



USAID
FROM THE AMERICAN PEOPLE

SOUTHEAST ASIA COMMERCIAL LAW AND TRADE DIAGNOSTICS – VIETNAM

FINAL REPORT



September 2007

This publication was produced for review by the United States Agency for International Development by Booz Allen Hamilton

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT



SOUTHEAST ASIA COMMERCIAL LAW & INSTITUTIONAL REFORM AND TRADE DIAGNOSTICS—VIETNAM

FINAL REPORT

September 2007

Booz | Allen | Hamilton

delivering results that endure

Contract No. PCE-I-00-98-00013
Task Order No. 13 The Seldon Project

DISCLAIMER

The views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States government.

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
	A. THE SEACLIR TRADE DIAGNOSTIC: A REGIONAL INITIATIVE.....	1
	B. THE METHODOLOGY OF THE DIAGNOSTIC: A 360-DEGREE REVIEW.....	2
	C. FIRST IN LINE: VIETNAM.....	3
	D. SUMMARY OF SUBJECT-SPECIFIC FINDINGS.....	4
	E. CROSS-CUTTING THEMES.....	10
II.	COMPANY LAW AND CORPORATE GOVERNANCE.....	18
	A. INTRODUCTION.....	18
	B. LEGAL FRAMEWORK.....	18
	C. IMPLEMENTING INSTITUTIONS.....	20
	D. SUPPORTING INSTITUTIONS.....	21
	E. SOCIAL DYNAMICS.....	22
	F. RECOMMENDATIONS.....	24
III.	CONTRACT LAW AND ENFORCEMENT.....	25
	A. INTRODUCTION.....	25
	B. LEGAL FRAMEWORK.....	25
	C. IMPLEMENTING INSTITUTIONS.....	26
	D. SUPPORTING INSTITUTIONS.....	29
	E. SOCIAL DYNAMICS.....	31
	F. RECOMMENDATIONS.....	31
IV.	REAL PROPERTY LAW.....	33
	A. INTRODUCTION.....	33
	B. LEGAL FRAMEWORK.....	33
	C. IMPLEMENTING INSTITUTIONS.....	37
	D. SUPPORTING INSTITUTIONS.....	38
	E. SOCIAL DYNAMICS.....	39
	F. RECOMMENDATIONS.....	41
V.	SECURED TRANSACTIONS LAW.....	42
	A. INTRODUCTION.....	42
	B. LEGAL FRAMEWORK.....	42
	C. IMPLEMENTING INSTITUTIONS.....	44
	D. SUPPORTING INSTITUTIONS.....	45
	E. SOCIAL DYNAMICS.....	45
	F. RECOMMENDATIONS.....	46
VI.	BANKRUPTCY LAW.....	47
	A. INTRODUCTION.....	47
	B. LEGAL FRAMEWORK.....	47
	C. IMPLEMENTING INSTITUTIONS.....	49
	D. SUPPORTING INSTITUTIONS.....	51
	E. SOCIAL DYNAMICS.....	52

F.	RECOMMENDATIONS	53
VII.	COMPETITION LAW AND POLICY	54
A.	INTRODUCTION	54
B.	LEGAL FRAMEWORK	54
C.	IMPLEMENTING INSTITUTIONS.....	57
D.	SUPPORTING INSTITUTIONS.....	58
E.	SOCIAL DYNAMICS.....	59
F.	RECOMMENDATIONS.....	59
VIII.	COMMERCIAL DISPUTE RESOLUTION	61
A.	INTRODUCTION	61
B.	LEGAL FRAMEWORK	61
C.	IMPLEMENTING INSTITUTIONS.....	62
D.	SUPPORTING INSTITUTIONS.....	66
E.	SOCIAL DYNAMICS.....	66
F.	RECOMMENDATIONS.....	67
IX.	COURT ADMINISTRATION.....	68
A.	INTRODUCTION	68
B.	LEGAL FRAMEWORK	68
C.	IMPLEMENTING INSTITUTIONS.....	70
D.	SUPPORTING INSTITUTIONS.....	71
E.	SOCIAL DYNAMICS.....	73
F.	RECOMMENDATIONS.....	73
X.	FOREIGN DIRECT INVESTMENT	74
A.	INTRODUCTION	74
B.	LEGAL FRAMEWORK	74
C.	IMPLEMENTING INSTITUTIONS.....	77
D.	SUPPORTING INSTITUTIONS.....	79
E.	SOCIAL DYNAMICS.....	80
F.	RECOMMENDATIONS.....	81
XI.	INTERNATIONAL TRADE LAW	82
A.	INTRODUCTION	82
B.	LEGAL FRAMEWORK	82
C.	IMPLEMENTING INSTITUTIONS.....	89
D.	SUPPORTING INSTITUTIONS.....	90
E.	SOCIAL DYNAMICS.....	91
F.	RECOMMENDATIONS.....	91
XII.	FLOW OF GOODS AND SERVICES.....	92
A.	INTRODUCTION	92
B.	LEGAL FRAMEWORK	93
C.	IMPLEMENTING INSTITUTIONS.....	96
D.	SUPPORTING INSTITUTIONS.....	99
E.	SOCIAL DYNAMICS.....	101

F.	RECOMMENDATIONS	101
XIII.	FLOW OF MONEY	104
A.	INTRODUCTION	104
B.	LEGAL FRAMEWORK	104
C.	IMPLEMENTING INSTITUTIONS.....	105
D.	SUPPORTING INSTITUTIONS.....	106
E.	SOCIAL DYNAMICS.....	106
F.	RECOMMENDATIONS.....	107
XIV.	FLOW OF PEOPLE.....	108
A.	INTRODUCTION	108
B.	LEGAL FRAMEWORK	108
C.	IMPLEMENTING INSTITUTION	109
D.	SUPPORTING INSTITUTIONS.....	110
E.	SOCIAL DYNAMICS.....	110
F.	RECOMMENDATIONS.....	110
XV.	FINANCIAL CRIMES.....	112
A.	INTRODUCTION	112
B.	LEGAL FRAMEWORK	113
C.	IMPLEMENTING INSTITUTIONS.....	114
D.	SUPPORTING INSTITUTIONS.....	116
E.	SOCIAL DYNAMICS.....	116
F.	RECOMMENDATIONS.....	117
XVI.	INTELLECTUAL PROPERTY	118
A.	INTRODUCTION	118
B.	LEGAL FRAMEWORK	119
C.	IMPLEMENTING INSTITUTIONS.....	122
D.	SUPPORTING INSTITUTIONS.....	123
E.	SOCIAL DYNAMICS.....	124
F.	RECOMMENDATIONS.....	125
	ATTACHMENT 1: COMPILATION OF RECOMMENDATIONS	126

I. INTRODUCTION

A. THE SEACLIR TRADE DIAGNOSTIC: A REGIONAL INITIATIVE

This Report is the first part of a USAID-sponsored initiative to understand and respond to economic growth, harmonization, and integration efforts in five emerging economies of Southeast Asia—Vietnam, Laos, Cambodia, Indonesia, and the Philippines. The Southeast Asia Commercial Law and Institutional Reform and Trade Diagnostic Activity (SEACLIR Trade) is designed to allow USAID’s Regional Development Mission/Asia, the governments of these countries, and other interested entities to better understand the economic impact of reforms in Southeast Asia’s commercial law and trade environment. It also establishes a baseline upon which USAID can prioritize future regional technical assistance.

SEACLIR Trade first examines the status of commercial law and trade facilitation in each of the participating nations, including each country’s respective strengths, weaknesses, and opportunities for development. Specifically, through the comprehensive methodology established during USAID’s Seldon Project for Global Trade Law Assessment and Assistance,¹ the Diagnostic examines—

Company Law	Foreign Direct Investment
Contracts Law and Enforcement	International Trade Law
Real Property Law	Financial Crimes
Secured Transactions Law	Intellectual Property
Commercial Dispute Resolution	Trade-Related Financial Flows
Court Administration	Customs (Flows of Goods and Services across Borders)
Bankruptcy	Trade-Related Flows of People
Competition Law	

Then, based on individual country reviews and organized opportunities for broad-based response to the country findings, SEACLIR Trade is designed to yield an overall Regional Diagnostic that will—

- Make intra-regional and subject-matter comparisons of international trade and commercial legal frameworks and associated institutions.
- Identify regional commercial law reform and trade capacity needs and establish program- and project-level priorities.
- Benchmark and evaluate regional progress toward an international trade and business-friendly legal and regulatory environment.
- Provide analytical and planning tools and metrics that will help design new regional strategies and approaches for sustainable, cost-effective reform activities.

¹Detailed information about the Seldon Project can be found at www.bizlawreform.com.

B. THE METHODOLOGY OF THE DIAGNOSTIC: A 360-DEGREE REVIEW

The examination of commercial law and trade in Southeast Asia, from both individual country and regional perspectives, involves a comprehensive and flexible framework for analyzing complex and dynamic development challenges. Taking data from a broad spectrum of stakeholders, the Diagnostic builds a “360-degree picture” of the challenge drawn from the following areas.

Legal Framework. The Diagnostic first examines the laws and regulations that form the structural basis for each SEACLIR country’s ability to achieve and sustain market-based development. The Diagnostic poses the following questions: *How closely do existing laws reflect emerging global standards? How well do they respond to commercial realities faced by end-users? What inconsistencies or gaps are present in the legal framework?* This review often uncovers opportunities to make relatively small changes that result in significant openings for business development and expansion.

Implementing Institutions. Next, the Diagnostic examines institutions that hold primary responsibility for implementation and enforcement of the legal framework and subsidiary laws, regulations, and policies governing one or more of the areas addressed in this Report. For example, courts are usually a crucial institution in the examination of commercial law. Problems uncovered often relate to bureaucratic inefficiency, lack of resources and training, and, of paramount concern, real or perceived corruption. With respect to the flow of goods, services, and people, customs and immigration authorities are the chief implementing institutions.

Supporting Institutions. The Diagnostic then considers the organizations, individuals, or activities without which the legal framework or policy agenda cannot be fully developed, implemented, or enforced. Examples include notaries, lawyers, banks, business support organizations, professional associations, universities, and other ancillary service providers. Of particular interest with respect to supporting institutions is whether they are meaningfully involved in *what the law says*. Where there has been “buy-in” from affected constituencies, a law and its commensurate system for implementation are more likely to be understood, to be used properly, and to achieve their overall purpose.

Social Dynamics. Finally, studying social dynamics entails asking whether the affected constituencies of a law or policy perceive a need for change, and, if so, how they are demonstrating this need. Are they effectively lobbying institutions that can effect change? Is the media promoting the issue as a topic of public concern? Are individuals speaking out? Or, have social dynamics taken a less positive approach: is, for example, the “gray economy” growing as a response to overly burdensome conditions for market entry? Social dynamics may affect how an assistance project is ultimately designed. Where outside participation is strong and public understanding high, a program may involve a relatively small number of government officials who are capable of meeting reform demands. Where mistrust and misunderstanding abound, an approach that involves significant engagement of end users may be necessary.

C. FIRST IN LINE: VIETNAM

The first stage of the SEACLIR Trade initiative took place from 10–28 September 2005 September 2005, when a team of commercial law and trade professionals traveled to the Socialist Republic of Vietnam to conduct a comprehensive Diagnostic of the laws, public and private sector institutions, and social dynamics that pertained to commercial law and trade. The team included—

- Aimee Carter, Booz Allen Hamilton (*Team Leader*) (Financial Crimes)
- Andrew Mayock, Booz Allen Hamilton (*Associate Team Leader*) (Financial and People Flows)
- Robert Koval, private consultant (Flow of Goods and Services)
- Markus Meier, U.S. Federal Trade Commission (Competition Law and Policy)
- Honorable David Russell, U.S. District Court for the Western District of Oklahoma (Court Administration)
- Charles Schwartz, USAID (Secured Transactions Law, Commercial Dispute Resolution)
- Veronica Taylor, University of Washington School of Law (Company Law, Contracts Law)
- Phan Nguyen Toan, LeadCo (Vietnam) (Real Property Law)
- Louise Williams, private consultant (Bankruptcy, Foreign Direct Investment, International Trade Law, Intellectual Property)
- Amy Allen, Booz Allen Hamilton (Project Coordinator)

The team received invaluable assistance in preparing for, facilitating, and executing its Diagnostic from the USAID regional mission in Thailand, the USAID Representative Office in Hanoi, the Office of the Government of Vietnam, and the Vietnam-based LeadCo consulting company. The team benefited greatly from the magnitude and quality of contributions from the USAID Support for Trade Acceleration (STAR) Project.

