DOING BUSINESS IN VIETNAM

by
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On the heels of its 2006 entry into the WTO, Vietnam's economy continues to show high growth and is generally considered the second fastest growing economy in Asia behind China. Foreign direct investment is burgeoning in Vietnam, with foreign direct investment likely to reach US$13 billion in the year 2007, an increase of 8.3% since 2006, and US$1 billion higher than earlier estimated. An estimated US$50 billion in projects is in the pipeline, including a US$5 billion project by Taiwan's Foxconn Group to develop high-tech industries in Vietnam. In August, the group launched two new manufacturing facilities worth a combined US$80 million in the northern province of Bac Ninh.

In particular, high technology companies have pegged Vietnam as having great potential as a research and development center due to its excellent technical workforce and modern IT infrastructure. With regard to workforce, Vietnam produces many outstanding engineers at its excellent engineering colleges – as evidence of this, Vietnam has won the annual Asian intercollegiate robot design competition three out of the last six years, with Vietnamese engineering students regularly topping colleagues from Japan, Korea and China. Additionally, because Vietnam's infrastructure is now just being developed, the telecommunications and IT infrastructure is more modern and superior to most countries in the region, Due to this excellent workforce and IT infrastructure, in addition to the Foxconn projects mentioned above, in 2006 Intel announced a US$1 billion investment in Vietnam's high tech sector. High-tech firms such as Cisco, Microsoft, Oracle and HP have been very active in Vietnam for a decade, and the software outsourcing sector is also beginning to become a player internationally as wages for engineers in India continue to escalate.

In the manufacturing sector, Vietnam has many Industrial Zones which offer streamlined investment procedures and attractive tax incentives. A number of Open Economic Zones are also being introduced. Vietnamese workers are hard working, skillful, and the wage level is still not high. Also, Vietnam has one of the highest literacy rates in the world, and the Romanized alphabet of Vietnam allows the people to learn English quickly, and this factor is often cited by investors as an advantage in Vietnam. Vietnam has major ports in the north (Hai Phong), central region (Danang) and the south (Ho Chi Minh City) and streamlined export procedures. All of these factors contribute to an environment where manufacturing activities can flourish. In recent years, the garment industry in Vietnam has seen explosive growth, and clothes from Vietnam can be found at most retail clothing stores in the United States.

Vietnam's retail sector is coveted by retail distributors and companies dealing in consumer goods, as well as by foreign media and entertainment conglomerates. Why? The answer is a population of 84 million consumers (the 12th most populous country in the world), half of whom are under the age of 25 who have more and more disposable income due to the improving economy. Just 15 years ago, bicycles were the primary mode of transportation. In 2007, many successful young professionals and successful business people are beginning to purchase automobiles. Luxury goods companies such as Louis Vuitton have opened up stores in major cities, and fast food giants such as Kentucky Fried Chicken and Pizza Hut are quickly expanding in Vietnam. Supermarket projects have been among some of the most successful projects in recent years, with Metro and Big C/Bourbon constructing and operating very successful big box stores in major cities.

In the tourism and property development sector, Vietnam is returning to its former reputation as "The Pearl of the Orient". Major hotel projects and condominium/villa construction projects are going forward in all major cities and in many vacation spots along the coast, such as in Nha Trang, Vung Tau, Danang and Hoi An. Hyatt and Sheraton own and/or operate major hotels in the country. The strength of the tourism industry and economy is apparent in the fact that hotel and airline reservations are often difficult to make unless made well in advance. Office projects and serviced apartment projects are also seeing significant investment due to the 99% occupancy rates in Hanoi and Ho Chi Minh City which has led to high rental prices of US$30-US$40 per square meter for prime space. Mid-level prices check in at US$17-US$25 per square meter. Several projects for the construction of new satellite cities or urban areas outside of major cities area also proceeding.

U.S. investment and trade with Vietnam has expanded significantly since the two countries signed a Bilateral Trade Agreement in July 2000. The American Chamber of Commerce has branches in Ho Chi Minh City and Hanoi, sporting several hundred members between them. In 2006, Vietnam hosted the APEC Summit, which was attended by President Bush and Secretary of State Rice. In June of 2007, Vietnamese President Nguyen Minh Triet visited the United States to further promote political and business ties between the countries.

