The decree did not contain any detailed guidelines for the above mentioned sectors. The list only serve as a basis for competent licensing authorities. Consequently, investors had to observe other regulations or international agreements or wait for future guidelines which will regulate detailed conditions for the stipulation of procedures in these sectors.

The investment capital is a factor on which the evaluation by the licensing authority may be based (e.g. VND 1.5 trillion in Article 37 CIL or 300 billion in Article 46). The limits for investments depending on stated purposes are listed in Decree 108, all in VND.

The new Implementing Decree 108 provided for more powers for the Province Departments of Planning and Investment within the Industrial, Economic, Export Processing and High-tech Zones. Thus the MPI no longer received applications or issue investment project licenses, but take action only in the following cases:

- consent or dissent with regard to projects which require the approval of the Prime Minister (PM);
- projects which drop out of structures regulated by law;
- and in other special cases.

The PM principally reserved the right of consent in all projects in the area of construction and operation of airports, air transports, state-owned harbors, oil and gas exploration, broadcasting, casino operation, cigarette production, university education, establishing Industrial, Export Processing, High-Tech and Economic Zones. Moreover, all projects with an investment volume from VND 1.5 trillion in the sectors of energy, mineral exploitation, metallurgy, railway construction, roads, in the area of infrastructure (inland water transport routes) and in the area of production of and trading with beverages were to be approved by him.

Furthermore, foreign investment projects in the water transport business, in the postal, telecommunications and internet services, in the printing and publication sector also required the approval of the PM, just like investment projects for establishing independent science and research centers.

Thus it seems that all investment projects which shall be registered or licensed by the Province Department of Planning and Investment require the principal approval of the PM. Province Departments shall receive projects which drop out of the Industrial, Economic, Export Processing and High-tech Zones as well as such which do not have a Management Board. The Management Boards shall have the licensing authority with regard to remaining projects.

Furthermore, it is unclear in case of the projects whether the investor is obliged to submit the approval before filing the applications with the competent Departments or Management Boards. Decree 108 did not regulate any specific procedure here.

Besides, pursuant to Decree 108, documents and information about the specific project had to be attached to the application for registration of the investment project. Similarly, an application for the registration of an enterprise has to contain detailed information about the enterprise and the formation of the enterprise. These documents have to be submitted uniformly to the licensing authority. Decree 108 admittedly contains detailed regulations on documents to be submitted in case

foreign investment projects. However, it does not contain any guidelines regarding documents to be submitted for the registration of domestic investment projects.

Previously, it was provided by law that certain enterprises have to appoint a Management Board. Decree 108 left the decision to appoint a Management Board or not to both the domestic and the foreign investor.

Decree 118 simplifies the investment procedure concerning purchase of shares and capital. Decree 118 provides under article 24 that foreign investors shall be able to submit both investment registration and business registration dossier to one agency.

Besides, foreign investors are not required to obtain investment registration certificate if investment is conducted through shares or capital.

Economic organizations having foreign investors investing in forms of capital contribution, purchase of share and contributed capital will have to go through the procedures of registration for changes of members or shareholders in organizations, unless:

- Foreign investors contribute capital, buy shares and contributed capital in economic organizations which engage in business areas accompanied by certain conditions for foreign investors;
- The capital contribution, purchase of share and contributed capital results in foreign investors holding 51% or more of the charter capital of economic organizations.

Then, the above-mentioned economic organizations must implement the following procedures:

- Submit one registration dossiers to the Department of Planning and Investment where economic organizations are headquartered;
- Within 15 days of receipt of a valid application, the Department of Planning and Investment will consider and notify the foreign investors whether they meet investment conditions;
- Upon receiving the notification, economic organizations implement procedures of registration for changes of members or shareholders at the business registration agency.

1.8 Limited Liability Company (LLC)

The 2014 Enterprise Law provides for two types of LLC, one-member Limited Liability Company and multi-member Limited Liability Company.

1.8.1 Multi-member LLC

The multi-member LLC can have minimum 2 and maximum 50 shareholders. They may be both legal and natural persons.

1.8.1.1 Capital

Pursuant to the Enterprise Law, members may bring in capital in the form of cash (VND or freely convertible foreign currency) or in the form of other assets. These include land use rights, intellectual property rights, but also technology and technical knowhow. A member has to notify the business registration authority of the contributions to the company and make a capital contribution in the form of assets determined by him. Each change of the form of capital contribution has to be made with unanimous consent of the remaining members and be communicated to the business registration authority.

Should a member fail to contribute his amount punctually and in full, so he is automatically no longer a member of the company and is responsible for the resulting damage. The member contribution which has not been paid in is compensated according to decision by other members.

1.8.1.2 Rights of the members

A member of a multi-member LLC has among other things the right to participate in meetings of the Board of Members (BOM), to give his vote according to the voting share in the capital and to demand the distribution of profits according to his own share.

1.8.1.3 Management and control

The LLC is managed by the so-called “Members Council” (MC) including all members of the company. The MC constitutes the highest decision-making body of a multi-member LLC. Its members are appointed according to their contributed capital.

1.8.1.4 Management personnel

A multi-member LLC must have a Managing Director or a General Manager who is appointed by the BOM of the company.

1.8.1.5 Meetings

The Chairman of the BOM or a group of members holding more than 10% of the share capital may convene a meeting of the BOM. If a member holds more than 90% of the share capital, the members being in minority have the right to convene a general meeting. For this purpose, at least 65% of the shareholders have to be present. If the first meeting fails because the minimum number of representatives failed to appear, then a second meeting has to take place within 15 days after the first at which representatives holding at least 50% of the share capital have to be present. If at this meeting again no quorum is present, then a third meeting is to be ordered within 10 days regardless of a required minimum attendance.

1.8.1.6 Voting

Resolutions may be passed either at meetings by obtaining opinions in writing or in another form formulated in the Articles of Association. In case the Articles of Association do not regulate this subject, it is compulsory to vote on the following resolutions:

- amendments or additions to the Articles of Association
- decisions on the direction of development of the enterprise
- election and dismissal of the Chairman of the BOM, appointment or dismissal of the Managing Director or the Deputy Managing Director
- approval of the annual financial statement and
- reorganization or liquidation of the enterprise.

The Enterprise Law provides for the most decisions that at least 65% of the company representatives have to consent to a decision. The following resolutions, however, require at least 75% of votes of all representatives of the company in order to be effective:

- sale of assets with a value of 50% and more of the total company value according to the recent financial statement
- as far as it is stipulated in the Articles of Association, also in case of the sale of less than 50% of assets of the company value according to the recent financial statement
- amendments and additions to the company’s Articles of Association
- reorganization or liquidation of the enterprise.

1.8.2 One-member LLC

The one-member LLC is run either by a legal or a natural person. The shareholder is liable to the amount of share capital. The one-member LLC has indeed the same status as a multi-member LLC and may also establish a Board of Members (BOM). However, the owner has full sole control over the company.

The owner of the enterprise may take decisions autonomously or they are made by way of voting of the BOM in writing. At meetings of the BOM, at least 2/3 of the representatives have to be present, and each has an equal right to vote. A resolution of the BOM is considered as adopted if more than the half of appeared representatives gave their consent to it. The shareholder has to appoint one or more controllers who carry the responsibility within the authority and duties assigned to them, taking into consideration the responsibilities delegated by the company owner.

The company owner is obliged to fully and duly contribute capital. A one-member LLC may increase or reduce its share capital. However, it may be increased either by the company owner himself or by contribution of new outside capital. In case there are new members contributing capital to the company, the company has to register the conversion into a multi-member LLC within 10 days after complete contribution; or restructure the company in the form of a joint stock company.

1.8.3 Duration and termination of a LLC pursuant to the UEL and the CIL

Pursuant to the 2014 Enterprise Law, the life of a LLC is not limited, though the duration of all specified projects may be limited pursuant to the 2014 Investment Law.

Pursuant to the UEL, a LLC may be liquidated if:

- the duration specified in the Articles of Association has expired and no decision on its extension has been made
- it was decided by the BOM or the company owner
- the LLC does not have the minimum number of members required pursuant to the 2014 Enterprise Law over a period of six successive months or
- the enterprise registration certificate has been revoked.

The liquidation of a LLC at own discretion is possible only if the LLC is free of any claims of creditors, the assets are not encumbered, or the LLC is not involved in any dispute before the court or an arbitration agency.

Pursuant to the 2014 Investment Law, the maximum duration of an investment project outside an economic zone is 50 years, but in certain circumstances a maximum duration of up to 70 years may be granted. The duration has to be stated in the investment certificate.

An investment project may be terminated in the following cases:

- expiration of the duration stated in the investment certificate
- decision of the investor to terminate the project
- arrangements on the termination of undertakings in the contract or Articles of Association
- inability to recover the condition of terminating operation by the state investment management agency or the Prime Minister
- land for project implementation being seized by the state agencies or not being allowed to use investment location and not implementing procedures to change investment location within 06 months from the land seizure date or from the date not being allowed to use investment location

- the project no longer operating and the 12-month period from that date has lapsed but the investment registration agency cannot contact the investor or the legal representative of the investor
- the investor not implementing or unable to implement the project after 12 months from the committed time and the project implementation period is not extended
- pursuant to a decision of the state investment administration agency, a court or arbitration court.

1.9 Joint Stock Company (JSC)

Pursuant to the 2014 Enterprise Law, the joint-stock company is defined as an enterprise the stock capital of which is divided into shares and is held by three or more legal or natural persons. A JSC is a legal person pursuant to Vietnamese law and the stockholders are liable for the losses of the company in accordance with the share they brought in. The JSC has the right to issue both stocks for the provision of capital increase and a list of security exchange.

The founding stockholders have to subscribe for at least 20% of total common stock of the firm which may sell the joint-stock company. The JSC has to hold common stock and may hold preferred stock and bonds.

