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VIET NAM

POLICY FRAMEWORK FOR INVESTMENT ASSESSMENT

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MINISTRY OF PLANNING AND INVESTMENT OF VIETNAM

OECD Investment Policy Reviews

OECD Investment Policy Reviews: Viet Nam 2009

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Foreword

This publication presents the results of the first Policy Framework for Investment assessment of Viet Nam. This assessment is the product of a joint collaborative effort between Viet Nam and the OECD. It particularly reflects contributions by an inter-agency team in the Vietnamese government under the leadership of the Ministry for Planning and Investment. The project was announced at the APEC High Level Policy Dialogue on the Policy Framework for Investment in Melbourne in April 2007 and presented at the OECD Global Forum on International Investment in Paris in March 2008. It benefited from the discussions at the Viet Nam-OECD public workshop and a Viet Nam donor meeting held in Hanoi on 4-5 March 2008, as well as comments from OECD Investment Committee members and the secretariats of the OECD Competition Committee and the Committee on Fiscal Affairs. The publication draws on the report prepared by William Witherell, acting as an external consultant on the project. The OECD lead manager for the project was Marie-France Houde, Senior Economist in the Investment Division headed by Pierre Poret, assisted by Ayse Bertrand, lead statistician, Neeraja Bhavaraju and Jack Faine, consultants. The original assessment is in Vietnamese and is considered as the official version. The Vietnamese authorities and the OECD are grateful for the support of the Australian Treasury, Aus AID and the Ministry of Foreign Affairs of Japan.

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Preface

In the last few years, Viet Nam has emerged as one of the world's leading destinations for foreign direct investment, fuelled by the country's accession to the WTO in 2006, a strong and stable growth rate and an ambitious reform program, which is very much welcomed by foreign investors.

To attract this vital capital to meet its development needs, Viet Nam has put in place an investment strategy conducive to sustained robust business-led growth and adaptation to evolving challenges. This strategy regularly reassesses the strengths and weaknesses of its investment environment with a view to adopting measures that reinforce the former and redress the latter, drawing on the good policies and practices of the international investment policy community.

The investment policy assessment of Viet Nam based on the *Policy Framework for Investment* constitutes a special effort by the Vietnamese government to revisit its investment strategy. It has been carried out in collaboration with a multi-line agency task force led by Ministry of Planning and Investment of Viet Nam with the assistance OECD experts. It also benefited from the critical eye of the Vietnamese business community.

On behalf of Ministry of Planning and Investment, I am very pleased with the foreign investment achievements, especially at this critical juncture of the implementation of the new Investment Law effective since 2006. I hope that the PFI assessment will pave the way for further OECD's support for Viet Nam to improve its legal and regulatory environment, better co-ordinate the work of the central and provincial authorities and make a more efficient and less wasteful use of its investment incentives.

It is also our wish that the co-operation between Viet Nam and the OECD continues to expand in the forthcoming future.

On behalf of the government of Viet Nam, I would like to express our great appreciation to each and every one of those who contributed to the realisation of this important project.

Vo Hong Phuc

Minister of Planning and Investment of Viet Nam

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Chapter 1

Key Findings and a Roadmap for Future Reforms

After more than two decades since the launch of the country's renovation strategy (1986 – 2009), Viet Nam has made an extensive effort to establish its legal framework and implement policies to mobilise investment from the private sector, including international investment, to stimulate economic growth and improve the standard of living of the Vietnamese people. Throughout this period, the Vietnamese economy has been transformed from a centrally planned model to a market-based one, featuring a dynamic private economic sector developing side by side with the state-owned sector for the good of the economy. Huge domestic economic resources have been unleashed. The economy has gone through important changes, both in quantity and quality. It has led to impressive growth of the private sector and to large inflows of foreign investment. Viet Nam is now seen as one of the most attractive destinations for foreign direct investment (FDI) FDI in the world, particularly for FDI from Asian and most developed countries as the figures for 2007-2008 clearly show.

Nevertheless, Viet Nam's economic reform process should be stepped up both in scale and depth. This PFI assessment has revealed that there are a number of further steps which could be taken if Viet Nam is to realise the great potential it has for continuing to attract large volumes of beneficial foreign direct investment in the coming years. There is a need to pursue market-based reforms and change the mindset and habits associated with the command and control economy.

The key findings and proposed course of action that developed in this comprehensive PFI assessment of Viet Nam are presented below.

1. Investment policies

The new Investment Law that was enacted in 2005 and the new Enterprise Law and Intellectual Property Act have unified rules relating to investment in Viet Nam by both local and foreign investors, have brought Viet Nam's investment regime in line with its WTO commitments, increased decentralisation at the provincial and institutional levels, drawn a clearer demarcation line between the role of the state and business and have given greater respect to investors' legitimate interests. In general, the investment and business environment in Viet Nam has been significantly improved as a result.

While the new Investment Law established non-discrimination as a general principle for the treatment of investors, there remain a number of

departures from this principle in other laws and regulations. Exclusion lists exist in sectors where local or international private investors are either prohibited or subject to conditions. There is also a list of conditional investment sectors applied only to foreign investors. Even though this negative list approach is the one followed by OECD countries and is generally welcomed, the exclusion lists remain quite extensive. The formalities that investors need to go through to acquire land use rights (without private ownership of land in accordance with existing Viet Nam constitution) are reported to be time consuming and in need of further improvement. The creation of the website *http://vietnam.investway.info* is a positive step to improve transparency.

There is evidence that the decentralisation of responsibilities to provincial investment management agencies and special economic zones has benefited investors by making the provincial authorities more accountable and responsive to business concerns as well as the needs of the local governments and communities. In fact, a substantial number of the major reforms on the path to becoming a market economy came from initiatives that emerged from actual experiences in the provinces and local businesses which were later adopted as national policies. There are concerns, however, that insufficient provision of guidance and training to local authorities, as well as differences between the new laws and the conditions attached to some existing financial and budgetary policies, may have been a source of inconsistency and inadequate enforcement of investment laws. Some questions have been raised regarding the appraisal process of large or sensitive projects requiring the National Assembly's approval. Investment guarantee provisions in the new Investment Law are generally up to international standards but have not been fully tested in practice. The Intellectual Property Rights Act of 2005 and related Decrees are based on international standards, but evidence suggests that enforcement has not been sufficiently strong.

In light of these findings, priorities for investment policy reform under consideration by different levels of Vietnamese Government are that they will:

- Continue to implement non-discriminatory treatment of foreign and domestic investors; guarantee early fulfilment of all WTO commitments regarding market entry in the service industry; accelerate the equitisation program of state-owned enterprises and provide for faster integration of foreign investors into this programme.
- Make the entry and approval procedures relating to domestic and foreign investors and their investment undertakings more transparent and readily accessible; further simplify the investment registration and certification procedures; provide description and explanation of existing procedures; consider changing to a simple registration system for foreign investment

verification of conformity with Vietnamese laws; and set clearer rules on areas where investment is prohibited or only allowed conditionally.

- Effectively communicate and co-ordinate between central and provincial governments with regard to the entry and approval process and provide more detailed explanations of their respective responsibilities and accountability duties.
- Clarify the roles of the National Assembly (the body which approves the laws) and the government (the law enforcement body) with respect to investment matters.
- Increase transparency in the real estate market in Viet Nam; increase the safety and marketability of land use rights; speed up and improve the performance of land planning and strengthen its management (including rezoning and reclaiming land being illegally or ineffectively used); simplify and warrant justice and equity rights, liabilities and administrative processes for getting access to public property for production and business use, with special focus on improving the ability of small and medium-sized enterprises (SMEs) to acquire land use rights and upgrade property used in production and business directly from government resources.
- Upgrade the capacity and enforcement of the Intellectual Property Act and provide adequate training to Vietnamese judges; develop justice supporting services and give more power to intellectual property enforcing agencies.
- Reinforce governance and provide political support for law drafting bodies, strengthen counseling and allow critical debate and assessment of the implication and competitiveness of existing and proposed legislation.
- Improve the transparency of legislation and regulation in order to decrease opportunities for corruption.
- Increase the capacity and independence of the judicial system.

2. Investment promotion and facilitation

Strategies for developing a secure and open business environment are written down in Viet Nam's socio-economic development plans. Investment promotion and facilitation measures play a catalytic role in these strategies. The Foreign Investment Agency (FIA) of the Ministry of Planning and Investment (MPI) functions as the central investment promotion agency in Viet Nam. Several provinces and centrally-attributed cities have also formed their own investment promotion offices (e.g. Hanoi). The Vietnamese authorities are aware that the bodies in charge of foreign direct investment do not always sufficiently co-operate or co-ordinate their activities. The new Investment Law has made some major adjustments on investment support and incentives, removing subsidies incompatible with Viet Nam's WTO commitments. Nevertheless, the Vietnamese investment promotion programme is complex. It

seeks to tap multiple direct investment flows and channel them toward a vast range of public policy targets. This has implications for cost effectiveness.

Respective to these findings, main priorities for investment promotion reform being considered by different levels of Vietnamese government include:

- Strengthening co-operation between provincial and central governments in investment promotion; providing sufficient funding for these activities and necessary training for the staff.
- Optimising and simplifying oriented investment incentives (including outbound investment); avoiding intervention in investment decision making of the private sector; removing arbitrary and inconsistent preferences at the provincial level.
- Evaluating on a regular basis the costs and benefits of incentive measures and ruling out those that fail to meet the cost – benefit evaluation requirements.
- Strengthening co-operation starting from the MPI Foreign Investment Agency; buttressing co-operation efforts to improve protocols and practices and providing information on business conditions and opportunities in Viet Nam and international business environments, for both Vietnamese and foreign investors.

3. Trade policies and investment

Viet Nam's accession to the World Trade Organisation in early 2007 was a turning point in the nation's transition to a market economy and has triggered major changes in its trade system. Investment opportunities have increased as a result. The government has pledged to fulfill all of its WTO commitments, including engaging in a multiple-phase opening up to the services industry, ensuring transparency and meeting its obligations under the Agreement on Trade-Related Investment Measures (TRIMS). Steps have been taken to improve customs procedures by simplifying them and increasing transparency, but there is more to be done as customs procedures in Viet Nam are still considered to be complicated, slow and sometimes, unpredictable.

In response to these findings, priorities for trade reform being considered by Viet Nam include:

- Maintaining the momentum of improving customs procedures in Viet Nam; broadening the use of the latest information technologies; regularly updating the data base used by the customs services.
- Communicating in clear terms to all levels of the government, the business community and the public the commitments and obligations of Viet Nam as a WTO member and the expected benefits from WTO membership.
- Implementing WTO commitments in an effective and timely manner; accelerating implementation whenever possible; promoting development

and modernisation of infrastructure; deliver quality business support services (financial, accounting, audit, legal services, etc.) in order to add value to both Viet Nam's investment climate and economic performance.

- Strengthening legislation and monitoring, supervision and sanctions of high effectiveness to prevent abuse, infringement and crimes in business competition; promoting healthy, sustainable and environment friendly investment.

4. Competition policies and investment

Viet Nam's new Competition Law, which was adopted in 2004 and started to take effect in 2005, draws upon the experiences and outcomes from many countries and international laws, and also incorporates some innovative features. Consideration is being given to strengthening the independence of the Competition Administrative Department, which is under the Ministry of Industry and Trade. The Law is applicable to all economic sectors without discrimination on the basis of ownership or scale and can play a vital role in harnessing investment potential for the country. The enforcement of the Law needs to stay in line with this principle. A drawback of the Competition Law is that it lacks specific enforcement regulations with respect to anti-competitive practices originating outside Viet Nam despite the fact that these may have adverse effects on competition in the domestic market.

Based on these findings, priorities for competition policy reform being considered by Viet Nam include:

- Enforcing the Competition Law fairly across all economic sectors in Viet Nam without prejudice to ownership.
- Seeking to mitigate and remove discrimination between state-owned and private businesses, as well as between local and foreign invested companies; promote transfer of ownership for state-owned businesses from the managing Ministries to the State Capital Investment Corporation.
- Ensuring the independence of the Viet Nam Competition Council in the performance of its mandate, including the appointment of non-government competition experts to work for the Competition Council.
- Amending the Competition Law to widen its coverage to anti-competitive practices stemming from abroad when these practices produce substantial adverse consequences on competition in the domestic market, and to include import and export cartels.

5. Tax policies

Viet Nam is taking steps towards installing a common, transparent and neutral tax system throughout all economic sectors, without prejudice to form of ownership, size of the business, nor the number of years in operation.

However, as in other countries in the region, there are differential tax burdens from sector to sector which are attributed to investment incentives schemes including preferential taxes. Viet Nam has a rather complex tax investment incentive programme with multiple goals and incentive levels. However, recent surveys show that tax exemptions or reductions have limited meaning to multinational enterprises. The key to investment attraction should be the creation of a favourable environment where the government plays a supporting role to the investors, rather than controlling or trying to find productive investment areas. The Vietnamese authorities are indeed aware of this.

In the light of these findings, priorities for tax reform being considered by Viet Nam include:

- Pressing ahead with a step-by-step reform of the tax system, including reduction of the complexity of the tax incentives system, an appraisal of the costs and benefits of investment incentives and the removal of lavish incentives.
- Improving and modernising tax administration and developing tax services to cut compliance costs for businesses.

A next step could involve developing answers to the relevant questions in the Policy Framework for Investment (PFI) and designing a roadmap for investment-related tax reform. This could be done in cooperation with the OECD Centre for Tax Policy and Administration (CTPA) using the detailed guidance on the PFI's Tax Chapter which CTPA has developed as a contribution to the PFI User's Toolkit.

6. Financial sector development for investment

Twenty years into reform, Viet Nam's banking system has experienced a major transformation in terms of scale, quality of services and organisational structure. Since the early 1990s, the banking system has been changed from a single-tier system with state-owned monopoly to a two-tier system that includes a growing number of joint banks, joint venture banks and branches of foreign banks. The State Bank plays the role of a central bank. It is the sole legal tender issuing institution as well as the governing agency for monetary and bank credit operations. The banking system has also been restructured in order to cope with systemic failures. The restructuring agenda has focused on upgrading the financial capacity of the banking system, particularly with respect to state-owned commercial banks.

Five state-owned commercial banks continue to account for a dominant share of the market. The equitisation of these banks began in 2007 (with two large banks, Viet Nam Bank for Foreign Trade and Viet Nam Bank for Industry and Trade, having been equitised to date) and is expected to continue with due regard to the socio-economic stability and the stability of the financial sector.

Over time, the government intends to keep a controlling share in a very limited number of the equitised commercial banks. Foreign banks with financial depth, technology and knowhow, managerial strength and sound reputation have been permitted to buy shares and to be involved in the management and operation of local commercial banks. Viet Nam's WTO commitments envisaged a phased-out liberalisation of these markets. Two 100% foreign owned banks, HSBC and Standard Chartered, were licensed in September 2008. A small (and growing) portion of the population has started to use banking services on a regular basis. Commercial loans are strained by the lack of credit. This situation is expected to improve with the establishment of private credit information desks, the first of which was created in 2007. A new law on securities was adopted in 2006, drawing on OECD best practices (except for a provision placing a cap on foreign shares in some state-owned businesses at 49% in a shrinking number of sectors). Market watch and enforcement still need to be strengthened.

In response to the above findings, priorities for financial market development in Viet Nam will concentrate on:

- Pushing forward with the implementation of the May 2006 roadmap for financial market reform, including renovation and modernisation of the State Bank of Viet Nam, strengthening the capacity and performance of commercial banks and developing the capital market.
- Continuing the equitisation process of state-owned commercial banks and creating more opportunities for foreign banks to make a full entry in the process; ensuring a timely implementation of WTO market access commitments in the financial sector while keeping, at a minimum, regulatory limitations on entry to the Viet Nam's financial market by foreign financial institutions.
- Improving the availability of financial and credit information by private financial and credit information providers and putting in place the necessary legal framework for these services.

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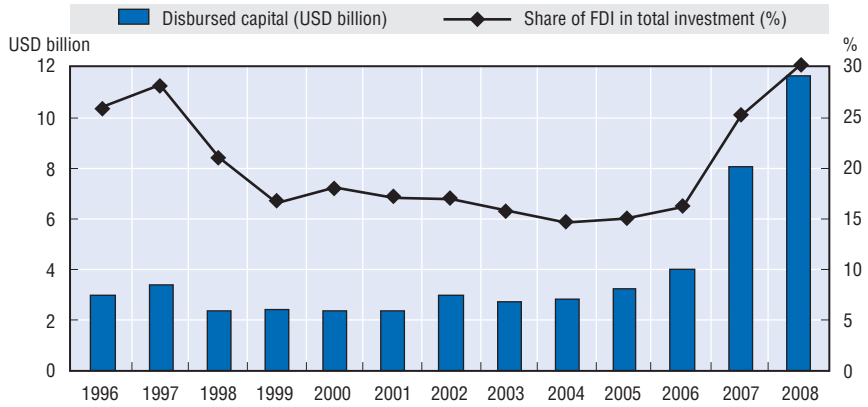
Chapter 2

Viet Nam's Evolving Position in the Global Economy

1. Trends in investment patterns

In 1987, early in the process of transition to a more market-oriented economy, the Vietnamese National Assembly adopted the Law on Foreign Investment. Follow-up steps have been taken in the past two decades to encourage, protect and improve the quality of foreign investment. Such efforts resulted in strong investment flows in the mid-1990s (see Figure 2.1). Due to the Asian financial crisis, net foreign investment inflows dropped significantly in 1997, but began to grow again in 2001. Since 2006, there has been a major increase in the level of FDI in Viet Nam. Disbursed FDI in 2007 totalled USD 8 billion, and estimates from Viet Nam's Foreign Investment Agency show that disbursements totaled USD 11.5 billion in 2008. Foreign direct investment as a percentage of total investment has increased also recently reached and exceeded the pre-Asian financial crisis levels, as FDI accounted for 30% of total investment in Viet Nam in 2008. Registered FDI in Viet Nam in 2008 totaled USD 71.7 billion.

Figure 2.1. **Trends in FDI Inflows in Viet Nam**



Source: Foreign Investment Agency – Ministry of Planning and Investment.

In recent years, Viet Nam's strong and stable growth rate, roughly 7% or 8% per annum since 2003, along with its improved investment environment have drawn considerable interest from major international companies. Increasingly, international firms see Viet Nam as a location for production to supply global markets and investment in Viet Nam as a way to diversify their

supply chains, which have thus far been highly concentrated in China. As of December 2008, Viet Nam has attracted over 10,100 active FDI projects nationwide with approximately USD 159.7 billion capital committed (both foreign and domestic). Most of the investment capital flow (53.8% of the total committed capital and 64.8% of projects) went to the manufacturing sector. The real estate sector accounted for 20.3% of the total invested capital and 2.8% of the number of projects.

Tables 2.1a, 2.1b, 2.1c and 2.1d present detailed data on foreign direct investment in Viet Nam. According to this data, Viet Nam recorded over USD 71.7 billion of committed FDI in 2008, including new registration and expansion of existing projects. This growth has been driven by a globally diverse pool of investors (see Table 2.1a). Investment commitments from

Table 2.1a. **New investments in 2008 – Top 20 source countries**
By investing country and region
Based on the investment certificates issued during 1/1/2008 and 31/12/2008

	Country and Region	Total Investment (USD million)	Greenfield registered capital (USD million)	No. of greenfield projects	Registered expansion capital of existing project (USD million)	No. of expanded projects
1	Malaysia	15 112	15 074	68	38	15
2	Chinese Taipei	9 171	8 879	187	292	82
3	Japan	8 036	7 654	147	382	46
4	Singapore	5 418	5 245	123	173	18
5	Korea	4 908	4 020	361	889	81
6	Brunei	4 444	4 426	30	18	4
7	British Virgin Islands	4 385	4 215	68	170	29
8	Canada	4 253	4 253	13		
9	Thailand	4 020	3 933	33	87	12
10	Cayman Islands	2 915	289	11	2 626	4
11	Cyprus	2 208	2 207	4	2	1
12	United States	1 948	1 914	79	35	16
13	Hong Kong, China	755	678	69	77	19
14	China	735	573	96	162	16
15	Switzerland	708	707	13	1	4
16	France	660	633	47	28	10
17	United Kingdom	585	584	18	2	2
18	Samoa	258	227	22	31	4
19	The Netherlands	232	218	21	14	4
20	Australia	222	196	36	26	7
	Other	753	577	111	176	23
	Total	**71 725**	**66 499**	**1 557**	**5 225**	**397**
	Memo item: Disbursements	**11 500**	**–**	**–**	**–**	**–**

Source: Foreign Investment Agency – Ministry of Planning and Investment.