This paper is a brief overview on a number of important considerations for those considering investing or trading in Vietnam.

INVESTMENT VEHICLES

Previously, foreign investment in Vietnam was governed by the Foreign Investment Law ("FIL"). However, in order to ensure that its laws allowed for national treatment of foreign-invested enterprises prior to Vietnam's 2006 accession to the World Trade Organization, in 2006 Vietnam issued comprehensive reforms to its corporate laws to create a corporate law regime that applies to both foreign and domestic enterprises. Specifically, on November 29, 2005, the National Assembly of Vietnam adopted the Law on Investment No. 59/2005/QH11 ("New LOI") and Law on Enterprises No. 60/2005/QH11 ("New LOE") which apply to all enterprises established by domestic and/or foreign investors. The New LOI and New LOE came into effect on July 1, 2006 and replaced all former laws governing foreign investment and domestic investment, such as the FIL, Law on Enterprises and Law on State-Owned Enterprises.

However, under the new corporate law regime, the old FIL remains relevant to many companies. Specifically, Article 170 of New LOE stipulates that foreign invested companies which were established before July 1, 2006 have the right to select either re-registering their operations under New LOI and New LOE or not to re-register. If such foreign invested companies decide not to re-register their operations under New LOI and New LOE, these companies shall still continue operating within the scope of investment licenses of the duration stipulated by investment licenses granted to them, and these companies will continue to be governed by the previous foreign investment regulations set forth in the FIL.

Main Business Forms

Foreign investors can invest in Vietnam in three forms: Joint Venture Enterprise ("JVE"), Business Cooperation Contract ("BCC") and Enterprise with 100% Foreign Owned Capital ("EFOC"). Build-Operate-Transfer ("BOT"), Build-Transfer-Operate ("BTO"), and Build-Transfer ("BT") investments are allowed for infrastructure projects. EFOC and JVE forms can be in the form of limited liability or joint-stock companies, and can be listed on the Vietnamese stock exchange if the requisite qualifications are met.

Before deciding on a business form, it is important for potential investors to explore the sector-by-sector restrictions set forth under Vietnamese law, as well as the phase-in periods for opening Vietnam's markets as prescribed in Vietnam's WTO accession commitments and in the U.S.-Vietnam Bilateral Trade Agreement. In many sectors, foreign companies are required to joint venture with Vietnamese companies. For example, in the education and training field, foreign companies must joint venture with a Vietnamese partner. Additionally, in some sectors, foreign companies are not yet allowed to hold a majority share. For example, in the logistics field, foreign companies are currently limited to a 49% maximum share in a JVE. Under phase-in periods, such restrictions may or may not be gradually lifted for certain sectors. In regard to trade, certain restrictions are also in place. For example, the amount of foreign films that may be imported is limited to a fixed ratio of the amount of Vietnamese films shown or produced. In regard to trading and distribution, as well as retail sales operations, Vietnamese law contains many restrictions at present, and investors must carefully consider various options for structuring business operations.

It is important to note that foreign invested companies are licensed for a limited term. Typically, the duration of a foreign invested enterprises or business cooperation contract will not exceed 50 years. The Government may permit longer term on a case-by-case basis, but the maximum term is 70 years. In theory, the term may be extended.

The licensing authorities for foreign investment projects vary based on the size and location of a project, as well as the sector involved. For example, most projects are subject to approval by the local investment authorities of the city or province where the project is located. However, for certain large projects or projects in sensitive sectors (such as movie theater production and operations, telecommunications, and tobacco production), approval from the Ministry of Planning and Investment, other relevant industries and/or the Prime Minister may be required. For investment projects in industrial zones, the board of management of the industrial zone will have the authority to license the project in most cases.

Joint Venture Enterprise (JVE). A JVE is an enterprise jointly established in Vietnam by two parties or several parties on the basis of a joint venture contract or agreement. A JVE may be established as limited liability company and is a Vietnamese legal entity. The liability of each party is limited to the respective amount of legal capital contributed.