During its five-year history of supporting Vietnam’s successful implementation of the U.S.-Vietnam Bilateral Trade Agreement and its accession to the World Trade Organization, USAID/STAR has been instrumental in advancing a remarkable change in Vietnam’s legal environment. Through its demand-driven technical assistance programs active in every key legal and judicial institution in Vietnam, USAID/STAR has helped Vietnamese counterparts (ranging from ministerial-led drafting teams to key National Assembly Committees to the Supreme People’s Court) adjust or develop almost 100 major laws and regulations. Once the new laws have been promulgated, USAID/STAR has helped build the institutional capacity and public understanding needed to more effectively implement the reforms. Among donors, USAID/STAR has been in the lead in almost all the main legal reforms affecting commercial activity and judicial procedures. We attempt to acknowledge USAID/STAR’s most important contributions throughout many of the sections of this Report. We would also like to acknowledge the USAID/STAR Chief of Party, Steve Parker, and his staff for the support they provided to the Diagnostic team, including technical and institutional background, legal documents, and other data, their assistance in identifying key officials and experts to interview, and their detailed comments on drafts of the Report. USAID/STAR updated the report in August of 2007.

The support of the USAID Regional Development Mission in Thailand, especially Mission Director Tim Beans and Skip Kissinger, the Director of its General Development Office, and USAID/Hanoi Representative Office, especially Dennis Zvinakis, David Brunell, and Hanh Do Hong, also proved indispensable. Scores of individuals from the Government of Vietnam, public-sector institutions, the private sector, the donor community, universities, and a wide range of supporting institutions proved enormously helpful in providing a candid and thorough view of the commercial law and trade sectors. The team is very grateful for the assistance and contributions of all of these individuals and institutions.

Through more than 100 meetings with public and private actors who participate in Vietnam's economic activity, and in concert with a thorough review of documents that touch upon one or more aspects of the SEACLIR Trade initiative, the team developed broad findings with respect to Vietnam's strengths, weaknesses, and opportunities. On 28 September 2005, the team met with representatives of the government and received various insights from representatives of several agencies pertaining to its preliminary findings. This Report summarizes the team's findings in each of the four areas of review—legal framework, implementing institutions, supporting institutions, and social dynamics—and includes specific recommendations for reform. Although this Report centers specifically on the commercial law and trade environment in Vietnam, its overriding purpose remains comparative, and it will be especially useful as the SEACLIR Trade initiative examines the same set of issues in the four other SEACLIR Trade countries.

D. SUMMARY OF SUBJECT-SPECIFIC FINDINGS

Before focusing on subject-specific findings, it is important to note the larger context for commercial law development in Vietnam. As an integral part of Vietnam's overall development strategy, Vietnam has linked a broad range of legal and judicial reforms to the implementation of the landmark U.S.-Vietnam Bilateral Trade Agreement (BTA), which came into effect on 10 December 2001, and accession to the WTO (which was completed on 11 January 2007). These trade agreements have required extensive changes to Vietnam's legal system to conform more closely to international norms and practices. Furthermore, Vietnam has adjusted many laws and regulations not directly required by the trade agreements, but which are equally integral to developing a stronger legal framework for market-based commercial activity, a more robust private sector, and a stronger and more independent court system (e.g., greatly improved law on contracts, secured transactions, negotiable financial instruments, court organization, and civil procedure). (The USAID/STAR Project has provided lead technical assistance to its 47 assigned state counterparts on most of these major legal reforms during the last six years.)² In response to these many reforms, foreign investment, trade, and economic growth have boomed in Vietnam over the last five years, and poverty levels have continued to fall at one of the fastest rates in the world.³

²USAID/STAR supported reforms in almost 100 laws and regulations from 2002 through 2006, in most cases playing a lead role among donor-assisted programs. In accordance with decisions made by an Office of the Government Steering Committee, STAR did not play an important role in the development of laws on bankruptcy, competition, land, anti-corruption, labor, and tax.

³See the Central Institute for Economic Management and STAR-Vietnam, "Assessment of the Five-Year Impact of the U.S.-Vietnam Bilateral Trade Agreement on Vietnam's Trade, Investment, and Economic Structure," *National Political Publishing House*, 2007.

The massive legal reforms accomplished by Vietnam since the year 2000 are inherently difficult to capture in a “snap-shot” look. It is equally hard to explain how many more changes to the legal system are required before Vietnam can become the next “Asian Tiger” economy. Much has been accomplished, but significant challenges remain. The huge number of relatively recent reforms must be improved and fine-tuned. And, more importantly, institutional capacities and integrity must be developed, along with professional skills and public understanding, in order for the much improved “letter of the law” to be implemented effectively.

Within this larger context, the findings of the 15 subject-matter areas examined in the Diagnostic are summarized below.

Company Law. With the introduction of a modern Enterprise Law in 1999, a great number of small businesses in Vietnam joined the formal sector through the process of company registration. Through improved legislation and procedures pertaining to entry into the formal sector, Vietnam has seized a critical mechanism in support of economic growth. One fundamental issue facing all smaller or newer private businesses in Vietnam, as well as many larger, more established ones, is the anti-competitive role played by state-owned enterprises in the economy. The new Enterprise Law (2005), which replaced the 1999 law, is legally sound and consistent with international standards. It continues the trend of liberalization of the private sector in Vietnam and levels the playing field among all types of enterprises, whether private, foreign-invested, or state-owned. The new Investment Law (2005), which was developed in parallel with the new Enterprise Law, generally reinforces this commitment to non-discrimination among types and ownership of enterprises. The revised Commercial Law and its implementing decrees regulate the establishment of representative offices and branches of foreign traders and foreign-invested trading enterprises in Vietnam. Even though the 2005 Enterprise Law establishes a common set of rules for all types of enterprises, it does not serve as a full counterweight to the advantages afforded to state-owned enterprises (SOEs) over the many private sector firms in the Vietnamese economy. (SOE reform, a cross-cutting theme, is discussed in greater detail below.) Due to the fact that most private Vietnamese businesses remain small and closely held, the strong corporate governance provisions in the Enterprise Law mechanisms may prove impractical for most private enterprises for some time to come. In addition, the new Investment Law introduced new evaluation criteria (which are in line with similar requirements for foreign-invested projects) for larger investment projects by domestic private enterprises that could significantly increase state intervention in private sector activity and retard the development of larger private firms in Vietnam.

Contracts Law. Recent changes to the Civil Code and Commercial Law, as well as the introduction of other pertinent laws, ordinances, and decrees, have significantly clarified and modernized contract law in Vietnam, bringing the country’s statutory framework for commercial contracting up to par with contract law in many industrialized countries. These new laws clarify the relationship among contract laws in Vietnam. The Civil Code also repeals the Ordinance on Economic Contracts, thereby eliminating much of the confusion and overlap that characterized the prior system. The new statutory laws and regulations, however, are just now being implemented. It is too early to judge how much the reforms have actually improved the operation and enforcement of contracts in practice. Judges and practitioners reported that their understanding of contract and related law would be improved if the current set of laws pertaining

to contracts (including ordinances, decrees, and other significant sources of authority) were “packaged” more effectively in, for example, a single volume or legal search mechanism that was regularly updated and readily accessible. This improvement might also allow for legal inconsistencies to be identified and remedied. More support of both implementing and supporting institutions is also required to change how businesses view contracts over the long term. Within Vietnam’s current socialist market economy, informal contracting is still popular, and contracts are mostly seen as devices to “minimize the room for misunderstanding between parties.” In time, more formal contracting is likely to lead the private sector, the government, and the courts to a more robust understanding and use of contracts as clear and enforceable commitments.

Real Property Law. One of the most significant constraints to enterprise establishment and growth in Vietnam is the difficulty that entrepreneurs face in obtaining and accessing land. In Vietnam, land is owned by the people through the state, with long-term land-use rights provided to citizens and businesses to own and use land. Even with the major recent reforms to the Land Law, the legal and regulatory framework for real property remains excessively complex and opaque. Other constraints include the low quality of property management services, including land and property valuation, development, and brokerage. Recent efforts to add another bureaucratic layer to the process of registering homes have detracted from the fluidity with which people can buy and sell land use rights.

Secured Transactions Law. The legal regime for secured interests in property in Vietnam, as recently updated, is strong and incorporates key aspects of international standards. In addition to the Civil Code, Vietnam’s Decree No. 163 on Secured Transactions allows for non-possessory secured interests, property interests that allow holders to execute against secured property, pledges that cover after-acquired property, and specialized pledges on accounts receivable, shares, agricultural produce, and livestock. With certain relatively straightforward technology updates, Vietnam’s system of pledge registries can effectively serve the public in the future; the land registries, however, warrant additional scrutiny for overall efficiency and effectiveness. Although the position of the secured party on enforcement has been strengthened, weaknesses in collateral law enforcement continue to constrain the use of movable assets to leverage financing in particular and private sector growth more generally.

Commercial Dispute Resolution. This Diagnostic identified an urgent need for reform and strengthening of Vietnam’s court system based on a near universal consensus among the business community and the public that the current system of dispute resolution does not support increased private sector development. Parties in Vietnam tend to avoid courts and seek alternative ways of settling commercial disputes. Although Vietnam has made considerable initial progress in improving its court system by consolidating its national and local courts into a more systematic organizational structure, improving court procedures, and enhancing the role of judges relative to prosecutors in civil cases, fundamental constraints continue to prevent the courts from providing effective commercial dispute settlement services and meeting the rising needs of an increasingly modern and sophisticated economy. As Vietnam becomes more integrated into international commerce and trade, the courts will become all the more important as clients outgrow informal methods of dispute resolution. Vietnam has been expanding and modernizing its alternative dispute resolution (ADR) system, and is continuing to improve the legal framework for arbitration. Though it cannot replace courts, ADR complements the courts,

adds another venue for resolution of disputes, and presents additional methods for getting the parties to settle their disputes. As is the case with many of the reforms in Vietnam, the legal framework for arbitration has been brought up to international standards, but the capacities to use arbitration services lag—businesses do not fully understand and feel comfortable with arbitration; there are few respected, experienced arbitrators; and many lawyers and judges are not well acquainted with the new laws and regulations. With additional improvements, ADR may increasingly be accepted by business and legal communities as an effective means for resolving commercial disputes.

Court Administration. Court administration in Vietnam lacks clarity and a strong legal framework for transparency and organization, leading to confusion and opportunities for rent-seeking. Inconsistent court practices and disorderly filing systems, as well as poor coordination among judges, must be addressed to boost public confidence in the adjudication process. A recent Party resolution (Resolution 08/2002 of the Politburo) that encouraged publication of final decisions by the Supreme People's Court is an important stride towards greater transparency, and should be supported. As a key first step, the USAID/STAR Project supported the first-ever publication of decisions by the Supreme Judicial Council, the country's highest court, for 2003 and 2004. International donor coordination is especially critical, as strong public demand and government receptiveness suggest an excellent opportunity for reform.

Bankruptcy. Vietnam's new Bankruptcy Law (2004) is generally perceived as an improvement over its predecessor. It clarifies and streamlines the conditions under which companies that cannot pay their debts may enter into bankruptcy. Further reforms and guidelines are needed for the new law to be made relevant and useful to the communities that need it most—Vietnam's registered enterprises and their stakeholders, including investors, creditors, and employees. Critical rehabilitation and liquidation procedures established by the Bankruptcy Law should be further developed and articulated; current guidance is insufficient. Importantly, the social dynamics relating to enterprise insolvency do not yet support the general intent of bankruptcy laws—to reduce risk faced by lenders and other investors, restore stalled assets into productive use, and improve a country's overall competitiveness. Instead, the emphasis of the current Bankruptcy Law, and its use since enactment, has been on punishing officers and directors who oversee insolvent companies, which only further stigmatizes business failure.

Competition Law. Vietnam's first-ever Competition Law (2005) addresses unfair competition and acts of restriction on competition. It created the Competition Administration Department and charges that organization with investigating complaints of prohibited acts and recommending sanctions for ratification by the Competition Council. The law applies to all enterprises, domestic, foreign-invested, and state-owned. The law incorporates many new concepts that are still unfamiliar to the business community and to advising companies doing business in Vietnam. Among the biggest challenges to implementation of the Competition Law are 1) the capacity of the Competition Administration Department to effectively and transparently handle competition investigations, and 2) the active involvement of the business community in developing competition policy and creating a truly competitive business environment. The law does not include an express statement about its purposes or goals, and it remains to be seen how the law will be applied in the future—as a check on large state-owned enterprises and state monopolies and/or a means to check the threat to Vietnamese businesses from foreign competition, as Vietnam continues its economic integration as a member of the WTO.