Table 2.1b. **Foreign Direct Investment in Viet Nam, 1988-2008**
By investing country and region
On-going projects as of 31 December 2008

	Country and Region	Total Registered Capital (USD million)	Amount of charter capital* (USD million)	Total number of projects
	OECD Member Countries			
1	Korea	18 952	6 499	2 114
2	Japan	17 457	5 040	1 078
3	United States	8 528	2 133	452
4	Canada	4 764	1 003	77
5	France	2 932	1 490	240
6	The Netherlands	2 798	1 563	110
7	United Kingdom	2 107	1 278	111
8	Switzerland	1 432	1 011	62
9	Australia	1 172	507	204
10	Luxembourg	800	725	15
11	Germany	666	346	125
12	Denmark	435	205	67
13	Italy	110	36	29
14	Belgium	78	36	32
15	New Zealand	73	52	18
16	Turkey	70	24	8
17	Sweden	66	20	20
18	Norway	64	28	18
19	Czech Republic	50	26	14
20	Hungary	42	7	6
21	Finland	33	11	5
22	Austria	28	6	13
23	Spain	10	6	9
24	Ireland	4	2	4
25	Mexico	0	0	1
	Total OECD	62 672	22 052	4 832
	Non-OECD Member Countries			
1	Chinese Taipei	19 945.89	7 952.31	1 981
2	Malaysia	17 897.36	3 824.30	311
3	Singapore	16 531.92	5 271.97	674
4	British Virgin Islands	12 085.26	4 069.21	423
5	Hong kong, China	6 876.21	2 541.18	524
6	Thailand	5 675.72	2 400.67	198
7	Brunei	4 663.78	935.97	79
8	Cayman Islands	4 611.30	824.19	41
9	China	2 547.06	1 194.51	633
10	Cyprus	2 209.07	751.68	6
11	Samoa	926.56	364.58	77
12	British West Indies	511.23	146.94	6
13	Russian Federation	427.56	238.41	63

Table 2.1b. **Foreign Direct Investment in Viet Nam, 1988-2008** *(cont.)*
By investing country and region
On-going projects as of 31 December 2008

	Country and Region	Total Registered Capital (USD million)	Amount of charter capital* (USD million)	Total number of projects
14	Philippines	294.66	146.16	40
15	Mauritius	215.80	147.76	32
16	Bermuda	211.57	128.45	5
17	India	200.09	123.50	31
18	Indonesia	187.54	93.41	21
19	Cook Islands	142.00	22.57	3
20	Channel Islands	113.68	40.66	14
21	UAE	112.00	20.84	1
22	Bahamas	108.35	22.65	3
23	Poland	98.42	41.26	7
24	Barbados	68.14	32.19	2
25	Lao PDR	48.05	30.31	8
26	Belize	48.00	23.96	7
27	Saint Kitts and Nevis	39.69	12.63	2
28	Liechtenstein	35.50	10.82	2
29	Isle of Man	35.00	5.20	1
30	Macao	30.70	25.60	7
31	Iraq	27.10	27.10	2
32	Ukraine	22.95	12.05	7
33	Panama	18.00	7.19	7
34	Costa Rica	16.45	16.45	1
35	Saint Vincent	16.00	1.45	1
36	Bulgaria	14.41	12.67	5
37	Sri Lanka	13.01	6.56	4
38	Israel	11.68	5.79	8
39	Dominican Republic	11.00	3.40	2
40	St Vincent and The Grenadines	9.00	3.20	2
41	Cuba	6.60	2.20	1
42	Cambodia	6.25	4.44	7
43	Island of Nevis	6.00	1.00	1
44	Turks and Caicos Islands	3.10	1.40	2
45	Brazil	2.60	1.20	1
46	Slovenia	2.00	1.00	1
47	Guatemala	1.87	0.89	1
48	Serbia	1.58	1.00	1
49	Guinea Bissau	1.19	0.53	1
50	Pakistan	1.10	0.40	2
51	Syria	1.05	0.43	3
52	Guam	0.50	0.50	1
53	Bangladesh	0.20	0.10	1
54	DPR of Korea	0.20	0.20	2
55	Argentina	0.12	0.12	1

Table 2.1b. **Foreign Direct Investment in Viet Nam, 1988-2008** *(cont.)*
By investing country and region
On-going projects as of 31 December 2008

	Country and Region	Total Registered Capital (USD million)	Amount of charter capital* (USD million)	Total number of projects
56	Lebanon	0.11	0.06	2
57	West Indies	0.10	0.05	1
58	South Africa	0.08	0.08	2
59	Rumania	0.04	0.04	1
	Total Non-OECD	**97 092.40**	**31 555.39**	**5 273.00**
	Total	**159 764**	**53 607**	**10 105**

* Charter capital is defined as the amount contributed or committed to contribute by all shareholders or members of a company respectively and is stated in the company charter.

Source: Foreign Investment Agency – Ministry of Planning and Investment.

Table 2.1c. **Foreign Direct Investment in Viet Nam, 1988-2008**
By Economic sector
On-going projects as of 31 December, 2008

No	Economic Sector	No. of projects	Registered capital (USD million)	Charter capital (USD million)
1	Manufacturing and Processing Industry	6 550	85 981	28 449
2	Real estate business	278	32 421	8 696
3	Hotels and restaurants	229	10 259	2 215
4	Construction	413	8 731	3 176
5	Information and Communications	489	4 565	2 858
6	Art and Recreation	110	3 456	1 042
7	Agriculture, Forestry and Aquaculture	468	2 920	1 432
8	Mining	60	2 682	1 999
9	Transport and storage	260	2 121	793
10	Electricity, gas and water supply	37	2 071	647
11	Finance, Banking and Insurance	70	1 182	1 084
12	Heathcare and social work	60	949	233
13	Wholesale, retail trade and reparation services	181	898	423
14	Other services	46	591	124
15	Scientific activities and technology	637	480	228
16	Education and training	119	240	97
17	Administration and supporting service	86	177	81
18	Water supply, waste processing	12	41	30
	Total	**10 105**	**159 764**	**53 607**

1. Charter capital is defined as the amount contributed or committed to contribute by all shareholders or members of a company respectively and is stated in the company charter.

Source: Foreign Investment Agency – Ministry of Planning and Investment.

Table 2.1d. **Foreign Direct Investment in Viet Nam, 1988-2008**
By province, top 10 receivincing provinces
USD million

Province	Total Investment	Number of Projects
Ho Chi Minh City	26 074	2 874
Ba Ria – Vung Tau	20 687	198
Ha Noi	18 865	1 349
Dong Nai	14 016	1 012
Binh Duong	10 879	1 856
Ninh Thuan	9 968	20
Ha Ti nh	7 920	9
Thanh Hoa	6 996	33
Phu Yen	6 378	47
Hai Phong	4 255	294
Other	33 727	2 413
Total	**159 764**	**10 105**

Source: Foreign Investment Agency – Ministry of Planning and Investment.

Malaysia into Viet Nam, for example, jumped from USD 1.2 billion in 2007 to over USD 15 billion in 2008, while investment commitments originating in Canada grew from USD 100 million in 2007 to USD 4.2 billion in 2008. The top five countries and territories investing in Viet Nam in 2008 were Malaysia, Chinese Taipei, Japan, Singapore and Republic of Korea. A more detailed analysis of the investment patterns of North American and European firms suggest that many of these firms could have made their investment through third-party countries such as Singapore, the British Virgin Islands and Hong Kong, China.

As shown in Table 2.1b, between 1988 -2008, investors from 25 out of the OECD's 30 member states made direct investments in Viet Nam from their home countries and together accounted for over 39% of the total investment capital over that period. The member countries at the top of the OECD investment list were Korea, Japan, United States, Canada, France, The Netherlands, United Kingdom, Switzerland and Australia. Firms from Chinese Taipei were among the first to invest in Viet Nam, mainly in garment manufacturing, but recently Chinese Taipei firms have invested in more advanced technology sectors. Indeed, Chinese Taipei is now the largest foreign investor in Viet Nam, with a total of USD 19.9 billion accumulated investment spread through 1,981 projects (See Table 2.1b). Closely following are Korea Republic, with USD 18.9 billion in investments, and Malaysia, with USD 17.9 billion. These three FDI sources along with Japan and Singapore account for 57% of registered FDI through 2008. The European Union accounted for only 9% and North America just over 8%.

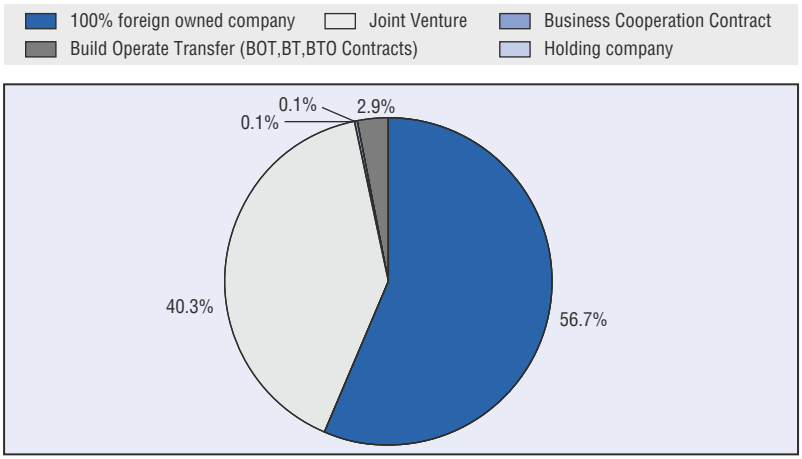
The sector-based composition of foreign direct investment capital from 1988 – 2008 is presented in Table 2.1c. It shows that the manufacturing and processing industry accounted for 54% of total FDI, real estate for 20%, and all other remaining industries for 26%. Finance and banking services accounted for only 1%,while agriculture and forestry accounted for 2%, and information and communications for 3%. It is evident that manufacturing is the largest beneficiary of foreign investment. The technology content of these investments has advanced considerably over the past two decades. Investment in the service sector is comparatively lower than in many other developing countries. This, particularly low investment in the telecommunications industry, can be largely attributed to more restrictive foreign access to some parts of the service sector. Many of these restrictions are scheduled for removal or reduction under Viet Nam's commitments as a new Member of the World Trade Organisation (WTO). Telecommunications, for example, will be partially liberalised, but with a 49% cap on foreign ownership of networks and at least 51% state-owned shares.

Where the geographic sources of foreign investment in Viet Nam have been diverse, the investments themselves have taken two major forms: 57% have been made by 100% foreign-owned companies and 40% have been made through joint-ventures. Less than 5% of investments have been made using other forms (see Figure 2.2a).

Figure 2.2a. **Foreign Direct Investment in Viet Nam, 1988-2008**

By form of investment

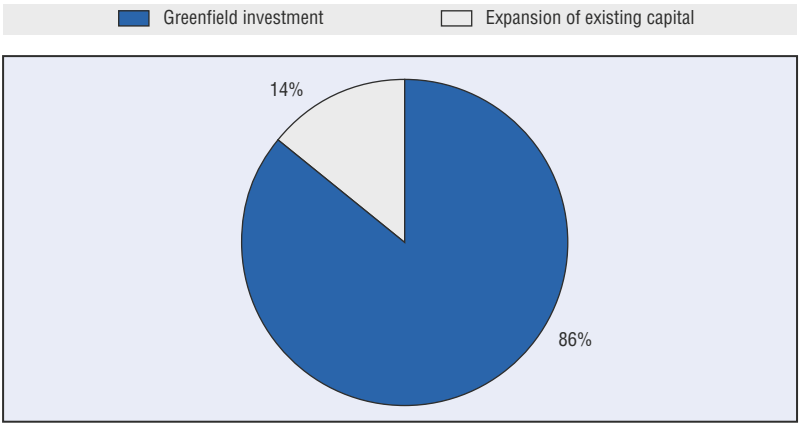
Based on the investment certificates issued during 1/1/2008 and 31/12/2008



Source: Foreign Investment Agency – Ministry of Planning and Investment.

In addition, the vast majority of FDI over the past two decades has been greenfield investment (see Figure 2.2b), with 14% of FDI being used to expand existing capital projects.

Figure 2.2b. **Foreign Direct Investment in Viet Nam, 1988-2008**
By form of investment USD million



Source: Foreign Investment Agency – Ministry of Planning and Investment.

A large share of Viet Nam's FDI inflows has been geographically concentrated around the urban areas of Hanoi and Ho Chi Minh City. However, each of the 64 provinces in the country has hosted at least one FDI project, and several provinces along the Vietnamese coast appear among the top 10 provinces for receiving FDI projects (see Table 2.1d). These ten provinces have attracted 79% of all FDI from 1988 – 2008.

2. Investment agreements

Soon after opening its doors to foreign investment, Viet Nam embarked on negotiations to engage in bilateral and, later, multilateral agreements on investment encouragement and protection. By March 2009, Viet Nam had entered into 55 such agreements, of which 21 were with OECD member countries.

The most recent investment-related agreements with OECD member countries include those with Iceland, Japan, Korea, Spain and the United Kingdom. In addition, the US-Viet Nam Bilateral Trade Agreement signed in 2001 contains a pivotal section, Chapter IV "Development of Investment Relations". The main provisions of this Chapter provide a good measure for the high standards of investment liberalisation and protection commitments that Viet Nam is today able to undertake. They can be summarised as follows:

- A broad, asset-based definition of investment (Article 1)
- In standard language, National Treatment and Most-favoured-nation Treatment are described as "… treatment no less favourable than that it accords, in like situations, to investments in its territory of its own nationals or companies (hereinafter 'national treatment') or to investments in its

Table 2.2. **Viet Nam's Agreements on Investment Encouragement and Protection**

Partner	Date of signing	Date of entry into force
Algeria	Oct. 21, 1996	…
Argentina	June 03, 1996	1-Jun-97
Armenia	Feb. 01, 1993	28-Apr-93
Australia	Mar. 05, 1991	11-Sep-91
Austria	Mar. 27, 1995	1-Oct-96
Bangladesh	May 01, 2005	…
Belarus	July 08, 1992	24-Nov-94
Belgium and Luxembourg	Jan. 24, 1991	11-Jun-99
Bulgaria	Sep. 19, 1996	15-May-98
Cambodia	Sep. 01, 2001	…
Chile	Sep. 16, 1999	…
People's Republic of China	Dec. 02, 1992	1-Sep-93
Cuba	Oct. 12, 1995	1-Oct-96
Czech Republic	Nov. 25, 1997	9-Jul-98
Denmark	Jul. 23, 1993	7-Aug-94
Egypt	Sep. 06, 1997	4-Mar-2002
Finland	Sep. 13, 1993	2-May-96
France	26-May-92	10-Aug-94
Germany	3-Apr-93	19-Sep-98
Greece	13-Oct-2008	…
Hungary	26-Aug-94	16-Jun-95
Iceland	20-Sep-2002	10-Jul-2003
India	8-Mar-97	1-Dec-99
Indonesia	25-Oct-91	3-Apr-94
Italy	18-May-90	6-May-94
Japan	14-Nov-2003	19-Dec-2004
North Korea	2-May-2002	…
Korea	15-Sep-2003	5-Jun-2004
Kuwait	23-May-2007	…
Lao People's Democratic Republic	14-Jan-96	23-Jun-96
Latvia	6-Nov-95	20-Feb-96
Lithuania	27-Sep-95	24-Apr-03
Malaysia	21-Jan-92	9-Oct-92
Mongolia	17-Apr-2000	13-Dec-2001
Mozambique	16-Jan-2007	…
Myanmar	15-Feb-2000	…
Namibia	30-May-2003	…
Netherlands	10-Mar-94	1-Feb-95
Philippines	27-Feb-92	29-Jan-93
Poland	31-Aug-94	24-Nov-94
Quatar	8-March-2009	…
Romania	15-Sep-94	16-Aug-95
Russian Federation	16-Jun-94	3-Jul-96
Singapore	29-Oct-92	25-Dec-92
Spain	20-Feb-2006	…
Sweden	8-Sep-93	2-Aug-94
Switzerland	3-Jul-92	3-Dec-92

Table 2.2. **Viet Nam's Agreements on Investment Encouragement and Protection** *(cont.)*

Partner	Date of signing	Date of entry into force
Chinese Taipei	21-Apr-93	23-Apr-93
Tajikistan	19-Jan-99	…
Thailand	30-Oct-91	7-Feb-92
Ukraine	8-Jun-94	8-Dec-94
United Arab Emirates	16-Feb 2009	…
United Kingdom	1-Aug-2002	…
Uzbekistan	28-Mar-96	6-Mar-98
Venezuela	20-Nov-2008	…

Source: Foreign Investment Agency, Ministry of Planning and Investment.

territory of nationals or companies of a third country (hereinafter 'most-favoured-nation treatment'), whichever is most favourable …" (Article 2.1). This is another specific provision that requires state-owned enterprises providing goods or services to conform to investment-related national and most-favoured-nation treatment specified rules.

- There is a provision in Article 2.2 on exceptions of the treatment defined in Article 2.1 and Annex H concretises these exceptions. For example, in case of price and fee of some goods and services under state control, paragraph 4.3 of this annex provides a schedule for eliminating such discrimination over a length of time starting from the effective date (e.g. in water supply) up to four years in case all of those goods and services could not be elaborated in shorter periods in order to remove discrimination over time. The General Provision on standard of treatment reads "fair and equitable treatment and full protection and security, and shall in no case accord treatment less favourable than that required by applicable rules of customary international law" (Article 3).
- No expropriation or nationalisation of investments, either direct or indirect, is permitted "except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article 3" (Article 10). The standard of compensation is the "Hull formula".[1] The article provides further clarification as to the fair market value based on which to define compensation and the importance of prompt execution ("freely transferable at the prevailing market rate of exchange on the date of expropriation"). In addition, there are also provisions on compensation to damages incurred owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or similar events.
- The issue of free transfer of funds associated with investment (such as contributions to capital, profits, dividends, capital gains, proceeds from the

sale of investments, interest, royalty payments, management fees, repayment of loans, etc.) is addressed in Chapter VII of the Agreement. Article 1 of this Chapter specifies that such transfers shall be granted "the better of national or most-favoured-nation treatment".

- There are also separate Chapters on Business Facilitation (Chapter V) and on Transparency-Related Provisions and the Right to Appeal (Chapter VI).
- The dispute settlement provision (Article 4) first encourages the parties to the dispute to settle the discrepancies through consultation and amicable negotiation. Should these fail, an array of listed alternatives will take over, including binding international arbitration (90 days after the dispute occurs), by filing an appeal to the International Centre for Settlement of Investment Disputes (ICSID) and to the Additional Facility of ICSID, in accordance with the UNCITRAL Arbitration Rules, or, if agreed by both parties, to any other arbitral institution or in accordance with any other arbitration rules.
- Regulations on trade–related investment measures (TRIMs) call for conforming to TRIMs standards of the WTO Agreement, which give Viet Nam a timeline of five years to remove trade-related investment measures that are incompatible with the WTO Agreement (Article 11).
- Both parties agree to endeavour to negotiate a bilateral investment treaty in good faith within a reasonable amount of time (Article 13).
- Both parties have included in the lists exceptions to the treatment-related provisions (Article 14 for the United States and Annex H for Viet Nam).

3. Viet Nam and ASEAN

The Association of Southeast Asian Nations (ASEAN), founded in 1967, has the purpose of accelerating economic growth and promoting peace and stability in the region. An important step toward integrating ASEAN member countries into a regional market was taken in January 1992 with the declaration of the establishment of ASEAN Free Trade Area (AFTA) with six original members – Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand. Viet Nam joined AFTA in 1995. The goals of lifting tariff and non-tariff barriers are still being pursued through the Agreement on Common Effective Preferential Tariff (CEPT), under which Viet Nam vowed to bring its CEPT to below 5% by 2006. AFTA also has a wide range of trade promotion measures. Viet Nam is also a signatory of the ASEAN Agreement for Promotion and Protection of Investment (1987), the ASEAN Framework Agreement on Services (1995), and the Framework Agreement on the ASEAN Investment Area (1998) and has been an active participant in the recently concluded new ASEAN Comprehensive Investment Agreement (ACIA). The ACIA was signed by ASEAN member states in February 2009. In addition,

negotiations for agreements between ASEAN and third party countries (Japan, Korea, China, India, etc) are being carried out. These agreements when concluded will offer more chances for trade and investment. Viet Nam has been a strong supporter and generator of ideas for dialogue and partnerships in favour of the expansion of ASEAN.