1.9.1 Stockholders

Stockholders of a JSC may be both Vietnamese and foreigners. Foreign shares may be higher here than in case of LLCs. The rights of the stockholders depend on the kind of stock. A distinction between common and preferred stock is made.

1.9.1.1 Common stock holders

Common stock holders have the following rights:

- they may participate in General Meetings of Shareholders (GMS)
- they may vote according to the respective voting share
- they receive dividends
- they have access to internal company information (e.g. Articles of Association, resolutions of the GMS)
- they may freely transfer their shares pursuant to the provisions of the Enterprise Law: during the first three years, however, founding members require the approval of the GMS in order to transfer shares to stockholders that are not founding members
- they are granted priority to purchase new shares
- they receive the remaining assets of the company according to their ownership percentage of the company's stocks
- besides, they may convene a GMS (pursuant to EL and Articles of Association)

1.9.1.2 Preferred stock holders

Preferred stock holders have other rights which depend on the kind of preferred stock. There are voting preferred stocks, dividend preferred stocks, redeemable preferred stocks and other stocks defined in the Articles of Association.

1.9.1.2.1 Voting preferred stock

The voting preferred stock has the same value as common stock, but a higher voting right. The number of votes which a voting preferred stock can represent depends on the regulations in the respective Articles of Association. The voting preferred stock may, upon approval by the GMS, be converted into

a “normal” common stock. Holders of these stocks may be only organizations authorized by the government or founding stockholders.

The holders of voting preferred stock have the following rights:

- voting at the GMS;
- all other rights which the holder of common stock has.

The holder of voting preferred stock cannot transfer his voting preferred stocks to other persons. Voting preferred stocks are personal.

Three years after issuing the Enterprise Registration Certificate, voting preferred stocks are converted into common stocks.

1.9.1.2.2 Dividend preferred stock

The holders of dividend preferred stock receive a higher dividend and have a right to additional payment. The rate of fixed dividends and the method of determining bonus dividends are stated in the dividend preferred stock certificate. Dividend preferred stock also may, upon approval by the GMS, be converted into common stock. The right to hold such stock is determined by the Articles of Association or by the resolutions of the GMS.

Holders of dividend preferred stock neither have a voting right nor are allowed to participate in the GMS nor designate persons for the BOM.

1.9.1.2.3 Redeemable preferred stock

Redeemable preferred stock is redeemed by the enterprise:

- at request of the owners or
- according to conditions specified in the stock certificates.

The redeemable preferred stock may, upon approval by the GMS, be converted into common stock. The right to hold such stock is determined by the Articles of Association or by the resolutions of the GMS.

Holders of this stock have principally the same rights as the holders of common stock. However, holders of redeemable preferred stock neither have a voting right nor participate in the GMS nor designate persons for the BOM or the Control Committee.

1.9.2 General Meeting of Shareholders (GMS)

The GMS is composed of all stockholders having a voting right and constitutes the highest decision-making body of the JSC. Principally, it is stipulated in the Articles of Association what powers the GMS has. In absence of such regulation, pursuant to the provisions of the 2014 Enterprise Law, in the following cases the approval of the GMS by voting is to be compulsory obtained:

- amendments or additions to the Articles of Association
- approval of the direction of development of the enterprise
- decision on the kinds of stocks and their total number
- election or dismissal of members of the BOM and Control Committee
- decisions on investments or sales of a value of at least 35% of the total share capital (according to the recent financial statement)
- decisions on annual financial statements
- reorganization or liquidation of the enterprise.

1.9.3 Management of the JSC

The JSC can choose to structure the company in either of the following ways: (i) General Meeting of Shareholders, Board of Management, Control Committee, Managing Director or General Manager; or (ii) General Meeting of Shareholders, Board of Management (BOM) and Managing Director or General Manager

The JSC is not obliged to establish a Management Board if less than 11 natural persons who are stockholders or a legal person own less than 50% of the total stocks.

1.9.4 The General Meeting of Shareholders (GMS) and the Managing Director

The GMS manages the enterprise and has the full legal power to make decisions on behalf of the company. It elects the Managing Director (MD) pursuant to the provisions of the Articles of Association. The MD prepares the task schedules and programs of the GMS and has among other things the right to convene the GMS. However, it meets also when at least 2/3 of members demand it.

1.9.5 The General Manager

The General Manager or Manager is elected by the BOM. He is the legal representative of the company who runs the day-to-day business of the company and, unless a Managing Director for the BOM is provided for in the Articles of Association, he takes this position as well.

1.10 Joint-Venture Company (JVC)

Within the period when the LFI was in force, numerous direct investments in Vietnam in the form of joint ventures were made. The Vietnamese government preferred this form of investment in contrast to fully foreign financed investments because only in a joint venture, through the participation of a Vietnamese enterprise, the direct control over the processes in the company could be exercised. Joint ventures could be formed principally in all sectors of industry. Pursuant to the new CIL and UEL including the implementing decrees, a JVC as a form of company is no longer provided for. In fact, even already existing JVC shall reregister as LLCs by 1 July 2008. The Implementing Decree 101 indeed leaves the re-registration of the JVC for free choice of the respective investor. However, as it is bound to the regulations of the new laws (CIL and UEL), it may result in legal difficulties described under 1.8.3.1 if the original form is maintained.

In the following, the structure of a joint venture is presented for comparison. A joint venture may be a Limited Liability Company, a Shareholding Company or a Partnership. The liability depends on the respective form of company. The following remarks include principal issues which should be taken into consideration when forming a joint venture in the forms of company mentioned above.

1.10.1 Partner

Before a joint venture can be entered into, the foreign enterprise has to find a suitable Vietnamese partner. In the search, the Ministry of Planning and Investment, the Vietnamese Chamber of Industry and Commerce, other relevant ministries as well the local People's Committees should be contacted. Besides, the German Embassy, the General Consulate and the Delegate of the German Economy in Hanoi are also helpful in the search for a suitable partner.

Finally we are also readily at your disposal if you want to have due diligence prepared. In this regard, you may contact our office in Hanoi. The success of a joint venture depends to a considerable extent on the selection of a suitable Vietnamese partner. That is why the selection of the partner should be carried out carefully. If you are not sure of the trustworthiness of the partner, you should rather consider establishing an enterprise with 100% foreign-owned capital or concluding a business

cooperation contract with the Vietnamese partner. The following general and Vietnam-specific criteria should make the search for and selection of a joint venture partner easier for foreign investors.

Among the general criteria are:

- corresponding interests and products of the parties
- capacity and size of enterprise of the partner, existence of an adequate personal and technical infrastructure and
- reliability of the business partner

Among the Vietnam-specific criteria are:

- the infrastructure of the location
- possible tax benefits
- the relations of the Vietnamese partner with important government agencies and
- German-speaking business partners (often former migrant workers in the GDR).

It is a part of the Vietnamese culture to value family and other social ties very highly. Personal relationships as well as the principle to save face in each situation often play a more important role than the contract concluded between the parties. Therefore it is very important to agree on the conceptions of the parties yet before signing the contract. Like in China, also in Vietnam the sentence that “the negotiation begins only after signing the contract” proves to be true in many cases.

1.10.2 Formation of the company

A joint venture is formed by:

- signing a Joint Venture Agreement;
- drafting a Charter for the respective form of company;
- granting the investment license by the Ministry of Planning and Investment.

Whereas the joint venture agreement includes the duration, the scope of business activity, the capital requirements as well as the rights and duties of the parties in the project, the Charter regulates the company structure, the profit and loss distribution as well as the bodies of the company form chosen. Both the Joint Venture Agreement and the Charter become effective only after the Investment License has been granted by the Ministry of Planning and Investment.

Joint Venture Agreement, Charter and Investment License determine the business objective of a joint venture. It is advisable to define an intended joint venture broadly because a joint venture may operate only within the Investment License granted. Business transactions beyond the approved business objective are unallowable and void. The business activities of joint ventures are checked by the Ministry of Planning and Investment and sanctioned in case of a violation. At worst, the Ministry of Planning and Investment may revoke the license, thus withdraw the basis for further business activities of the joint venture.

1.10.3 Share capital and total investments

The share capital may be contributed in cash or in kind. Contributions in kind are to be valued on the basis of market prices ruling at the moment when the contribution is brought in and to be included in the Joint Venture Agreement. The parties determine the value of a contribution in kind together. Should an agreement between the parties be impossible, the competent approval agency may commission an independent appraiser with the valuation. Contributions in kind in the form of intangible assets may be brought in only if they have been valued and approved by the Ministry of Planning and Investment. If the Vietnamese partner brings in land use rights as contribution in kind, it

is common to take the accumulated rent value within the duration of the project as a basis for its valuation.

In practice, the Vietnamese party often brings in into the joint venture contributions in kind in the form of buildings, equipment or land use rights and the foreign party contributions in kind in the form of technology (including industrial property rights) as well as imported equipment. The transfer of shares in a joint venture is possible only with the consent of other shareholders, and the co-partners principally have the right of preemption.

1.10.4 Management of the companies

Management of a Limited Liability Company (“LLC”) and a Joint Stock Company (“JSC”)

The management structure of the LLC and the JSC has been already explained in the items 1.10 and 1.11.

Partnerships

A partnership requires at least two partners who run the enterprise together. At least one partner has unlimited liability with his entire property, whereas the liability of further partners may be limited. In this respect, slight similarities to the German KG (limited commercial partnership) are identifiable.

Private enterprise

This legal form is used only by a shareholder who has full responsibility for all business activities.

1.10.5 Duration, dissolution and liquidation

The duration of a joint venture is determined respectively on a case-by-case basis by the Ministry of Planning and Investment and noted in the Investment License. The usual duration of a joint venture is 50 years. In exceptional cases, the government may approve a maximum duration of 70 years.