Foreign Direct Investment. Vietnam has considerably improved the environment for foreign direct investment (FDI) in recent years with the adoption of the new Investment Law (IL) and Enterprise Law (EL) (both of which took effect on 1 July 2006). These laws aim for but have not yet achieved a unified set of rules for all investors and enterprises,—domestic, foreign-invested, and state-owned. The IL moves Vietnam to an investment-registration-certification paradigm (investment projects over a certain size and in restricted sectors are still subject to an evaluation-certification regime), and away from the old investment-licensing system. The IL and its implementing regulations also advance the decentralization of investment registrations/evaluations and certifications, which was possible in a more limited way under the old investment regime; the Ministry of Planning and Investment no longer has any licensing/certification responsibilities. Despite these improvements in the legal framework, some major issues continue worry investors, including issues such as the overall environment for trade, tax and customs issues, the need for further improvements and greater flexibility in labor and employment, and a court system that lacks the capacity to provide fair, swift, and predictable resolution of disputes. Foreign investors identify three issues of long-term, fundamental interest: 1) treatment of intellectual property rights (IPR); 2) the anti-competitive role played by the state through its continued support of inefficient state-owned enterprises; and 3) pervasive official corruption in Vietnam.

International Trade Law. On 11 January 2007, Vietnam completed 11 years of multilateral a bilateral negotiations to become the 150th member of the WTO. Vietnam's WTO accession process benefited greatly from its successful implementation of the U.S.-Vietnam Bilateral Trade Agreement, which was based on WTO principles and designed by the Vietnamese and U.S. governments as a stepping stone to the WTO. Legal reforms initiated since 2002 to meet U.S.-Vietnam BTA requirements led directly to the acceleration of 2005 and 2006 legislative actions that had to be completed before full WTO membership could be approved. Additional liberalization of market access for trade and investment in goods and service sectors were also allowed. Vietnam's full WTO commitments are listed in the Working Party Report, Tariff Schedule, and Service Schedule, all available on the WTO Web site. Vietnam approved its WTO Accession Protocol in November 2006, under the legal framework of the recently approved Law on Treaties. The Law on Treaties provides a greatly improved process for conforming domestic law to treaty requirements, including an innovation that allowed Vietnam to attach changes to several laws (that had to be passed in order for Vietnam to comply with Accession requirements) to the Protocol acceptance vote.

With WTO accession, Vietnam has taken major steps toward completing the construction of a legal framework that is aligned with international best practice. But its many potential trading partners continue to look for stronger evidence of effective, fair, and transparent application of the new laws and regulations, and of true parity between domestic and international companies. Primary areas of concern include subsidization of state-owned enterprises, customs procedures, trading and distribution rights, IPR, and overall compliance with existing trade agreements.

Customs (Flows of Goods and Services). The new Commercial Law (CL) regulates domestic and foreign trade in goods and services, including many elements of trade facilitation. The new Investment Law and various sector-specific laws regulate what kinds of firms can do business in service sectors. The newly revised Customs Law and Law on Export-Import Duties regulate the

procedures and tariff rates for trade in goods. Many of the laws and market access limitations in this area have been determined in the context of U.S.-Vietnam BTA and WTO requirements, although interpretation and implementation of those requirements remain controversial. For example, confusion continues among businesses with regard to how and when foreign firms can import and then distribute certain products into the domestic market (an area of confusion for U.S.-Vietnam BTA and WTO implementation). With respect to trading and distribution, a U.S.-Vietnam BTA and WTO-compliant decree has been promulgated but has not been implemented. As Vietnam implements its treaty commitments, it is struggling to develop a more transparent, arms-length set of regulatory procedures for many service sectors that is aligned with the WTO General Agreement on Trade in Services (GATS). This reform is needed to support the modernization of Vietnam's service sectors.

To facilitate goods and services flows, Vietnam must continue to improve the laws, institutions, and operations of its trade-related institutions, especially the General Department of Customs. Modern institutions must be managed, staffed, and equipped to achieve the appropriate balance between facilitation and control, and to lower trade transaction costs. Through efforts such as a major World Bank-sponsored customs modernization program, Vietnam has been improving its operations at ports of entry, but much remains to be done. Key next steps include 1) refining and expanding the current pilot program for electronic clearance, and 2) enhancing fledgling procedures and capacities for stronger risk controls, post clearance auditing, centralized product classification, and anti-smuggling and border measures against importation of products that infringe upon intellectual property rights.

Trade-Related Financial Flows. Vietnam has made significant strides in the area of trade-related financial flows in the past five years. Cross-border transactions have been growing rapidly and reflect a significant amount of monetary exchange. Overall exports and imports in Vietnam have increased from \$31.2 billion⁴ in 2001 to \$84.7 billion in 2006. Implemented FDI inflows have increased from \$2.5 billion in 2001 to \$4.1 billion in 2006. Remittances rose to an estimated \$3.8 billion in 2004 from \$2.6 billion in 2002 (up from \$31 million in 1991), and revenue earned from Vietnamese working abroad is substantial. Overall, Vietnam's laws and public and private institutions support these trade-related money flows. Basic trade finance products are widely available to traders. Foreign currency is broadly available for business/trade transactions, and profits on foreign investment can be repatriated. The state of trade-related financial flows contrasts with the situation of just a few years ago, when foreign exchange was difficult and limited and trade financial products were hard to come by. Several areas, however, require further improvements. Although a new Law on Negotiable Instruments was recently enacted, the application of basic financial instruments such as bills of exchange, promissory notes, and letters of credit is underutilized in practice.

Trade-Related Flows of People. Overall, Vietnamese laws, the public sector, and private institutions exhibit significant improvements in the facilitation of the flows of people for trade-related purposes. Vietnam has eased legal travel restrictions, streamlined processes, and upgraded automation in relevant agencies. Additionally, the safety of foreign travelers is high, as the risk of kidnapping, street crime, and terrorism is extremely low. As is the case with institutions related to the flows of goods, services, and money, however, Vietnamese institutions

⁴Unless otherwise noted, all dollar amounts in this document are U.S. dollars.

involved in trade-related flows of people require additional modernization. Vietnam should consider revising its visa system for tourism and business travelers to provide increased and easier access to the country for those interested in visiting, trading, and investing. The government should help the Immigration Agency improve its institutional capacities, implement an integrity program, and strengthen independent internal affairs.

Financial Crimes. Vietnam has signed most major treaties banning money laundering. Decree 74 on Anti-Money Laundering, promulgated in June 2005 and in effect since August 2005, is an important step forward in the development of Vietnam's nascent anti-money laundering regime. Though money laundering is not considered a critical problem for Vietnam, evidence suggests that the inflow of some funds into the Vietnamese economy from certain sources may be related to international crime. Vigilance is necessary to stem future abuse of the financial system. The government should continue to develop its financial crimes investigation and enforcement capabilities, and should expand the coverage of financial crimes to terrorist financing and other white-collar crimes. The government should also solicit banks and non-bank financial institutions for input during development of financial crimes regulations.

Intellectual Property. Vietnam enacted a new Law on Intellectual Property (IP Law) in November 2005 to create a more modern and comprehensive legal framework to address intellectual property issues and to fulfill its obligations under the U.S.-Vietnam BTA and the WTO TRIPS agreement. The IP Law applies to copyrights and related rights, industrial property rights, and plant variety rights, and includes provisions on enforcement. Criminal liability for IP violations falls under the Criminal Code. Vietnam has promulgated numerous decrees and circulars to implement the IP Law, and has acceded to many of the key multilateral conventions and agreements governing intellectual property (i.e., Paris, Madrid, Berne, Geneva, Brussels, Rome, and the International Convention for the Protection of New Variety of Plants (UPOV)). Nonetheless, the perception among foreign investors, donors, and local professionals in Vietnam is that theft of intellectual property, including piracy of copyrighted works, trademark counterfeiting, and pharmaceutical counterfeiting, is widespread and that infringers and pirates are not deterred by the current system of administrative sanctions. Throughout the Diagnostic process in September 2005, several interviewees recounted instances of trademarks being stolen and goods being counterfeited, not only by private actors within the Vietnamese economy, but also by SOEs. Due to continued high rates of piracy, Vietnam remains on USTR's "Watch List" of countries that exhibit major problems in the area (although, significantly, it is not among the 13 countries listed on the USTR's "Priority Watch List" for 2006). Key challenges involve improving administrative enforcement processes, raising public, business, and government understanding of the importance of protecting IPR, reforming laws to strengthen criminal sanctions against piracy and counterfeiting at commercial levels, and improving the capacity and credibility of the judicial system as a viable option for IP owners to use civil remedies to protect their rights.

E. CROSS-CUTTING THEMES

Along with the findings summarized above, certain cross-cutting themes emerged with respect to CLIR and trade in Vietnam. These themes include the following: a) the conflicts inherent in developing a private sector where SOEs often dominate; b) the urgency of judicial reform; c) the problem of corruption; and, on a more positive note, d) the many examples of success in these

areas. It is important to evaluate and integrate these themes, but not necessarily through stand-alone initiatives. It would be prudent to address these themes within the context of other reforms, as further detailed below.

Conflicts Inherent in Developing a Private Sector where State-Owned Enterprises Often Dominate. Given Vietnam’s history of socialism and central planning, its economic and legal transition over the last two decades has been heavily influenced by the legacy of a strong state sector, especially the strong role of SOEs. Estimates of the current number of SOEs in Vietnam vary; figures cited over the course of this Diagnostic ranged from 4,500 to 5,600; we can say with confidence that less than half of the approximately 12,000 to 14,000 SOEs that operated in the late 1980s still exist today.⁵ This dramatically reduced number suggests that Vietnam has made significant progress in reducing the role of SOEs in the economy. However, many key sectors are still heavily influenced by SOEs. While some SOEs are profitable and reasonably efficient, the state is too involved in areas of commerce that would be better served by the private sector.⁶ The reduction, reorganization, and reform of SOEs has been a government priority since at least 1995, when Vietnam applied for membership in the WTO and established, for the first time, a Law on State-Owned Enterprises. A reduction in the number of SOEs will allow private enterprise to experience greater economic freedom and better access to markets, *and* will allow Vietnam to enjoy access to higher quality goods and services at better prices.

Before the recent reforms, Vietnam engaged in virtually 100 percent nationalization of industrial and commercial enterprises and invested heavily in its SOEs, subjecting them to the “direct control and management of line ministries of the central government or different departments of the local government.”⁷ This model, combined with central planning, resulted in a sustained lack of industrial growth and productivity and unrelenting poverty throughout Vietnam. Beginning in late 1986, through its *doi moi* initiative, Vietnam abandoned some elements of this approach and launched a gradual process of market-oriented reforms “with a socialist direction.” Although much has changed in 20 years, this model of state management of SOEs has remained largely in place until just the last several years.

As part of the WTO accession process and in line with domestic policy objectives, Vietnam is transforming many of its SOEs through an “equitization” process that dilutes state ownership and shifts them into joint-stock or limited liability companies subject to the Enterprise Law. SOEs have been categorized into three groups: those that would remain under 100 percent state ownership; those in which the state would retain a majority ownership interest; and enterprises in which the state would maintain a minority interest or completely divest ownership. As of 31

⁵Friedrich Ebert Stiftung/CIEM, “Accelerating State-Owned Enterprises Reform to Meet the Requirements of National Development and WTO-Accession,” Working Paper, January, 2004.

⁶State-owned banks are especially damaging to the economy because they can engage in bad lending practices (e.g., fronting money to insolvent SOEs without any requirement of collateral or expectation of pay-back). Many foreigners assert that state-owned banks grant capital to SOEs that should be directed elsewhere, i.e., to private sector companies that may have a greater chance of growing that capital and paying back their loans. State-owned banks, however, have recently diversified their lending, and are scheduled to be equitized in the coming years. Led by Vietcombank, the state-owned commercial banks are in the process of developing offering documentation and retaining the services of international financial institutions to act as International Public Offering Advisors (IPO) advisors.

⁷Vu Quoc Nu, “The State-Owned Enterprise Reform in Vietnam: Process and Achievements,” *Institute for Southeast Asian Studies*, 2002, page 5.

December 2005, 2,935 enterprises have been equitized. To further this process, the government promulgated Decree 109 (dated 26 June 2007) on Conversion of Enterprises with 100 Percent State-Owned Capital into Shareholding Companies. Although Vietnam has enacted other legal reforms much more rapidly than many would have expected just five years ago, in many respects it has not met expectations to rapidly rationalize SOEs. With new Vietnamese leadership in 2007, faster and deeper equitization of SOEs is expected over the next several years. This has important implications not only for economic efficiency but also for Vietnam's stock market, which has greatly benefited from a steady increase in the public listing of viable, equitized joint-stock enterprises.