A foreign party may make its contribution of capital in foreign currency, Vietnamese currency generated from investment activities in Vietnam, equipment, machinery, plant, building facilities, industrial property rights, technical know-how, technical processes, and technical services. The Vietnamese party to a joint venture may make its contribution of capital in Vietnamese currency, foreign currency, value of land-use rights, natural resources, value of rights to use water surface and sea surface, equipment, machinery, building facilities, industrial property, technical know-how, technical process and technical services. As mentioned above, in some sectors, Vietnam has limits on the percentage of ownership in which a foreign party may hold in a joint venture.

Business Cooperation Contract (BCC). BCCs are a quasi-corporate entity formed on the basis of a contract. The BCC operations are governed by a management committee appointed by the BCC partners. BCCs are common in certain sensitive sectors in which foreign companies are not yet allowed to directly invest in a corporate entity form, such as telecommunications business. BCCs have also been established in the advertising sector.

Enterprise with 100% Foreign Owned Capital (EFOC). An EFOC is an enterprise in Vietnam whose capital is wholly owned by foreign investor(s). The EFOC has a corporate charter which sets forth its management structure and mechanisms. An EFOC may joint venture with other existing foreign invested companies and/or foreign investors in setting up new foreign invested companies in Vietnam. In the early to mid-1990s, it was difficult to establish an EFOC, as the Vietnamese Government encouraged or required JVEs in most fields. However, EFOCs are increasingly popular, and in the high tech field, most companies establish an EFOC.

Build-Operate-Transfer Project (BOT). A BOT project is formed based on a contract signed between a Vietnamese competent agency and a foreign investor to build and operate an infrastructure project for a certain period of time; upon expiration of the specified time, the foreign investor transfers the project to the State of Vietnam without compensation. Vietnamese regulations also contemplate various related forms of structuring infrastructure projects, such as BTO or BT projects.

Alternative Business Forms

Representative Offices. One option for foreign companies that would like to establish an initial presence in Vietnam is to establish a Representative Office in Vietnam. Representative offices are licensed by the relevant local trade authorities in the city or province where the representative office will be located. Representative offices are allowed to (1) promote and formulate commercial or tourist cooperation projects in Vietnam; (2) promote and identify opportunities for sale of products or services in the Vietnamese market; and (3) supervise or monitor implementation of contracts signed between the mother company and Vietnamese parties. Representative offices are not permitted to engage in any direct revenue-generating activities in Vietnam. The chief representative may enter into commercial contracts with Vietnamese parties for and on behalf of the mother company under authorization on a case-by-case basis.

Investment in Buying Shares of Vietnamese Shareholding Companies. Under Prime Ministerial Decision No. 36/QD-TTg dated March 11, 2003, foreign investors including financial and economic organizations, foreigners residing in foreign countries, foreigners residing in Vietnam, and Vietnamese residing in foreign countries may buy shares of newly equitized state-owned enterprises or shares issued by shareholding companies, and may contribute to legal capital of limited liability companies, partnerships, cooperative unions and cooperatives operating in fields or sectors prescribed from time to time by Prime Minister or Minister of Planning and Investment. The total value of the shares sold to foreign investors must not be more than 30% of company's charter capital.

Under Prime Ministerial Decision No. 146/2003/QD-TTg dated July 17, 2003, foreign organizations and individuals are allowed to purchase issued shares of listed companies or issued bonds in Vietnam Stock Exchange. Investors must be registered with the Vietnam Stock Exchange through custody organizations. All foreign investors are allowed to hold not more than 30% of the total shares of one company listed in the Stock Exchange, while there is no limit for foreign investors holding bonds listed in the Stock Exchange. Foreign investors are also allowed to hold not more than 49% of charter capital of a joint venture securities company or a joint venture fund management company.

Agency and Distributor Relationships. Foreign companies may enter into agency and distributorship relationships with Vietnamese companies. Intellectual property issues should be carefully considered when establishing such relationships if intellectual property is licensed. Technology and trademark license agreements must be properly registered with Vietnamese authorities.