However, a joint venture may be dissolved early by an appropriate resolution of the competent panel and the approval of the licensing agency. Such approval of the licensing agency has to be requested by at least one joint venture partner. The Joint Venture Agreement and the Charter should contain regulations on the possibility of early dissolution and its execution.

In principle, a joint venture may be dissolved for the following reasons:

- upon expiry of its duration stipulated in the agreement
- by the Ministry of Planning and Investment in case of violations of provisions of the Investment License
- in case of insolvency
- termination because of breach of the agreement by a co-partner
- if other grounds of termination stipulated in the agreement exist.

Regulations on the kind and scope of liability to compensation in case of early dissolution as a result of breaches of the agreement by one party should be stipulated in the Joint Venture Agreement or in the Charter.

On request, the competent agency may grant a temporary interruption or an extension of period of the project. In case of an interruption, an exemption from or reduction of the financial charges (e.g. taxes) is possible on request.

1.11 Business Cooperation Contracts

1.11.1 Requirements

Apart from effective conclusion of the Business Cooperation Contract itself, holding of an Investment License is a requirement for a valid Business Cooperation Contract. The BCC becomes effective only after the Investment License has been issued. The contract has to be put down in writing and should contain among other things:

- the object of the enterprise
- the scope and duration of cooperation
- rights and duties of the parties and
- regulations on the distribution of profit and loss

1.11.2 Coordinating Committee and Executive Board

In principle, Business Cooperation Contracts do not have any bodies. However, the parties to a Business Cooperation Contract may stipulate in the contract a body – the Coordinating Committee – to be established. It may be entrusted for example with the supervision and implementation of the contract. Moreover, such Coordinating Committee makes equal control by both contracting parties possible. Within a Business Cooperation Contract, some tasks (such as leasing of buildings and recruitment of workforce) could be in principle carried out by the Vietnamese partner only because the Business Cooperation Contract itself is not an independent legal entity. In order to ensure control during contract implementation, since recently it is possible for the foreign investor to establish an administrative office. Such an office may supervise the business processes and recruit the workforce.

1.11.3 Business Cooperation Contract in comparison with Joint Venture

A Business Cooperation Contract and a Joint Venture are comparable in many aspects. For both forms of investment, the foreign investor needs a Vietnamese partner. What is more, in both models an agreement establishing the joint investment project as well as detailed regulations regarding management are required. Besides, the Business Cooperation Contract, just like the Joint Venture Agreement, should contain arrangements on the object of the enterprise, the scope and duration of the cooperation as well as the rights and duties of the parties. The transfer of a share in a Business Cooperation Contract requires, just like the transfer of capital shares in the joint venture, the consent of all partners. The partners have the right of preemption. Possible reasons for dissolution are also identical in both forms of organization.

The most important difference between a Business Cooperation Contract and a Joint Venture, apart from the unlimited liability of the parties, is the profit distribution. Whereas the profit distribution in a Joint Venture depends on the shares of the parties in the share capital, the profit distribution in a Business Cooperation Contract may be regulated otherwise, independently of the capital contributions.

1.11.4 Extension of the rights within a Business Cooperation Contract

Since 01 August 2000, foreign partners of a Business Cooperation Contract are allowed to establish, on the basis of a BCC, administrative offices for the following purposes:

- to represent the enterprise;
- to carry out activities within the Investment License and the contract;

- to open and maintain accounts;
- to recruit employees; and
- to perform contracts

With this local presence, the foreign investor was granted a better overall view and control over the activities in Vietnam.

Besides, enterprises with Business Cooperation Contracts which operate in the manufacturing sector may redeploy taxes and other financial charges between the partners. That way the Vietnamese partner may be imposed with charges and obligations which relieve the foreign partner. It is in accordance with the right to decide freely on the method of determining the profit and loss distribution between the parties.

1.12 Wholly foreign-owned-enterprise subsidiary

Pursuant to the 2014 Investment Law and Enterprise Law, an enterprise with 100% foreign-owned capital (EFOC) does no longer exist. In fact, pursuant to the Implementing Decree 194, the already existing EFOCs may reregister as an LLC. As an overview, this form of company is presented again.

1.12.1 Area of application

Many export-oriented foreign enterprises used in Vietnam the forms of company which had 100% foreign-owned capital. Moreover, the government promoted infrastructure projects. However, the formation of enterprises with 100% foreign-owned capital (EFOC) was not possible in all economic sectors. Therefore, the formation in such sectors as real property, telecommunications, transport, power production and power distribution is excluded and is possible in the service sector in exceptional cases only. The reason for such restrictive investment policy is the endeavor of the Vietnamese government to gain technical knowhow and foreign currency. However, it is possible in investment projects with Vietnamese participation only.

1.12.2 Company formation

Companies with 100% foreign-owned capital have different requirements, depending on the form of company; however, the following are common for all forms of company: The Articles of Association of all companies principally have to include the following items:

- company structure;
- scope of activity of the enterprise;
- designation of authorized representatives; and
- information about the scope and the schedule of capitalization.

The Articles of Association may be amended afterwards. It requires only a registration at the competent agency. In order to facilitate obtaining of the approval for an Investment License, it is advisable to use model Articles of Association as a template. We can provide it readily on request in Vietnam. Interested parties should contact the Duane Morris office in Hanoi. However, in view of the constantly changing Vietnamese law, the model Articles of Association should be thoroughly examined in respect of possible legislative changes and adapted to individual requirements of the investor.

1.13 Representative offices and branches

Foreign enterprises have the possibility to open representative offices (RO).

Previously, establishing and maintenance of representative offices, with the exception of specialized sectors such as banking, finance, legal advice services, culture and education, was regulated by the Commercial Law of 1997 as well as the Decree No. 45/200/ND/CP of the government stipulating representative offices and branches of foreign merchants in Vietnam and foreign tourism enterprises in Vietnam. The decree brought with it some welcomed changes in the previous law, as for instance the introduction of the unlimited period of validity of licenses for the representative offices of foreign enterprises.

However, Decree No. 45 has been superseded by the additions to the Commercial Law in June 2005 and the Decree No. 72/2006/ND/CP of 25 July 2006 (official publication of 14 August 2006). This regulations included more restrictions for representative offices which make it more difficult and more expensive for foreign enterprises to establish and to maintain representative offices in Vietnam.

In 2016, the Decree 72 has been superseded by Decree No.07/2016/ND-CP. This new decree includes regulations on grant, re-grant, adjustment and extension of licenses for establishment of branches. It defines also the scope of operation, rights, obligations and shutdown of the representative offices or branches.

1.13.1 Permissible area of activity

The function of a representative office should be to enable foreign investors to prepare their investment projects or other economic activities in Vietnam. Through a representative office, opportunities to buy and sell goods as well as to provide commercial services can be probed and promoted. They can support the foundation of economic projects of foreign investors as well as ensure and oversee the implementation of concluded contracts.

Since 01 October 2000, representative offices may execute purchase contracts with Vietnamese trading firms, provided that the Manager of the representative office is duly authorized. The power of attorney has to refer in each case to the specific contract, and general powers of attorney are no longer permitted. A representative office, however, is forbidden to transact business itself with the intention to make profits or to act as representative of other firms in Vietnam.

Besides, pursuant to the new regulations the representative offices are forbidden to conduct sales promotions. What is more, they are not allowed to conduct direct advertising, advertisements and exhibitions as well as fair-trade activities in order to promote their own services and products. Now, the representative offices have to commission a local service provider to carry out these activities. The chief representatives may sign contracts for this purpose only if they have a specific authorization from the head office. The Ministry of Trade has yet to enact specific guidelines regarding these restrictions which regulate even what form the authorization must have.

1.13.2 Approval authority

The approval authorities for the supervision and administration of ROs are local Ministry of Industry and Trade (MOIT) and the State Bank. The MOIT is responsible for the examination of applications and the issuance of RO licenses for all foreign firms except for banks and credit institutions which fall within the area of responsibility of the State Bank. Moreover, the MOIT is authorized to amend, to extend, to revoke and to cancel licenses.

1.13.3 Formation

The representative office is not an independent legal entity and its formation is accomplished in two steps: First the approval procedure and then the notification procedure have to be completed successfully.

1.13.3.1 Approval procedure

At first, the foreign investor has to submit to the People's Committee in the area of which the representative office is to be opened an application for opening of a representative office and wait for a respective approval. Whereas it was earlier required that the applicant has conducted the business already for 5 years and could prove economic relationships with Vietnamese enterprises, now it is sufficient as the only requirement that it can produce a business registration which is legally valid pursuant to a foreign law in order to come into consideration for a RO approval as foreign merchant in Vietnam.

In order to obtain a RO approval, the following application documents are required (article 10. Decree 07):

- a filled in application form required by the MOIT;
- a certified, translated into vietnamese and consularized business registration document (deed of foundation) of foreign merchant;
- a letter of appointment of the head of the representative office, being translated into vietnamese
- most recent audited financial statement of the foreign merchant or certificates of fulfillment of tax liabilities or financial obligations of the last fiscal year or equivalent documents being translated into Vietnamese and notarized, consularized; and
- copies of the passport or ID card (for Vietnamese) or copies of the passport (for foreigners) of the head of the representative office, being translated into vietnamese
- documents on the expected location of the representative office including copies of memorandum of understanding (MOU) or leasing agreements or documents as proof of the right to use a location as the representative office
Copies of documents on the expected location of the representative office in accordance with provisions of Article 28 hereof and related laws

The notarial certification is carried out by a notary (usually an attorney) or by an official certifying body in the country of origin. It confirms that the copied documents are true to original. The authentication of a document is a concept of the international law which is applicable when it comes down to the recognition of documents used in another legal system for that for which they have been issued.

1.13.3.2 Notification procedure (article 25, Decree 07)

Afterwards follows a notification procedure at the same agency after which the formation of a RO is completed. Besides, within 15 working days after issuing the license, the agency has to be notified using a prescribed form of the place of the head office and the number of Vietnamese and foreign staff employed at the RO. This second step is completed once the foreign investor has appointed a Manager of the representative office. The RO has to conclude a lease contract for the representative office and, if required, try to recruit local staff.