4. Viet Nam in WTO

In late 1986, Viet Nam kick-started its process of renovation for a transition of the economy from a centrally planned version to a market economy with series of reforms. Viet Nam became the 150th member of the World Trade Organisation (WTO) on 11 January 2007. This was the result of eleven years of preparation, including eight years of negotiations. Anchoring domestic reforms to the requirements of WTO membership has created a uniform basis for important advances in many areas of the national economy. As is discussed extensively in this assessment, the foreign direct investment climate has benefited significantly from this still continuing reform process. In addition to Viet Nam's extensive lists of commitments on goods (tariffs, quotas and ceilings on agricultural subsidies) and commitments on services (Viet Nam has committed to the scheduled liberalisation of 11 out of 12 services categories), Viet Nam has also committed to implement such WTO agreements as TRIPS (intellectual property), TRIMS (investment measures), CVA (Customs Valuation Agreement), TBT (technical barriers to trade), SPS (sanitary and phytosanitary measures), ILP (import licensing provisions), A/D & C/V (anti-dumping), and ROO (rules of origin). The full texts of Viet Nam's commitments and related documents can be found on the WTO website *www.wto.org*.

Notes

1. The so-called "Hull formula" is to provide "*prompt, adequate and effective compensation*".

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Chapter 3

Viet Nam's Policy Framework for Investment

This section evaluates Viet Nam's reform efforts and provides an anatomy of the regulatory framework for investment based on the general matrix of the Policy Framework for Investment (PFI) (see Box 3.1).[1] This assessment, as a co-operative endeavour, builds upon Viet Nam's self-evaluation under the PFI. It focuses on the first four chapters and part of Chapters 9 of the PFI relating to investment policies, investment promotion and facilitation, trade policies, competition policies, tax policies and development of the service sector.

Box 3.1. **The Policy Framework for Investment**

The Policy Framework for Investment (PFI) was developed to help governments "mobilise private investment that supports steady economic growth and sustainable development, and thus contribute to the prosperity of countries and their citizens and the fight against poverty" (PFI Preamble). Inspired by the 2002 United Nations Monterrey Consensus on Financing for Development, which ascribes to governments the responsibility for creating the right conditions for private investment to flourish, the PFI aims to support development and the fight against poverty and to promote responsible participation of all governments in the global economy.

The PFI represents the most comprehensive multilateral support approach to date for optimising investment conditions. It addresses 82 questions to governments in 10 policy domains to help them design and implement good policy practices for attracting and maximising the benefits of investment. The PFI is developed based on the common values of rule of law, transparency, non-discrimination, protection of property rights in tandem with other human rights, public and corporate sector harmony and international co-operation.

Any interested governments were welcome to participate in making of the PFI, and about 60 OECD and non-OECD governments joined the process. The business community, working class, the people and other international organisations such as the World Bank also played an active role as dialogues and public consultations were organised around the world.

The PFI was endorsed by OECD ministers in 2006, when they called on the OECD block to continue to work with non-member governments and other inter-governmental organisations to promote its active use. Egypt was the first country to undertake a PFI-based self-assessment and has since become the 10th non-member country to adhere to OECD's Declaration on International Investment and Multinational Enterprises.

1. Investment policy

The first chapter of the PFI addresses the extent to which investment policy and the relevant regulatory and legal framework contribute to an environment that is attractive to investors and that enhances the benefits of investment for society. Core investment policy principles include transparency and predictability, property rights protection, contract enforcement and non-discrimination. Attracting investment requires a consistent, predictable system of laws, regulations and administrative practices. And to reassure all market participants that business operates on a level playing field, investment laws and regulations and their enforcement should be codified, written in plain language and clear to all.

PFI Question 1.1. What steps has the government taken to ensure that the laws and regulations dealing with investments and investors, including small and medium sized enterprises (SMEs), and their implementation and enforcement are clear, transparent, readily accessible and do not impose unnecessary burdens?

1.1. The new Investment Law

On July 1, 2006, a new Investment Law came into force in Viet Nam together with a new Enterprise Law and Intellectual Property Rights Act. The Investment Law is aimed at mobilising different services of financing for development, enabling free entry into the investment market and creating a level playing field for both domestic and foreign investors. It allows investors to do business without restrictions in a wider range of economic sectors than before. The Investment Law provides that only the Government has the jurisdiction to decide and publicly announce sectors or activities subject to investment prohibition or restriction. Ministries and local governments are not allowed to do this or hinder investors' lawful activities. Meanwhile, to ensure enforcement and effectiveness of the law, the government has put together special units on inter-ministerial task forces and given designated agents more responsibility and power to oversee and propose corrective action for power abuse that is damaging the business environment and investors' legitimate interests.

In the past, foreign and domestic investments were subject to two separate laws, the Law on Foreign Investment and the Law on Domestic Investment Facilitation. As part of Viet Nam's efforts to meet the criteria for accession to WTO and the non-discrimination principle in accordance with international practice, the new Investment Law seeks to unify rules relating to investment in Viet Nam by making itself applicable to both

foreign and domestic investors. Adoption of the Investment Law was considered to be a condition of ensuring that business and investment laws were aligned with key WTO Agreements, including TRIPS (intellectual property), TRIMS (investment measures), GATS (services), SCM (subsidies and countervailing measures) and ITA (information technology). For the implementation of the Investment Law, the Government has issued a number of other pieces of legislation such as Decree No. 108/2006/ND-CP of September 22, 2006. Key provisions of the Investment Law are summarised in Box 3.2.

Box 3.2. **The Viet Nam Investment Law, 2006 – Key Provisions**

The Investment Law and its implementing legislations identify five prohibited sectors applicable to investors, nine conditional investment areas applicable to all investors and fourteen conditional investment areas applicable only to foreign investors. The conditions may include certain requirements for company establishment, project coverage, ownership pattern, both in and outside the country of a project and forms of permitted legal entities. Foreign investors may conduct unlimited investments in sectors other than the prohibited and conditional zones. Under Article 4.1, investors are permitted to engage in any sectors and locations not forbidden by the law. This follows the "Negative List" approach which is strongly recommended by OECD.

The Investment Law provides a list of forbidden and conditional sectors or types of investment projects.

Under Article 30, four categories of sectors are prohibited for all investors, including:

1. Projects that may be detrimental to national defence, security and the public interest;
2. Projects that may be detrimental to historic relics, culture, ethics, good customs and practices in Viet Nam;
3. Projects that may be detrimental to people's health or destructive to natural resources and the environment;
4. Projects involving treatment of toxic waste imported in Viet Nam, manufacture of toxic chemicals or use of toxic agents prohibited by international treaties.

The Conditional List for all investors (domestic and foreign) under Article 29 of the Investment Law includes the following sectors:

1. Sectors having effects on national defence, security and social order;
2. Finance and banking;

Box 3.2. **The Viet Nam Investment Law, 2006 – Key Provisions** *(cont.)*

3. Sectors impacting community health;
4. Culture, information, press and publishing;
5. Entertainment services;
6. Real estate;
7. Survey, search, exploring and exploitation of natural resources; ecological environment;
8. Education and training development;
9. Other sectors as specified by the law

Article 29.2 states that in addition to the sectors specified in Clause 1 of Article 1 (hereinafter called "Conditional List"), "In respect of foreign investors, apart from sectors specified in Clause 1 of this Article, the sectors in which investment is subject to conditions shall comprise investment areas attributed to a roadmap for realisation of international commitments defined in international treaties which the Socialist Republic of Viet Nam is a member of". Foreign investors may, therefore, be subject to other conditions provided for in relevant international commitments. Decree No. 108/2006/ND-CP contains a "Conditional List" applicable only to foreign investors. The list consists of the following fourteen categories of sectors in which foreign investment will only licensed under special conditions:

1. Radio and television broadcasting;
2. Production, publishing and distribution of cultural products;
3. Mining and processing of minerals;
4. Infrastructure development for telecommunication networks, transmission, provision of telecommunication and internet services;
5. Development of public post networks; provision of post and delivery services;
6. Construction and operation of river and sea ports, airports, airfields;
7. Transportation of goods and passengers by railroad, air, road, sea routes and inland waterways;
8. Sea fishing;
9. Production of tobacco;
10. Real estate;
11. Import, export and distribution;
12. Education and training;
13. Hospitals and clinics; and
14. Other investment areas included in international treaties of which Viet Nam is a member, committing limited opening doors to foreign investors.

Box 3.2. **The Viet Nam Investment Law, 2006 – Key Provisions** *(cont.)*

Article 29.4 defines that foreign investors investing in companies in which local investors are holding more than 51 per cent of the charter capital (that is, the foreign investors are minority share holders) will be subject to the same investment conditions as domestic counterparts. Capital contributions, share purchase, merger and acquisition in Viet Nam are restricted in a number of areas in accordance with the country's commitments with WTO and in other international agreements. Apart from these restrictions, foreign investors can buy without limit shares from Vietnamese investors.

Article 31.1 states that the government may amend the Prohibited List and Conditional List from time to time based on the "Master plan and strategies for socio-economic development in specific periods" and outcomes of international treaty undertakings. Article 29.3 specifies that in case an enterprise with foreign owned capital already invested in an originally unconditional investment sector which later turns conditional, "the investor shall be eligible to continue investment in such area".

In addition, the Investment Law also provides investors with an abundant degree of autonomy, including the right to transfer of capital and projects or independence in managing their own business. For instance, in hiring workers, managers, use of land and resources and access to credits, there is no discrimination between domestic and foreign investors. Furthermore, the Investment Law also provides more types of investments than ever before. Foreign investors now can choose to set up limited liability companies, partnerships or joint stock companies. Similarly, the Investment Law defines a broader range of investment approaches. Article 21 states that direct investment can be made in the following manners:

1. Establishment of wholly domestic- or foreign-owned companies;
2. Establishment of joint venture business institutions between local and foreign investors;
3. Investment in the form of business co-operation contracts (BCC), build-operate-transfer (BOT) contracts, build-transfer-operate (BTO) contracts and build transfer (BT) contracts;
4. Investment in business development;
5. Purchasing shares or contributing capital to join the management of investment activities;
6. Investment in mergers and acquisitions; and
7. Other forms of direct investment.

Prior requirements on the minimum foreign capital share in a joint venture project and the percentage of legal capital versus investment capital have been lifted so that investors have now more autonomy in raising funds.

As described in Box 3.2 above, Viet Nam prohibits investment in 4 categories that may be detrimental to the national security, community heath, traditional culture, natural resources and environment. A first Conditional List consists of nine categories of sectors and applies to all investors. Investments in these sectors are permitted only when specific conditions are met. This list contains a number of important sectors such as banking and finance, mining and exploitation of natural resources, and real estate. The conditions are not elaborated in the Investment Law but in the specialized laws and regulations in each specific sector. Also, several categories in the conditional list are generically worded, such as "sectors impacting community health", "sectors that may affect social order" and "other sectors as specified by the law".

A second "Conditional List" (also mentioned in Box 3.2) targets only foreign investors in the Investment Law implementing Decree No. 108/2006/NP-CP. Article 29.2 gives this list. The list largely reflects Viet Nam's international commitments to facilitate entry to the local market. The conditions that foreign investors need to meet "may take the form of company establishment, project coverage, ownership pattern, forms of permitted legal entities and certain business conditions". There seems to be some overlap between the conditional lists provided in the Decree and the Law. Most conditional sectors are services. This second conditional list also includes a generic provision mentioning "other sectors in accordance with international treaties," which adds uncertainty to investors.

Prior to WTO accession in 2007, Viet Nam maintained extensive restrictions to foreign investment in service industries. Upon its accession, however, Viet Nam undertook a number of commitments to allow foreign access to these industries as follows (see Annex C for additional detail):

- Business services: most restrictions will be lifted 1-3 years after accession.
- Communications: mail delivery services to be opened 5 years after accession, only partial opening of telecommunications services.
- Construction and engineering: most restrictions for most types of construction and engineering services will be lifted 2-3 years after accession.
- Distribution: the joint-venture requirement for foreign investment will be lifted by 2009, establishment of foreign-owned retail outlets will remain somewhat regulated.
- Education: 100% foreign-owned investments will be allowed from 2009, however some restrictions in certain fields of study will remain.
- Environmental services: the joint-venture requirement for foreign investment will be lifted by 2011.
- Financial services: Most restrictions in insurance, banking and other financial services will be lifted by 2011.

- Recreation, culture, and sporting: FDI in entertainment services will be opened from 2012, however foreign entities can only participate through joint-ventures with a maximum foreign participation limit of 49%.
- Transportation: an increase in the limit on foreign participation in joint-ventures or a lifting of the joint-venture requirement entirely, depending on the situation.

In all of the above service categories, Viet Nam has committed to loosening specific restrictions over time through 2012.

Securities laws and regulations set a maximum ownership share for foreign investors in listed companies. The current cap is 49% (up from the prior level of 30%) in most industries, however this can vary based on industry-specific regulations. For example, a 30% cap remains in place for foreign ownership in Vietnamese banks.

The clarity and coherence of the laws, regulations and administrative practices associated with investment have been substantially improved with the adoption of the three new economic laws. Before the Investment Law came into effect, investment activities were managed with four pivotal legislative instruments including Enterprise Law (1999), State-owned Enterprise Law, Law on Domestic Investment Facilitation and Law on Foreign Investment. In addition, sector-specific laws also contain provisions for foreign investments, including the State Bank Law, Law on Credit Institutions, Law on Insurance Business and Law on Petroleum. Regulations on domestic and foreign investment were issued at different times and had different provisions. As a result, investment policies at the time remained inconsistent and unclear, unable to create a common playing field and the discrimination between investors constrained economic development. It became apparent that the legal and regulatory framework for investment needed to be improved to reinforce investors' trust.

The 2005 Investment Law incorporates the previous Law on Foreign Investment and Law on Domestic Investment Facilitation in an effort to create an uniform legal framework on investment encouragement and policies for both domestic and foreign investors. Rules on organisation and operation of businesses, including foreign enterprises, are provided for in the 2005 Enterprise Law. Provisions attributed to investment activities are found in sector-specific laws and/or refer to the Investment Law to ensure consistency. Provisions of sector-specific laws in the future concerning investment activities need to be bound to the Investment Law.

Nevertheless, the objective of attaching both domestic and foreign companies into a single system has not been fully achieved. The basic administrative routines for making investment in Viet Nam are defined in Articles from 45 to 73 of the Investment Law. Concerning the implementation

of this Law, the Government issued Decree No. 108/2006/ND-CP, providing specific guidelines on particular provisions in the Investment Law, Decree No. 78/2006/ND-CP, relating to direct investment abroad, Decree No. 95/2006/ND-CP on transforming state-owned enterprises to single share holder limited liability company and Decree No. 101/2006/ND-CP on registration renewal, conversion and application for change of investment certificates for foreign-invested enterprises, under the Enterprise Law and Investment Law.

Under the Investment Law (Article 45.1), domestic investment projects capitalised at less than VND15 billion (approximately USD0.95 million) and not on the Conditional Lists are not required for investment registration. Nevertheless, such investment projects still have to be registered under the Enterprise Law for a Business Registration Certificate so that the enterprise is recognised as carrying a legitimate business. Domestic investment projects capitalised from VND15 billion to VND300 billion (approximately USD19 million) and not included in the Conditional Lists are subject to investment registration procedures. In addition, "in case investors require investment certificates, relevant provincial administrative bodies shall issue such documents to them" (Article 45.2).

All foreign investment projects, including those capitalised below VND300 billion and not included in the Conditional Lists, are required to be registered in accordance with the Investment Registration procedure. These investments need Investment Certificates (Article 46). Foreign investors investing in Viet Nam for the first time must have an investment project. The Investment Certificates for foreign investors investing for the first time in Viet Nam also serve as Business Registration Certificates for their newly established enterprises. This helps cut down paper work. Article 46 requires that the registration of investment projects are to be completed within 15 days after the registration authority receives the full legitimate application.

The Investment Appraisal process applies to large-scale or conditional investment projects including: *i)* projects in the conditional lists regardless of the investment capital; and *ii)* projects capitalised at VND300 billion (approximately USD 19 million) or more and not included in the Conditional Lists (Articles 47 – 49).

The appraisal process has been significantly simplified. Investors are responsible for the report on the financial and capital resources of their investment projects. The Investment Law specifies in Article 47.3 that in case of important national projects, the National Assembly shall decide on investment guidelines and specific project standards. The OECD recommends that the National Assembly should not be asked to approve each individual project but to provide instead a common legal framework for investment. A stated objective of this appraisals regulation is to ensure the efficient planning in such fields as infrastructure development, management of land, natural

resources and environment. For all cases, the appraisal process must not exceed 30 days or up to 45 days, where needed, from the date of receipt of a full valid application.

The authorities responsible for issuing investment certificates for foreign investors include:

1. Provincial People's Committees issue investment certificates (signed by the province's chairperson) for projects located inside the province but outside industrial parks, export processing zones, high-tech parks and economic zones in the province (if any; hereinafter, these will be called "special economic zones").
2. The administrative body of special economic zones (Management Board) issue investment certificates (signed by the board Chairperson) for projects located inside the special economic zones.
3. Central authorities issue investment certificates for investment in some sectors, namely
   - Ministry of Planning and Investment issue investment certificates for BOT, BTO and BT projects,
   - Ministry of Planning and Investment issues investment certificates for oil, gas projects,
   - State Bank of Viet Nam issues investment certificates to credit institutions,
   - Ministry of Finance issues investment certificates for insurance projects.

According to the new Law, the provincial authorities play a dominant role in approving investment projects; however, they still need to consult governmental agencies (relevant Ministries) for big projects in conditional sectors specified in Article 37 of Decree No. 108/2006/ND-CP prior to issuing the investment certificates.

1.2. Implementation

In order to assist the implementation of the Enterprise Law and Investment Law, on September 25, 2007, the Prime Minister issued Decision No. 1267/QD-TTg on the formation of a Enterprise Law and Investment Law Task Force, headed by the Minister of Planning and Investment. The mandate of the Task Force is to supervise, manage and guide different Ministries and local governments in implementing the two laws. More specific duties include formulating guiding regulations under the two laws, particularly unification of formats and contents of business registration dossiers, revision of investment registration, collection and review of obstacles that investors may encounter, in order to counsel the Prime Minister.

The Task Force co-operates with related agencies and business associations, like the Viet Nam Chamber of Commerce and Industry (VCCI), in

supervising the enforcement of rules on business licensing and other business conditions. It also recommends abolishing inappropriate, unnecessary and unlawful business certificates and amending inadequate, non-specific, unclear and irrelevant regulations. In particular cases, the Task Force proposes other management alternatives that are more efficient, which do not even require a licence. The Task Force also conducts online discussions on the two laws and has organised training to strengthen the capacity for officials responsible for the enforcement of the two laws.

Administrative procedures have been reformed, upon recommendation of the Task Force, to create more favourable conditions for investment:

- First, local authorities are permitted to grant licences to any investment projects regardless of size. The goal is to put in place a "one-stop" shop for the registration of investment projects/businesses at the provincial level.
- Second, with regards to investment procedures, there are only two steps, registration and appraisal. Investment registration is a simple process and takes less than 15 days.

Investment incentives are written on the investment certificate granted to all foreign investors, and domestic investment projects that require investment certification (Article 38). A majority of the projects qualify for investment incentives.

In their reports on experience thus far in implementation of the Investment Law and Decree No.108/2006/ND-CP, provincial authorities have indicated fewer problems than were anticipated in changing to decentralisation of granting investment certificates. Administrative routines are said to be handled more quickly and with greater transparency than before. However, the implementation process also unveiled certain challenges and impediments which are confusing both domestic and foreign investors and the provincial authorities.

1.3. Key issues reported by the provinces

The implementation issues can be grouped under the following four categories:

- General regulations on investment conditions and incentives;
- Regulations on procedures for granting investment certificates;
- Inconsistencies of investment certification among provinces; and
- Administration of investments.

1.3.1. General regulation on investment conditions and incentives

- Many provinces say that conditional investment sectors and requirements for conditional investment projects under Article 29 of the Investment Law

and Annex III of Decree 108 seem too generic and difficult to comply with. For example, the necessary criteria to determine what 'sectors impacting community health' have not been issued. There should be a government decree concerning guidelines on the conditions for such investment.

- Provincial agencies and investors have found it difficult to implement international commitments, especially WTO commitments, on investment conditions. To take account of this concern, the Vietnamese authorities have released a more accessible presentation of the commitments relating to opening of the domestic market in the form of a government decree which will be submitted for the PM's approval.
- Investment incentives for Vietnamese residing overseas have not been made clear as to whether they are treated as foreign or domestic investors.

1.3.2. *Regulations on procedures for granting investment certificates*

- In accordance with the Investment Law, a project capitalised between VND15 billion and under VND300 billion and not on the conditional investment lists is entitled to the simplified investment registration procedure to get the investment certificate. Investors need to submit only basic information about the projects and no evaluation or verification is required. In such cases, the provincial authorities have indicated that they have had difficulties in "monitoring the projects".
- The procedures under the Investment Law for investment certification do not require the submission of a feasibility study. However, the Law on Environment Protection requires that the investor conduct an environment impact assessment as part of a feasibility research. Clause 4, Article 22 of the Law on Environment Protection defines that the investment licence will only be granted upon approval of the environment impact assessment. Similarly, the Construction Law requires that an environment impact assessment is included in the investment proposal. The environment issue therefore is raised in a different form in the three laws.
- Among the information to be submitted in case of projects in need of investment evaluation is the project progress chart. In accordance with the regulations, the project progress shall be prepared by the investor. Compliance to this time frame will be a basis for deciding to suspend or withdraw an investment certificate. When investors amend investment projects relating to the objectives, scales, location, form, capital and duration of implementation of the project, they must carry out procedures to amend the Investment Certificate.
- While the Investment Law and Decree 108/2006/ND-CP define procedures for adjustment of investment projects, the protocol is not clear enough.