Despite these reforms, the lingering and not unsubstantial presence of SOEs continues to distort markets in several ways—

- SOEs are afforded many benefits, including some that are legislatively supported and some that are informal, that increase the difficulty of competing against them. For example, SOEs are obliged to pay a lower minimum wage than foreign-invested enterprises (FIEs). SOEs are often treated more favorably with respect to transporting goods through borders, can access capital much more easily, are rarely subjected to “excessive” red tape and inspection problems, and are likely to receive favorable treatment in court procedures that involve commercial disputes. SOEs also appear to be freer to engage in trademark and copyright infringement without significant government intervention.
- In the past, state-owned banks were usually not required to comply with the minimum deposit requirements demanded of domestic joint-stock and foreign-owned branches of banks. They were also allowed to borrow from state-owned banks without offering collateral, an enormous advantage over private companies. Reforms have eliminated these advantages, however. The 2004 amendments to the Law on Credit Institutions call for state-owned banks to operate as full-fledged commercial banks, and two “non-commercial policy banks” were created to handle policy lending. As part of these reforms, a Decision on Prudential Supervision was promulgated in 2005. These reforms call for state-owned banks to be supervised on the same basis as domestic private and foreign banks (largely in line with “BASEL I” criteria) after a phase-in period of a number of years. To date, the change has not occurred for any state-owned banking institutions. SOEs are also under less pressure to fully repay loans, compared to expectations for loans to private businesses.
- The new Law on Competition restricts comparative advertising, in effect denying private companies the important right to truthfully assert why their products may be preferable to those offered by SOEs.

Urgency of Judicial Reform. One of the most significant non-market risks for companies doing business in Vietnam is the lack of predictable, affordable enforcement in the event of a commercial dispute. The courts are both slow to issue judgments and notoriously influenced by factors that are unrelated to the evidence. When judgments are finally issued, they are often difficult to enforce, at least within a reasonable timeframe and at a reasonable cost. Without effective enforcement, commercial rights are no more than theories.

Virtually every substantive section of this Report—including contracts, secured transactions, real property, IPR, bankruptcy—identifies the inability of Vietnam's court system to facilitate the prompt resolution of commercial disputes and the enforcement of judgments as a fundamental

problem. Important aspects of this issue include a lack of public confidence in judges, the overall inefficiency and sluggishness of court processes, a lack of significant automation in the courts, and the difficulty of enforcing court decisions in a timely fashion. Examples include the following—

- Vietnamese judges are generally regarded as bureaucrats with no particular status. Historically, judges and courts have not reliably delivered justice. They have been seen as instruments or tools of the state that implement the will of rulers instead of impartial dispensers of reasoned decisions. Enhancing and modernizing the status and role of the judiciary remains a challenge.
- The courts are not operating effectively, especially with respect to resolving commercial contract disputes. Around 1,000 cases were actually brought to the economic court in 2004; roughly 80 percent were resolved. The public's access to these decisions is limited. Data on how many of these decisions were enforced in practice are not widely available, but delays in enforcement of decisions are an endemic problem in Vietnam. Procedural oversight of the courts by prosecutors can further delay enforcement of decisions. These factors erode the ability of the court system to resolve commercial disputes.
- Court users and court staff reported the following inadequacies in court administration:
 - Poor quality of information management, as evidenced by inconsistent and occasionally duplicative methods of collecting and maintaining information about cases.
 - Inconsistent court administration procedures and inconsistent forms.
 - A lack of control over case records and security.
 - An overall inability to generate useful statistics regarding the operation of the courts.
 - Lack of clear, long-term strategies at the individual court and institutional levels to integrate automation processes into court administration.
- Transparency throughout the court process can be weak, and decisions are often poorly written and hard to obtain.
- The courts have limited ability to enforce attendance at civil or commercial proceedings.
- The courts have no institutional incentive to ensure that their judgments are enforced.
- Judges do not feel that they have adequate access to or understanding of the new commercial laws. For example, judges report significant gaps in understanding of both the various sources of contract law—including not only the major general sources, but also sources pertaining to property, employment, notaries, and other issues regularly faced by businesses—and the substance of those sources.
- Foreigners who try to discipline or dismiss employees, even for just cause, often find the courts unsupportive of these efforts.
- Vietnam's Economic Courts lack capacity to deal with the challenges presented by the new Bankruptcy Law. Judges do not fully understand the principles behind swift and fair dissolution of insolvent businesses, and they lack facility with the new law. Other than limited guidelines reportedly issued by the Judicial Council, the Economic Courts have not yet received clear instructions regarding rehabilitation and liquidation.

In general, profound lack of public confidence in the courts may, in the long term, discourage sustained economic growth.

The Dangers of Official Corruption. While corruption continues to be an impediment to trade and investment in Vietnam, the government has been moving to address this issue, under pressure from foreign investors, trading partners, and the citizens of Vietnam to do so in a comprehensive way. The new Anti-Corruption Law that came into effect on July 1, 2006, was supported by multiple bilateral and multilateral donors. It calls for much greater disclosure of assets by public officials, and for the government to establish specialized groups to tackle corruption. In January 2006, the Government of Vietnam established the National Steering Committee for Anti-Corruption, which is led by the Prime Minister and includes the Office of the Government, the Ministry of Justice, the Government Inspectorate, the Ministry of Public Security, the Supreme People's Court, the Supreme People's Procuracy, and the Ministry of Defense. In early February 2006, the Government Inspectorate and the Ministry of Security each established Anti-Corruption Departments. Under an instruction from the Prime Minister, every line ministry and provincial People's Committee will prepare an Action Plan for Anti-Corruption within its management area. However, the Anti-Corruption Law did not establish an Independent Anti-Corruption Commission, as many recommended, and its actual effects have yet to be seen.

In addition to the Anti-Corruption Law, Vietnam has undertaken reforms to improve transparency, due process, and accountability for administrative actions, all of which will eliminate opportunities for corrupt behavior by officials.

The Law on Complaints and Denunciations has been amended twice since 2004 to implement U.S.-Vietnam BTA and WTO requirements that stipulate that final administrative decisions can be reviewed by the courts. To further strengthen the right to seek court review of administrative determinations, this law is expected to be separated into two laws—one on complaints and one on denunciations—in 2008. The Ordinance on Procedures for Settling Administrative Cases was also amended to give the courts broader jurisdiction to hear appeals of administrative decisions. As a continuation of these reforms, Vietnam is currently drafting an Administrative Procedures Law and is debating the merits of establishing independent tribunals to hear appeals of administrative decisions.

The Law on the Promulgation of Legal Instruments (Law on Laws) was amended in 2002 to require that most legal instruments must be published for 15 days before taking effect, as required by the U.S.-Vietnam BTA. As a result, the number of issues of the *Official Gazette* published each month has gone from an average of four issues per month in 2002, to almost 20 issues per month in 2003, to nearly 50 issues per month in 2006, a more than 1,000 percent increase. Also, since the adoption of the new Law on the Promulgation of Legal Instruments of People's Councils and People's Committees (Law on Local Laws), 52 out of Vietnam's 64 provinces have established local official gazettes that publish regulations promulgated at provincial and district levels. An electronic version of the *Official Gazette* is being developed by the Office of the Government.

The Law on Laws requires that draft legislation be circulated for comment among relevant government agencies, but does not require that draft laws and regulations be published for public comment. In practice, however, a large number of government agencies do publish draft legislation on Web sites and in the mass media in order to solicit public comment. Many state agencies also organize public workshops to discuss draft laws and regulations, often with the support of international donors, including USAID/STAR-Vietnam. From 2002 to 2006, for example, USAID/STAR supported almost 300 such seminars.

Corruption-related complaints include customary “informal charges” for administrative services such as business registration or notarization of documents; bribes demanded (or expected) by

Transparency International Corruption Perception Index (2006) (63 countries ranked) Source: www.transparency.org		
Country	World Ranking	CPI Score (out of 10)
Singapore	5	9.4
Hong Kong	15	8.3
Japan	17	7.6
South Korea	42	5.1
Thailand	63	3.6
Laos	111	2.6
China	70	3.3
Vietnam	111	2.6
Cambodia	151	2.1
Indonesia	130	2.4

judges to decide a case one way or the other; relentless inspections of enterprises, assuaged only through paying off inspectors; and even manipulation and misappropriation of donor funds by government representatives. In addition, rampant corruption in Vietnam’s Customs Agency was the primary complaint from the trade community and other Customs Agency customers.

Transparency International’s 2006 Corruption Perception Index, which examines perceptions of corruption in most countries throughout the world, ranks Vietnam in the bottom third. Vietnamese leaders recognize that corruption erodes public trust in the government and constrains competitiveness.

Some foreigners in Vietnam identified noticeable improvements with respect to corruption, noting that some Ministries are “not as corrupt” as others or as they have been in the past. Business processes in Ho Chi Minh City have significantly improved, for example.

The behavior of foreigners working in Vietnam has apparently had a positive influence. When foreigners refuse to participate in corrupt practices, local bureaucrats are forced to think beyond immediate payment and to do their jobs more effectively. Moreover, the Foreign Corrupt Practices Act in the United States, which criminalizes bribes made by U.S. companies or individuals in foreign states, deters corruption, and Americans avoid having to make many of the payments that other foreigners or Vietnamese must make.

Although Vietnamese leaders have acknowledged the harm caused by corruption and have taken positive steps to combat it, the reality is that businesses must still deal with corruption in all phases of operation. Specific suggestions that arose during the course of the Diagnostic (especially with respect to the “low-level,” everyday expectation of informal payments during the course of doing business) included the following—

- Government offices that charge fees for their services should clearly post their fees for each service provided, including any fees related to legitimately expediting the service.
- Customers should not pay bribes or other “informal charges.”
- Corruption hotlines should be established in each of the ministries.
- The media should receive training specifically in the area of corruption, including investigative techniques and the ability to recognize different charges of corruption such as scapegoating or political exercises to discredit someone.
- Anti-corruption “champions” should be identified and empowered, both by the state and the donor community.
- Public financial disclosure of the assets of high-level public employees, including judges, should be mandatory.
- Information technology should be introduced into all state functions where there is a chance for hiding information or obscuring financial transactions. This would allow charges to be tracked and eliminated some opportunities for corruption.
- Transparency should continue to be enhanced at all levels of government and government procurement, including consistent and timely publication of all laws, regulations, and court decisions, and reporting on regulatory procedures and decisions.
- An “Inspector General” position should be created in large public agencies, and be charged with investigating and, where necessary, referring to prosecution instances of waste, fraud, and abuse.

Many government officials have been implicated in corruption scandals in recent years. One illustrative case is that of Mai Van Dai, former Deputy Minister for Trade, who was jailed in 2005 on multiple charges and brought to trial in early 2007 for large-scale corruption in relation to textile quotas. Strong, resolute, and forward-looking leadership is urgently needed to counter the highly damaging state of affairs concerning corruption in Vietnam.

The Many Lessons of Success. Although this Report contains many suggestions for change and some direct criticism of the environment for commercial law and trade in Vietnam, these points should not obscure the many positive findings in this Diagnostic or the “bottom line” figures showing a sustained period of meaningful economic growth. Vietnam is doing many things right—

- *The government listens to the private sector.* Domestic and foreign representatives of the private sector confirm that numerous opportunities exist to become involved in the process of commercial law transformation in Vietnam. Government representatives, including members of the National Assembly, meet with the private sector to consider its reaction to draft laws and the submission of draft regulations to the Vietnam Chamber of Commerce and Industry (VCCI), as they are required to do by law.⁸ Legislative changes typically go through numerous drafts in order to incorporate the reactions and changes proposed by both private and public stakeholders.
- *The government often moves quickly.* Vietnam has invested significant energy into designing change processes that are collaborative, substantively strong, and swift. The

⁸USAID/STAR helped the VCCI establish a web page (www.vibonline.com.vn) for draft legislation to be posted and debated among business and other non-government stakeholders.

challenge for the future lies in channeling the system of legislative responsiveness into efficient and relatively fast *implementation* of economic reforms.

- *Access to information, though imperfect, is improving.* Through use of the Internet, increased media freedom, and expanding public engagement in economic development policy, information about the true state of the Vietnamese economy, including specific policies that are of interest to outsiders, is rapidly and markedly improving. Vietnam boasts some unusually strong sources of information and support for businesses, including foreign organizations, the U.S.-Vietnam Trade Council, and several international chambers of commerce. Although the quality and access to legal information has improved substantially, many types of basic data on economic activity remain incomplete or unavailable. For example, the most fundamental data on Vietnam's banking system and monetary sector are not publicly available.
- *The government effectively manages the donor community.* Vietnam deals with a vast number of international, bilateral and non-government institutions that provide technical assistance and funding for market-oriented reforms. This is no small challenge: often donors arrive with overlapping visions of where their support is needed, and in a few cases their visions conflict. Unlike some countries, which may refuse or undermine international assistance efforts, Vietnam has proven remarkably receptive to outside contributions toward the development of its "new" economy and effectively balanced the interests and agendas of its various partnering institutions.