Franchising. Vietnam recently adopted its first ever franchising regulations. A number of domestic companies have begun to employ these regulations to establish franchises for coffee shops and noodle shops, as well as convenience stores.

INTELLECTUAL PROPERTY LAW

Vietnam's Law on Intellectual Property, which was adopted by the National Assembly in 2005, protects patents, trademarks, copyrights, circuit board designs, industrial designs and trade secrets. Vietnam also has adopted unfair competition legislation in recent years that has also helped companies to protect their intellectual property rights.

Trademarks

Vietnam employs a first-to-file trademark filing system. As a result, foreign companies who fail to register their trademarks first in Vietnam may have little recourse against Vietnamese companies who register identical or confusingly similar trademarks first, unless the foreign company can prove that its trademark is well-known or can show clear bad faith. Cancellation proceedings can take several years, and are costly and unpredictable, so it is advisable for companies to register their trademarks early in Vietnam. A trademark may be cancelled for non-use if it is not used for five consecutive years.

As noted above, license agreements must be registered in Vietnam. However, the authorities will not register license agreements relating to unregistered trademarks. It takes roughly 12-18 months to register a trademark. Therefore, if a company delays in registering its trademarks, such delay could cause the company to miss out on any potential opportunities to conduct licensing activities in Vietnam in the interim time until its trademarks are registered. Finally, if a company's trademark is not registered in Vietnam, it will be very difficult to take action against infringers or producers of counterfeit goods.

Copyrights

Vietnam is a member of the Berne Convention regarding literary and artistic works, as well as the Brussels Convention on the protection of satellite programs. The U.S.-Vietnam Bilateral Trade Agreement also contains many provisions on copyright protection. Copyright is established upon fixation of a work, and registration is not a prerequisite to filing a copyright infringement action.

Enforcement

Intellectual property rights can be enforced by various authorities, such as police, market management authorities and various inspectors. Statutory damages of up to US$31,000 can be assessed in court cases in which the value of the damages cannot be clearly ascertained. Criminal penalties are provided for under the law for infringers, but are generally only applied in the case of counterfeiting medicine or food that is dangerous to human health. Counterfeit goods may be seized and destroyed by authorities. Foreign companies in Vietnam have established the Vietnam Anti-Counterfeiting and IP Protection Association (VACIP).

EMPLOYMENT LAW

Vietnam's Labor Code was adopted by the National Assembly in 1994 and has since been amended a few times. There are various implementing decrees to the law concerning issues related to wages, hours, and employment contracts.

The Labor Code governs both Vietnamese and foreign employees. Employees can be classified as either fixed-term or indefinite term employees, and this classification impacts the rights and obligations of both the employer and employee. Employers must exercise extreme caution when terminating employees or reducing work force. Vietnam does not have an at-will employment regime, and the employer must make sure that it has proper cause to terminate the employment relationship, and has strict notice requirements. Vietnam also requires severance pay to be paid in most cases.

In general, companies are required to have written Work Rules. The Work Rules must be registered with the relevant local labor authorities. Other legislation concerns unions and collective bargaining agreements.

PROPERTY LAW

Land-owners in Vietnam do not own the land per se, but rather own land-use rights (i.e. the right to use the land). Vietnamese citizens hold such rights permanently. However, because a foreign investment project has a limited term, if a foreign-invested company has land-use rights, it will only hold such for a time period corresponding with the term of the investment project (e.g., 50 or 70 years). Land-use rights are typically contributed to joint venture projects by the Vietnamese party and constitute the capital contribution of the Vietnamese party.

Despite these ownership issues, the property development sector is expanding quickly, and many foreign investors have amassed fortunes from hotel, office and serviced-apartment projects, mostly in part to the high value of property in Vietnam. Hanoi, in particular, has some of the most expensive real estate in the world, with some prices reaching US$30,000 per square meter in the city center.

TILLEKE & GIBBINS IN VIETNAM

Tilleke & Gibbins is one of the oldest law firms in Southeast Asia, tracing its roots to Thailand, where it was established in the 1890s. The firm's head office is located in Bangkok, where the firm maintains a team of more than 50 attorneys and over 200 staff members. The firm is consistently rated as the top intellectual property law firm in Thailand, and has leading dispute resolution and commercial/corporate practices in Thailand.