Provincial agencies find it difficult to determine what needs to be adjusted and what procedures are applicable.

1.3.3. *Inconsistencies in investment certification routine among provinces*

- Some provinces have studied, assembled and optimised relevant legislations to put together an investment procedure guide tailored to their own needs. This instrument is issued by the Provincial People's Committees, Departments of Planning and Investment or the Management Boards of Industrial Parks or Export Processing Zones. The manual can come in the form of either a regulatory document (like Decision No. 08/2007/QD-UBND dated Mar. 14, 2007 in Quang Ngai province specifying routines and protocol of investment certification in the province) or in a less formal way by being posted on local websites.
- An examination of the aforementioned provincial legislation and procedures indicates a lack of consistency across the country. For example, provinces may have different rules about the responsible body for verification of investment certificates and co-operation among related local authorities.

1.3.4. *State administration for investments*

- Export Processing Zone and Industrial Park Management Boards are authorised to issue investment certificates which also serves as business registration certificates. However, these management boards are not part of the national business registration apparatus in accordance with Decree No. 88/2006/ND-CP.
- While investment certification has been decentralised to the provinces, feedback from provincial agencies indicates that they are still uncertain on many of the issues. They are reputed to have difficulties knowing which ministerial agencies are in charge of solving particular problems.

The implementation problems cited above by government officials are consistent with concerns voiced by a number of participants in the Mid-term Viet Nam Business Forum in Hanoi on May 30, 2007 and in other business forums. The concerns indicate that the verification and investment certification process remains quite complicated and unclear. Sector-specific licences add complexity to the process. The creation of the website *http://vietnam.investway.info* is a good starting point in improving transparency in this regard. In addition, there is a significant lack of capacity, co-ordination and experience at different levels, owing in part to resources constraints.

Part of the problem stems from the fact that investment licensing has been decentralised to provincial authorities without adequate guidance and training. Rules apply to practically every type of investment (categorised by

size, ownership or investment incentives). Under Article 13 of the Investment Law, investors are entitled to 'autonomy in business and investment activities', including the right 'to select the sector in which to make an investment, form of investment, method of adding capital, location and scale of investment, investment partners and the project length'. However, other provisions of the Law, implementing Decrees and the complex investment programme can limit such rights to some extent.

The project appraisal requirements and process, which can be a source of uncertainty and unnecessary burden and delay, are particularly likely to have a negative impact on the investment climate in the eyes of foreign investors. Sensitive projects may go through a lengthy certification process involving both the central and the local governments.

The latest World Bank and International Finance Corporation report on business sentiment indicates that there has been an improvement in doing business in Viet Nam, notably in terms of the shortened time of business registration and better access to loans. Areas needing further improvement include starting a business, taxes and protection for investors.[3] An important component of policy dialogue is the collaborative effort between the USAID-funded Viet Nam Competitiveness Initiative and the Viet Nam Chamber of Commerce and Industry which compares the business environment in 46 provinces with respect to regulatory environment, transaction costs, infrastructure and human resources.[4]

1.4. Consultation mechanism

For better law enforcement, it is vital to ensure effective communication and consultation before and after any regulatory change. The Task Force on Implementation is expected to be in the very core of this process. In the formulation of policies and regulations associated with business in general and investments and investors in particular, the stated policy of the Vietnamese government is an increase in regular dialogue between law makers and the affected groups.

This is expressed in the Law on Legislation Issuance (amended in 2002), which has increased the transparency of the drafting process. The Law describes the rights and obligations of those which are entitled to provide legislative comments, as well as the responsibility of the legislative bodies as regards to public consultations (from agencies, organisations, associations and individuals) in the process of law making. The Prime Minister issued Resolution No. 28 in 2001, nominating the Viet Nam Chamber of Commerce and Industry (VCCI) as the official representative of the business community and requiring that all regulations in connection with the business community be referred to VCCI before enactment.

At the moment, the government gathers enterprises' comments via the following channels:

* Face-to-face dialogues between government agencies and the business community

The annual meeting between the Prime Minister and the business community is one of such face-to-face dialogues. These meetings have also become a routine between provincial leaders and local business communities. The ministries and related agencies also hold meetings with the business community. At provincial level, the meetings are mostly hosted by Provincial People's Committees Chairpersons.

* Executive agency official letters requesting business community representatives to comment on a draft legislation

In accordance with the Law on the Legislation Issuance, legislative agencies drafting regulations concerning businesses and related issues need to seek consultation from the business community through its representative, such as VCCI.

* Publishing of draft laws and regulations in the media and on the internet to allow individuals and businesses to provide comments.

This communication channel, now commonplace in OECD member countries, is rather unfamiliar in Viet Nam but is becoming increasingly popular. The OECD has for long recommended the use of advanced communication technologies to improve transparency. As an example of this trend in Viet Nam, when the Enterprise Law (2005) and Investment Law (2005) were being formulated, the drafts were posted on the Ministry of Planning and Investment website. The draft laws were also published on the press and VCCI's "Online Viet Nam Business Forum" website. A fundamental feature in the formulation of these laws was the strong involvement of the media and the availability of various law analysing articles and public comments.

* Two annual Viet Nam Business Forums

The Viet Nam Business Forum has quickly become an important policy dialogue forum between the public and private sectors where Ministries can comment on on-going changes, anticipate regulatory frameworks associated with economic activities and businesses and in turn, listen to ideas from representatives of the private sector. Such dialogues help ensure transparency of the laws and regulations and to avoid overlaps and conflicts in the business legal environment.

* Seminars with local and international scientists and businesses, including overseas Vietnamese experts, to provide specialised input in draft laws under development.

1.5. Concluding remarks

While recent reforms in Viet Nam have made important progress, there is still room for improvement to ensure the entry and approval procedures relating to domestic and foreign investors and their investments are transparent, readily accessible and avoid imposing unnecessary complications and burdens. There seems to be still persistent elements of a command economy, with many of the regulations and information requirements having the apparent objective of obtaining conformity with Viet Nam's economic and industrial policies as detailed in its Master Plans. The sharing of responsibilities between the central and local authorities does not seem to be clearly defined or understood.

The inconsistency in Viet Nam's investment-related regulatory and policy framework (the Investment Law, the Enterprise Law, the Land Law and the Construction Law and their implementing regulations) indicates that more needs to be done to improve the investment climate and FDI promotion performance. The Vietnamese government has identified the following issues as important obstacles that must be overcome in the creation of better investment environment: slow issuance of guidance by some Ministries to implement the government decrees, infrastructure shortcomings, strikes, power scarcity, challenges in land compensation and environmental issues.

To address these concerns, various measures need to be taken: firstly, to describe and explain the existing procedures in an easy-to-understand and friendly manner to investors, strengthen and make convenient the provision and access to information on investment climate and policies; secondly, to simplify the procedures for foreign investment registration by quickly transforming to a more simple registration system applicable to both domestic and foreign investments, where all investors need only to check whether their investment intention is compatible with Vietnamese laws, for example, if it is in one of the prohibited categories; thirdly, to materialise WTO commitments as soon as possible; fourthly, to consider additional liberalisation measures, including acceleration of the equitisation process; and fifthly, increase training to upgrade capacity, accountability, integrity and business discipline for government officials involved in foreign investment management.

PFI Question 1.2. What steps has the government taken towards the progressive establishment of timely, secure and effective methods of ownership registration for land and other forms of property?

Ensuring access to industrial and commercial land for factories, warehouses, offices, retail outlets and other infrastructure facilities is

essential for the formation and development of investment activities in the economy. A transparent land market and land ownership rights as tradable commodities in the market are key in this respect. Private ownership of land is not recognised and only universal ownership is available in Viet Nam, under the management of the government. The relevant law is the Land Law of 26 November 2003 as amended. This law defines individuals and businesses entitlements for land-use certificates, including land allocation and lease from the People's Councils, the transfer of land-use rights among entities, and purchase land-use rights via auctions.

Changes to management of land accessible by foreign investors have been made available by the government by empowering provincial authorities to make land allocations and leases. In respect of businesses, the law rules that all enterprises are equal in the use of land. Nevertheless, private enterprises including small and medium-sized enterprises (SMEs) have reported experiencing difficulties in obtaining access to land as the acquisition process is often complex and prolonged. On the other hand, the length of land use has significantly been extended from previously eligible periods and can even exceed fifty years. Enterprises with foreign invested capital, in addition to being entitled to land use rights, are now able to sub-lease their land. Provincial People's Committees and Vietnamese stakeholders are responsible for site clearance and land compensation as needed.

Enterprises with foreign invested capital are allowed to mortgage assets associated with their land rights and use the value of these rights for financial loans. The real estate collateral mechanism is provided for in the Land Law, the Civil Code, the Law on Credit Institutions and other related laws. Credit institutions have the liberty to select and decide on collateral assets as well as other types of collaterals and intangible guarantees. Assets eligible for use as collaterals include land use rights, houses, structures and other assets associated with land.

Decree No. 181/2004/ND-CP which provides guidance to the application of the Land Law states that "land-related information including specifications of particular pieces of land, land usage rights, assets associated with the land and enforcement of land users' rights can be publicly released upon request". Land prices fluctuate with market conditions and are published annually by the provincial People's Committees.

The application procedure for acquiring land use rights for the People's Committees has been simplified. The application can be done at the Land Registration Office under a "one-stop" protocol, which has been designed to be convenient for land users. With this new procedure in place, only three documents are required: an application for land use, an investment acknowledgement or certified copy of an investment licence and an acceptance letter from the local Department of Natural Resources and

Environment. A nominal 30-day period is routinely needed for processing for cleared-out land and 45 days for occupied land. The Department of Natural Resources and Environment is the sole contact point for applicant investors throughout this process.

Despite the improvements in the new Land Law, hindrances remain and can present hurdles to investors in acquiring necessary land use rights:

- There is a lack of an effective mechanism for acquiring idle or ineffectively used land, particularly from state-owned agencies or government agencies.
- Land pricing methods are not sufficiently detailed and access to basic property market information is difficult. The organised real estate market remains under-developed and the availability of available experts is limited.
- There is a lack of detailed and uniform guidelines on auction of land use right certificates and prevailing regulations are both obsolete and incomplete; provincial by-laws are still active in practice.
- Very few regulations are available to guide implementation and organisation of activities involving utilisation of land for building houses for sale and lease, and more importantly, for development of production and business facilities (such as factories or offices).
- Updates of land information and registration system are slow.
- Land planning is either non-existent or uncertain. Length of lease is sometimes detrimental to realisation of investment projects.
- The security of land tenure is weak.
- Administrative routines remain burdensome, complicated and subject to redtape.
- Some inconsistencies exist between the Land Law and Investment Law (mainly because the Land Law provides different land use rights regimes for foreign and domestic owners while the Investment Law does not separate investment procedures applying to these two categories of investors).

PFI Question 1.3. Has the government implemented laws and regulations for the protection of intellectual property rights and effective enforcement mechanisms? Does the level of protection encourage innovation and investment by domestic and foreign firms? What steps has the government taken to develop strategies, policies and programmes to meet the intellectual property needs of SMEs?

Viet Nam today possesses a comprehensive and consistent intellectual property regulatory framework in about 40 pieces of legislation. The centre

of this legal system is the 2005 Civil Code, which came into effect since 1 January 2006 (significantly Chapter 34 on copyrights, Chapter 35 on industrial property and crop varieties, and Chapter 36 on technology transfer), the 2005 Intellectual Property Act, effective since 1 July 2006 and Decree No. 89/2006/ND-CP on trademarks and branding. This system has been developed to be compatible with international standards and international treaties to which Viet Nam is a signatory, including the Paris Convention on Industrial Property and the Berne Convention on Copyrights. Decree 89 paves the way for businesses to use technical means to inform customers about products, origin, trademarks or warnings of possible infringement.

A number of other important Decrees guide the implementation of the Intellectual Property Act. Decree No. 105/2006/ND-CP dated Sep. 22, 2006 describes in detail the rights of organisations and individuals (both owners of intellectual property rights and those without ownership but affected by counterfeiting products) to require authorities to judge administrative violations of this law. The Decree specifies that a single infringement is subject to financial penalty worth between 1 to 5 times the value of captured illegal or counterfeiting goods, the higher the value of the illegal commodities, the higher the multiplier factor used to calculate the penalty.

The enforcement of intellectual property rights under this judicial system is, however, deemed weak. The limited number of findings implies low deterrent effects. Clear guidelines on brand name protection are non-existent as everything is subject to a 'first man to register' protection system. There is a lack of clarity on the relationship between central bodies and provincial authorities, as well as between administrative and enforcement agencies, especially with respect to enforcement.

The Government has undertaken efforts to raise the awareness of domestic firms, particularly small and medium-sized enterprises (SMEs) as to how they can make use of the intellectual property rights system. A national training programme has been established for SMEs (under Decision 143/2004/QD-TT). The training content covers capacity building, technical skills, intellectual property rights (IPRs) and quality standards for SMEs. The government has also created special market watchdogs, promoted the development of private services and supported the development of detection and protection of property rights.

In addition, the National Office of Intellectual Property (NOIP) has set up an IPR information data base covering IPRs in the World and Viet Nam. NOIP has to date collected about 4,000 valid patents and 200 utility solutions from all over the world as well as 50 million descriptions of inventions. In addition, NOIP has made available 30 million descriptions of inventions on CD-ROM and electronic versions convenient for research. NOIP will continue collecting

patent information by exchanging information with international counterparts and organisations. An electronic library in both Vietnamese and English and embedded searching tools has also been developed by NOPI (including English – Vietnamese and Vietnamese – English translation tool) open to the general public. Information centres have been established in Ho Chi Minh City and Da Nang to inform the public.

PFI Question 1.4. Is the system of contract enforcement effective and widely accessible to all investors? What alternative systems of dispute settlement has the government established to ensure the widest possible scope of protection at a reasonable cost?

Prior to 1 January 2006, the judicial system in Viet Nam differentiated between business contracts and civil contracts. The Civil Code in 2005 unifies these two types of contracts. Since the 2005 Civil Code came into effect, the term 'business contract' no longer exists and all contracts are referred to as 'civil contracts' subject to the 2005 Civil Code. This law provides uniform coverage over all contractual relations. The principle of rights and obligations equity in civil procedures for all entities and organisations, regardless of ownership and organisational pattern, is provided for in the 2003 Ordinance on Commercial Arbitration, 2004 Civil Transaction Code, 2005 Investment Law and Prime Minister's Decision No. 204/TTg dated April 28, 1993 and subsequently Decision No. 114/TTg dated February 16, 1996 on the Viet Nam International Arbitration Centre.

The 2005 Civil Code also governs foreign civil relations. When trading goods and services with foreign businesses, Vietnamese and foreign entrepreneurs are entitled to choosing foreign laws as reference for their contractual agreement. In addition, commercial contracts between businesses are also regulated by the 2005 Commercial Law which gives detailed provisions for different types of transaction.

In cases where Vietnamese laws or international conventions to which Viet Nam is a signatory makes reference to a foreign law, such law can be used providing that the application of the law does not violate the basic principles of Vietnamese law. When a foreign law refers to the reciprocal application of a Vietnamese law, the Vietnamese law will be used. In cases where the parties do not have a specific agreement on which law to use, the Vietnamese law will prevail in the following cases:

- contractual agreements relating to real estate in Viet Nam;
- contracts signed in Viet Nam and performed entirely in Viet Nam;

- contracts initiated by a Vietnamese enterprise and performed in Viet Nam but that do not state the place of execution.

Vietnamese laws do not require dispute settlement as a substantial part of a contractual relation. Yet, resolution of contractual violation is clearly provided for in Vietnamese laws. This has been commonly used in various types of contracts, including international contracts. Accordingly, related parties may refer to international conventions or laws or the laws of a third country and request arbitral or judicial proceedings of a third country, providing that such reference or request complies with the laws and rules in Viet Nam and is explicitly stated in the contract.

The 2005 Investment Law has one Article (Article 21) on dispute settlement. Accordingly, settlement of disputes relating to investment activities in Viet Nam must firstly be done by amicable negotiation. If negotiation fails, the dispute will be settled by arbitration or court, including foreign arbitration and court, in keeping with international laws. Procedures for the settlement of business disputes by arbitration are also available. The establishment of the International Arbitration Centre in Ho Chi Minh City is a welcomed development. If the conflicting parties do not want the legal actions to be done in the People's Court, they can choose, by consensus, to resolve the discrepancies in an international arbitration centre. The concept of commercial activities has also been widened to be consistent with international practices. Arbitration decisions are final and binding, unless judged null and void by a competent court.

According to Vietnamese law, Vietnamese courts will not re-hear a dispute previously processed by a foreign court or arbitrator. They will check and verify the verdict made by the foreign court or arbitrator as to whether such verdict aligns with Vietnamese laws and international conventions that Viet Nam is a party to. The recognition and enforcement of a civil verdict ruled by a foreign court or arbitrator in Viet Nam must not contradict basic principles of Vietnamese law.

Articles 356 and 370 of the 2004 Civil Procedural Law of Viet Nam clearly identify several types of civil verdicts of foreign courts and arbitrators that are neither recognised nor enforceable in Viet Nam. These include civil verdicts which are rendered ineffective by the law of the original country of the court giving the verdict, cases that fall under the specific jurisdiction of Vietnamese courts, cases in which related parties have chosen arbitrators who do not have the power to make such decisions in accordance with the respective laws of each party, and/or cases in which the dispute is not resolved by arbitration in accordance with the Vietnamese laws.

Some investors are reported to be concerned about the short time limit for appeals (15 days) as compared to the usual practice in OECD countries (30-45 days). Also, there is no provision for the mandatory announcement of verdicts.

PFI Question 1.5. Does the government maintain a policy of timely, adequate, and effective compensation for expropriation also consistent with its obligations under international law? What explicit and well-defined limits on the ability to expropriate has the government established? What independent channels exist for reviewing the exercise of this power or for contesting it?

The Government of Viet Nam maintains a compensation policy in case of nationalising assets of both foreign and Vietnamese businesses operating in the country. This compensation policy is deemed to be based on a timely, complete, effective principle and in consistent with obligations required by international laws. Article 6 of the new Investment Law guarantees that "investors' lawful assets and capital shall not be nationalised or confiscated by administrative measures;" with exceptions for situations where there is "a real need for national defence, security and national interest". In such cases, compensation must refer to market prices at the time of such expropriation with a view to fairness and non discriminatory treatment. Compensation must be settled at the time of expropriation. Compensation to foreign investors is to be made in a freely convertible currency and is permitted to be taken out of the country.

The Investment Law provides equal, non-discriminatory treatment for all investors, both local and international. Compensation must guarantee the legal interests of related parties. Paragraph 2, Article 6 of the Investment Law says "no discrimination among investors". Such non-discrimination is also reflected in Article 4. Paragraph 2, Article 4 indicates that the State will give equal and lawful treatment to investors of any economic sectors, either domestic or foreign investors, promote and create a favourable environment for investment. Paragraph 3, Article 4 specifies that the government recognises and protects ownership of assets, capital, income and other legitimate interests of the investors. This suggests that investors, either local or international, can count on the protection of Vietnamese laws and not fear sudden, unlawful confiscation of their eligible assets and interests.

As a result of amendments in 2001 of the 1992 Constitution (Articles 15 and 16), there is an acknowledgment in the constitution that foreign investor sector and the domestic private for an integral part and can contribute to the Vietnamese economy alongside the already recognised state-owned sector. The new Investment Law is applicable as a general rule to both domestic and foreign investors and has removed all price-related discrimination against foreign investors. In addition, the Ordinance on

PFI Question 1.6. Has the government taken steps to establish non-discrimination as a general principle underpinning laws and regulations governing investment? In the exercise of its right to regulate and deliver public services, does the government have mechanisms in place to ensure transparency of remaining discriminatory restriction on international investment and to periodically review their costs against the intended public purpose? Has the government reviewed restrictions affecting the free transfer of capital and profits and their effect on attracting international investment?

most-favoured-nation and national treatment in international trade, dated 7 June 2002 shares the same rule. The Investment Law also firmly establishes non-discrimination as a general principle toward any investors. As a WTO member, Viet Nam has vowed to comply with WTO's non-discrimination principles including most-favoured-nation and national treatment.