This Report acknowledges specific actors in Vietnam for the high quality of their contributions to change. There is no doubt that the recent successes of Vietnam—including the policies and actions behind these successes—will serve as an important source of guidance in the region for years to come.

II. COMPANY LAW AND CORPORATE GOVERNANCE

A. INTRODUCTION

With the introduction of a modern Enterprise Law in 1999, a vast number of small businesses in Vietnam joined the formal sector through the process of company registration. The legal mechanism of registration is related to economic growth—in almost all cases, formal access to capital requires evidence of registration; moreover, the submission of a company to the country's formal tax structures provides vital revenue for the state.⁹ The new Enterprise Law, which became effective on 1 July 2006 and replaced the 1999 law, continues the trend of liberalizing the private sector in Vietnam and leveling the playing-field among all types of enterprises, whether private, foreign-invested, or state-owned. The revised Commercial Law, which took effect on 1 January 2006, regulates the establishment of representative offices and branches of foreign traders and foreign-invested trading enterprises.

One fundamental issue for private businesses in Vietnam, whether large or small, is the dominant role played by state-owned enterprises in the economy. The new Enterprise Law, although legally consistent with international standards, cannot in itself serve as a counterweight to the advantages afforded SOEs over many private sector firms in the Vietnamese economy. In addition, the Enterprise Law is somewhat ahead of the implementing capacities and supporting institutions needed for a truly effective company law to be in place.

B. LEGAL FRAMEWORK

The major legislative development for companies in Vietnam is the introduction of the new Enterprise Law (EL). The EL was adopted by the National Assembly on 29 November 2005, and took effect on 1 July 2006. A new Investment Law became effective on the same date. The EL supersedes the 1999 Enterprise Law that became effective in 2000. The EL is unified in the sense that it covers both Vietnamese and foreign-owned enterprises located in Vietnam and regulates all forms of private enterprise, including limited liability companies, shareholding (joint-stock) companies, partnerships, SOEs, joint ventures, and 100 percent foreign-owned enterprises. The law opens up all business lines to private enterprise, except those that are specifically reserved to or restricted by the state. The EL eliminates distinctions between foreign investors and Vietnamese citizens with respect to formation, capital contributions, board memberships, and exercise of shareholder rights. It is generally consistent with company law in both common and civil law industrialized countries. Development of the new EL was supported by a number of donors, including USAID/STAR.

⁹Of the 128,000 or so formally registered companies in Vietnam by 2005, however, a number of those registered have not remained active. There is no formal estimate of this number, but using General Statistics Office (GSO) data, approximately 30–40 percent of registered firms were likely to have not been active in 2004. This number probably fell to 20–25 percent in 2005.

The revised Commercial Law and its implementing decrees regulate the establishment of representative offices and branches of foreign traders and foreign-invested trading enterprises in Vietnam. Under Decree No. 72 (effective 14 August 2006), the Ministry of Trade (MOT) has authority over branches, while provincial Departments of Trade have authority over representative offices. The Decree permits the establishment of foreign trading companies to engage in trading activities and activities directly related to trading of goods (with the exception of distribution, which is regulated by Decree 23 on Trading and Distribution (effective 12 February 2007)). Branch trading rights are available only to the extent of Vietnam's commitments in international agreements and as announced by the MOT. Decree 72 limits the term of representative office and branch licenses to five years, which represents a "step backwards" from prior regulations that did not term-limit branch licenses; licenses are renewable for additional five-year terms upon submission of an application. Branches and representative offices operating in specialized sectors, such as banking, legal services, insurance, and education, are not subject to Decree 72, but are instead subject to regulations issued by relevant ministries/licensing bodies. Revisions to the Commercial Law and development of its many implementing regulations were supported by USAID/STAR and several other donors.

While the EL is of high quality, many legal commentators and the Diagnostic team have found the EL too comprehensive and elaborate for the current level of business activity in Vietnam.¹⁰ For example: while difficult to measure, as much as a one quarter to one half of the economy may be operating informally; most companies are closely held; and currently less than 10 percent of companies take the form of a joint-stock enterprise, even though this sector has grown since 2000. The EL, like other recent legislation enacted as part of Vietnam's push to join the WTO, lacks an impact analysis and projection of implementation cost. Small and medium-sized businesses (SMEs) in Vietnam will continue to incorporate as limited liability companies or operate as sole proprietorships, but are unlikely to follow—or be able to afford to follow—the procedures set out in the EL. The rules on conduct of shareholder meetings, for example, seem overly prescriptive. To the extent, however, that Vietnam's courts remain ill-equipped to rule on corporate governance matters and there is no other authoritative source on what compliant corporate procedures should look like, this highly prescriptive language may remain useful.

The EL retains some features that are distinctive to Vietnam. For example, for shareholding companies with more than 11 shareholders, or where one shareholder owns more than 50 percent of the corporate assets, a Control Board (Supervisory Board) is required. This feature is not uncommon in civil law countries, although whether it functions meaningfully in actual corporate governance is debated. Chapter IX of the draft law sets out in detail the role of the state in management of enterprises.

One aspect of the EL underscored by interviewees during this Diagnostic is that, although the law provides standard corporate governance approaches to operating an enterprise, it does not directly address the special needs of the SOE as a manager of state assets. A number of interviewees commented that specific legislation aimed at strengthening the governance, efficiency, and restructuring of SOEs is likely to be required in the future.

¹⁰See World Bank in Vietnam, Vietnam Private Sector Development Policy Note, *Firm Dynamism: Beyond Registration*, June 2004.

C. IMPLEMENTING INSTITUTIONS

Business Registrar. Articles 162 and 163 of the EL direct the Provincial People’s Committees to organize business registration through business registration bodies. The business registration bodies are charged with all the tasks necessary for issuing a certificate of registration, maintaining a registry, requiring business reports, and resolving disputes about registration. In practice, business registration under the 1999 Enterprise Law in both Hanoi and Ho Chi Minh City is available online, is fast, and is relatively inexpensive. Business registration is covered by the 2006 Decree No. 88 on Business Registration, which implements relevant provisions of the EL. Business registration bodies are organized at both the provincial and district levels. At the provincial level, business registration is carried out by the Department of Planning and Investment (DPI); the DPI office is referred to as “provincial business registration offices.” Business registration offices also are to be established in districts where there have been over 500 registrations of new household businesses and cooperatives over the past two years. For foreign-invested businesses, the investment-registration-certification or investment-evaluation-certification (where evaluation is required under the Investment Law) also serves as business registration under the EL. Domestic businesses, however, are required to complete the additional and separate step of business registration as well as investment-registration/evaluation-certification.

There currently is no incentive or requirement to report the closure of businesses as a formal matter, which leads to inflated estimates of the number of formal businesses if the estimate is based only on registrations. Users of the business registries reported relative efficiency in the process, although they also noted the common practice of “informal charges”—that is, unlawful charges by individuals who work for the registries—for speeding up the registration process.

Tax Office. Although outside the parameters of this Report, evidence from prior surveys of businesses in Vietnam confirms that interactions with tax authorities (most prominently, the purchase of tax invoices) is regarded by SMEs as both inefficient and a route through which improper payments may be solicited. The discretionary nature of the tax administration is viewed as a major disincentive for businesses to maintain and report accurate financial statements.

Provincial/Local Government. A new and significant policy tool developed by the USAID-funded Vietnam Competitiveness Initiative (VNCI) Project is the Provincial Competitiveness Index as released in 2005 (PCI 2005) and 2006 (PCI 2006). While PCI 2005 surveyed 42 provinces, PCI 2006 included all of Vietnam’s 64 provinces. Both PCI 2005 and PCI 2006 show that implementation of the 1999 Enterprise Law varied across provinces. The entry costs of business, including time spent waiting to start a business, time required to negotiate with local officials and tax officials, and the time cost of regulatory compliance, are calibrated in the indices. Whether informal charges are required to be paid to officials or to tax inspectors, and whether the province is responsive in working within central laws, is also measured. In 2006, Hanoi ranked 38th and Ho Chi Minh City ranked 7th; in PCI 2005, their respective rankings were 14th and 17th. The PCI is weighted for structural endowments and so seeks to isolate the regulatory component as a factor that can be changed at the local level to support private enterprise.

Economic Courts. Although the legal framework for company law has been significantly strengthened by the adoption of the EL, there is a strong perception among lawyers and donors that the court system is not yet equipped to process company law disputes.¹¹ As stated by one Vietnamese lawyer, “The courts are very terrible. You cannot win using law in the courts.” This comment, consistent with other interview responses during the Diagnostic, suggests that there is likely to be significant lag time between not only the introduction of the EL and its general implementation, but also the willingness of shareholders and company management to submit disputes to courts. Support for the expanded economic jurisdiction of the district courts is likely to be an important reform issue, as is enhancing the capacity of the Supreme People’s Court to administer the EL.

D. SUPPORTING INSTITUTIONS

Notaries. As described in detail in this Report’s section on contracts, notarial services—at least in Hanoi and Ho Chi Minh City—appear to be relatively efficient, inexpensive, and used routinely for commercial transactions, including those relating to company formation and transactions entered into on behalf of companies. With respect to transactions involving property, however, Vietnamese lawyers reported often significant interference by the notary with the contracting process, which inhibits or delays the abilities of new companies to grow their businesses. This is especially a problem for complicated contracts, especially larger projects involving foreign investors, which typically go far beyond the expertise of local notaries, who must nevertheless “sign off” on the overall contract.

Incorporation Agents. A recent World Bank survey reports that incorporation agents who will establish a corporation for an entrepreneur for about one million *dong* (about \$60) are now operating and are commonly used.

Accounting, Auditing, and Credit Information. A key institutional gap in the Vietnamese market at present is the availability of reliable financial information about companies. There currently is little basis upon which to assess the creditworthiness of an enterprise, and this absence of critical information curbs bank lending, particularly to SMEs. The lack of financial information is attributable in significant part to under-reporting in order to avoid taxes or unwelcome government scrutiny. The area of Vietnamese professional services in accounting and auditing is underdeveloped, but is likely to emerge as the economy opens and grows. A 2006 Implementing Decree on establishing auditing enterprises (60/2006-TT-BTC) and a 2005 Decision on accounting standards (100/2005/QD-BTC) are part of an extensive set of regulations issued or being developed to support the implementation of the EL and the new Investment Law. There is, however, a large contingent of foreign accounting and auditing firms in Vietnam.

Valuation Agents/Appraisers. The EL contemplates the existence of professional appraisers. Article 30, for example, states that business assets that are to be used as capital contribution must be valued by the members, founding shareholders, or a professional valuation organization. The extent to which there is a market for professional appraisals, however, is not clear. One donor

¹¹The Supreme People’s Court Annual Report for 2004 states that 909 cases were heard by the economic court: all instance economic courts received 885 cases, and decided 784 cases; courts of appeal received 155 cases, and decided 116 cases; 11 cases were received for review of legal error and newly discovered matters, of which nine were decided.

engaged in secured transaction reform, for example, stated that official land valuations are dramatically out of alignment with the (much higher) market values of land. This may be a supporting area that takes some time to evolve.

Lawyers and Legal Professional Associations. The Vietnamese Bar is small but growing. Its core functions have been litigation and liaison with government on business questions such as approvals and licenses. A business risk management or transaction advising approach to practice is likely to emerge over time as the business market grows in size and matures. The new Law on Lawyers (effective January 2007) continues to liberalize the market for legal services. Key reforms include permitting the establishment of sole practitioners and equal treatment for all forms of domestic legal practices by allowing all legal practicing organizations to cooperate with foreign law firms (previously, local firms were prohibited from such cooperation). With respect to foreign law firms, foreign legal practices can be established as a branch office or a limited liability company (either as a joint venture with a Vietnamese firm or 100 percent-foreign owned); existing foreign firms are not required to convert to conform to the forms specified in the new law. In addition, Vietnamese lawyers working for foreign firms are now allowed to participate in civil court cases (but not in criminal cases). Under prior law, Vietnamese lawyers working for foreign firms could not appear before Vietnamese courts. There is a wide perception, however, that Vietnam requires many more lawyers who are well-trained, especially in dealing with foreign elements and the many new, modernized legal issues. This perception is reinforced by the recent escalation in salaries for lawyers. The number of domestic and foreign law firms in Vietnam has been expanding rapidly over the last decade.