1.13.4 Manager of the representative office

Pursuant to the Decree 07, chief representatives must not act at the same time as legal representatives of the foreign enterprise without special authorization to sign contracts on its behalf. What is more, they must not work at the same time for another enterprise established pursuant to the Vietnamese law.

1.13.5 RO license

If a foreign investor had once obtained a RO license pursuant to the old law, it could use the license until it discontinued its activity or the license was revoked by the approval authority. A revocation was possible if the RO violated the Vietnamese law.

Pursuant to Decree 07, foreign enterprises have to extend their licenses for representative offices every five years. In addition to the previously required application form and the Business Registration Certificate, they have to submit copies of their (i) Articles of Association and (ii) audited financial statements, copies of the existing license for establishment or other documents proving their existence as well as the actual activity in the preceding business year. If a representative office is found guilty of a serious breach of the Vietnamese law, the application for extension of the license may be rejected.

Furthermore, pursuant to Decree 07 it is required from existing representative offices to file an application for granting the license within 6 months after coming into force of the Decree (14 August 2006), i.e. by February 2007 at the latest.

Moreover, Decree 07 regulates in what cases and in what circumstances the license of a representative office may be withdrawn:

- if the headquarters fail to come into operation for 01 year and fail to enter into transactions with licensing agencies.
- If the headquarter fail to submit reports on the operation of the representative office or branch for 02 consecutive years.
- If the headquarter fail to submit reports stipulated in clause 2, Article 32 hereof to the licensing agency within 06 months from the deadline of submission or at the written request of the licensing agency.
- if such representative offices or branches are governed by provisions of laws.

Decree 102 made clear that in order to open up a new branch outside its head office, it is not necessary to do that as a separate investment project. If a branch of a foreign-invested enterprise is set up without an investment project, the parent company only needs a branch operation registration certificate. A branch which is set up with a separate investment certificate, the parent company must follow the investment registration or approval process to obtain a separate investment certificate for the branch.

1.13.6 Conclusion

As regards opening and operation of representative offices, Decree 07 is as restrictive as Decree 72. If representative offices fail to become aware of the new regulations and to adhere closely to them, they will be exposed to different sanctions including the withdrawal of the license.

Representative and Branch Office

Branch office of a trading firm in Vietnam is legally defined as “an entity dependent on the foreign trading firm which is established in Vietnam in order to directly generate profits”. Just like the representative office, it is not an independent legal person, but acts on behalf and on account of the foreign company. A branch office may carry on business activity in Vietnam only within the license. Before the implementation of the Commercial Law on 01 January 1998, only banks, insurances, law firms and accountancy firms were allowed to establish branch offices in Vietnam. Afterwards, the law opened these possibilities for all foreign enterprises, at least in theory. The Commercial Law, however, contains only general framework legislation. The relevant implementing decrees are essential.

Decree 72, which limited the scope of operation of representative offices, mentioned the possibility to open branch offices. The reason for this is probably the endeavor to prevent foreign companies from establishing representative offices as before and carrying out gainful activities contrary to relevant

legal regulations. The companies are rather to be encouraged to establish branch offices which are subject to taxation and to carry on trade lawfully.

However, implementing guidelines required for the implementation of the decree are still lacking so that opening of a branch office in Vietnam is possible yet only in theory. It remains to be seen when trading branches will be possible in practice and what exactly their areas of operation will be.

1.14 Build-Operate-Transfer (BOT)

1.14.1 Meaning

The basis of BOT projects is a BOT contract approved by the government. The BOT contract is concluded between the foreign investor (BOT investor) and the administrative agency authorized by the government. The purpose of BOT projects is the construction of infrastructure facilities, such as power plants and other public utilities. Foreign enterprises investing in infrastructure projects, for instance the construction of one of planned new freeways, will realize their projects mostly in the form of a Build-Operate-Transfer Contract (BOT). A BOT is not an independent form of investment, but rather a legal framework for an investment project. There are different variants of a BOT. However, the basic principle is as follows:

A foreign investor undertakes by the contract with a Vietnamese agency to build an infrastructure project and to its transfer to the Vietnamese state without compensation. In return, the investor receives an operating license for a limited period which enables it to generate profits.

In case of a standard BOT, the investor builds the infrastructure project, operates it over an agreed period and has to transfer the infrastructure project to the government agency only after the expiration of the operation period (build-operate-transfer). Apart from this standard model, there are yet two subforms of the BOT contract: Build-Transfer-Operate (BTO) and Build-Transfer (BT) projects. BTO projects differ from standard BOT in that the realized infrastructure has to be transferred directly after completion, but the investor is granted an operating license for a specific period. In case of a BT project, the investor does not receive an operating license, but the infrastructure project, after building and transfer, is operated exclusively by the Vietnamese state. In return, the Vietnamese government guarantees the investor other investments in Vietnam. Both the BTO and the BT model, however, have hardly any practical relevance. Only a few investment projects have been realized in one of the both forms as yet.

The BOT contract enables the Vietnamese state to implement bigger infrastructure projects (e.g. building of bridges, power plants, airports, railway lines and freeways) without having to finance them itself. So a BOT is a kind of concession contract. Since BOT projects carry a high investment risk due to big investment volumes, very few BOT projects have been realized in Vietnam as yet.

1.14.2 Foundation/licensing

A license is necessary in order to make a foreign investment in BOT projects. This license has to be applied for by the investor or is granted in connection with a tender. Moreover, the consent of the Prime Minister, which is given on the basis of opinions of the MOI and other competent authorities, is necessary. Subsequently, the MPI issues investment licenses.

Furthermore, the responsibility for the distribution of resources and the determination of priorities within the projects rests on the MPI. This ministry compiles the ranking list of BOT projects which should be actually implemented. For that reason, it plays the leading part when determining the direction of the investment policy.

After granting the investment license, the MOI acts as the Vietnamese contracting party to the BOT contract. As a result, the following obligations arise for the MOI:

- determination of economic and technical objectives of the project;
- carrying out, verification and approval of preliminary feasibility studies and feasibility studies;
- drafting, approval and conclusion of BOT, BTO and BT contracts;
- verification and evaluation of the technical design of the project in cooperation with the Ministry of Construction and other ministries, district offices, cities under central authority and People's Committees;
- building inspection during the construction phase in order to ensure the quality;
- giving consent to contracts concerning the supply with materials and the provision of engineering services between the BOT company and the Vietnamese enterprise.

Long awaited clarity for BOT projects

In January 2011, Circular 03/2011/TT-BKDT came into effect. Aside from providing guidance on Decree 108/2009/ND-CP, Circular 3 also supplied prescribed forms of document applicable to various investments in the form of BOT, BTO and BT contracts.

Under that regulation, investor selection was made through a public tender or appointment. The most experienced one being selected. Circular 3 described the 6 steps process. After selection, the investors discuss the BOT contract with the relevant State authority. Circular 3 required that an investor set up a new company to implement a BOT project, seemingly prohibiting investors using an existing entity, contradictory to Circular 108. Circular 3 sets out timeline and procedures for the issuance of an investment certificate to a BOT project. It appears, as if that they do not evaluate the capacity of the investors nor the feasibility study for the project. It is possible that this is because these issues will have already been verified during the process of investor selection. Also various forms of documents relating to BOT projects are annexes to Circular 3.

Since 2015, the Decree No. [15/2015/ND-CP](#) replaces Decree 108/2009/ND-CP and as a consequence, Circular No. 06/2016/TT-BKHDT replaces Circular 03/2011/TT-BKDT.

Circular No. 06/2016/TT-BKHDT guides the implementation of a number of articles of the Decree No. [15/2015/ND-CP](#) dated February 14, 2015 by the Government on investment in the form of public-private partnerships.

The Circular 06 includes the transformation of investment with regard to the investment project by the public capital; but provides also framework for project contracts and samples of project contracts. In addition, Circular 06 sets out procedures for issuance, modification and revocation of the Certificate of registration of investment and establishment of project management enterprises and relevant forms.

Finally, it provides other contents within the competence to give guidance of the Ministry of Planning and Investment as prescribed in Decree No. 15/2015/ND-CP.

1.14.3 Implementation

The implementation of a BOT project is possible in the investment form of a joint venture or as a company with 100% foreign-owned capital. Since the Vietnamese state does not have required financial means for a contribution of capital available, the Vietnamese government prefers exclusively foreign-financed BOT projects (in the form of a company with 100% foreign-owned capital).

1.14.4 BOT Company

Furthermore, in the course of implementation of BOT projects, the BOT investor has to establish a company for the construction and the management of the project, respectively (BOT companies). There are no restrictions with regard to the share of foreign ownership in BOT companies.

A BOT company is an independent legal entity.

1.14.5 Duration of the BOT project

The duration of a BOT project is negotiated between the BOT investor and the authorized government agency. The statutory term is maximally 50 years or in exceptional cases 70 years.

1.14.6 Subcontractors

If required, foreign enterprises may also participate in the project as subcontractors for the supply and installation of equipment or machines.

However, it is still unclear how the selection and designation of such a subcontractor is to be carried out. These 1996 enacted regulations provide that, with few exceptions, the subcontractors shall be selected by way of a free tender. The exact extent of these regulations cannot be assessed yet. However, should all subcontractors be selected by way of tenders, it would be contrary to the BOT regulations pursuant to which the subcontractors shall not be selected by the government side:

Pursuant to the BOT regulations, the BOT Company has the right to select the subcontractors or to organize the tender for them, respectively. Apart from that, after the selection the BOT company has to notify the competent administrative authority of the name of selected subcontractor.