Regulations relating to non-discrimination, however, still exist in different laws, inconsistent with the Investment Law and WTO commitments. A thoroughly unequivocal and effective mechanism is still not in place to ensure the transparency of existing discriminatory restrictions on international investment and to review periodically the cost-effectiveness of such discrimination. Examples may include the conditional investment lists or restrictions only applicable to foreign investors described in Box 3.2 and discussed under the PFI Question 1.1 above. Finance, distribution and telecommunications are the most restricted sectors since they play a central role in the development of the Vietnamese economy, as in other economies. The extent of restrictions on foreign investment in Viet Nam remains high in comparison with many other countries, especially given the fact that the state-owned sector is still generating 40% of GDP, holding more than 50% of government investment funds, accounting for 70% of total national outstanding loans and over 80% of total commercial loans. Under such circumstances, it is difficult for the judicial system in Viet Nam to uphold the non-discrimination principle across all economic activities.

With regard to the transfer of profits and capital to home countries, the new Investment Law (Article 9) specifies that foreign investors, after having fulfilled all of their financial obligations to the government of Viet Nam, are entitled to bring home a part of or the entire profits earned, amounts received from technology and intellectual property transfer, principal and interest of loans, invested capital and proceeds earned from liquidation of

investments and other lawful amounts of money. Viet Nam is maintaining restrictions only on *i*) capital transfers abroad for investment by local residents, which must be approved by competent agencies and within the foreign currency limit owned by such organisations; and *ii*) payment and repayment of foreign loans by local organisations, which must be registered with the State Bank.

PFI Question 1.7. Are investment policy authorities working with their counterparts in other economies to expand international treaties on the promotion and protection of investment? Has the government reviewed existing international treaties and commitments periodically to determine whether their provisions create a more attractive environment for investment? What measures exist to ensure effective compliance with the country's commitments under its international investment agreements?

Viet Nam has signed and acceded to various investment-related bilateral and multilateral agreements, including bilateral agreements on investment facilitation and protection, with 55 countries and regions, agreements on avoidance of double taxation with 46 countries and regions, the ASEAN Framework Agreement on Investment (AIA), MIGA and the New York Convention. As aforementioned, Viet Nam has acceded to the WTO and signed many multilateral agreements, including the agreement on Trade Related Investment Measures (TRIMS), agreement on Trade Related Intellectual Properties (TRIPs) and the General Agreement on Trade in Service (GATS). Legislative documents associated with this process are found in the Law No. 41/2005/QH11 on "Conclusion, Accession and Implementation of Treaties" in June 2005. The Ministry of Planning and Investment is the body in charge of managing investment agreements implementation. However, no explicit and concrete regulations on periodic review of existing investment treaties and commitments are in place to determine whether such provisions are creating an attractive environment for investment. However, reports can be provided on demand and international sponsors or organisations may choose to participate in monitoring targeted investment projects funded with foreign capital. In addition, accounting standards, investment information and supporting services in Viet Nam are also being promoted and optimised to align with international standards and Viet Nam's commitments in international investment treaties (*e.g.* investment certification, origin of goods certification, environmental standard certification etc.).

In response to WTO international commitments and other investment agreements, the business environment in Viet Nam has been considerably improved with extensive and intensive reforms. Viet Nam, for the first time, introduced a common legal framework for all investments in 2005 by endorsing two new laws, the Investment Law and the Enterprise Law. These laws, as discussed above, are aimed at creating a level playing field for foreign investment, private investment and state investment alike. The Government is scheduled to issue a Decree guiding the implementation of Viet Nam's WTO commitments. Investors are also expecting this Decree. Hopefully, it will clarify the intentions of the responsible authorities and resolve outstanding issues relating to implementation of WTO commitments and thereby open doors even more to investment flows in Viet Nam.

PFI Question 1.8. Has the government ratified and implemented binding international arbitration instruments for the settlement of investment disputes?

Viet Nam was a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1995. Viet Nam has also acceded to the Washington Convention on the settlement of investment disputes between the state and citizens of other countries. Under the 2005 Investment Law, Viet Nam allows foreign investors to use foreign arbitration or use and apply foreign laws as specified by the relevant Vietnamese laws. The Association of Southeast Asian Nations has established a mechanism to resolve related trade and investment issues. This mechanism allows investors to direct complaints to government agencies via the internet when they meet difficulties relating to the implementation of the ASEAN agreements. Foreign arbitral awards rendered by a recognised international arbitration institution must be respected by Vietnamese courts without a review of the awards. As noted above, foreign arbitral awards are recognised and enforceable in accordance with the Civil Procedure Code and other related legislative documents for enforcement in Viet Nam.

There is, however, some ambiguity on the interpretation of certain provisions. For instance, the definition of "third country" is not clear. In case one of the partnering parties is a multinational enterprise, it is unclear whether countries involved in its operation are considered third countries. Similarly, there are no official definitions for "international economic relations" and "domestic business transactions".

2. Investment promotion and facilitation

The second chapter of the PFI addresses investment promotion and support measures, including an overarching strategy for improving the investment environment. Establishing a sound investment environment is of primary importance. Once this is achieved, active promotional policies can help investors recognise potential business opportunities and develop linkages with local firms. The creation of an investment promotion agency or a similar body can be a way to help simplify administrative routines, improve transparency and focus on promotion efforts.

PFI Question 2.1. Does the government have a strategy for developing a sound, broad-based business environment and within this strategy, what role is given to investment promotion and facilitation measures?

Given the top priority that the private sector has had in recent economic policies, the government has become increasingly aware of the importance and requirements of developing a stable and open business environment. Several guidelines, policies and action plans have been developed at both national and provincial levels. The enactment of the 2005 Investment Law and the Enterprise Laws in 1999 and 2005, along with a number of Prime Minister's decisions has helped to further improve the business environment and promote inbound foreign investment. Decision 109/2007/QD-Ttg on the National Investment Promotion Programme for 2007 – 2010 is considered an important measure to help to attract more FDI inflow into Viet Nam.

The Ministry of Planning and Investment is the agency tasked with drafting the socio-economic development plan for the country in 2006 – 2010. This plan gives considerable importance to investment and promotion and facilitation measures as a catalyst for economic development and growth.

The Ministry of Planning and Investment has identified three roles for investment promotion:

- Providing information for investors to encourage them to invest in Viet Nam;
- Providing assistance to investors to establish enterprises in Viet Nam;
- Providing assistance to existing investors when they face difficulties in Viet Nam.

The programme for the reorganisation, restructuring and equitisation of state owned enterprises (SOEs) has important implications for foreign investment in Viet Nam. The equitisation process consists in transforming

SOEs into shareholding companies and selling a portion or the entirety of the shares to private investors and/or to the employees of the company. By the end of 2007 roughly 3,315 enterprises were equitised and 326 were transferred or sold. The plan for 2008-2010 was for the equitisation of another 948. This programme should be strongly promoted. Most of the asset sales have been limited to SMEs and to minority stakes in larger SOEs. The Government indicated in 2007 that there are 19 sectors in which existing SOEs will remain under 100% Government ownership (such as radio, television, publishing and the press) and another 27 sectors in which the Government will maintain more than 50% of the capital (such as insurance, and the mining of minerals, petroleum and natural gas). SOEs still account for some 40% of GDP and most are involved in commercial activity in competition with private firms. The equitisation programme includes large and smaller firms across a wide range of industries, including power, telecommunications, maritime, oil and gas, and finance and insurance.

PFI Question 2.2. Has the government established and investment promotion agency (IPA)? To what extent has the structure, mission, and legal status of the IPA been informed by and benchmarked against international good practices?

At the central level of government, the Foreign Investment Agency (FIA) in the Ministry of Planning and Investment plays the role of the Investment Promotion agency for Viet Nam.. The organisation, role and mandate of FIA are defined in Decision No.52/2009/QD-BKH. The FIA works as a counsellor to help the Minister to manage foreign direct investment in Viet Nam and Viet Nam's direct investment abroad and to draft plans and policies to attract foreign investment. The FIA is also given the task of reviewing socio-economic implications of foreign involvement and providing information to foreign investors. With regard to receiving, processing and licensing investment projects, the FIA is responsible for advising domestic and foreign investors about investment procedures, receiving project dossiers and participating in the evaluation and licensing of BOT, BTO and BT projects. There are at present three investment promotion centres under the FIA, the North Investment Promotion Centre, the Central Investment Promotion Centre and the South Investment Promotion Centre.

Similarly, there is also a team in charge of foreign direct investment in each provincial Department of Planning and Investment. Independent specialised IPAs have also been established in various places.[5] The organisational skeletons of such teams however, may differ from province to

province. In some provinces, an investment promotion centre under the Department of Planning and Investment is preferred while in others, the investment promotion role is attached to the trade and tourism promotion team to form a trade, investment and tourism promotion centre. Elsewhere, this mandate is assigned to the Department of Planning and Investment without setting up an independent investment promotion team. At present, there are 120 state agencies in charge of investment in the country, including provincial People's Committees, management boards of provincial industrial and export-processing zones, management boards of economic zones and management boards of high technology parks. These entities take on investment promotion under multiple forms. The provincial IPAs have organised trade fairs, seminars, dialogues and overseas tours relating to investment promotion to make available more information channels to investors both within and outside the country. In some particular places like Hanoi City, representative offices have been opened abroad (already in Japan and scheduled for opening in Russia and US) to promote investment and trade of their own.

A positive side of decentralisation is that it increases competition between provincial IPAs, thereby helping to improve performance and promote even stronger reforms among provincial bodies. A major drawback at this moment is the lack of effective co-ordination between the provincial IPAs and Department of Planning and Investment, the Ministry of Planning and Investment and other government agencies, which may create confusion for investors.

A decision issued in July 2007 on developing and implementing a National Investment Promotion Programme for 2007 – 2010 aims to correct this situation.[6] Under this decision the programme must also be consistent with the national and provincial economic development plans. It is unclear though, how this desired consistency is achieved in practice.

PFI Question 2.3. Is the IPA adequately funded and is its performance in terms of attracting investment regularly reviewed? What indicators have been established for monitoring the performance of the agency?

Generally speaking, IPAs at both the central and provincial levels appear under-financed. At the central level, about VND2 – 5 billion (about USD 130,000-300,000) is earmarked from the central budget (not including other funds) for investment promotion every year. This resource is channelled to the Ministry of Planning and Investment but is enough only for essential administrative operation and not for promotion and advertising. At present,

most investment promotion at the sub-national level is financed from provincial budgets. The provincial fund allocation for investment promotion depends on the local budget capacity and the awareness of the provincial People's Committees, as well as the position of investment promotion in the provincial socio-economic development agenda. The National Investment Promotion Programme for 2007 – 2010 sets aside funds for investment promotion, better communication (such as improved websites), the organisation of public events and foreign investment promotion and promotional missions abroad.

Inadequate human resource capacity, both in terms of number of potential employees and their skill level, is a general problem for all Planning and Investment Departments and Management Boards. There is inadequate funding, and many provincial staff lack the necessary professional, language and marketing training. However, in the larger cities, such as Hanoi and Ho Chi Minh City, staff tend to have good qualifications, often obtained through education abroad.

PFI Question 2.4. How has the government sought to streamline administrative procedures to quicken and to reduce the cost of establishing a new investment? In its capacity as a facilitator for investors, does the IPA take full advantage of information on the problems encountered from established investors?

Under the Enterprise Law (2005) and Investment Law (2005), the former licensing system was replaced by a business registration certificate or an investment certificate. This helped abolish 150 types of licences and thousands of secondary permits issued at sub-national levels. Investment registration has become simpler. Provincial government authorities have made a great effort to set-up a "one-stop shop" system. However, every provincial investment promotion agency has tried to implement the procedure in a different way and with different levels of success. As mentioned earlier, all foreign investment projects, regardless of capital amount or organisational structure, need to obtain investment certificates. Enterprises can do business in any area not prohibited by the laws (the Negative List). The Enterprise Law and Investment Law task force will continue its mandate of scrutinising secondary sub-licences and conditions established by line Ministries and provincial authorities.

The Ministry of Planning and Investment, in co-operation with Departments of Planning and Investment in most provinces, has developed websites and hot lines to inform investors as well as receive and address

feedbacks of comments and challenges encountered by investors. Many investment promotion agencies have established or planned to establish websites for investment promotion. However, the information on these websites does not sufficiently address the needs of most investors. This shortcoming may be attributed to resource constraints, limited qualification and accountability of staff and other weaknesses in statistics, reporting and updating of national, sector and provincial data.

The weakest link in the services provided by Viet Nam's investment promotion agencies is dealing with problems that arise after the Investment Certificates have been granted. Such services are provided both inside and outside industrial parks and export-processing zones. Yet, investors inside industrial parks and export-processing zones appear to face fewer problems than their outside counterparts. The management boards of industrial parks and export-processing zones can undertake most parts of the procedure following certificate granting. Management board officers are responsible for multiple important matters in an investment project, including site clearance and the development of infrastructure. Investors outside industrial parks and export-processing zones have to make direct contact with relevant agencies and handle various issues themselves.

PFI Question 2.5. To what extent does the IPA promote and maintain dialogue mechanisms with investors? Does the government consult with the IPA on matters having an impact on investment?

The Prime Minister has annual meetings with investors to listen to their comments and complaints about the investment climate in Viet Nam and to provide responses to investors on their outstanding issues. Relevant Ministries also have meetings with investors on the issues under their authority, especially when such issues are known to be of current concern to the investor community, particularly in the areas of tax, customs, and land. For example, the Ministry of Finance and the Viet Nam Chamber of Commerce and Industry organised a meeting with business representatives to discuss tax and custom issues. Provincial People's Committees organise annual meetings with enterprises to discuss issues of concern. Representatives of functional departments and state agencies participate in the dialogue. In such meetings, enterprises can discuss their needs and the business and investment challenges they face, with particular emphasis on areas such as business sites, investment incentives, credit availability, tax incentives, and the granting of business licences. The government team implementing the Enterprise Law and the Investment Law organises

meetings with relevant agencies to solve and/or submit to the government proposed actions to overcome any difficulties arising in the process of implementing the two laws. Dialogues via hot-lines, internet-based forums and open letters on the media are also promoted. Also, the Ministry of Planning and Investment and its Foreign Investment Agency consult for the government in promulgating instructions and in identifying and solving problems that may arise for investors.

PFI Question 2.6. What mechanisms has the government established for the evaluation of the costs and benefits of investment incentives, their appropriate duration, their transparency, and their impact on the economic interests of other countries?

Under its new Investment Law, Viet Nam has significantly modified its investment incentives programme. The Government has removed preferences related to subsidies for products and areas that are contrary to Viet Nam's international commitments. Investment incentives are now decided on the basis of investment areas and/or investment locations ("domains"). Certain investment sectors and geographical areas give rise to tax, accounting and land incentives, under Articles 33-37 of the Investment Law. The incentives are applicable to both domestic and foreign investors without any discrimination.

Encouraged investment sectors include: *i)* the manufacture of new materials and production of new energy, manufacture of high-tech products, biotechnology, information technology and mechanical products; *ii)* the breeding, rearing, growing and processing of agricultural, forestry and aquaculture products, production of salt, and creation of new plant and animal varieties; *iii)* the use of high technology and advanced techniques, protection of the ecological environment, and investment in research, development and creation of high-technology; *iv)* labour intensive industries; *v)* the construction and development of infrastructure facilities and important industrial projects on a large scale; *vi)* the professional development of education, training, health, sports, physical education and Vietnamese culture; *vii)* the development of traditional crafts and industries; and *viii)* other manufacturing and service sectors that require encouragement (Article 27). Encouraged geographical areas include: *i)* those where socio-economic conditions are either difficult or especially difficult (such areas are stipulated in implementing regulations for the Investment Law) and *ii)* industrial zones, export-processing zones, high technology zones and economic zones (Article 28).

The central government proposes objectives and criteria for the incentive programme based on the overall strategy of social and economic development.

Ministries and Provincial People's Committees are responsible for the implementation process. In addition, provincial governments also provide local incentives. To ensure consistency and transparency, provincial incentive programmes are required to be in line with the policy framework of the central government.

The government employs two types of analysis to evaluate the costs and benefits of investment incentives provided from the state budget: one uses a financial benefit indicator and the other uses social benefit indicators. Depending on specific cases, the weight given to one or the other indicator in the cost-benefit analysis will differ. It is noted that the Mekong Project Development Facility (MPDF) and the World Bank's Foreign Investment Advisory Service (FIAS) recently undertook an examination of Viet Nam's preferential corporate income tax policy.

In connection with the general issue of taxation, Viet Nam has adopted several different investment incentive measures, including corporate income tax exemption and reduction, import tariff exemption and reduction, credit and investment assistance. Specific statistics of the impact on investments resulting from tax incentives in Viet Nam are not available. Surveys of domestic investors using in-depth interviews and questionnaires have been conducted to collect information on this subject. A recent survey on business competitiveness reveals that roughly 85% of the surveyed firms (140 domestic enterprises) would have invested in their businesses even if income tax preferences had not been made available. This indicates that business decisions are, in most cases, not based on the availability of investment incentives, though they can provide a "supporting" factor. The aforementioned survey also concluded that infrastructure and human resources are the most important factors to investors. Other elements that matter to investors include access to resources and markets and the legal framework and attitude of provincial governments.

PFI Question 2.7. What steps has the government taken to promote investment linkages between businesses, especially between foreign affiliates and local enterprises? What measures has the government put in place to address the specific investment obstacles faced

Based on policies supporting the development of SMEs, the government has established the Agency for Small and Medium-sized Enterprises Development (ASMED), under the Ministry of Planning and the Investment and Credit Guarantee Funds for SMEs. A National Centre for SMEs Support has also been created under the Viet Nam Chamber of Commerce and Industry,

and similar provincial centres have been formed in provinces, including Hanoi. Despite recent substantial improvement in business environment and conditions in Viet Nam, SMEs continue to report difficulties to varying degrees in obtaining financial credit, coping with tax burdens, acquiring business space, finding qualified employees, accessing information and organising trade promotion activities, creating, developing and safeguarding brand names as well as promoting sales and dealing with commercial disputes on foreign soil. There is also a reported disconnect between established central government policies and SME policies at the local level.

PFI Question 2.8. Has the government made use of international and regional initiatives aimed at building investment promotion expertise, such as those offered by the World Bank and other intergovernmental organisations? Has the IPA joined regional and international networks?

The government has participated in and benefited from a number of international programmes. An Investment Climate Assessment was undertaken in Viet Nam by the World Bank's Foreign Investment Advisory Service (FIAS). An extensive review of Viet Nam's business licensing system was carried out by FIAS, in collaboration with the Mekong Private Sector Development Facility (MPDF). The World Bank's Multilateral Investment Guarantee Agency (MIGA) has supported Viet Nam on issues related to the involvement and potential role of the private sector in the power generation and transmission sectors, and on the development of investment. Viet Nam has yet to participate in the World Association of Investment Promotion Agencies (WAIPA), and has not yet used UNCTAD's Advisory Service on Investment and Training aimed at building investment promotion expertise.

PFI Question 2.9. To what extent has the government taken advantage of the information exchange networks for promoting investment?

Viet Nam has not yet prepared a timetable for joining such information exchange networks.

3. Trade policy

Chapter 3 of the PFI studies laws, trade policies and awareness on how trade policies can encourage investment, both domestic and international, and how they can help maximise the contribution of investment to growth.

Viet Nam's accession to the WTO marked a major milestone in the nation's transition to a market economy and has involved a great many changes in Viet Nam's trade regime.

PFI Question 3.1. What recent efforts has the government undertaken to reduce the compliance costs of customs, regulatory and administrative procedures at the border?

Improvements in the customs procedures are based on Customs Law 2001 and further amendments this law adopted on 14 June 2005 (Law No. 42/ 2005/ QH11), effective from 1 January 2006, and looking further back, accession to the 1974 Kyoto Convention on harmonisation and simplification of customs procedures. Standardised customs procedures are expected to be compliant with the Revised Kyoto Convention (1999), which Viet Nam is seeking to join. A strategy to improve customs procedures for the period to 2010 has been designed with the assistance of the World Bank.

Viet Nam's customs procedures are now considered to be more transparent than before. Procedures have been simplified and harmonised, reducing the amount of required documentation. A system of electronic customs declaration and clearance was introduced in August 2005 pursuant to the Minister of Finance's Decision No. 50/2005/QDBTC of 19 July 2005 along with a risk management and post clearance audit system. Customs procedures are discussed with interested parties during the drafting process and are published in the Official Gazette once finalised. All customs procedures, regulations and policies related to importation and exportation were disclosed officially through mass media (Customs News, Customs Magazine and the General Department of Customs website *www.customs.gov.vn*).

Despite these recent improvements, Viet Nam's customs procedures are still considered to be complicated, relatively slow and at times unpredictable. There are work overloads in the processing of declaration forms at some key border gates that have a high level of import and export traffic. The application of IT and modern techniques is still limited. Another concern is ineffective follow-up of complaints, leading to delays in complaint settlements (some cases took more than one year). The database of the customs agencies is also infrequently updated, which limits the tax calculations of customs agencies under GATT principles and the declarations by enterprises.