Law Schools. Law school curricula in Vietnam generally include components on business law and corporations, but the rigor of training and exposure to new, modern legal topics leave much to be improved. Clinical legal education, as well, has yet to be fully developed, and the short internships that trainee lawyers serve at the courts or in government legal offices are not likely to be adequate preparation for the practice of company law. Over the course of this Diagnostic, those lawyers who demonstrated the clearest grasp of company law principles and practice were those who had studied abroad or are currently working in foreign law firms in Vietnam.

Trade and Special Interest Groups. Donors and business interviewees praised the transparency of the EL drafting process. Foreign interviewees in large part viewed the new EL as an important step forward, although there was criticism of a clause inserted late in the drafting process that established super-majorities for many key board decisions. This super-majority clause was later rescinded by the law passed to approve the WTO Accession Protocol. The Vietnam Business Forum and other international business groups advocated strongly for the repeal of constraints on foreign investors in the previous Enterprise and Investment Laws. These groups can also be expected to monitor the implementation of these new laws and regulations.

E. SOCIAL DYNAMICS

The new EL is a product of Vietnam's desire to build a stronger legal framework for business development and to meet its obligations under its trade agreements with the United States and the WTO. Businesses in Vietnam did not appear to strongly demand a new statute with comprehensive corporate governance provisions. Rather, the major catalyst for business incorporation since 2000 has been that it enables companies to issue official invoices to

customers and thus opens up the prospect of doing business with foreign-invested corporations or SOEs. In addition, it enables companies to be eligible for public procurement contracts. What has been more significant from a business standpoint has been the relaxation of licensing requirements across a number of economic sectors, although much remains to be done in this regard.

Entrepreneurs report that continuing constraints on business growth include—

- Limited access to land and difficulty leasing land from the government or SOEs.
- Inability to access capital because banks are unwilling to lend to SMEs unless supported by land as collateral (it remains difficult for many to use non-land assets as collateral).
- Lack of predictability in charges that will be levied for government licenses and services.
- Difficulties with time-consuming and capricious procedures at the tax office.

The World Bank Doing Business Indicators for 2006 assess the time to start a business in Vietnam and the required capital (50 days and 44.5 percent of *per capita* income) as being significantly more burdensome than in either China or Thailand. This finding needs to be treated with caution, however. The World Bank's Vietnam office conducted its own 2004 survey of incorporated enterprises in Hanoi and surrounding provinces in which entrepreneurs reported high levels of satisfaction with the incorporation process.

The local survey suggests a more complex picture of the uptake of formal incorporation by Vietnamese businesses. In particular—

- SOEs continue to play a large role in Vietnam's economy, and the role of private firms remains relatively small.¹²
- Only four percent of Vietnamese firms employed more than 300 workers in 2000.
- SMEs are only marginally profitable and few are more efficient than SOEs.
- Reported numbers of incorporated businesses (approximately 100,000 by the end of 2004) are much higher than the number of operating businesses (approximately 50,000 for the same period), although the survival rate over five years is roughly 75 percent.
- Growth in registered businesses does not indicate growth in business activity or economic growth—rather, this first generation of incorporations formalizes part of the informal economy.
- Most small businesses that incorporate will still operate in the style of household firms.

This profile of business size and operation in Vietnam will continue to change now that Vietnam has entered the WTO. The current company law statute is ahead of both the implementing and

¹²Updated data in this regard from the Central Institute for Economic Management (CIEM)/STAR economic assessment show the following: from 1995 to 2004, the percentage of SOEs in the economy has declined from 52 to 35 percent, the percentage of foreign firms has increased from 18 to 33 percent, the percentage of domestic private firms has increased from eight to 20 percent, and the percentage of household and cooperatives has fallen from 22 to 12 percent. SOEs still play a key role in the economy, but increasingly less so over time. The role of domestic firms, although growing rapidly, remains unacceptably small, especially relative to Vietnam's neighbors (including China).

supporting institutions needed to allow it to operate more effectively in practice, and it appears to be ahead of demand by Vietnam's still fledgling domestic private sector.

F. RECOMMENDATIONS

- Establish a mechanism to identify those businesses that are formally registered but no longer functioning. This process would provide a more accurate picture of Vietnam's formal sector, thus enabling more effective support in the future. It may also serve to better facilitate appropriate use of the bankruptcy regime.
- Establish a plan for implementation of the EL that leverages the many government and private sector assistance activities in Vietnam, including training of pertinent constituencies, support for public education, and a long-range plan for improved practices of corporate governance for mid-sized and larger companies.
- Continue leveraging both donor assistance and opportunities inherent through the presence of foreign companies to promote the increased professionalization of the business support sector. For example, support for university curricula pertaining to commercial law, improved access to internships, on-the-job-training, and continuous skills training for valuation professionals and others would increase the overall ability of professionals to cope in the increasingly complex business environment.

III. CONTRACT LAW AND ENFORCEMENT

A. INTRODUCTION

The legal framework for contract law in Vietnam was completely renovated in 2005–2006 with the drafting and adoption of major revisions to the Civil Code and Commercial Law. Both came into effect on 1 January 2006. Importantly, the Civil Code repealed the prior Ordinance on Economic Contracts, reducing the number of legal documents governing contracts and eliminating much of the overlap and confusion that had previously existed. With the Civil Code and Commercial Law reforms and the introduction of other related laws, ordinances, and decrees, the statutory framework for commercial contracting in Vietnam is now comparable to that of many industrialized countries. Both judges and practitioners, however, reported that their understanding of the current set of laws pertaining to contracts (including ordinances, decrees, and other significant sources of authority) would improve if these were “packaged” more effectively—in, for example, a single volume that was regularly updated and readily accessible.

Given Vietnam’s socialist traditions, and the fact that the private sector is predominantly made up of SMEs, it is not surprising that domestic parties often view contracts as devices to “minimize the room for misunderstanding between parties,”¹³ and routinely conclude informal contracts. With the rapid integration of Vietnam into global markets, capped by Vietnam’s WTO entry in January 2007, increased contract formality should be expected to follow; the government, businesses, and the courts are more likely to view contracts, over time, as clear and enforceable commitments.

B. LEGAL FRAMEWORK

The bases for commercial contract law in Vietnam are the Commercial Law and Civil Code. The major revisions to the Civil Code (supported by USAID/STAR) came into effect on 1 January 2006 and repealed the Ordinance on Economic Contracts. The revised Commercial Law (also supported by USAID/STAR), which includes the right of foreign branch offices and foreign invested enterprises to be licensed to engage in non-production “commercial activities,” also took effect on 1 January 2006. These changes, which also expand the definition of commercial activities to be more in line with international norms, move Vietnam closer to a market-oriented conception of contract in which commercial contracts are a normal legal activity and are regulated according to common principles. The revised Civil Code and Commercial Law will be supplemented with implementing regulations such as the new Decrees on Distribution and Franchising and the Law on Electronic Transactions (35/2006/ND-CP)—each supported by USAID/STAR.

Significant features in the contracts section of the new Civil Code include entrenchment of the principle of freedom of contract, more precision about the grounds for termination and invalidation of contracts, provisions on particular contract types (e.g., leases, processing contracts, sale of goods), and fewer provisions on intellectual property rights (IPR), which are

¹³World Bank, “Vietnam Private Sector Development Policy Note,” *Promoting Business to Business Commercial Contracts in Vietnam*, January 2005, page 8 (hereinafter *Promoting Business to Business Commercial Contracts in Vietnam*).

now reserved for a separate Intellectual Property Law that came into effect in July 2006. Consumer contracts are not singled out for specific regulation, a decision consistent with the trajectory of contract law development in other transitioning and developed economies. Important lateral supports for the Civil Code include the new Code of Civil Procedure, which came into force on 1 January 2005, and the new Law on Competition, which came into effect on 1 July 2005.

Key features of the new Commercial Law include its applicability to non-traders who engage in commercial activities, an expanded definition of commercial activities to conform to international practice, specification regarding its relationship with other laws bearing on contracts and commercial relations, and provisions for types of commercial relations (e.g., services, franchising, leasing) that were previously inadequately covered under Vietnamese law but are necessary for a modern market-oriented economy. Many of the decrees necessary to implement the Commercial Law have been adopted, including the Decree on Franchising, the Decree on Origin of Goods, the Decree on Trading and Distribution,¹⁴ and the Decree on Foreign Branches and Representative Offices.

Case decisions by courts do not currently function as a public or uniform source of law on contract. As a socialist civil law system, Vietnamese courts take the position that the judges interpret statutes rather than make law. How those interpretive decisions are reached is still a matter of some uncertainty due to the absence of published decisions. This situation significantly improved with the USAID/STAR-funded 2005 publication of selected Supreme Judicial Council which is part of the SPC decisions for 2003 and 2004, Volume 1 of which contains civil and economic judgments. The commitment from the Japan International Cooperation Agency (JICA) to train judges for the SPC in decision-writing is an important step towards developing cases as a source of legal information pertaining to contracts.

The statutory legal framework for commercial contracting in Vietnam is now comparable to that of many industrialized countries. Some areas of contract law—for example, provisions on agency—must still be refined, but the law in its current form provides a comprehensive framework for both domestic and international contract formation and performance.

C. IMPLEMENTING INSTITUTIONS

Publication of Laws. There has been increased transparency with regard to publishing laws and regulations in Vietnam since 2001; however, information availability is still uneven. Although the Vietnamese statutory framework for commercial contracts is comprehensive and sound, it will remain largely theoretical until it becomes publicly available. Business lawyers and judges report significant gaps in understanding of the sources and content of legal instruments pertaining to contract law—including not only the major general sources, but also sources pertaining to property, employment, notaries, and other issues regularly faced by businesses. One remedy for this lack of understanding might be the introduction of a single volume of selected

¹⁴Decree 23 on Trading and Distribution (effective 12 February 2007), in accordance with Vietnam's WTO commitments, authorizes, subject to prior approval from Ministry of Trade (MoT), the issuance of business licenses to foreign-invested enterprises to engage in trading and distribution activities. However, citing the lack of an implementing circular, the MoT is not currently considering licensing any foreign-invested company to import and distribute products in Vietnam.

laws (or relevant portions of laws), ordinances, decrees, pertinent Supreme Court decisions, and other sources pertaining to contracts. A single volume, regularly updated and readily accessible in print and electronically, could significantly increase understanding and clarify practices. A USAID/STAR Project-supported effort to develop an Electronic Official Gazette and Web site for electronic publication of laws, regulations, and procedures that properly indexes references to contracts could serve this purpose.¹⁵ Greater access to laws and regulations in both Vietnamese and English should be a key priority for promoting private sector development and foreign investment and trade.

Courts. Interviewees recognized that this is an important transition period for commercial contract law in Vietnam. The new Civil Code has received less donor funding for judicial training than the Code of Civil Procedure. Therefore, although the Ordinance on Economic Contracts has been repealed as of 1 January 2006, courts may still continue to conceptualize contracts in accordance with their administrative division of cases into “civil” and “economic.” Donors reported that reluctance to use the courts can be explained by risk avoidance: there is a fear that the court will take a highly formalist view of a contract transaction and invalidate it rather than work to solve the commercial dispute. Trust in the courts’ discretion in contract disputes is low because users believe that the courts are not prepared to handle commercial contracts.

Both Vietnamese and foreign lawyers report that the courts struggle with commercial contract cases. Results are mixed: one multinational company reportedly recovered a contractual debt, while other foreign investors have not. One foreign law firm client had a high-value case that remained on appeal in Ho Chi Minh City without a clear prospect for resolution, even though the client was successful in the court of first instance. Most interviewees, Vietnamese and foreign, expressed concerns about the inefficiency of the courts and their inability to resolve complex contractual disputes because the court system, understandably, is lagging behind both statutory developments and market change.

The courts are not established and operating effectively with respect to resolving commercial contract disputes. A reported earlier, around 900 cases were heard in the economic court in 2004, likely far less than would be the case with a more robust court system. When the Code of Civil Procedure took effect in January 2006, the jurisdiction for the district courts expanded; it will include economic cases by 2009. Enhancing the capacity of the district courts is viewed by the

¹⁵The most reliable source of published information on Vietnamese laws and regulations has traditionally been a private law firm subscription service: www.vietnamlaws.com. There has been a proliferation, however, of new government Web sites over the last several years, including:

- National Assembly, www.na.gov.vn: legal documents promulgated by the National Assembly and NA Standing Committee (Vietnamese only)
- Ministry of Justice, www.moj.gov.vn: Legal documents in effect (in Vietnamese, English is under construction)
- Office of the Government

Other ministries provide access to legal documents within their respective areas of responsibility, including:

- Ministry of (Industry and) Trade, www.mot.gov.vn (Vietnamese and English)
- Ministry of Finance, www.mof.gov.vn (Vietnamese and English)
- Ministry of Science and Technology, www.most.gov.vn (Vietnamese and English)
- Ministry of Trade, www.mot.gov.vn (Vietnamese and English)
- Ministry of Natural Resources and the Environment, www.nea.gov.vn (Vietnamese and English)

Supreme People's Court as a priority. To date, any case that looked in any way economic was routinely referred to the Economic Court—local courts had no direct experience in commercial matters. Denmark had a program in 2005–2006 aimed at providing training for judges in commercial law and supporting for the arbitration system.