1.14.7 Legal basis

The BOT regulations and the implementing provisions constitute the legal basis for BOT, BTO and BT projects¹⁸. Please note that a new BOT decree is currently under way and it partially abrogates the regulations explained here. However, the decree has not changed anything in the basic concept of the BOT, BTO and BT projects. The introduction of the BOT regulations is to be put down to the support of legal experts from the MPI and other ministries as well as of foreign lawyers, bankers and enterprises. Moreover, the government obviously makes efforts to create more favorable conditions and simpler investment processes for foreign investors in respect of the BOT projects.

The regulations on BOT, BTO and BT contracts, which were in force since November 1993, have been abolished by the Government Decree of 15 August 1998. The regulations in force since that time contain among other things the following alterations:

- exemption from the tax on earnings in case of investments in promoted sectors and regions - up to eight years;
- principally, a tax on earnings of 10% is to be paid over the entire period of the project, in the first four years of profit generation a 100% tax exemption, and in four subsequent years a 50% tax exemption are provided for;
- for funds transferred abroad, a 5% tax deducted at source is to be paid;
- the rules for taxation of foreign building contractors apply to subcontractors, exemption from the taxation of technology transfer (technical knowhow, customer service, technological processes, industrial property rights). The list of tax-free imports of machines and equipment as well as the conditions of tax exemption have been specified in more detail and partly extended, the latter apply for example in case of a project extension. A possibility has been created to convert revenue in Vietnamese dong (VND) to a stable currency by way of foreign trade activities. The State Bank is obliged to convert VND revenue to foreign currency so that the debts and interest can be paid, business transacted and generated revenue transferred abroad.
- BOT may open foreign currency accounts;
- Planned rates for the use of infrastructure to be created have no longer to be explicitly stated in the BOT contract; and
- During the period of project implementation, the BOT projects are exempt from the land rent.

Since 01 August 2000, the government may conclude contracts and provide guarantees related to BOT, BTO and BT projects. It is important for ensuring purchase or supply contracts (e.g. in the energy sector) and increases the attractiveness of such models for foreign investors.

Legislation amendment 2015 – new Decree No. 15/2015/NĐ-C

Since february 2015, the Decree No. 15/2015/NĐ-C of the government on investment in the form of Public-Private-partnership replaces Decree No 108/2009/ND-CP.

Area of application

This Decree 15 provides the regulation on the sectors and requirements, procedures for execution of the investment projects developed in the form of public-private partnerships; but also management and use of the State funding for execution of investment projects.

Besides, it includes the government's investment incentive and assurance policies, and government agencies' responsibilities for management of the investment projects developed in the form of public-private partnership.

This Decree 15 applies to the regulatory agency, investor, project enterprise, lender and agency/organization/individual involved in the execution of the project developed the form of public-private partnership

¹⁸ Regulations on BOT, BTO and BT contracts have been issued by the Vietnamese government in the Decree No. 62/1998/ND-CP on 15 August 1998 and amended in January 1999.

The latter related to investments on the basis of Build-Operate-Transfer (BOT), Build-Transfer-Operate (BTO) and Build-Transfer (BT) contracts.

Transitional provisions

The list of projects announced prior to the effective date of this Decree shall be revised and re-approved under the provisions of this Decree; unless otherwise approved by Prime Minister.

If the feasibility study report has been approved before the effective date of this Decree, there is no need to re-approve it.

Besides, if the project of which investor selection result has been approved before the effective day , it's not required to go through the investor re-selection.

The project contracts that are initialed before the effective day of this Decree shall not be re-negotiated.

The implementation of project that has been granted the investment certificate or for which the contract has been officially signed before the effective day of this Decree shall proceed according to the regulation defined in the investment certificate and the project contracts.

Finally, if a project has obtained a written commitment or approval by the Prime Minister or Ministries, provincial People's Committees and regulatory bodies on the use of the State funding for the project, incentive and investment before the effective day of this Decree, the execution of the project shall proceed according to these such documents.

The projects other than those mentioned above shall be governed under the Decision of the Prime Minister according to the proposal from the Ministry of Planning and Investment

Highlights

Promoted investment sectors

Whereas Decree 108 contained a list of investment sectors for investments on the basis of BOT, BTO and BT contracts which should be particularly promoted. Decree 15 only classifies and references the different projects included on the construction, improvement, operation and management of infrastructural works, supply of public equipment and utilities.

Pursuant to Decree 15, projects on construction, operation and management of projects to build new infrastructure facilities or projects to renovate, expand, modernize, operate and manage already existing facilities include:

- (i) Transportation infrastructure and supporting services;
- (ii) Lighting system; clean water supply system; water drainage system; sewage collection and disposal system; social housing; resettlement housing; cemetery;
- (iii) Power plants, transmission lines;
- (iv) Infrastructure works for healthcare, education, training, cultural activities, sports and relating services; head offices of regulatory agencies;
Infrastructure works for commerce, science and technology, meteorology and hydrology, economic zones, industrial zones, hi-tech zones, concentrated information technology zones; the application of information technology;
- (v) Infrastructure works for agriculture and rural development, and the services for enhancing the correlation of agricultural production with farm product processing and sale;
- (vi) other infrastructure facilities which have been classified by the Prime Minister as worthy of promotion.

¹⁹ Decree 78 water supply systems, drainage systems and sewage treatment facilities

Requirements on the investor's equity capital

The investor or the project company, respectively, is obliged to make sure that sufficient sources of financing for the implementation of the project are available. Pursuant to Decree 15, the equity capital of the investor shall account for at least 15% of the total capital.

Besides, regarding project funded by total investment of over VND 1,500 billion, the percent of equity capital is calculated as follow:

- for projects with an investment volume up to VND 1,500 billion, now an equity quote of at least 15% of total investment volume is required; and
- if the investment volume amounts to over VND 1,500 billion, a minimum equity quote of 10% is required.

The previous decree 108 imposed restrictions regarding the use of state capital for the implementation of the project, so that such projects may be financed with a quota of maximally 49% of state capital in the total investment volume.

However, pursuant Decree 15, the amount of State funding is estimated on the basis of project financial plan and no maximal quota is fixed.

The following government bodies are allowed to enter into as well as to implement project contracts:

- Ministries, regulatory bodies and provincial People's Committees.
- Based on functions, tasks, powers and specific management conditions, Ministries, regulatory bodies can delegate to their affiliates;
Provincial People's Committees can delegate to their directly affiliated specialized agencies or the People's Committees of districts to sign and execute the group B or C project contracts.

Drafting and announcement of projects and approval of project proposals as well as validation of project feasibility reports

With regard to a project financed by the State funding, based on the estimated amount and proposed capital sources, Ministries, regulatory bodies and provincial People's Committees shall report to competent agencies according to the regulation on public investment so as to decide the budget allocation before approving the project.

Ministries, regulatory bodies and provincial People's Committees shall draw up and make an aggregate planning for the State funding for the projects that are announced in the 5-year public investment program for industry sectors. Based on the approved 5-year public investment plans, feasibility study reports or project proposals (with regard to group C projects), the Ministries, regulatory bodies and provincial People's Committees shall draw up and make an aggregate planning for the State funding for the local projects defined in 5-year public investment program.

With regard to a project financed by the State funding, based on the estimated amount and proposed capital sources, Ministries, regulatory bodies and provincial People's Committees shall report to competent agencies according to the regulation on public investment so as to decide the budget allocation before approving the project (article 17 decree 15).

The time limit for the approval for the use of the State funding for the project prescribed in Clause 2 of this Article shall not exceed 30 days from the receipt of sufficient documents.

Selection of investors

There are two possibilities to carry out the selection of investors:

The selection of investor is carried out in the form of open bidding or contractor appointment.

Negotiations and signing of BOT, BTO and BT project contracts

The investor that was awarded the contract by way of the tendering procedure or through direct designation has to agree with the respective regulatory agencies on conditions of the BOT, BTO or BT project contract and other possibly required contracts and sign them after the agreement has been reached. Afterwards, the regulatory agency and investor may sign an investment agreement to confirm that a drafted-project agreement has been implemented.

The signature of an investment agreement also confirm that the rights and obligations of each contracting party to the implementation of the procedures to be issued with the Investment Registration Certificate and set up the project enterprises.

After the certificate has been issued for the respective project, the investor and the regulatory agency may officially sign the project contract.

With regard to group C project, after completing the project contract negotiation, the regulatory agencies and the investor may sign the project contract.

The rights and obligations of the project enterprise have to be agreed as follow:

a) the project company signs the project contract and together with the investor constitutes a party to the project contract, or;

b) The regulatory agencies, investors and project enterprises sign a document allowing the project enterprise to exercise the rights and assume obligations of investors. This document is an integral part of the project contract.

Security to guarantee the implementation of the project contract

Securities to guarantee the implementation of the project contract may be provided either in the form of a bank guarantee or by other securities defined in the Civil Code. Pursuant to Decree 78, the project liabilities have to be secured at least in 3%, 2% and 1% of the total investment capital of the project, corresponding to particular stages of the total investment volume of the project (e.g. VND 75 billion to VND 1500 billion and over VND 1,500 billion). Decree 108 has changed the quota of required securities and the amount of capital as follows:

- projects with total investment volume up to VND 1,500 billion have to be secured at least in 2% of the total investment capital;
- and projects with total investment volume over VND 1,500 billion have to be secured in the following proportion:

(i) the quota of total investment volume which amounts to less than VND 1,500 billion has to be secured with at least 2% of the quota; and

(ii) the quota of total investment volume which comprises more than VND 1,500 billion has to be secured with at least 1% of the quota.

Since 16 January 2017, Decree 15-2011-ND-CP on the provision and management has been replaced by Decree No. 04/2017/ND-CP.