The Viet Nam government has committed to fulfil all WTO agreements signed in conjunction with Viet Nam's accession to the WTO on 11 January 2007.

PFI Question 3.2. What steps has the government undertaken to reduce trade policy uncertainty and to increase trade policy predictability for investors? Are investors and other interested parties consulted on planned changes to trade policy?

Since Viet Nam's accession to the WTO, the Office of the Government is legally required to publish draft Government Resolutions and Decrees and Decisions and Instructions of the Prime Minister on the Internet or in mass media for comments by government agencies, organisations and individuals. Ministries and drafting agencies are also required to seek comments from the business community through the Viet Nam Chamber of Commerce and Industry (VCCI) when drafting policies that affect business operations. Draft legal documents affecting the business community have been published on the VCCI website (*www.vibonline.com.vn*). The duration of the time period for collecting comments on draft measures is 60 days. Viet Nam has also made a commitment to publish these drafts in magazines and/or websites of state agencies.

The Government Action Plan issued to implement Resolution No. 16/2007/NQ-CP dated 27/02/2007 confirms the importance of circulating information about the WTO to state agencies, investors, businesses and associations. The government intends to use diversified information channels, the media and training courses to increase awareness and understanding of the opportunities and challenges following Viet Nam's accession to the WTO as well as the specific contents of commitments and their implementation. Information on the implications of WTO rules for Viet Nam's policies on socio-economic development will also be distributed. The primary information channels will be training courses in all local areas, television and radio programmes, the print media and published documents.

PFI Question 3.3. How actively is the government increasing investment opportunities through market-expanding international trade agreements and through the implementation of its WTO commitments?

Viet Nam has established trade relations with 160 countries and territories worldwide, and signed 90 bilateral trade agreements. Moreover, the country is a signatory to 350 development co-operation agreements and another 37 bilateral agreements on economic and cultural co-operation with foreign countries and international organisations. Most significant is Viet Nam's participation in the US-VN Bi-lateral Trade Agreement, the ASEAN Free

Trade Agreement (AFTA1996), and other regional economic co-operation schemes such as Asia Pacific Economic Co-operation (APEC-1998), ASEAN Economic Community, and the Greater Mekong Sub-region (GMS) Those agreements have proven to help in attracting more investments into Viet Nam, since they help to supplement the country's small domestic markets. Many of these agreements aim to promote both trade and investment, and they entail measures to protect intellectual property rights, harmonise customs valuation, procedures and nomenclature, develop common product certification standards and eliminate quantitative restrictions and barriers.

Currently, Viet Nam, through its participation in ASEAN, is simultaneously negotiating 6 FTAs with partners. These are ASEAN-China, ASEAN-Korea, ASEAN-Australia, New Zealand, ASEAN-India, ASEAN-Japan, and ASEAN-EU. (Annex A to this section gives a summary of these negotiations.) In addition, ASEAN has signed the ASEAN-US Trade and Investment Framework Arrangement (TIFA) and in the near future will sign the ASEAN-Canada Trade and Investment Co-operation Arrangement (TICA). The purpose of these agreements is to create a foundation with which to consider future action; they are not legally binding. In addition, ASEAN is exploring the possibility of establishing FTAs with Pakistan and Turkey, though the prospects for these remain uncertain. (See Annex 1 to the present document.)

As for bilateral agreements, the Viet Nam – Japan Economic Co-operation Agreement was signed in December 2008.

Pursuant to implementation of WTO commitments, the Government issued the Action Plan to implement Resolution No.16/2007/NQ-CP dated 27/02/2007 regulating the main policies to strengthen the rapid and sustained growth of the economy in context of Viet Nam being a member of the WTO. This action plan delineates the responsibilities of central and local state agencies and of enterprises in all economic sectors to carry out the Resolution. The objective is to take full advantage of opportunities and overcome challenges to drive Viet Nam to a new stage of rapid and sustained growth. The National Assembly has programmes for drafting laws and regulations that extend until 2012 to complete the necessary legal framework for Viet Nam's commitments with the WTO.

Under the WTO Viet Nam has entered into commitments on investment policy related to trade (discussed below), transparency and opening the service market. The commitments on transparency will generate more updated information and will strengthen investor confidence in Viet Nam's legal framework. With regards to commitments related to the service sector, Viet Nam has agreed to open 11 sectors, or 110

of the total 155 service sub-sectors under the WTO's classification scheme, to foreign investment. Foreign investors are able to invest in Viet Nam through the establishment of joint-venture enterprises, 100% foreign invested enterprises (in accordance with a concrete schedule for each of the sub-sectors) and co-operation with Vietnamese enterprises through business co-operation contracts (BCC). In several sectors, foreign investors are permitted to establish branches. These commitments expand the investment opportunities available for foreign investors in Viet Nam. Viet Nam's accession to the WTO has sent a strong, positive signal to foreign investors that Viet Nam is determined to provide a positive environment for investment and continued economic growth.

PFI Question 3.4. How are trade policies that favour investment in some industries and discourage it in others reviewed with a view to reducing the costs associated with these distortions?

Viet Nam has a unified tariff table for all imported and exported commodities. WTO rules require that Viet Nam eliminates all subsidies prohibited by the WTO and provides investment incentives on equal terms to both foreign and domestic investors. Adherence to these rules resulted in the termination of subsidies for motorcycles in 2003. Similarly, the Government had planned to spend VND 5,000 billion on the Development Strategy of Textile through 2010, but the Vietnamese government is now committed to cutting this expenditure after Viet Nam's accession to the WTO. When implementing trade policy reform, the Government conducts impact assessments of its policies, aiming to minimise negative impacts. Presently, draft regulations are published on the Government website to solicit public feedback, particularly from the business community and other relevant stakeholders.

Regarding the WTO Agreement on Trade-Related Investment Measures (TRIMs), Viet Nam commits to fully carry out its obligations under this instrument. The TRIMS Agreement does not stipulate specifically how to design trade-related investment measures, but it presents a list to illustrate several investment measures that are inconsistent with the national treatment obligations stated in Article III and with obligations to remove restrictions on quantification as stated in Article XI of GATT. The prohibited measures in the list include local content requirements, investment in association with expansion of access to domestic materials, foreign currency balance or import-export balance conditions or export restrictions. Viet Nam is committed to eliminating any such conditions and will not

introduce any future measure that is inconsistent with the TRIMS Agreement.

For Viet Nam, its obligations under TRIMS are not new, as the US-Viet Nam Bilateral Trade Agreement (BTA) basically requires Viet Nam to commit to fully implement the TRIMS regulations. The 2005 Investment Law places into legislation Viet Nam's full commitments with respect to this BTA. Viet Nam is seeking new policy tools for development that are consistent with WTO obligations. The Government is studying possible measures, such as replacing export criteria by other criteria like creation of jobs or investment areas, encouraging investment projects that supporting industry development, encouraging the establishment of infrastructure and of raw material development, particularly in areas with difficult socio-economic conditions, and encouraging projects for the planting and processing of forestry and agricultural products.

Regarding the WTO Agreement on Subsidies and Countervailing Measures (SCM), Viet Nam has agreed to abolish entirely subsidies that are banned under WTO's regulations (subsidies for export and local contents). However, regarding investment preferences for production granted before the date of Viet Nam's accession to WTO, Viet Nam maintains a 5 year period of transition. This relates exclusively to the textile and garment industries.

In sum, Viet Nam is committed to fully observing WTO regulations and Viet Nam's legal system has been adjusted to conform to WTO regulations. Several legal documents guiding the implementation of Viet Nam's commitments to the WTO on distribution and trading rights have been issued: Decree No. 23/2007/ND-CP dated 12/02/ 2007 stipulating in detail Trade Law concerning sales and purchases and other activities concerning the foreign invested enterprises, Decree No. 90/2007/NDCP dated 31/5/2007 stipulating the rights of export and import by foreign traders who are not present in Viet Nam, and Decision No. 10/2007/QD-BTM dated 21/05/2007 publishing the schedule of Viet Nam's commitments on commodity sale and purchase in Viet Nam. Other legal documents regulating Viet Nam's commitments on bank and insurance also have been issued. Also, Decree No. 108/2006/ND-CP dated 22/9/ 2006 guides the implementation of some articles of the Investment Law, including the rights of investors investing in Industrial Parks, Export Processing Zones, and Economic Zones and investors investing in infrastructure in these Parks and Zones.

PFI Question 3.5. To what extent do trade policies raise the cost of inputs of goods and services, thereby discouraging investment in industries that depend upon sourcing at competitive world prices?

In 2000, the Law on Amendment and Supplement to some Articles of the Law on Foreign Investment removed the requirement on foreign exchange self-balancing and the obligation for foreign-invested enterprises to give priority to the purchase of domestic products; foreign-invested enterprises were free to choose their own markets for products. As of 1 January 2007 all foreign individuals and enterprises (including foreign-invested enterprises) have full trading rights, except for some products subject to "State-trading". The full trading rights accorded such individuals and enterprises would include the right to sell the imported product to any individual or enterprise having the right to distribute such product in Viet Nam. The right to import requires no minimum investment in Viet Nam. The individual or firm seeking to be the importer of record needs only to register (mainly for administrative purposes).

A certain number of items still do require approval from relevant ministries (*e.g.* pharmaceuticals, some chemicals, recording and broadcasting equipment). Access to trade for these goods is generally limited and enterprises that can participate in trade of these goods are selected in special ways, usually by nomination and approval of either Prime Minister, the line Ministries or the Provincial People's Committees.

Costs are being reduced through the opening up of the commodity market by import tariff cuts and the abolishment of non-tariff barriers. The following are Viet Nam's commitments on import tariff reduction:

Viet Nam agrees to bind the cap level for all tariffs (VND 10,600). The average rate of all tariffs is to be reduced from current level of 17.4% to 13.4%, with the regular cuts within 5-7 years. The average rate for agricultural products is to be reduced from 23.5% to 20.9% with the regular cuts within 5 years. For industrial products, the average reduction rate is from 16.8% to 12.6%, with the regular cut within 5-7 years. Approximately one third of the tariff lines have to be reduced. These are mainly concentrated in the lines with tariff rates of more than 20%. Viet Nam will maintain certain levels of protection for some sensitive and important commodities for the economy, including agricultural products, cement, steel and iron, constructive materials, and automobiles. The sectors with the strongest tariff reductions are textile and garment, fish and fish products, wood and paper, other manufactures, machines and electronic and electric equipment. Like other WTO members, Viet Nam also commits to cut and reduce tariffs for particular industries, such as information technology products (ITA), textile and garment, and health care equipment, with the implementation duration within 3-5 years. For tariff quotas, Viet Nam maintains application rights on sugar, poultry egg, tobacco leaf and salt.

As a result of the above actions, the level of import tariffs is now not considered to be a decisive factor in determining the input costs of Viet Nam's commodities. Rather other factors, particularly customs clearance procedures and logistics (transport, warehousing), are believed to have stronger impacts on commodity prices. Viet Nam's trade infrastructure, including sea ports, airports, land transport and warehouse facilities, remains inadequate and inefficient. This leads to increased production costs and thereby to decreased competitiveness of Vietnamese enterprises and their exports.

4. Competition policy

The fourth chapter of the PFI concerns competition policy and the contributions competitive markets can make to improving the investment climate, economic efficiency and thereby to economic development. Recognising these benefits, developing countries have been adopting competition laws and strengthening competition policies in ever increasing numbers. Passed in December 2004 by the National Assembly of Viet Nam, the Competition Law of Viet Nam is a result of a four-year drafting process, with reference to the statutes of nine nation-states and territories, and the model laws promoted by international institutions like the United Nations' Conference on Trade and Development (UNCTAD) and the World Bank (WB), as well as with influences from the enforcement practices and experiences of other countries. It has been in effect since 1 July 2005.

PFI Question 4.1. Are the competition laws and their application clear, transparent, and non-discriminatory? What measures do the competition authorities use (*e.g.* publishing decisions and explanations on the approach used to enforce the laws) to help investors understand and comply with the competition laws and to communicate changes in the laws and regulations?

According to the Article 2 of the Competition Law, the Law applies to all business enterprises and professional and trade associations in Viet Nam; overseas enterprises and associations registered in Viet Nam; public utilities and state monopoly enterprises; and State administrative bodies. It has superseding power over all other enacted laws of Viet Nam regarding restrictive business practice and unfair trade practices. Therefore, this Law is applicable to every business without discrimination towards ownership types of enterprises (domestic and foreign, State-owned or privately-owned). In the Competition Law, there is no regulation providing for cases of exception or exemption based on ownership types of enterprises. The law prohibits

anticompetitive behaviour/decisions by officials or State administrative agencies, taking advantage of their authority.

The Competition Law does provide an exemption in some cases of practices in restraint of competition and "economic concentration" (a term usually referring to mergers and acquisitions). These cases of exemption are applicable to all types of enterprises. Specifically, according to the Article 10 of the Competition Law, agreements in restraint of competition stipulated in item 2, Article 9 of this Law are exempted for a certain period of time if satisfying one of the following conditions in order to lower production costs and bring benefits to consumers:

1. Rationalising organisational structures, business models, improving business efficiency.
2. Speeding up technical and technological advances, improving the quality of goods and services.
3. Promoting uniform application of quality standards and technical norms of products categories.
4. Harmonising business, goods delivery, and payment conditions, which have no connection with prices and price factors.
5. Enhancing the competitiveness of small and medium-sized enterprises.
6. Enhancing the competitiveness of Vietnamese enterprises in the international market.

With regard to mergers and acquisitions (M&As), all cases in which the combined market share of the relevant firms would be 50% or more are prohibited except where *i)* the result is still a small or medium-sized enterprise (a concept not defined in the Law), *ii)* one or more of the merging parties is/are in danger of dissolution or bankruptcy, or *iii)* the result has an effect of expanding export or contributing to socio-economic development, technical and technological advance. It should be noted that basing merger notification on market share, as is the case in Viet Nam, is not a favoured approach as it can put the foreign investor at some risk.

The authority to grant exemption is vested solely with the Industry and Trade Minister (in the case of Article 10 and Art 19(1) of the Law) and the Prime Minister (in the case of Art 19(2) of the Law) respectively. The decision of granting exemption, however, will be dependent on the ability of the relevant parties to prove that their eligibility. Specifically, to enjoy one of the above exemptions, representatives of the participants in the competition restriction agreement or economic concentration must submit exemption application dossiers to the Competition Administration Department for receipt and appraisal.

The process of appraising dossiers of application for exemption is led by the Competition Administrative Department. It will consist of analysis, research and assessment of the suitability with criteria in the Competition Law for enjoying exemption. For cases of exemption under the authority of the Prime Minister, this dossier must get opinions from lines and ministries concerned before submitting to the Prime Minister for decision (*see Article 41, the Government Decree 116/2005/ND-CP dated 15 September 2005 on Detailed Provisions for Implementation of the Law on Competition*).

Article 56 of the Competition Law stipulates that the settlement of competition cases involving competition-restricting acts shall comply with the provisions of this Law and the settlement of competition cases involving unfair competition acts shall comply with the provisions of this Law and legislation on handling of administrative violations. In the process of carrying out competition procedures, investigators, the head of the Competition Administration Department and Competition Council members must, within the scope of their respective tasks and powers, keep confidential business secrets of enterprises and respect the legitimate rights and interests of related organisations and individuals. The Competition Law clearly stipulates the proceedings of investigation and settlement of competition cases without discriminating among enterprises of different types of ownership. Every business is treated equally by the Law. Viet Nam authorities confirm that the principles of non-discrimination and consistency are important principles in the process of making verdicts in competition cases.

The Competition Law recognises all enterprises' lawful right to business competition. However, competition must be implemented on the principles of honesty, non-infringement upon the interests of the State, public interests, legitimate rights and interests of enterprises, consumers and compliance with the provisions of this Law.

The adoption of the Competition Law represents a major step in the economic reform and regulatory framework development process in Viet Nam. There were a number of public consultation rounds convened during the law-drafting process, and there were numerous public/media-based debates surrounding the content of the Law before its official promulgation. These activities increased the public's awareness of the contents and implementation of the Law.

Businesses and other interested parties can access all necessary information related to the Law and its implementation from several sources. The Viet Nam Competition Administration Department (VCAD) has the responsibility to undertake advocacy and public education programmes on policies regarding competition in Viet Nam and build up databases, collect information and provide relevant State agencies as well as organisations and

individuals in Viet Nam with the same. Accordingly, the VCAD has been arranging to provide such information either directly from their offices (in Hanoi, Da Nang, and Ho Chi Minh City), via their websites (*www.qlct.gov.vn* and *www.vcad.gov.vn*, in Vietnamese and English respectively), or web-based forums, printed publications and telephone hotline (04 936635; extension numbers: 102 and 106). Resource constraints, however, do remain a limitation.

In addition, since the Competition Law was issued, VCAD has held a number of workshops and conferences with the goals of information dissemination, public consultation and compliance education. This process began during the process of drafting the law, continued through drafting the implementation regulations and is on-going. Moreover, VCAD has published two books on Questions and Answers about competition law in Viet Nam and on multi-level selling, as well as leaflets on competition law. These publications have been sent out widely to different groups, including business circles, professional associations, consumers, management agencies, etc., in order to publicise legal regulations in this field.

The Government and the Ministry of Trade have also published a number of documents to guide implementation of the Competition Law. Article 35(2) of the Competition Law states that the competition authorities have the mandate to "publicise the decisions on grant of exemption according to the Government's regulations". The obligation to convey procedural documents and decisions on competition cases is stipulated specifically in Decree 1162005-ND-CP. Another relevant provision in this regard is Art 104 of the Competition Law, which states that "*hearings shall be held in public*", unless when the contents of a hearing are related to national secrets or business secrets.

PFI Question 4.2. Do the competition authorities have adequate resources, political support and independence to implement effectively competition laws?

The Viet Nam Competition Administration Department (VCAD) is under the Ministry of Industry and Commerce (Former Trade Ministry) which is established and stipulated in terms of functions, duties, powers and organisational structure by the Government. VCAD performs the regulation of economic concentration and investigations into competition cases and resolves cases involving unfair competition acts. The Viet Nam Competition Council (VCC) has also been established and stipulated in terms of functions, duties, powers and organisational structure by the Government.

Political support will be crucial to the success of the Competition Law. This would enable passage of further necessary legislation and would provide more independence and resources for the implementing bodies. Political backing would raise the profile of competition issues and create public awareness through the media and wide publicity about the competition authority and its support from key politicians would also make it more difficult for the politicians to backtrack on their commitment under pressure from special interest groups. In the case of Viet Nam, where the competition regime is still young, the backing of the Ministry of Industry and Commerce and the Prime Minister (due to the institutional standings of the competition authorities within the government system, as well as the staff appointment procedures, as mentioned below) would be a significant asset.

In order for the competition authorities to function effectively, they require adequate resources, including both financial support and human resources. The operating budgets of VCAD and VCC are included in the State budget and are accounted for independently, not depending on other agencies. The Ministry of Finance has the authority to make decisions on the annual level of budget for these two agencies based on their proposed operating budget estimates. Yet, as Article 1 of Decree 05 states, "*the fund for the operation of the Viet Nam Competition Council shall be allocated from the state budget and prepared in the annual estimated budget of the Ministry of Trade*", to a certain extent the operational budget of the competition authorities depends on the budget allocation of the Ministry.

The VCAD, however, may have an additional source of finance for their operations from the collection of case-handling charges. Art. 62 of the Competition Law states that, "*competition case-handling charges shall be used for the handling of competition case. The Government shall prescribe the levels, collection, payment, management and use of such charge in accordance with legislation on charges and fees*". Liability to competition case-handling charges is provided for in the Law. The party that is concluded to have violated the provisions of the Law must pay competition case-handling charges. Where the investigated party is found not guilty, the complainant shall have to pay competition case-handling charges. Where a competition case is initiated by the VCAD, if the investigated party does not violate the provisions of the Law, the VCAD shall have to pay competition case-handling charges. Viet Nam is the first country in the world to have such provisions. This approach might curb abuse of the Law, but it might also lead to under-enforcement.

Even the most well-written law cannot be applied effectively without adequate human resources, *i.e.* a staff of sufficient size with adequate technical competence. The area of competition law often involves a high-

level economic and legal analysis to detect and analyse the effects of business conduct. Competition authorities thus need staffs of lawyers, economists and investigators familiar with competition issus, including several attorneys with litigation experience and a sound knowledge of administrative law and civil procedure. The Competition Law provides that a VCAD investigator and a VCC member should hold at least a Master degree in law, economics or finance, and have five and nine years of experiences in these fields respectively. However, this provision might prove difficult to realize in Viet Nam. Most of the VCAD staff are young, and do not possess the necessary qualifications and skills though they are dynamic and highly dedicated. The process of recruitment is carried out in compliance with the general regulation on recruitment of State civil servants under the legal regulation on civil servants.