Tilleke & Gibbins was the first foreign law firm established in Vietnam in 1989 in the form of a representative office. The firm was granted official branch licenses in Hanoi and Ho Chi Minh City in the 1990s. The firm's practice focuses on commercial and intellectual property law. In September 2007, the firm moved into its new state-of-the-art offices near the U.S. Embassy in Hanoi. The firm's Ho Chi Minh City office is located in the business district of bustling District 1 of Ho Chi Minh City (the former Saigon).

Key Team Members

John E. King is the Managing Director of Tilleke & Gibbins' Vietnam operations. Mr. King is a U.S.-qualified attorney who graduated Order of the Coif from the University of Minnesota Law School. He has extensive experience in all areas of commercial law and dispute resolution. Prior to heading the firm's Vietnam operations, Mr. King was Director of the firm's Dispute Resolution Department in Bangkok. Mr. King practiced finance, banking and commercial law in the United States for several years before joining Tilleke & Gibbins.

Nguyen Tuan Minh is a graduate of Hanoi Law University and is a member of the Hanoi Bar Association specializing in corporate, trade and finance matters. Mr. Minh is also a skilled negotiator who has also assisted clients to resolve various contentious matters and joint venture negotiations in Vietnam. He has extensive experience in banking and securities issues, and sits on the board of directors of a large Vietnamese bank.

Trinh Trung Kien is a member of the Hanoi Bar Association and has been practicing commercial law in Vietnam with Tilleke & Gibbins for 13 years. Mr. Kien, a graduate of Hanoi Law University, has assisted more than one hundred foreign companies to establish businesses in Vietnam through investments and commercial relations. He advises many leading companies on corporate compliance, tax and employment issues on an ongoing basis. Mr. Kien has recently advised many foreign companies on Vietnam's sector-by-sector commitments for opening up its markets under Vietnam's WTO accession agreements and the U.S.-Vietnam Bilateral Trade Agreement. He also has extensive experience in pharmaceutical and cosmetic product registration in Vietnam.

Nguyen Thi Phi Nga is a Vietnamese-qualified IP representative and is a graduate of Hanoi Law University. Ms. Nga, who heads the firm's trademark division in Vietnam, has over 13 years of experience in trademark and patent registration in Vietnam, as well as in enforcement. She was formerly Deputy Director of the Licensing Division of one of the largest IP Agencies in Vietnam. She has extensive experience in drafting and negotiating technology transfer agreements and other licensing agreements. As part of her practice, Ms. Nga also handles appeals, oppositions and cancellations, including patent and trademark infringement cases.

Thomas J. Treutler is a USPTO-qualified patent attorney with 10 years of experience in intellectual property and commercial matters in Vietnam. Mr. Treutler, who speaks Vietnamese and is a member of the State Bar of California, formerly headed the IP Practice Group of another international law firm in Vietnam. Mr. Treutler, who graduated from the University of Michigan College of Engineering and graduated magna cum laude from Indiana University - Bloomington School of Law, has assisted clients to protect their intellectual property assets in high-tech, luxury goods, and pharmaceutical areas. In 2005, he assisted a pharmaceutical client to obtain a favorable ruling in an unfair competition case which resulted in the Ministry of Health revoking the product registration of the infringer. He was named a leading IP Practitioner in Vietnam for 2008 by Chambers U.K. He serves as an advisor to USAID's trade acceleration program in Vietnam to assist the Government of Vietnam in reforming its intellectual property laws, and to assist in the training of judges, officials and businesses.

Nguyen Thi Mai Linh is a Vietnamese IP attorney specializing in complex matters such as trademark cancellations, oppositions and appeals, as well as IPR enforcement. Ms. Mai Linh was awarded a Fulbright Scholarship by the U.S. Government, and earned a Master's Degree in Intellectual Property Studies at Franklin Pierce Law School in the United States. She is a Vietnam-qualified IP Representative and is a member of the Hanoi Bar Association. She has helped protect the IP assets of numerous multinationals in Vietnam, including automakers, computer hardware producers, and apparel manufacturers.

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