Enforcement of judgments remains an important issue in the Vietnamese legal system. A draft law on the enforcement of judgments, which will become the Judgment Enforcement Code (supported by USAID/STAR), was debated in the National Assembly in late 2006. It represents a major institutional development, but will require considerable effort to implement. The draft law is said to contemplate a Judgment Enforcement Agency established by the Ministry of Justice that will be more effective than the current organization of the same name. One donor commented that a major shift in institutional thinking would be required here, because the typical approach to enforcement by the Ministry of Justice official who heads judicial enforcement is to retry the case. Information flows between agencies remain poor because of sectionalism and because individual officials are reluctant to be blamed for “errors.” The courts have no institutional incentive to ensure that judgments are enforced, and those charged with enforcement do not want to overreach their authority. A Law on Judicial Assistance was being debated in the National Assembly in February 2007, and, when passed, should allow the judicial system to deal more effectively with civil and criminal matters involving foreign courts or other international elements.

Arbitration. The Ordinance on Commercial Arbitration, supported by the USAID/STAR Project, came into effect on 1 July 2003. A Resolution on the Implementation of the Ordinance on Commercial Arbitration was approved by the Supreme People's Court in 2003, and a Decree on the Enforcement of Arbitral Awards was approved in 2004. A key change in the Ordinance on Commercial Arbitration was that it greatly expanded the scope of coverage for commercial arbitration, in accordance with international best practice. The Ordinance also guaranteed party-autonomy, another international best practice, including the right to select the substantive and procedural law governing the arbitration for disputes involving foreign elements. It also expressly stated that, when presented with a request for recognition and enforcement of an arbitral award, the court may not “re-try” the case on its merits. This key feature is reinforced by similar provisions in the Civil Procedure Code. Although the legal framework for arbitration has improved, there does not appear to be any significant increase in the use of arbitration in Vietnam. This may be due to the lack of skilled arbitrators and judges, and to a lack of understanding by many businesses about the advantages of arbitration. A Danida program has provided training on arbitration processes for arbitrators and judges.

New laws on commercial arbitration and implementing regulations are in development. These laws will make an arbitral award final. This key change should open an alternate forum for commercial contract dispute resolution. Foreign law firms recommend international arbitration in preference to domestic litigation, and acknowledged that Vietnam lacks arbitrators with commercial experience. If patterns from elsewhere in Asia hold, the uptake of commercial arbitration may primarily come from foreign investors or transaction partners seeking to avoid contact with the Vietnamese court system, rather than from domestic businesses.

D. SUPPORTING INSTITUTIONS

Notaries. As in other civil law systems, contract documents are notarized in case a dispute arises later and to ensure that the documents and the transaction are legally compliant. It is required, for example, by banks for loan documentation. Other commonly notarized documents include translations, copies, mortgages, contracts, property transfers, and civil agreements, such as wills.

Notaries are public officials who fall under the Ministry of Justice's jurisdiction for structure and organization; other matters are regulated by the Notary Organization. Offices are established by geography; Hanoi, for example, has five notary offices (a sixth will be added in 2005) that employ about 18 notaries, four of whom were recently appointed. In areas where there are no notaries or an insufficient number, some (state) justice offices in districts perform similar functions to notary offices, but the scope of service is limited. Notarial work is regulated by the Law on Notarization, which took effect on 1 July 2007.

In addition to checking the legal document for compliance with laws and ordinances, notaries also provide basic legal advice to clients. Vietnamese lawyers complain, however, that notaries often insist on "rewriting" contracts to conform to their own forms and standards. This practice is due to a notary's ultimate personal liability for the content of the documents, yet it is widely perceived as interfering with freedom of contract and proves particularly burdensome with respect to leases and other property-related contracts. This problem is most profound for large contracts, e.g., those related to major foreign investments, where the technical issues involved can far exceed the knowledge of a local notary.

Qualifications for becoming a notary include a law degree and five years' experience working in a legal field as well as completion of a course for notaries. Charges and fees for notary services are set by law and are published and prominently posted in the office.

Notaries report strong demand for services. At one office we observed 60 clients waiting; the estimated through-put of documents was 500-600 per day. Fees for services were prominently displayed. There is some tension between the rising trend toward legal formality (which requires more notarial services) and government policy to reduce the number of state officials. Notary offices are semi-self supporting in that they are permitted to retain a proportion of their fees to fund their operations. This funding arrangement may create incentives to solicit irregular payments from users, although these are prohibited by law. The private provision of notarial services is now allowed under the new law.

Bailiffs. In theory, bailiffs have sufficient authority to enforce judicial decisions as prescribed in related court decisions. In practice, however, donors report that they lack the necessary authority to seize assets and are unwilling to do so out of fear of incurring political or social penalties. Ensuring that the Judgment Enforcement Agency has the power to enforce a civil judgment is a key issue for the new Judgment Enforcement Code.

Lawyers and Legal Professional Associations. The Vietnamese Bar is relatively small and legal practice is bifurcated between local lawyers and law firms and a number of foreign lawyers and law firms operating in both Hanoi and Ho Chi Minh City. Local lawyers are organized into local bar associations, although the government now requires the formation of a national bar

association. The Vietnam Lawyer's Association is the mass political organization that comments on laws and is a stakeholder in discourse about legal reform.

Local lawyers continue to practice as advocates and as liaisons with government entities and regulators. Those local lawyers who choose to work for foreign firms reported that they do so because this is the only setting in which professional contract drafting and transactional work is performed. Foreign lawyers and law firms continue to outsource to local lawyers much of the work that requires government approvals, face-to-face liaison with regulators, or litigation. There has been huge growth in Vietnamese law firms, including increased hiring of foreign lawyers, who work primarily for foreign businesses, filling a niche to do much of the legal work required by international companies at considerably lower rates than are charged by the foreign law firms.

Interviewees report that local lawyers are enthusiastic attendees at donor-funded seminars explaining new laws, although fatigue with donor initiatives is also evident. The bar associations are not experts in contracts or capable of carrying out professional legal education in this field. The passage of the new Law on Lawyers, which took effect on 1 January 2007, instituted reforms that continue to liberalize the market for legal services.

Law Schools. Law school curricula in the major law schools include components on domestic contract law and the Civil Code, as well as international conventions and practices. For example, Hanoi Law University has a curriculum that includes business law and international arbitration (taught by adjunct instructors from the Ministry of Justice), but the curriculum still needs development in areas such as commercial transactions, IPR, trade and investment. An ambitious program of teacher training that includes a joint LLM degree for young law teachers is being funded by Sweden, and both Japan and Australia are providing scholarships and instructional support. Questions remain, however, as to how quickly authorities will allow law schools and curricula to become more independent and responsive to market trends.

Trade and Special Interest Groups. Foreign investor associations such as the American Chamber of Commerce report general satisfaction with their ability to have input into draft legislation and regulation, and with the degree of access that government officials provide. In interviews, many stakeholders praised the Vietnamese government for its transparency and willingness to consult openly on legal reform in this area. Business input on law reform, including commercial contract, has been solicited through the VCCI-BTA On-Line Business Forum¹⁶ (supported by USAID/STAR), which also publishes draft laws and regulations for comment by business. The World Bank-funded Vietnam Business Forum, a highly successful organization that regularly (twice per year) convenes meetings for private-public dialogue, maintains a continued program of dialogue on specific issues over the course of the year.

Media. Interviewees reported that media coverage of contract disputes and litigated cases has increased dramatically in recent years. This has contributed to an atmosphere of open discussion of non-political issues in business disputes and has also raised business awareness of the impact of law on business activity.

¹⁶At www.vibonline.com.vn.

E. SOCIAL DYNAMICS

Contract informality. Though estimates vary, it is clear that a substantial amount of Vietnam’s economic activity remains informal. There are also “informal” contract relations among firms operating in the formal economy. One observer estimated there to be about 70 franchise-style businesses operating in Vietnam; these businesses do not currently depend on a formal contractual framework. This may change with the adoption of the Decree on Franchising (2006), which includes detailed rules for the content and form of franchising agreements. Unpublished research based on interviews conducted in 2002 and 2003 with Vietnamese, Chinese-Vietnamese, and foreign merchants operating in Ho Chi Minh City suggests that contracting in Vietnam remains primarily relational. Several Vietnamese interviewees stated that supply contracts related to distributorships and real estate transactions revealed a lack of trust between business partners. Managers working for multinational corporations in Vietnam face the dilemma of how to manage risks according to business protocols without alienating partners.

The dominance of informal contracting can be attributed to the following variables—

- *Weakness of supporting institutions.* Creditworthiness, for example, has to be established by reputation or by personal observation.
- *The stratified nature of the Vietnamese economy.* Current World Bank research shows that SMEs tend to do business together, and that the same is true for SOEs and foreign-invested enterprises (FIEs), with relatively limited cross-over.
- *The predominance of family-owned and sole proprietorship businesses in the SME sector.*
- *Preferences for not growing businesses in order to avoid government scrutiny.*
- *Vietnamese firms are not yet integrated into production networks in the region,* a type of business that is dominated by contractual relationships.

Research into other transition economies suggests that formal drafting, best-practice formats, and the use of contracts for risk management and dispute resolution occur when transaction partners become more distant, the content of the transaction becomes complex, intangibles such as IPR are involved, and the value of the transaction increases.

Impact of new legislation and implementation. Clearly, the new contract laws should improve the use of contracts in commercial transactions. For example, according to one local lawyer, the Decrees on Trading and Distribution and Franchising will provide a new framework within which these kinds of contracts will be drafted and negotiated. The decrees will also open these markets to foreign entrants, which will introduce new contract forms and global standards.

Growth of supporting institutions. As the number of lawyers increases in Vietnam, and if notarial services are expanded and/or marketized, there is likely to be more support capacity from legal professionals for entrepreneurs. If patterns from other transition economies apply, this will also be a driver in moving businesses of appropriate scale toward contract formalization.

F. RECOMMENDATIONS

- Create a single volume of selected laws (or relevant portions of laws), ordinances, decrees, pertinent Supreme Court decisions, and other sources of authority pertaining to contracts.

A single volume, regularly updated and readily accessible in print and electronically, could significantly increase understanding and clarify practices related to contracts and could serve as the basic text for future training of judges, lawyers, and law students.

- Establish a plan for implementing the new contract regime that leverages the many government and private sector assistance activities in Vietnam, including training of judges and other pertinent constituencies, support for public education, and engagement of the media.
- Strengthen private sector practices, including standardization of business contracts, development of unified self-help practices (including pre-litigation attempts at collection), and increased use of alternative dispute resolution.

IV. REAL PROPERTY LAW

A. INTRODUCTION

One of the most significant constraints to enterprise establishment and growth in Vietnam is the difficulty that entrepreneurs face in obtaining and accessing land. Land disputes constitute approximately 75 percent of the recent complaints against government decisions. These obstacles arise from the complex and opaque regulatory framework for real property and the shortage of land in urban and industrialized areas. Other constraints include the low quality of property management services, including land and property valuation, development, and brokerage.

All land in Vietnam is owned by the people and administered by the state. The Land Law of 2003 is the first property law that clearly defines the role of the state in exercising authority over management of the land on behalf of the people. Currently, land users (who can be individuals or enterprises) can only own or lease the *right to use* the land. These land use rights can, however, be exchanged, transferred, mortgaged, leased and sub-leased, pledged, given as a gift or inherited, or contributed as legal capital. Also, land use rights can establish a basis for compensation if they are reclaimed by the state. The term “real estate” in Vietnam describes the ownership of land use rights and any buildings and other structures permanently attached to the land subject to the land use right.

It is generally expensive to rent land in industrial zones and to finance the cost of relocation to such zones. If entrepreneurs find an available rental property, they must often wait for a long time to get a Land Use Right Certificate (LURC), which serves as collateral to obtain loans from financial institutions. The administrative procedures governing LURCs are complex and time-consuming. An enterprise wishing to rent land and construct property on an industrial zone must obtain some 13 agreements and decisions by relevant authorities and invest significant resources. As a result, most industrial SMEs operate from their owners’ homes, resulting in inefficient production, urban pollution, and significant public disturbance.