The Prime Minister appoints the eleven to fifteen members of the Competition Council (VCC) and the Head of the Competition Administration Department (VCAD). The Vietnamese Government is determined to delegate competent people to undertake these important duties and to create sufficient strong positions, independent from other parts of the government, for those who will be making decisions on competition cases. The current members are all ministry officials, including three Deputy Ministers. There is no requirement that members be public officials; the appointment of several recognised competition experts that are not public officials could strengthen the independence of the VCC.

An important institutional arrangement for reducing political interference is the mechanism for *judicial review of competition decisions/ judgements*. Decisions for competition cases are based on the voting of the majority or the decision of the Chairperson of the report session if a majority vote is not reached. A decision by the VCC on a competition case is similar to an appeal verdict and is enforced by authorised state agencies. If the relevant parties disagree with the decision of the tribunal and the VCAD head, they may lodge a complaint with the VCC and the Industry and Trade Minister respectively.

The Competition Law also allows relevant parties to seek the judgement of the court if they disagree with the decisions to handle these complaints. As the penalty decision involves imposing administrative sanctions, by using this provision, the relevant parties can invoke the general judicial review system of administrative actions in Viet Nam. Judicial review was built into the Vietnamese legal system in 1998 when administrative litigation was provided for by the Administrative Litigation Law (ALL). The difficulty of enforcing court judgements and orders has been a daunting problem, and is particularly serious in administrative cases.

Finally, the Competition Law does not require a decision by the competition authorities as a prerequisite to bring private civil suits before the court. Private suits can be initiated independent of administrative proceedings regulated at the Civil Code. The law allows interested parties to initiate a lawsuit against a decision granting exemption by the Industry and Commerce Minister and the Prime Minister in accordance with the Law on Complaints and Denunciations.

PFI Question 4.3. To what extent, and in what way, have the competition authorities addressed anti-competitive practices by incumbent enterprises, including State-owned enterprises, which inhibit investment?

The term "abuse of dominant position" refers to anticompetitive business practices in which a dominant firm may engage to maintain or increase its position in the market. These business practices may be considered "abusive or improper exploitation" of monopolistic control of a market aimed at restricting competition. The Competition Law provides clear market share thresholds that establish market dominant positions by a single enterprise or a group of companies, as well as a monopoly position. Abuse of dominance or monopoly position is prohibited by the Law in its Articles 13 and 14, which provide a list (though not necessarily exhaustive) of dominant firm practices that violate the law. This list of prohibited behaviors does not have an exemption section similar to the one in the anticompetitive agreements. Presumably, since the dominant firms, as defined by the Law, possess at least 30 per cent of the relevant market, they have passed the "safe harbour" threshold provided by the Law, and thus might be able to restrain competition significantly.

As noted above and according to the Article 2, the Competition Law is applicable to business organisations, individuals (defined as "enterprises" in the Competition Law) including enterprises which manufacture, provide public goods and services, operate in State monopoly sectors and foreign enterprises operating in Viet Nam. Therefore, in the Competition Law, there is no form of discrimination between State-owned enterprises and enterprises of other types of ownership. There is a potential problem, nevertheless, in having the competition regulatory oversight of SOEs and their direct ownership both under line Ministries. This issue will be resolved with the move of the ownership of SOEs to the new State Capital Investment Corporation (SCIC). This process, which has been limited thus far, should be accelerated and extended to all SOEs.

Furthermore, Article 6 of the Competition Law prohibits anticompetitive behaviour by the governments and their subordinate departments who abuse their administrative power through industry monopolies or provincial monopoly. Accordingly, the Law divides prohibited government actions into four types: *i)* forcing an enterprise to purchase or sell goods and services with an enterprise appointed by a state administrative body; *ii)* discrimination between enterprises; *iii)* forcing industry associations or enterprises to associate with each other with a view to excluding, restraining or hindering other enterprises from competing in the markets; and *iv)* other practices that hinder the lawful business of enterprises. Yet instances of preferable treatment to SOEs remain. To give one example, according to the Law on Mineral Resources of Viet Nam, only SOEs are permitted access to the national mines. Non-state enterprises can access to these mines only through contracts with SOEs.

As for breaches of regulations in Articles 13 and 14 of the Competition Law on the abuse of a dominant position or monopoly position, the Competition Administrative Department has authority to conduct investigations (Term c, Clause 2, Article 49 of the Competition Law) and convey results of the investigations and the proposal for settlement measures to the Competition Council. This Council will make its decisions on competition cases by simple majority voting (item 2, Article 49, the Competition Law).

Article 117 of the Competition Law provides for a wide range of remedies to be applied in cases of abuse of dominant position, including monetary fines, public corrections, restructuring of enterprises, revocation of the business registration certificates, and deprivation of licences and practicing certificates. In addition, the Head of the Competition Administration Department and the Competition Council Chairman have the authority to apply some administrative preventive measures prescribed by legislation on handling of administrative violations (Article 61 of the Competition Law). The contents of these measures are specified in Article 88 of the Decree 116/2005/ND-CP. Moreover, the Decree 120/2005/ND-CP in Article 55 also stipulates forcible measures for executing decisions dealing with competition cases, to be applied in cases where organisations or individuals have not acted within the time limit as required by a competition case decision. The mechanisms of forcible implementation of the competition case-handling decisions are regulated in Article 121 of the Law of Competition and legal documents on implementation.

Assessment of the impacts of barriers to competition in the market is a function of Viet Nam's competition agency. In implementing the Competition Law, this agency will supervise and assess the possible effects of policies, legal regulations and specific administrative decisions and make proposals for

PFI Question 4.4. Do the competition authorities have the capacity to evaluate the impact of other policies on the ability of investors to enter the market? What channels of communication and co-operation have been established between competition authorities and other relevant government agencies?

suitable amendments and supplements to the issuing bodies. Accordingly, the competition agency has been undertaking research on certain economic sectors to identify current policies that are not compliant with competition policies. The results of these reviews have indicated that the policies examined do not create barriers to the free market entry of enterprises, nor does the Government of Viet Nam create barriers to the market entry by way of offering monopoly positions to foreign investors in its investment incentive policies.

Competition law is just one element of competition policy. The effectiveness of the Viet Nam's Competition Law will depend on the extent of coordination with other regulatory policies. The most direct overlap will be with sectoral regulators governing key utility sectors, which are mandated to create and promote competition in the regulated sector. The boundaries and roles of the sectoral regulators and the competition authority are difficult to define, and in many countries the overlap issues remain unresolved. Ideally, the sectoral regulators would concentrate on the structure of the sector, trying to create a competitive market so that the regulator's day-to-day role in setting prices would diminish over time.

The role of the competition authority is to deal with cases of anti-competitive practices when they arise. However, it is likely that sectoral regulators will continue to play a hands-on role for the foreseeable future. To prevent potential conflict and confusion, the competition law and the sectoral laws should specify clearly the circumstances under which the competition authority could investigate the behaviour of companies in the regulated sector. The legislation should also define a consultative role for the competition authority in the implementation and development of sector regulatory policies.

In the case of Viet Nam, the Competition Law specifies that "where there is any disparity between the provisions of this Law and those of other laws regarding competition-restricting practices or unfair competition acts, the provisions of this Law shall apply". This means the competition authorities will have power over all behavioural competition issues in all sectors, including regulated ones, while the sectoral regulatory bodies therein will look after structural as well as technical issues.

When competitive barriers are created by legislative policies or administrative decisions issued by other agencies, the Vietnamese competition agency will propose to amend or supplement the policies and decisions in question. In order to prevent such developments and otherwise promote effective competition, the Competition Administrative Department has established relations with sector-regulating agencies and formed a co-operation mechanism under a Memorandum of Understanding. The purpose is to strengthen the executive effect of competition legislation in specialised fields via exchanging and sharing information and participating in settling competition cases in such fields.

Consideration should be given to adopting strengthened and focused procedures for reviewing the effect on competition of new laws, regulations and sectoral development strategies. Particular attention should be given to any plans that would provide a licence to state enterprises (often in partnership with foreign investors) to dominate certain sectors of the economy.

PFI Question 4.5. Does the competition authority periodically evaluate the costs and benefits of industrial policies and take into consideration their impact on the investment environment?

To date, the Vietnamese competition agency has not undertaken such cost-benefit evaluations. However, VCCI and several national institutes (e.g. CIEM, Viet Nam Economics Institute, The World Politics & Economics Institute etc.) have undertaken independent research relating to the cost-benefit evaluation of certain industrial policies and their effect on the investment environment. Over the last 3 years VCCI has co-operated with international organisations in undertaking periodical evaluation and comparison of provincial competitiveness indexes of Viet Nam, taking into account the policy factors and other factors that constitute the provincial investment environment.

PFI Question 4.6. What is the role of the competition authorities in case of privatisations? Have competition considerations having a bearing on investment opportunities, such as not permitting market exclusivity clauses, been adequately addressed?

The Vietnamese government has increasingly strengthened its role in encouraging competition in certain sectors of the economy, and has earned initial results, most noticeably in the telecommunication sector. Viet Nam had

around 12,300 State-owned enterprises (SOEs) at the beginning of *Doi Moi*. The economic performance of SOEs lagged, as they lacked often incentives to be more efficient and profitable. Accumulated bad debts of unprofitable SOEs, resulting in mounting fiscal burden and budget deficits, have always caused headaches for the government. By the end of the 1980s, a comprehensive SOE reform programme was a necessity, and the first round of SOE reform started in 1986. Initial reform measures sought to dissolve unprofitable SOEs and rearrange the others by means of merger and consolidation. Profit-based accounting was introduced and output targets were replaced with profit targets. In 1992 the government decided to experiment with equitisation as part of SOE reform, though major equitisation efforts were not undertaken until early 2000.

Although the equitisation programme has been successful in transforming a large number of SOEs into more efficient enterprises, it still has many shortcomings. The pace of equitisation has been slow. By early 2005, only 80% of the government target has been met; total capital of equitised SOEs accounts for only 8.2% of total state-owned capital in the economy. SOEs continue to contribute approximately 40% of Viet Nam's GDP and 50% of the State budget revenue. By the end of 2007, over 3300 SOEs had been equitised, 200 of which are listed in the stock market.

Viet Nam's Competition Agency assists the Government in its management functions in order to establish and maintain a healthy competitive environment in Viet Nam's markets. The agency will contribute its ideas and proposals to the Government and related agencies on activities during the privatisation process that may lead to disadvantageous consequences in forming and maintaining the above mentioned competition environment.

The Competition Law and its implementation regulations include recognition of the possibility of an enterprise gaining control over other enterprises by way of taking over their assets or a sufficient bloc of shares. A guiding principle in the equitisation process in Viet Nam has been that the State maintains its control and dominant share in enterprises in key industries, which is important to the stabilization of the economy.

The government of Viet Nam has also tried to ensure consistency between the Competition Law and competition-related provisions of other laws and regulations. The Unified Enterprise Law 2005 of Viet Nam, for example, states that, "*for merger cases where merging parties have a combined market share of 30 per cent up to 50 per cent in the relevant markets, the legal representatives of the merging parties have to notify the competition-managing agency before the merger is affected, unless the laws and regulations on competition stipulate otherwise. Merger cases, in which merging parties have a combined market share of*

beyond 50 per cent in the relevant markets, are prohibited, unless the laws and regulations on competition stipulate otherwise". The same regulation and prohibition applies in the case of acquisition.

In instances where monopolistic state enterprises are replaced by private enterprises, the Competition Law as such would come into play only if the process would result in a violation of the regulations on economic concentration or belong to prohibited cases in Article 18 of the Competition Law. The Law does not explicitly address the issue of replacing public monopolies/incumbents with privates ones during the privatisation process. All cases of selling shares in State-owned properties are subject to the regulations of the Competition Law if this trading activity meets the conditions on acquisition of enterprises regulated in this Law.

The application of legal provisions on mergers and acquisitions in the case of privatisation implies that the government gives considerable attention to creating competitive market structures in sectors/industries previously dominated by State-owned monopolies and oligopolies. This, however, will have to be balanced with the desire of industrial agencies to sell State assets at the highest possible prices. The competition authorities would not be in a position to determine a balance between these two considerations. The institutional standing, mandate and authorities of the competition authorities are not sufficient to take the matter in their hands. Moreover, the provisions of the Competition Law, despite possibilities for exemptions and exceptions in the case of M&A's, would not permit the competition authorities to let through any deals which would reduce the level of competition and contestability of the markets, even if they would bring a considerable amount of capital.

PFI Question 4.7. To what extent are competition authorities working with their counterparts in other countries to co-operate on international competition issues, such as cross-border mergers and acquisitions, bearing on the investment environment?

The Competition Law of Viet Nam, as well as its implementation regulations, does not deal with any cross-border anticompetitive practices. The only foreign element dealt with by these provisions occurs when one of the parties to competition cases is a foreign-invested enterprise, based and operating in Viet Nam [Art. 2(1) of the Law]. This is a significant constraint because Viet Nam is actively opening its economy and integrating into the global economy. Also, since Viet Nam's accession into the WTO requires the removal of most existing protectionist measures,

enterprises in Viet Nam will have to deal with not only competitive pressure from within and outside the country, but anticompetitive conduct originating from outside as well.

The Competition Administrative Department is building bilateral co-operation with competition agencies in other countries which have extensive experiences in executing competition policies, such as the United States, Germany, Korea, Japan, Canada, and France, to learn, exchange and share practical information on competition issues. These activities have their legal basis in Art. 2(8) of Decree 06, which states that the Department shall "*carry out international co-operation activities in elaborating and implementing the legislation on competition, combat against dumping, combat against temporary subsidy, application of measures of self defence and protection of customers' rights*". VCAD intends to participate actively in regional and international competition organisations/forums to collect information and learn from the experiences of other competition authorities in dealing with competition issues within regional and multinational frameworks.

In the future, co-operation will be extended by VCAD towards jointly settling transnational competition cases. Information can be exchanged via current co-operation mechanisms based on signed documents. The provisions of co-operation in signed co-operative documents have clearly stated the necessity of maintaining the security of exchanged information. The exchange of particularly sensitive information can be carried out via diplomatic means through Ambassadors. The Competition Law has regulations on securing such information (see Article 36 the Competition Law).

Nevertheless, in the era of globalisation, a competition law which lacks jurisdiction to try any anticompetitive practices *originating* from outside its country (though having substantial adverse effects on the competitive process in its domestic market) will be of limited effectiveness in such situations. The Competition Law of Viet Nam, therefore, in its next amendment, should widen the scope of regulation to such practices to avoid this hurdle. In addition, other issues with foreign elements and having substantial impacts on trade and livelihood in the country, such as export and import cartels and compulsory licensing of Intellectual Property Rights on grounds of public interest, should also be dealt with at that time.

5. Tax policy

To fulfil their functions, all governments require taxation revenue. However, the level of the tax burden and the design of tax policy, including how it is administered, directly influence business costs and returns on

investment. Sound tax policy enables governments to achieve public policy objectives while also supporting a favourable investment environment.

PFI Question 5.1. Has the government evaluated the level of tax burden that would be consistent with its broader development objectives and its investment attraction strategy? Is this level consistent with the actual tax burden?

The general stated objectives of Viet Nam's tax policy are to establish a tax system appropriate for the socialist market economy, modernisation of tax management in order to mobilise tax revenue, to ensure the country's financial requirements for modernisation and industrialisation of the economy, to ensure social equality and to integrate actively into the international economy. The document of the Party Congress IX on the socio-economic development strategy in the period of 2001-2010 included the following: "…To continue reform on tax system in accordance with the situation of country and international commitments. To supplement, improve, simplify types of tax, gradually apply a consistent tax system, regardless of which economic sectors enterprises belong to, Vietnamese enterprises and foreign-invested enterprises. To apply a consistent and favourable personal income tax for every taxed object, ensuring social equality and bringing in motivation for development. To modernise the procedure of tax collection and State management improvement".

Although most taxes, fees and charges have been amended and supplemented in recent years towards reducing the obligations of enterprises, tax still remain the main source of domestic revenues in the State budget. Tax revenue from the production and business sector in 2007 accounted for 69.3% of the total budget revenue. The government seeks to balance its revenue requirements for needed public expenditure with its investment attraction strategy through its investment incentives policy described earlier in this report. In developing its incentives the government refers to international experience. It recognises the desirability of avoiding revenue losses and windfall gains to investors. Work is under way to better evaluate the level of tax burden in comparison with other emerging and OECD countries.

Viet Nam is proceeding with step-by-step reforms, with the objective of applying a common, transparent, neutral tax system equally across all economic sectors and gradually reducing protection by eliminating non-tariff barriers and lowering import tariffs in order to motivate Vietnamese enterprises to reinforce technological development and improve their competitiveness.

PFI Question 5.2. What is the average tax burden on domestic profits, taking into account statutory provisions, tax-planning opportunities and compliance costs?

Until the end of 2008, a common corporate income tax (CIT) of 28% was imposed for all enterprises registering operations in the territory of Viet Nam, regardless of economic sectors or the capital sources. From 1st January 2009, the common corporate income tax has been reduced to 25% in accordance with the Law on Corporate Income Tax which was approved by the National Assembly on 3rd June 2008. There are estimates that enterprises involved in retail trade have actual tax burdens of 30 to 40% because their ability to deduct as business expense the costs of advertising and marketing is capped at 10% of total business costs. On the other hand, many manufacturing firms have tax burdens substantially below the common rate of 25% (or previously 28%) due to tax holidays. More work is under way to evaluate the average tax burden on domestic profits.

There are no estimates available of how much tax revenue is being reduced through tax evasion. However, cases of tax evasion detected by police offices and tax agencies show that the amount of tax avoided may be large, and the losses to Viet Nam's State budget not insignificant.

Viet Nam's Central Institute for Economic Management (CIEM) carried out a survey on the average length of time for enterprises to complete tax-related procedures. On average, it takes one enterprise 1959.2 hours per year to do the tax-related procedures, with 15.1 hours to register for tax codes; 93.1 hours to print and manage VAT invoices; 1 732.7 hours to pay VAT; 51.2 hours to pay corporate income tax; 8.7 hours to pay special consumption tax; 58.5 hours to satisfy requirements of inspection. The length of time for paying VAT is the most time-consuming, which accounts for 88% of the total time of doing the tax-related procedures. Within 1 year, the average enterprise must pay taxes 32þtimes. According to the World Bank and Price Water House Coopers, this is less than in China and Thailand but the consumed length of time is 10 times as high as that in Thailand (104 hours) and 1.2 times as high as that in China (872 hours).

Today in Viet Nam, responsibility of controlling corporate income tax and personal income tax belongs to the General Bureau of Tax under the Ministry of Finance. The General Bureau of Tax has a management network that extends from central level to district level: the General Bureau of Tax at central level, Bureaus of Tax at provincial level and branches of Tax Bureau at district level.

The Ministry of Finance and the Bureau of Customs and Bureau of Tax under the Ministry of Finance have established three websites

(*www.mof.gov.vn*, *www.gdt.gov.vn*, *www.customs.gov.vn*) where enterprises can access regulations and other information on the tax system and can send queries to the relevant government agencies regarding any difficulties. However, there remain hundreds of thousands of small enterprises and

Box 3.3. **Statutory Taxes in Viet Nam**

Corporate income tax is a direct tax applicable to business organisations and individuals subject to corporate income tax. The tax amount is identified based on taxable income and tax rates. Taxable income includes: income from production and trading in goods and services minus legitimate expenses. The tax rate is fixed by the government, and is currently at 25%.

Licensing tax is an annual fee applicable to business entities, including: state-owned enterprises, shareholding companies, limited liability companies, private enterprises, foreign-invested enterprises stationed in Viet Nam, foreign organisations and individuals doing business in Viet Nam, economic organisations, public service providers, self-subsisting business organisations; co-operatives, co-operative unions and credit funds; company branches, shops, showrooms (attributed to companies or company branches) and so on, employing a financially dependent or financial statement accounting system. The levels of licensing tax vary based on types of business, business lines, scale and range from a fixed VND50,000 to VND3,000,000 per annum.

Value-added tax (VAT) is an indirect tax that is calculated based on the added value of taxable goods and services. Goods, services used in production, trade and consumption in Viet Nam are subject to the VAT.

Special Consumers' Tax is an indirect tax, applicable only to high tax rate groups for the purpose of adjusting the income of individual consumers of special goods and services, including cigarettes, cigars, wine, beer; under 24-seat cars, gasoline of all types, naphtha, reformade components and other gasoline making ingredients; air conditioners with a capacity of 90.000 BTU or lower, playing-cards, votive paper and objects. Any organisations and individuals involved in the production, import of goods and provision of services belonging to one of the goods and services listed above are subject to special consumers' tax. Special consumers' tax rates applicable to imported goods and services named above range between 15% and 100%.