The most significant change introduced by Decree 15 was its applicability to foreign invested projects. Decree 15 provided that if the project company seeking the government guarantee for a loan was foreign invested, the guarantee will be provided only for that portion of the loan corresponding to the level of liability of the Vietnamese party in the enterprise. Also decree 15 introduced restrictions on the ability of a Vietnamese shareholder or member of the borrower to transfer their interests to a foreign investor. Another requirement was found in the standard form of undertaking which must be provided by the borrower. The borrower should acknowledge the debt owed to the government guarantor and undertake to repay that debt if the borrower cannot do so. Not expressed, such as the principle of the guaranteed loan being at least USD 10 million and having a minimum term of 10 years are not mentioned.

With the new Decree 04, the Ministry of Finance remains the body in charge of issuing government guarantees. Unchanged is also that the guarantee fees are capped at 1.5% of the outstanding balance of the guaranteed loan. In Decree 04, the maximum level of the guarantee is fixed at 70% (instead of 80%) of the total investment of the guaranteed project.

Investment certificate

From 01 July 2015, individual People's Committees of the provinces is no longer allowed to issue the Investment certificates, except for the Management Committee of industrial zone, export processing zone, high tech zone, economic zone and the local Ministry of Planning and Investment:

- a. The Ministry of Planning and Investment shall issue investment certificates for the following projects:
 - The projects of national importance;
 - The projects that are signed by a Ministry, a regulatory body or an authorized agency;
 - The projects that involve multiple provinces

- b. Provincial People's Committees is in charge of the issuance, adjustment and revocation of the investment registration certificate of the projects other than those specified above

The issuing authority has will grant the investor an investment certificate within 25 days after receiving a valid application dossier.

Project entry rights, assignment and securities

The contracting parties may agree that in case the project company or the investor fails to (no longer) meet their obligations arising from the project contract or the loan agreement, a part of or all rights and duties of the project company may be assigned to the lender. After the entry, the lender has to meet all respective obligations of the project company or the investor. The conditions, the procedures and the contents of the right of entry of the lender into the project have to be (strictly) stipulated in the loan agreement, the agreement on securities or in other contracts between the project company and/or the investor and the lender and be approved by the respective authorized body.

The investor may assign parts of or all its rights and duties arising from the project contract upon approval by the respective regulatory agencies. Project companies may pledge and/or mortgage property and land use rights, provided that it has been approved by the respective regulatory agencies.

Investment incentives, guarantees

Decree 15, as Decree 108 makes only fairly general statements on the subject of tax incentives. Pursuant to Decree 15, tax incentives granted with regard to BOT, BTO and BT project contracts have to comply with the applicable tax laws and regulations. Indeed, the foreign and local contractors involved in the project have to fulfill their tax. BOT and BTO companies shall be exempt from the land rent over the entire phase of project implementation. On the other hand, BT companies shall be exempt both from the land rent and from land use fees for the area used to carry out the BT project work for the period of execution of the work.

1.14.8 Ownership structure

The BOT assets are owned neither by the BOT investor nor the BOT company. In fact, at the end of the project period they have to be transferred to the state without compensation.

1.14.9 Taxes

To BOT projects apply the most favorable tax rates offered to foreign investors in Vietnam. Some tax advantages are enumerated below:

- corporate income tax in the amount of 10% of net income during the entire period of the project (the standard rate on foreign invested projects is 25%)
- exemption from the corporate income tax for four years from the first profit year as well as a reduction of 50% in the following four years. If the project is located in a mountainous region or in little developed areas, a eight-year reduction from the first profit year applies
- profit remittance tax (a tax on exported profits) in the amount of 3% if the investor contributed more than US\$ 10 million to the statutory capital of the enterprise, otherwise in the amount of 5% (the standard rate is 7%)
- exemption from all taxes with regard to technology transfer.

Moreover, BOT companies and their foreign subcontractors may also obtain, on request, tax reliefs with regard to import duties on equipment, accessories, raw materials and transport vehicles which are required for the implementation of the project.

It remains to be mentioned that foreign subcontractors are granted equal tax reliefs as foreign BOT project partners.

1.14.10 Land use rights

Pursuant to BOT regulations, a BOT company has the right to make use of plots of land required for the realization of the project without paying rents during the entire project period.

Moreover, the Vietnamese government strives, for the purpose of general support of BOT companies, to ensure the adherence to all regulations regarding plots of land, roads and other public facilities and utilities which are necessary for the implementation of the project. The People's Committee and the towns in the project area are responsible for developing the project area for the implementation of the project within the agreed period of time.

On the other hand, compensation costs borne by a BOT company may be credited against the total investment capital, unless the BOT, BTO or BT contract provides otherwise.

1.14.11 Warranties and mortgages

The BOT regulations provide that pursuant to the Vietnamese law a BOT company may encumber its assets in order to guarantee for its domestic and foreign loans. In this context, it is required that a state approval exists. However, the Vietnamese law does not contain any clear regulations. As regards land use rights, it is only laid down that the mortgage has to be taken out at a bank that has been licensed in Vietnam.

Other assets which may be pledged or mortgaged include:

- factories, equipment, buildings and land which have been purchased or built with the capital of the BOT company
- other assets of the BOT company
- land use rights which have been approved for the performance of the BOT contract pursuant to the Vietnamese law and
- other contract rights with economic value, such as loans.

However, it has to be taken into consideration that pursuant to provisions of the Decree No. 90 the assets mentioned above may be pledged or mortgaged only if they are items bought with the loan amount itself. On the other hand, the State Bank of Vietnam (SBV) is competent for the approval of warranties and mortgages of foreign lenders²⁰.

²⁰ See Article 23.5 of the Decree No. 90/1998/ND-CP of 7 November 1998 ("Decree No. 90").

Besides, the BOT contract stipulates that legal successors of rights or assets encumbered by the BOT company with a mortgage or a warranty are obliged to further implementation of the respective BOT project.

1.14.12 Legal disputes

The Decree 15 maintains the approach of the Decree 108. In fact, the disputes arising from the PPP projects should be approached with caution. Disagreements between the enterprises themselves or the foreign subcontractors may be settled by a Vietnamese court of arbitration, an ad-hoc arbitrator, an arbitration institute of a third party or by an international arbitration tribunal. Vietnam has enacted a national law on the recognition and enforcement of foreign arbitral awards and signed the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. Pursuant to the BOT regulations, an arbitral award may be enforced pursuant to the Vietnamese law. Nevertheless, this fact constitutes little reassurance for foreign investors because Vietnam cannot show any experience in effective enforcement of such arbitral awards.

In case of disputes between a BOT company (a Vietnamese entity) and a Vietnamese subcontractor, the Vietnamese legal system alone is applicable. The procedure may be carried out or arbitrated in Vietnam only.

If disputes are involved in which state authorities participate, the BOT regulations provide that they shall be settled by way of a foreign arbitration procedure according to foreign law, and only after an attempt of conciliation the dispute settlement by a court may be used.

Commercial arbitration

Law 54-2010-QH12 was passed by the National Assembly on June 17th 2010 and came into effect on 1st January 2011. It replaces the Ordinance on Commercial Arbitration from 2003. Law 54 continues to cover disputes which arise from commercial activities, but no limited definition is provided. Law 54 applies to activities where profit is generated and in cases where at least one party is involved in commercial activities or the law stipulates the arbitration. Now arbitrators are not limited to Vietnamese citizens only, so that everybody can apply who fulfills the requirements. Foreign arbitrator can be appointed, even though there is no foreign company or entity involved in the dispute. Law 54 provides for the establishment and operation of the arbitration organizations or the representative office. Law 54 contains an entire chapter of empowering arbitration tribunals to issue certain types of interim relief order at the request of a party. Negative is the inability to appeal a decision to set aside an arbitral award provides finality, but at the risk of incorrect decisions setting back the progress of arbitration in Vietnam.

1.14.13 Bank accounts abroad

With reservation of the consent of the State Bank of Vietnam (SBV), after application by its lender, the BOT company may establish a bank account abroad in order to be able to conduct financing for the BOT company.

1.14.14 Insurance

Article 65 of Decree No. 24/CP of 31 July 2000 provided that enterprises with foreign invested capital may insure themselves only in such insurance companies which are licensed in Vietnam. Whereas the interpretation of this article allows several possibilities, foreign investors were strongly interested in protecting themselves against political risks and require a guarantee for the convertibility of the Vietnamese dong. Furthermore, the need for reinsurance exists.

In order to satisfy these needs insurances by the OPIC (Overseas Private Investment Corporation) and the MIGA (Multilateral Investment Guarantee Agency) are provided, however, due to current Vietnamese currency problems MIGA does not offer insurance with regard to convertibility of the Vietnamese currency. It should be also pointed out that domestic insurance companies are lacking in

a solid financial basis. Besides, a protection against political risks is provided by the guarantees for direct investments of the German federal government. Information in this regard can be found in the internet under www.agaportal.de.

1.14.15 Warranty for foreign currency

The BOT regulations oblige the SBV to ensure currency conversion of generated VND to a foreign currency during the entire period of the BOT contract. The purpose of this guarantee is to enable the BOT company to meet its payment obligations abroad. Among them are for instance the redemption of loan capital, interest and shares in profits. However, the actual regulatory content of this “guarantee” consists only in that the BOT company is no longer obliged to seek the approval of the SBV for each conversion. Moreover, it does not contain any guarantee that the BOT company will receive foreign currencies from the State Bank in case of a currency blockage or a currency shortage. Since the lender of the project usually needs more security with regard to currency matters, such a “guarantee” is very seldom sufficient.

1.15 Franchising

Before going into advantages and disadvantages of respective forms of investment under 1.21, a short overview of franchising as another interesting form of investment in Vietnam is presented.

1.15.1 Chances and risks

There is no doubt that Vietnam offers good chances and opportunities for a successful investment in the franchising business. A steadily growing population, increasing prosperity and a great demand for brand-name products guarantee a high potential. Whereas the high economic potential in this sector is obvious, the legal framework conditions for franchising in Vietnam remain often unclear yet. So until recently no legal regulation on franchising existed at all, with the consequence that today there are almost no big brands or chains in Vietnam. In the meantime, comprehensive laws concerning franchising have been enacted the applicability and scope of which, however, is not entirely clarified yet.