Natural Resources tax is a type of tax levied on the exploitation of natural resources on land, islands, inland waters, territorial sea waters, special economic regions and sea-beds under the sovereignty of the Socialist Republic of Viet Nam, including: *a)* metallic minerals; *b)* non-metallic minerals; *c)* petroleum; *d)* natural gas; *e)* natural forests products; *f)* natural aquatic products; *g)* natural water; and *h)* other natural resources.

Box 3.3. **Statutory Taxes in Viet Nam** *(cont.)*

Land use right transfer tax is a type of tax levied on the income of land user right owners upon transfer of the right to another person. Households and individuals owning land use rights who are engaged in transfer of the right under the provisions of the Land Law, are deemed transferors of land use rights. Business organisations owning land use rights engaged in land use right transfer from Jan. 01, 2004 who are subject to corporate income tax are exempt from land use right transfer tax. The tax rate in connection with arable land, forest land, aquaculture land, salt production land is 2%. The rate for housing land, construction land and other types of land not mentioned above is 4%.

Agricultural land use tax (housing land tax) is in principle, applicable to all organisations and individuals using the land at the rates provided and adjusted on an annual basis by the provincial People's Committees. In addition, extensive exemptions and reductions are available, such as for land of centenary tree plantation renewing the planting cycle and annual tree planting land converted to centenary tree growing; tax reduction in case of disasters affecting crops and poor households; business organisations, political organisations, socio-political organisations, citizenship societies and business associations, units of the armed forces, administrative and public services (including Institutes, research and testing stations and camps) currently managing and using land in agricultural production or handing over the land to other organisations, households and individuals for agricultural production on a contractual basis etc.

Registration tax is a liability levied on registration and transfer of ownership of valuable assets and other mandatory forms of registration, such as for real estate, cars, motorcycles etc., at various tax rates depending on types and value of assets and time.

Personal income tax is a tax enacted on Nov. 20, 2007 and in effect from Jan. 01, 2009 as a replacement of the High Income Ordinance. Under the Law on Personal Income, taxable income includes business-related income (goods, services, lease of assets, freelance practice etc.); income from salaries, wages, pays; income from capital investment and transfer (transfer of stocks, shares and others); income from transfer of real estates (land use rights, assets, land lease right, water surface etc.). In addition, other income in excess of VND10 million in a particular occasion originated from winning a lottery, a prize in promotion events, prize-awarding games, copyrights, legacy, gifts etc. is also subject to this tax. A progressive tax rate scheme of 5%-35% is applied.

Export and Import taxes are levied on export and import of goods, services across the border. Taxable items and rates are listed in the tariff schedule of Viet Nam and can be found on the website of the General Tax Department, Ministry of Finance, which is subject to adjustment in line with Viet Nam's international commitments.

millions of households that do not use the Internet. According to the tax reform plan, a "one-stop shop" for tax matters is to be developed.

PFI Question 5.3. Is the tax burden on the business enterprises of investors appropriate with reference to the policy goals and objectives of the tax system?

The Government estimates that the Vietnamese tax system needs to produce a total tax revenue of 19%-22% of GDP. Corporate taxes are expected to contribute around 15-17% of the total revenue. In the past, this rate has amounted to 12% or more of the total. When considering future changes in taxes on business enterprises, the government will seek to balance concerns about the effects on the business environment, social equality, practicality, suitability and effectiveness.

PFI Question 5.4. If framework conditions and market characteristics for investors are weak, has the government evaluated the limitations of using tax policy alone to influence favourably investment decisions?

As other countries in the region, Viet Nam has introduced a number of different measures of investment incentives such as enterprise income tax reduction and exemption, import tax reduction and exemption, credit subsidies and investment subsidies. Viet Nam has no specific statistical data on the extent to which investments in Viet Nam have been due to tax incentives. The results of a survey of domestic investors based on in-depth interviews and a questionnaire were informative on this issue. The competitive capacity initiative project for encouraging domestic investment revealed that among the companies receiving enterprise income tax incentives, about 85% (of 140 domestic companies) said that they would still invest in their businesses even if enterprise income tax incentives were unavailable. This suggests that the availability of the incentives, while it may be a necessary condition in some cases, it is not a sufficient reason for investors to make an investment. Some investment projects will continue without tax incentives if the investors recognise that the tax incentive will be provided at a certain point in time. The incentive is only "the facilitator." The survey mentioned above indicated that when making an investment decision, infrastructure and human resources remain the most important factors for enterprises. Additional factors that impact investment decisions more than tax incentives include access to raw materials, access to markets, local legal framework and local management behaviour.

As noted earlier, an additional issue in Viet Nam is the complexity of the incentive program, whose multiple objectives and varied levels of incentives may create a significant administrative burden on the government, decrease net tax revenues, and confuse potential investors. In the final analysis, tax reduction and exemption for foreign investors is likely to attract only a small number of investors. The most important thing to attract investment is the creation of a favourable environment in which the government plays the role of a supporter for investors rather than a controller seeking to fine tune investment flows.

Viet Nam monitors the tax reductions and exemptions offered by other countries in the region with similar market conditions. Competition between countries has affected the government's tax policy to some extent. At the same time, now that Viet Nam is a full member of WTO, tax incentive policies have to comply with the principles of the WTO. Viet Nam has no specific statistical data on the extent to which investment in Viet Nam has been driven by tax incentives.

PFI Question 5.5. Where the tax burden on business income differs by firm size, age of the business entity, ownership structure, industrial sector or location, can these differences be justified? Is the tax system neutral in its treatment of foreign and domestic investors?

The Vietnamese tax system applies to both domestic and foreign investors without discrimination, and is neutral with respect to nationality, firm size and age. There are differences between firms' tax burdens due to the granting of incentives. For example, for businesses involved in the exploration or extraction of oil, gas or rare natural resources, the enterprise tax rates can range from 28 to 50 per cent.

PFI Question 5.6. Are rules for the determination of corporate taxable income formulated with reference to a benchmark income definition (*e.g.* comprehensive income), and are the main tax provisions generally consistent with international norms?

The main regulations on tax are generally consistent with international norms, including the approach to determining taxable income. Companies are allowed to deduct standard business-related expenses. Accelerated depreciation is allowed in certain cases. Companies can carry forward losses up to five years. Inter-corporate dividends are excluded from corporate taxable

income to avoid double/multiple taxation. Individuals do not pay income tax on dividends they receive.

PFI Question 5.7. Have targeted tax incentives for investors and others created unintended tax-planning opportunities? Are these opportunities and other problems associated with targeted tax incentives evaluated and taken into account in assessing their cost-effectiveness?

Further work is needed to fully estimate the cost effectiveness of Viet Nam's tax incentives. There are reported instances of misuse of available tax incentives by businesses. One area that may provide room for abuse is the advanced technology field, where incentives are available but it is difficult to define a "new or advanced technology" and confirm that it is being applied.

PFI Question 5.9. Are tax policy and tax administration officials working with their counterparts in other countries to expand their tax treaty network and to counter abusive cross-border tax planning strategies?

Viet Nam is a member of the International Trade Organisation (WTO). Therefore, Viet Nam is bound by all agreements and binding regulations of WTO including those that have implications for tax (and customs) policies.

Viet Nam has established a network of tax treaties based on the OECD model. Viet Nam has signed agreements with 46 other countries. The objective of those agreements is to prevent double taxation by: 1) exemption and reduction of number of taxes be paid by a business or individual who is resident in a country which has concluded such an agreement with Viet Nam; and 2) deduction from the Vietnamese tax to be paid by a Viet Nam resident of the amounts paid already in a country which has concluded such an agreement with Viet Nam. These agreements create a legal framework for mutual co-operation and support between Vietnamese tax agencies and the tax agencies in partner countries to avoid and counter tax fraud. For countries with which Viet Nam does not yet have a tax treaty, Viet Nam still applies the treatment of double tax avoidance.

6. Financial-sector development

200. A well-functioning financial sector and system is critical for an attractive investment climate. Payment services, mobilising savings and allocating financing to firms wishing to invest are essential services. Well

functioning financial systems also impose discipline on firms to perform and drive efficiency.

PFI Question 9.7. What process does the government use to evaluate the capacity of the financial sector, including the quality of its regulatory framework, to support effectively enterprise development? What steps has the government taken to remove obstacles, including restrictions on participation by foreign institutions, to private investment in the development of the financial sector?

Every year, the State Bank of Viet Nam (SBV) submits a regular report on progress and quality of the legal documents of the banking sector to the Government. The SBV regulates and supervises the banking system, which has undergone a major transformation since 1988. Before 1988, Viet Nam had a state-owned, mono-banking system. Viet Nam now has a more diversified banking system, including, the five state-owned, commercial banks (SOCBs), the so-called state-owned banks for social policies and for development, 37 joint-stock banks, 9 finance companies (of which two are wholly foreign-invested), 12 leasing companies (of which 3 are wholly foreign-invested), 960 public credit unions, 5 joint venture banks and 39 branches of 28 foreign banks. The SOCBs still account for the majority of loans and deposits. Despite the recent growth of the banking sector, less than 5% of the population use bank services regularly and less than 20% hold bank accounts. Risk management is generally considered to be poor and reporting is highly unsatisfactory.

Recent reform efforts have focused on strengthening and modernising the State Bank of Viet Nam, improving the performance of the SOCBs and developing capital markets. A roadmap for reform was signed by the Prime Minister in May 2006, including strengthening banking supervision, and restructuring the SOCBs. The SOCBs historically carried out policy lending and continue to be the main source of finance for State-owned enterprises. The government has indicated its plan for the equitisation of the SOCBs. The process began in December 2007 with the USD 652 million realised in the auction of shares in Vietcombank. The second SCOB, the Industrial and Commercial Bank (Vietinbank) was privatised in December 2008 with an auction of 20% of its shares. Foreign private institutions wishing to invest in Vietnamese banks, including SCOBs in the process of equitisation, need to be among the top 500 banks in the world. This requirement presumably is a proxy for an assessment of qualifications for a banking licence based on prudential and other non-discriminatory criteria, the approach used in all

OECD countries. Generally shareholding is limited to 10%; but if the investor is a strategic partner and with the approval of the Prime Minister, this limit can be raised to 20 per cent. Investors are then limited in their ability to transfer these shares for a number of years thereafter.

Viet Nam's capital market regulator is under the State Security Commission. There are trading centres in Hanoi and Ho Chi Minh City. Under the 2006 Law on Securities and Securities Markets which came into effect in January, 2007, the 49% limitation on foreign ownership of listed companies has been introduced. The new law provides important elements of a legal base for investor protection and market transparency. Market surveillance and enforcement has also been strengthened.

Viet Nam's domestic bond markets have been rather inactive. Treasury bonds account for 64% of the market, bonds issued by the Bank for Investment and Development account for 18% and corporate bonds account for only 11%. The government bond market is highly fragmented with more than 400 bond instruments. The government has announced plans to issue a much needed benchmark bond. Liquidity in this market is low. Only SOCBs are said to be participating in the bond auctions.

Viet Nam has actively encouraged the development of the insurance sector. Foreign joint ventures and foreign-owned subsidiary branches are permitted under the Insurance Law of 2001. Three of the state-owned insurance companies have been equitised. A major constraint on the growth of the insurance industry is the lack of investment assets of sufficient quality due to the underdeveloped capital market. The development of the pension sector is even more retarded due to this factor. There is, in fact, no pension fund for private sector workers. A well-functioning commercial bond market is of critical importance for both of these important sectors. To date, however, this market as seen only very limited activity.

According to the existing regulations, foreign financial service providers are allowed to take part in the financial sector. However, the scope of their participation and operation are restricted, depending on the type of the organisation, its business lines, and the domain of operation. For the most part foreign banks have concentrated on serving foreign invested companies, large stated-owned corporations and foreign individuals in Viet Nam. Several have entered into the retail markets for automobile loans, housing loans and international credit card services. Implementation of the commitments to the WTO, will result in the removal of most obstacles against foreign financial firms by 2010. Under market opening moves taken to date, foreign financial firms have expanded their commercial presence in Viet Nam in many forms, such as:

a) For the foreign commercial banks: Representative offices, branches, foreign commercial banks, joint-venture commercial banks, in which the financial

contribution of the foreign partner does not exceed 50% of the charter capital of that joint-venture commercial bank, joint-venture financial leasing companies, 100% foreign invested capital financial leasing companies. Since 1/4/2007, 100% foreign invested capital banks are allowed to be established;

b) For foreign financial companies: Representative offices, joint-venture financial companies, 100% foreign invested capital financial leasing companies;

c) For foreign financial leasing companies: Representative offices, join-venture financial leasing companies and 100% foreign invested capital financial leasing companies.

Foreign credit institutions face restrictions on their activities, but these will be reduced significantly in the coming years. These include: restrictions on VND deposit mobilisation from individuals, and organisations, restrictions on credit card issuance; restrictions on the foreign individuals and organisations' establishment of sub-banks, branches or transaction offices and other restrictions on the financial service supply such as currency intermediation, financial information supply, and consultancy service supply.

According to the current regulations (Decree No. 69/2007/ND-CP) and Viet Nam's WTO commitments with respect to banking and other financial services:

a) Viet Nam can limit the participation of foreign credit institutions in the equitisation of Viet Nam's State commercial banks to the same participation level as that of Viet Nam's banks.

b) In terms of the financial contribution under the form of stock purchasing, the total amount of stock that foreign individuals and foreign legal entities are allowed to hold in each of Viet Nam's State joint stock commercial banks can be limited to 30% of the bank's charter capital, unless the Viet Nam's regulations and law provide for higher limits or unless they are allowed by Viet Nam's authorised agencies.

The limitations on foreign participation in Viet Nam's financial sector are quite severe in comparison with OECD countries. Experience has shown that opening financial markets to foreign institutions can accelerate the development of a modern, competitive and efficient financial system, which in turn, is an essential component of a robust economy and the investment environment. WTO commitments in this area should be considered a floor and opportunities for acceleration of the timetable should be seized.

The legal basis to protect the rights of borrowers and creditors in Viet Nam is provided by a number of legal documents, including the Law on State Bank of Viet Nam and subsequent adjustments and revisions, the Law on Credit Organisations Institutions and the Decree on deposit insurance, State Bank's decisions on the loan regulations, and other legal documents on the

PFI Question 9.8. What laws and regulations are in place to protect the rights of borrowers and creditors and are these rights adequately balanced? Is a registry system in place to support the use of property as collateral and to expand business access to external sources of credit? What data protection and credit reporting laws have been enacted to facilitate the flow of information and improve financial sector stability, thereby enhancing the investment environment?

regulation, guidelines on currency, credit, banking activities. The rights of shareholders of join stock commercial banks must follow the regulation of Enterprise Law, Stock Law, and charter of that join stock commercial bank. The Civil Law has regulations on the rights and responsibilities of lenders and borrowers in order to ensure the legal rights of both.

According to the Civil Law, enterprises are allowed to use their legally owned properties as a guarantee asset (mortgage, collateral, guarantee) for bank loans (foreign companies, however, are not allowed to own land). In particular, in terms of the land use right, according to the Land Law, enterprises are allowed to use the land use right (not originated from the State Budget) as an asset to guarantee their loan at credit organisations. Secured properties are registered at the Secured Transaction Registration Agency under the Ministry of Justice in compliance with Vietnamese law to ensure the rights of credit organisations and borrowers, including the regulations on priority order of creditors in case of guarantee property treatment.

The availability of credit information is not yet up to the level common to developed financial systems. The Credit Information Centre (CIC), belonging to the Viet Nam State Bank, is the agency whose function is to collect information related to the capital lending activities of the enterprise, analyse, evaluate the financial performance and credit trustworthy of the enterprises, and credit relationships among enterprises and banks in order to provide this information to credit organisations for further appraisal and approval of loans. However, according to the current regulations, credit organisations in Viet Nam are only responsible for reporting high value credit loans to the CIC. Low value loans are not reported to the CIC. The confidentiality of credit information and its provision must follow the regulations of the Law on Credit Organisations, the Statistics Law and other regulations relating to data protection.

There is, therefore, a need for the establishment of private credit bureaux that will cover low value loans. The absence of such institutions to date has meant that lenders have been unable to obtain information on the indebtedness and credit histories of most applicants for loans, particularly SMEs.

Regarding deposit insurance, Viet Nam currently has a decree on deposit insurance. A law on the deposit insurance is in the process of being drafted by relevant agencies. Under the current system, credit organisations have a responsibility to take part in the insurance or consolidation of deposits. Credit organisations and non-credit organisations that are allowed to implement several banking activities involving the deposit of individuals must take part in the compulsory deposit insurance. Organisations that take part in the compulsory deposit insurance must publicly announce information on the deposit insurance at their head offices and transaction offices.

Notes

1. Policy Framework for Investment, OECD, 2006 (*www.oecd.org/daf/investment/pfi*).
2. Viet Nam: A Guide to Business and Investment, Foreign Investment Agency, Viet Nam Ministry of Planning and Investment, January, 2007, Page 29.
3. Doing Business in 2008, World Bank and the IFC, December 2007.
4. See *www.vnci.org*.
5. Examples are investment promotion centres in Hanoi, Ho Chi Minh City, Da Nang, Nghe An, Lang Son, Binh Dinh, An Giang, Hue, Kien Giang, Thai Nguyen and Bac Giang.
6. No. 109/2007/QD-TTg.

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ANNEX A

Viet Nam's Current Free Trade Agreement Negotiations

ASEAN-China

The negotiation was initiated in late 2002. In 2003, ASEAN and China signed a Framework Agreement on comprehensive economic co-operation ASEAN-China. After that, two important agreements were concluded, including an Agreement on Trade in Commodities (2004) – which came into effect on 1 July 2004 – and an Agreement on Trade in Services (2006) – which came into effect on 1 July 2007. The ultimate objective is to form a Free Trade Agreement (FTA) in the year of 2010, with a phase-in period for new members of ASEAN until 2015. Presently, ASEAN and China are negotiating an Agreement on Investment and are initiating the second round for the negotiations on an Agreement on Trade in Services.

ASEAN-Korea

ASEAN and Korea signed a Framework Agreement on Comprehensive Economic Co-operation in December 2005. In August 2006 ASEAN and Korea signed the Agreement on Trade in Goods, which came into effect on 1 June 2007. In November 2007 the two sides signed the Agreement on Services, and now they are trying to conclude negotiations on an Agreement on Trade in Investment before the end of 2008.

ASEAN-Australia, New Zealand

In contrast to the step-by-step process under way in the ASEAN-China and ASEAN-Korea negotiations, ASEAN-Australia and New Zealand in 2005 commenced to negotiate simultaneously all the points of a FTA (single undertaking), including commodities, services, investment, intellectual property, competition, original principles, dispute settlement. With respect to

the model to be used for commodities in the FTA, ASEAN-CER, ASEAN-6 and Australia-New Zealand have reached certain achievements. On the other hand, the models for tariff reduction, services, investment and hygienic and technical standards still have big gaps. It is anticipated that by the end of 2007, ASEAN and Australia, New Zealand will have finished the negotiations and in early 2008 will sign a comprehensive agreement.

ASEAN-India

ASEAN and India signed a Framework Agreement on ASEAN-India comprehensive economic co-operation on 8 October 2003 in Bali, Indonesia. Currently, the two sides are negotiating the model of tariff reduction for creating the ASEAN-India FTA. The next step was the signing of an Agreement on Trade in Services under this Framework Agreement on occasion of the Ministerial Consultant Meeting ASEAN-India held in August of this year.

ASEAN-Japan

In 2003, ASEAN-Japan reached the General Agreement on Comprehensive Economic Partnership in Phnom Penh, Cambodia. Thereafter, the two sides held many sessions but progress has been slow. Japan wanted firstly to bilaterally negotiate with each of ASEAN countries before negotiating at the regional level. Up to now, Japan has finished negotiating with 6 ASEAN countries. Since the beginning of 2007, negotiations have progressed more rapidly. Presently, there are still divergences between ASEAN and Japan on the model for tariff reduction, C/O, and epidemic hygiene.

ASEAN-EU

In August 2005, EU and ASEAN established the Vision Group to study the feasibility of formulating an ASEAN-EU Free Trade Area. The Vision Group subsequently proposed undertaking negotiations to establish the ASEAN-EU FTA. In April 2007, ASEAN-EU formally initiated the negotiations and agreed to set up a Joint Commission of officials from the two sides to discuss the model and the manner of the negotiations. In July 2007, the Joint Commission held its first meeting in Danang, Viet Nam. The two sides intend to finalise the comprehensive structure of FTA, and set up the necessary working groups, and have the first discussions on the model for tariff reduction at the end of 2007

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POLICY FRAMEWORK FOR INVESTMENT ASSESSMENT

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