1.15.2 Legal situation

Until 2006, franchising was not regarded in Vietnam as a separate form of distribution, but was assigned, somewhat step motherly, to technology transfer. Consequently, the regulations applicable to franchising of the Technology Transfer Law limit the amount of license fees of franchisees to franchisers to maximally 5% of net sales, which has understandably made the franchising sector unattractive for many investors.

In 2006, a new Commercial Law became effective which contains a separate chapter on franchising in Vietnam. The new Commercial Law normalizes rights and duties of both franchisees and franchisers and classifies franchising as a separate form of distribution.

1.15.2.1 Decree No. 35 (Decree No: 35/2006/ND-CP)

The new Commercial Law was put in concrete terms by the Decree No. 35 the regulatory content of which is of great importance for franchising in Vietnam. It contains a duty of disclosure for franchisers, and for foreign franchisers a one-time duty of registration with the Ministry of Trade. Furthermore, as a result of a strong lobby work, Decree 35 does not oblige franchisers to carry out further registrations or to obtain a business license. Nevertheless, franchisees have to show a license for operation in the business sector in which they want to act as franchisees.

1.15.2.2 WTO Service Sector Commitments

After Vietnam's accession to the WTO on 11 January 2007, now the WTO Commitments in the service sector become important. As part of the commitments in the service sector, Vietnam has already limited the foreign business presence in the franchise sector. Thus foreign interests in the franchise business may operate only in the form of joint venture companies with a share of foreign capital amounting to maximally 49%. However, whereas the limitation of maximal foreign capital to 49% applies until January 2008 only, afterwards the operation of a franchise business will still be possible in the form of a joint venture alone. Only from 01 January 2009, Vietnamese franchisers may be foreign owned in 100%. These restrictions will result in a further hindrance to growth on that market until then.

1.15.2.3 Decree No. 23

Decree No. 23 regulates the commercial relations of foreign invested enterprises (FIEs) in the Vietnamese distribution sector. Especially since, pursuant to the WTO law, franchising is classified as a form of distribution, Decree No. 23 is applicable also to franchising and therefore has to be taken into consideration in business planning. The fact that Decree 23 contains indeed sufficient regulations in the area of wholesale and retail trade, but no special provisions on the franchise business, results again in more insecurity and uncertainty as to precise rights and duties of franchisers and franchisees. An example of law uncertainty concerns the issue of approval requirement for franchise transactions by the Ministry of Trade. As already mentioned above, in Decree 35, as the implementing decree of the new Commercial Law, a respective requirement was deliberately abolished. However, Decree 23 provides that FIEs require a special approval of the Ministry of Trade in order to establish new retail outlets in Vietnam. If, due to classification of franchising as a form of distribution by the WTO law, Decree 23 is directly applicable to franchise businesses in Vietnam, it is to be feared that foreign invested enterprises also require a respective approval for the franchise business. Decree 23, yet farther reaching than this regulation, provides that for each opening of a new retail branch a license from the Ministry of Trade on the basis of the so-called "economic needs test" is required. Only the first retail branch is exempted from this regulation. However, it is debatable and yet unclear what such an economic needs test shall include at all. So it remains to be seen how the administration will apply the Decree 23.

1.15.3 Conclusion

Due to described uncertainties in the legal framework, all potential franchisers and franchisees are urgently advised to carry out an appropriate and comprehensive legal due diligence before investing in the franchise business.

VIETNAM – "Franchising in the Promised Land"

A strategy as key to success in Vietnam for franchisers

In a world of constant economic uncertainty, foreign investors seem to regard Vietnam as Promised Land. It applies in particular to the franchise sector in which Vietnam until recently lagged behind the rest of Asia.

Despite this late start, Vietnam experiences an unprecedented degree of attention of the international franchise industry. For example, recently organized *Viet Nam International Franchise Show* in Ho Chi Minh City (Saigon) attracted over 150 international exhibitors.

One of the reasons for this increased interest is the opening of the Vietnamese retail market for foreign investors which took place on 01 January 2008 in connection with the WTO Commitments of the state. Another reason is rapid economic growth of the country which, according to Viet Nam Food and Drink Report, continues to outshine the growth of most national economies of South Asia.

Furthermore, Vietnam is appreciated by potential international and local franchisers against the background of a stable political situation and its fast growing consumption-oriented young population in which about 70% are aged under 30. The emerging urban middle class has an increasing disposable income and an insatiable hunger for quality products and Western brands.

The delayed development of franchising in Vietnam is another reason. Franchising is a business model which is substantially based on intellectual property, whereas Vietnam had a rather underdeveloped judicial system in the past and provided an improper industrial property protection as regards the rights of franchisers and franchisees.

Whereas the Law on Protection of Intellectual Property of 2005 (revised in 2009) and the Decree No. 35/2006/ND-CP regulating the franchising extended the legal framework with regard to the protection of the intellectual property and the franchise rights, the protection and enforcement of intellectual property rights remains critical and constitutes a challenge. In order to be able to profit from both own intellectual property values and the potential Vietnamese market, they have to feel certain of a solid strategy which aims equally adequately at protection and enforcement.

The expanding domestic franchise market which includes leading local brands as Trung Nguyen Coffee, Highlands Coffee, Pho 24, T&T Shoes and NinoMaxx as well as international brands, such as KFC, Lotteria, Jollibee, Dilmah, Gloria Jean's, Parkson and Metro suggests that with appropriately carried out due diligence, professional consultation and with persistence, the challenges are not insurmountable.

A strategy for a franchiser should include the following:

(1) Registration of intellectual property and related rights. The rights have to be registered considering the first-to-file principle.

(2) Trademark. All trademarks licensed within franchising have to be registered with the National Office of Intellectual Property. The registration of a brand provides a basis for taking action against franchise counterfeiters.

(3) Copyrights. Copyrights originally arise from the creation of a work. It is indeed not necessary to register copyrights with regard to a work; however, the registration with the Office of Copyrights makes it easier for the franchiser to establish the proof of ownership and enables the enforcement of direct rights.

(4) Business name. A business name is a name under which a company or an individual appear in business operations. Although a registration of the name is not required because the rights may be established directly by legitimate use of a business name, a registration of the name as trademark is advisable if it appears to be appropriate.

(5) Domain name. A domain name identifies an internet address. Franchisers should register their domain names with the national Vietnam's Internet Center in order to avoid the use by others in the internet.

(6) Business secrets/knowhow. A business secret (such as the formula of Coca Cola) is each business or technical knowledge which is not available to the public. Business secrets are protected in Vietnam if they have an economic value, are not a common knowledge or simply replicable and the holder makes efforts to keep them secret. Against the background that the burden of proof that the business secret was kept confidential is on the franchiser, they are usually difficult to protect. Non-disclosure

agreements and shaping of access limitations for employees serve equally as the proof of confidentiality and authorization.

(7) Due diligence. An analysis of a potential franchisee by the franchiser yet before the entry into an agreement pays off. Proper due diligences are obligatory in order to ensure strict compliance with the franchise agreement.

(8) Franchise agreements. Before signing a franchise agreement, the franchiser should insist that the negotiations of the agreement are accompanied by a non-disclosure agreement. The franchise agreement, which is drawn up both in English and in Vietnamese, should comprise all aspects of the obligations and provide a waterproof protection of the intellectual property rights, including the limits of the rights of use transferred to the franchisee. Moreover, a clause providing for a mediation or arbitration instead of the recourse to local general jurisdiction in case of disagreements would be advisable.

(9) Registration of franchise agreements. If a business is franchised to or from Vietnam, the franchise agreement has to be registered with the Ministry of Industry and Trade.

(10) Employees. A reasonable personnel policy should ensure in any case that the use of intellectual property by employees after leaving the enterprise is excluded. Vietnamese employment contracts provided by franchisers or franchisees should contain restrictive stipulations regarding intellectual property as well as business secrets and confidential information. By way of staff training, the importance of the brand should be conveyed.

Against the background of developing industrial property protection and the growths of local and international franchise market of 20-30% per annum expected by the industry experts, the moment seems to be ideal for companies and entrepreneurs to invest in this comparably underdeveloped market.

1.16 The forms of investment in comparison (advantages and disadvantages)

1.16.1 LLC and JSC

Both forms of investment, LLC and JSC, have advantages and disadvantages which should be taken into consideration when choosing the company form. The crucial advantage of JSC is that a foreign investor may sell its shares for the purpose of capital increase. Besides, by acquisition of shares, a sufficient majority in the Board of Management, thus de facto the possibility of controlling the company may be achieved. That is why the JSC is suitable for instance for investors who want to test the Vietnamese market with minority shareholding first, before they engage extensively in an unknown business environment. In principle, a subsequent acquisition of shares, thus increased possibility of control over the company, is possible just as potential exit from the company.

The LLC is suitable for enterprises that are fully foreign invested, in particular if there is only one investor. The structure was suitable also for joint ventures with Vietnamese partners. In a LLC, the investor may select its partners, in contrast to JSC where the shares may be purchased by the public.

16.2 Joint ventures

Joint ventures may be practically the only available form of investment in sectors in which approvals for foreign investments are granted with reluctance. The cooperation with a local partner is often the only way for the foreign investor to implement an investment project.

1.16.3 Business Cooperation Contract

There are less statutory provisions on a Business Cooperation Contract than on a joint venture so that a Business Cooperation Contract is in principle the more flexible form of investment. Nevertheless, when concluding a Business Cooperation Contract as well as when establishing a joint venture, the issues of the approval procedure, the equity participation, the management and the discontinuation have to be considered. The crucial differences are, however, that the distribution of profit takes place pursuant to contractual stipulations, a Business Cooperation Contract is not structured like a company, and thus no liability limitation is provided.

1.16.4 EFOC

The enterprise with 100% foreign-owned capital was the most attractive possibility for foreign investors to conduct economic activity in Vietnam.

1.16.5 Branches

A branch, in contrast to a representative office, may indeed conduct the economic activity directly, but it remains to be seen what the legal regulations will provide and how the Ministry of Trade will handle the approval practice. When establishing a branch, fiscal aspects have to be considered in detail. Kind and rate of taxation have not been regulated yet.

1.16.6 Representative offices

The formation of a representative office is recommendable for an investor as a first step to explore the market and to establish contacts. Nevertheless, their possibilities regarding trading companies have been restricted by additionally created regulations on the execution of closed contracts.

1.17 Merger, demerger and change of the form of enterprise

The CIL with its implementing decree as well as the UEL regulate the procedure on demerger, merger and conversion of enterprises as well as the change of form of enterprise.

For one thing, that way it was made clear that these changes are principally possible. For another thing, it is important for corporations to know in what form and on what conditions such changes may be carried out in Vietnam.

Each of these changes has to be approved by the Ministry of Planning and Investment and requires sending a detailed application dossier, including an explanatory description of the entire restructuring measure.

Privatization

At the beginning of the 1990s, about 12,000 state-owned enterprises existed in Vietnam. Since most of these state-owned enterprises were uneconomical and burdened the budget, the Vietnamese government endeavored to reduce the number of these enterprises. Therefore the government halved the number of state-owned enterprises by way of restructuring measures to about 6,000 enterprises. At the same time, framework laws on privatization of state-owned enterprises were enacted. However, initially the privatization proceeded very slowly. Consequently, between 1991 and 1998 only 116 state-owned enterprises were privatized. In 2007 only, the number came to 87. The planned target, however, was much higher. Therefore the government created new regulations on privatization which are expected to speed up the privatization process.

In this context, the Vietnamese government coined the new term “equitization”. By this term, the transformation of 100% state-owned enterprises into joint stock companies is to be understood. There are four kinds of equitization:

- issue of stock in order to capitalize state-owned enterprises
- partial sale of state-owned enterprises
- spin-off of departments which are capable of equitization and
- complete sale of state-owned enterprises for the purpose of transformation into joint stock companies

The Vietnamese government, however, retains control over certain equitized enterprises by holding special controlling shares in these enterprises. The equitization is also a special form of privatization with the possibility of a state control option. At present, only certain state-owned enterprises may be equitized.

Foreign enterprises and private individuals may acquire stocks of equitized enterprises. However, the value of all stocks of an enterprise issued to foreign investors must not exceed 30% of the common capital stock. In principle, only registered stocks with a nominal value of VND 100,000 (about 5 euro) each are issued to foreign investors. The stocks have to be paid in dong. The acquisition of stocks is announced publicly. Foreign stockholders are entitled to management, provided that they meet the requirements of Articles of Association of the enterprise.

The income from distribution of dividends or sales of shares may be converted into currencies and transferred abroad (subject to taxation). The sale of stocks by foreign stockholders is subject to restrictions. Basically, stocks may not be sold until one year after their purchase. If the foreign stockholder participates in the management, then this period is extended to three years.

It remains to be seen if Vietnam succeeds to privatize its state-owned enterprises with the aid of equitization and to relieve the stressed national budget. However, it should not be overlooked that restructuring measures alone are not sufficient in order to establish an economically sound company from an uncompetitive state-owned enterprise. Moreover, the equitization of only few joint stock companies can provide an investment incentive because the equitized enterprises have to assume all liabilities incurred as state-owned enterprise.

Competition

The new Law on Competition issued on 9 November 2004, with effect from 1 July 2005, regulates, apart from the restraints on competition and unfair competition, the formalities and procedures of resolution of competition cases as well as the sanctions in case of violations of the Law on Competition. The new Law on Competition is also closely related to Vietnam's liberalization efforts. Only the future can show to what extent it will guarantee fair competition and effective protection of fair competition, particularly with regard to state-owned enterprises. However, at least a first step towards a competitive order was made.

Area of application

The Law on Competition applies to associations of enterprises or individual enterprises, including enterprises from the manufacturing industry and enterprises supplying products or services of public interest. Besides, enterprises operating in the industrial sector and the state monopoly sector as well as foreign enterprises conducting activities in Vietnam come under the Law on Competition. Finally, the Law on Competition applies also to trading organizations in Vietnam.

Pursuant to the Law on Competition, state authorities are not allowed to take certain measures which come into conflict with market competition.

The Law on Competition has the priority of application in relation to other laws and regulations if restraints on competition or unfair competition are involved and the regulations are contradictory. The Law on Competition provides also for a priority of application with regard to international agreements in which Vietnam participates or which have been signed by Vietnam if the provisions of the Law on Competition are contradictory to international agreements.

Agreements restricting competition

Pursuant to the Law on Competition, the following agreements come within agreements restricting competition:

- direct or indirect price arrangements;
- arrangements on market or supplier allocation;
- arrangements on limitation of the production, purchasing or sales volume;
- arrangements on limitation of technical/technological development and investments;
- agreements to impose irrelevant obligations or conditions when concluding contracts;
- agreements hindering or preventing the market access for others;
- agreements excluding enterprises which are not parties to the arrangement from the market; and
- secret agreements in bidding procedures.

The last three enumerated agreements are strictly forbidden. On the other hand, the first five agreements are forbidden only if the parties to the agreement together come to a market share of at least 30%; however, exceptions of the prohibition may be made if certain criteria, such as cost reductions and other benefits for the consumers, are met.

Dominant market position and monopoly

It is assumed that an enterprise has a dominant market position if it has a market share of at least 30% or is able to impair competition to a considerable extent.

In case of a group of enterprises it is assumed that it has a dominant market position if the enterprises act together in order to restrict the competition and (i) come to (i) a market share of altogether 50% or more in case of two enterprises, (ii) 65% and more in case of three enterprises and (iii) 75% and more in case of four enterprises.

In case of one enterprise, it is assumed that it has monopoly position if it has no competition.

Prohibition of abuse of a dominant market position or a monopoly position

Enterprises with a dominant market position or a monopoly position are prohibited from the following practices:

- sale of goods or services at prices below overhead costs with the intention of excluding other competitors from the competition;
- imposing unreasonable purchase or sale prices for goods or services as well as fixing minimum sale prices which inflict losses to consumers;
- use of different business conditions on identical transactions in order to create unequal competition; and
- hindrance of market access for new competitors.

The abovementioned prohibitions apply also to enterprises operating in the sectors of state monopoly. Besides, these enterprises are forbidden from (i) imposing unfavorable conditions on consumers and (ii) using the monopoly position to unilateral alteration or cancellation of contracts without legitimate reason

“Economic concentration”

The Law on Competition includes also a concept of “economic concentration”. This term comprises mergers and acquisitions, consolidations, joint ventures and other forms of economic concentration. Mergers, consolidations, acquisitions and joint ventures are defined in the Law on Competition.

Economic concentration is prohibited if the common market share of participating enterprises amounts to more than 50% of the relevant market, however, several exceptions are possible. If the enterprises participating in an economic concentration have together between 30% and 50% of market share in the relevant market, the statutory representative of such enterprises has to report the intended economic concentration to the Competition Board before pursuing the plan.

Unfair competition

Pursuant to the Law on Competition, among other things the following practices constitute unfair competition:

- misleading statements;
- breach of business secrets of others;
- coercion to a specific management of business;
- disparagement of other enterprises;
- disruption of business activities of others;
- advertising measures for the purpose of unfair competition;
- bargain sales for the purpose of unfair competition;
- discriminating treatment by an association;
- forbidden multi-level sale; and
- other forbidden measures of unfair competition according to abovementioned criteria.

Furthermore, the Law on Competition elaborates what may constitute unfair competition according to abovementioned criteria.

Sanctions in case of violations of the Law on Competition

The sanctions for violations of the Law on Competition include warnings, fines in the amount up to 10% of the total annual revenue of the enterprise concerned as well as the possibility of withdrawal of business licenses.

Besides, the following countermeasures may be taken against the enterprise concerned:

- restructuring of the company abusing its dominant position;
- splitting or demerger of consolidated or merged enterprise or compulsory rescinded transaction of an enterprise acquisition;
- public revocation;
- exclusion of anticompetitive agreement from the contract or transaction concerned; and
- other measures necessary for the elimination of an anti-competitive act.

Furthermore, the Law on Competition contains several regulations with regard to investigation and treatment of competition cases by the Competition Board, the competition proceedings as well as the procedure on granting an exception to the abovementioned prohibitions.

SUMMARY AND PROSPECTS

The Asian crisis of 1997 initially curbed in Vietnam the economic boom and the progressing political opening of the previous 10 years. As a consequence thereof, the investment volume declined temporarily. However, it changed soon with the continuation of the reform policy and Vietnam became

a popular investment location again. In recent years, the required reforms on the way to a market-based economic system were increasingly implemented in order to meet the requirements for the WTO accession. On 11 January 2007, Vietnam officially became a member of the WTO. It is the crowning achievement of the reform policy so far which opens further investment opportunities above all for foreign investors and increases the security, thus the attractiveness of Vietnam as investment location. Nevertheless, the numerous challenges with which Vietnam is presently confronted have to be mentioned as well. So the still existing old structures of the socialist leadership constitute a barrier in the implementation of urgently needed reforms. The Vietnamese government will also have to rethink in order that Vietnam keeps up in the competition with other South Asian countries. Nevertheless, Vietnam has been showing for years consistently high economic growth rates of over 8%. If Vietnam maintains its reform course, it is well on the way to fully integrate into the global economy. Thus Vietnam offers interesting prospects also for German investors.

Should additional questions arise, I am available at all times. You can contact me as follows:

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