It should be noted that, according to the Investment Law, real estate is one of the sectors in which investment is subject to conditions, regardless of the capital source. Accordingly, all real estate projects are subject to a review and approval procedure that ultimately results in an investment certificate.

B. LEGAL FRAMEWORK

In Vietnam, land ownership resides with the people; the state administers the land on behalf of the people. The state assigns land use rights to natural and legal persons for an unlimited period of time. Holders of land use rights effectively have most real property rights to land, including the right to sell, bequeath, lease, exchange, and mortgage their land use rights. Land use rights must be registered in a local land registry. The holder of a land use right is entitled to a LURC, also known as a “red book.” In practice, especially in urban areas, officials sometimes demand significant bribes to issue a red book. In rural regions, LURCs can also be issued by the people’s committees of districts and municipalities.

The main property laws are the Land Law of 2003 and the Civil Code, the revised version of which took effect on January 1, 2006. Subordinate legislation includes: (i) Decree 181/2003/ND-CP on the Implementation of the Land Law (Decree 181); (ii) Decree 95/2005/ND-CP on Issuing Certificates of House Ownership Rights or Construction Work Ownership Rights (Decree 95); (iii) Decree 05/2005/ND-CP on Property Auctions; and (iv) Decree 188/2004/ND-CP on Methods of Determining Land Price and Price Frame for Various Types of Land (Decree 188).

Official Land Prices. Decree 188 provides a methodology (comprised of maximum price and minimum price) for determining the price for each type of land. Subject to the actual assignment price in the province, the provincial people's committee establishes the Official Land Price for each specific type of land at each location on January 1 of each year. The Official Land Price must not be 20 percent higher than the maximum price or 20 percent lower than the minimum price in the land price framework.

The Official Land Price determines: 1) the amount of compensation paid to existing occupants by the state; 2) payment of financial obligations to the state (i.e., land use fees, rent, registration fees, land use tax, land transfer tax); and 3) the value of land use rights when equitizing state-owned enterprises. Costs of apartments and villas are typically higher than the Official Land Price.

Land Use Fees. Most FIEs lease land from the state or industrial zone developers and are therefore subject to rent rather than land use fees. In the case of residential for-sale projects invested in or built by FIEs, the FIEs are responsible for the difference between the land use fees and the prepaid land rent in order to be able to set off the prepaid land rent when selling the residential housing.

Domestic enterprises and Vietnamese individuals allocated land for residential and business purposes are subject to land use fees. However, domestic enterprises are entitled to deduct these fees against paid compensation expenses, pursuant to Article 2 of Decree 198.

Land Compensation and Clearance. The state does not often reclaim land solely for economic development purposes. To obtain a land site, investors may purchase the land use rights from the existing occupants without involving the state. Only in special cases—such as industrial zones, high-tech zones, economic zones, so-called “group A” projects, and 100 percent foreign-owned enterprises (FOEs), which cannot locate in industrial zones—will the state recover land, impose compensation on the basis of the Official Land Price, and allocate the land to the investors. It is unclear whether such special cases are applicable to joint venture enterprises (JVEs).

Residential For-Sale Projects. Domestic enterprises investing in and developing residential for-sale projects are obliged to pay land use fees once they are allocated the land. FIEs that invest in or develop residential for-sale projects are required to prepay land rent for the entire duration of the lease term, and must pay the difference between the land use fees and the prepaid land rent upon sale of the apartments or villas. JVEs investing and developing residential for-sale projects on land contributed by the Vietnamese Party are not subject to payment of land rent and land use fees.

Except in very limited circumstances that require further legislative clarification, residential for-sale projects that involve only the construction of infrastructure on land and subdivision of land into land lots for sale appear to be prohibited.

JVEs Using Land Contributed by the Communist Party of Vietnam. A JVE using land contributed by the Communist Party of Vietnam is not required to pay rent. A JVE is also entitled to the same rights as a domestic enterprise using allocated land with payment of land use fees, including assignment, lease, mortgage, and capital contribution of land-use rights (LURs). If the JVE is converted into a 100 percent FOE, however, the rights of the previous JVE will be reduced. The land used by the 100 percent FOE must be converted into the form of leased land and therefore the 100 percent FOE is required to pay rent. In this case, the 100 percent FOE must prepay the rent for the remaining duration of the enterprise in order to retain the same rights as the previous JVE. This provision clearly does not encourage the trend of conversion from JVEs into 100 percent FOEs.

Land Use Rights Certificates. Land users (including FIEs) are issued LURCs. Changes in land use must be recorded in the LURC. Assets on land are recorded in the LURC; however, registration of ownership of such assets must conform to laws on registration of real estate. The Ministry of Construction is reportedly drafting legislation that will require the owner of assets on land must to register ownership via a separate procedure.

Buyers of villas and apartments from FIEs are now assured that they will be issued LURCs on the basis of stable and long-term LURs (i.e., in perpetuity).

Registration of LURs. Land users are responsible for registering LURs upon: 1) being allocated or leased land from the state; or 2) any changes in land use, including swap, assignment, lease, sub-lease, bequeath, donation, mortgage, guarantee, capital contribution of land use rights, change of personal name, change in the shape, dimensions or area of the land parcel, conversion of land use purpose, change of land use term, conversion from land lease by the state to land allocation with collection of land use fees, change to the restrictions on the rights of the land user, or land recovered by the state. All such registrations by enterprises are carried out with the ORL.

Contracts Relating to Land Use Rights. Contracts relating to land use rights are prepared by the involved parties. Sample forms issued by the Ministry of Natural Resources and Environment are no longer used.

Grounds for Land Recovery. The state may recover land in the following circumstances: 1) if it is used in an inefficient way or incorrect purpose; 2) if it has not been used for 12 consecutive months, or the project schedule has been delayed for more than 24 months from the time of taking-over of the site; 3) if the land user intentionally destroys the land; or 4) if the land user intentionally fails to discharge financial obligations to the state.

The user of land recovered by the state is entitled to a refund equal to or less than the "residual value" of the capital that the defaulting user has invested on the land, including land use fees, land rent, and assets. The residual value is fixed by a Valuation Council established by the relevant people's committee. If the land is then allocated or leased to other users without auction,

the defaulting user will receive an amount equal to the residual value. If the land is allocated or leased to other users by auction, the defaulting user will receive an amount equal to the net auctioned price (if the net auctioned price is lower than the residual value) or, otherwise, the residual value (if the net auctioned price is equal to or higher than the residual value). The other users to which the land is allocated or leased must pay that amount to the defaulting user.

In addition to the legal documents discussed above, Vietnam has promulgated two other important laws—

Law on Residential Housing. The Law on Residential housing was passed on 29 November 2005 and became effective on 1 July 2006. It includes the following principles—

- There should be only one certificate of ownership for a parcel of land with residential housing in urban areas.
- Warranty periods for new apartments should be 60 months for nine or more-story high-rises and new buildings funded by the state budget; 36 months for high-rises of four to eight stories; and at least 24 months for the remaining categories. This previous normal warranty period was only one year.
- Overseas Vietnamese must reside in Vietnam for at least six months before they are eligible to own a house or apartment. Despite the fact that there have been only 60 cases of overseas Vietnamese purchasing residential housing since 2001, the National Assembly Standing Committee agreed to t this condition in order to prevent overseas Vietnamese from driving up housing prices.

Real Estate Business Law. A Law on Real Estate was passed by the National Assembly on 29 June 2006 and became effective 1 January 2007. The major provisions were summarized in March 2007 by the Hanoi law firm office of Gide Lorette Nouel, and are available at www.iflr.com. Under the new law, Vietnamese individuals and businesses are permitted to engage in all forms of real estate activities, including—

- Real estate business: development of real estate for sale/lease, purchase, sale and lease of real estate, and assignment of real estate for profit-making.
- Real estate related services: brokerage, consultancy, valuation, auction, advertisement, and management of real estate.¹⁷

By contrast, foreign invested enterprises are only permitted to invest in the development of housing/construction works for sale/lease and engage in the enhancement of land and infrastructure on lease land with a view to subletting. The scope of activity for foreign investors under the law is expected to increase over time.

The law introduces the notions of property market and property exchange. Any real estate transaction (including all forms of sale, lease, or lease-purchase of a real estate asset) undertaken by a company or private individual engaged in a real estate business must be negotiated through

¹⁷With the exception of brokerage services, the majority of real estate businesses may only be carried on by a corporate entity (enterprise or cooperative). In addition, businesses operating in this market are required to employ specially qualified personnel. Qualifications are acknowledged by the issue of ad hoc certificates by people's committees.

a property exchange, which is a corporate entity. A property exchange may also offer real estate services (such as brokerage or valuation).

Pre-sale of real estate is formally recognized under the new law, although pre-payment is restricted to 70 percent of the asset value.

All contracts must be recorded in writing and, with some exceptions, be notarized or certified by the relevant people's committee.

C. IMPLEMENTING INSTITUTIONS

The concept of a **Land Registry** has been introduced and a national uniform land registry system has been established throughout the country. The land administrative agency will be a single system from the grassroots to central levels. The land administrative agency at the central level is the **Ministry of Natural Resource and Environment** (MONRE). At the provincial level, it is the **Department of Natural Resource and Environment** (DONRE). At district level, it is the **Division for Natural Resource and Environment under the District People's Committee**. Finally, at commune level, there is a cadastral officer who will be appointed by the district people's committee.

At the local level, land administrative agencies will have a Land Registry that will be a public service, non-profit unit that undertakes land registration (including the custody of the original cadastral dossier), records the subsequent registration into the cadastral dossier, and helps the land users exercise their rights and obligations as provided by the law.

With the introduction of the Land Registry, the government wishes to establish a one-stop shop. For all land transactions, land users will only have to be in contact with the Land Registry. The rest of the process will be undertaken between the Land Registry and the land administrative agency or district/provincial people's committees.

Since 1997, all the cadastral documents, including cadastral maps, have been made using digital technology. Up to 2001, approximately 60 percent of new cadastral documents were digitally captured and archived (with the 40 percent balance being only on paper). MONRE has recently established the **National Land Information System** (NLIS). In 1999, MONRE received the approval of the IT state committee for the construction of the National Geodatabase and Land Database. This is organized as a distributed database system, in which each provincial DONRE will have its own land-database that includes all the cadastral documents of the province. MONRE plans to complete the National Geo-database, National Land-database, and NLIS by 2010.

In both initial registration and subsequent registration, land users will file their applications with the Land Registry. Where there is no Land Registry available, especially in rural and remote areas, the application file is submitted to the **Commune People's Committee**.

In the case of initial registration, land users file the application with the Commune People's Committee. The Land Registration Council consists of the Chairman of the Commune People's Committee, Commune Land Officer, Commune Justice Officer and a representative from the

commune **Fatherland Front** in the presence of the Village Head. The committee will verify the current status of the use of the land, the original status of the use of the land, and the dispute status of the land, and then certify the dossier. The Commune People's Committee will then submit the recommendation for issuance of the LUC or BOLUC to the district or provincial People's Committee (through the district or provincial Department of Land Administration).

Currently, the registration of subsequent transactions is applied only when the land user has obtained a LUC or BOLUC and wishes to change the definition of purpose of land use, change the type of land, or transfer the land use rights. After the user pays the land use fee, land transfer tax, and registration fee, the procedures for this second type of land registration are similar to those for the first one. As a result, each land parcel has a cadastral dossier filed only with the Land Registry—a single national system.

According to the MONRE “Review of 10 Years’ of Implementation of the Land Law,” initial registration has been carried out smoothly throughout the country. Hanoi, Ho Chi Minh City, and Da Nang have each issued a specific Directive requiring all land users to register land. To date, 92.7 percent of agricultural land users have been registered, accounting for 97.8 percent of agricultural land. Only 35 percent of forested land has been registered, however, and only 35 percent of urban land users have registered, representing only 25 percent of urban land. Additionally, demand for re-issuances of and amendments to LUCs/BOLUCs are growing.

Due to the complexity of land registration procedures for both initial and subsequent registration, the majority of urban land parcels remain outside the land registration system. In many provinces, especially in major cities, the land registration process has been slow because—

- Historically, land parcels have not been physically identified with accuracy (which often creates boundary disputes upon land registration commencement).
- Ownership of land or buildings cannot be definitively and clearly proven.
- Transaction processes are complicated, costly, and unclear.

The sustainability of land registration depends on subsequent transactions and non-transaction changes of ownership being reported to and brought into the register. There are substantial structural disincentives to bringing information to the register. These include—

- Historical patterns of informal land trading.
- Costs of “official” paperwork, including land use fee, land use transfer tax, and registration fee—transactions in unregistered land attract no tax.
- Seller failure to obtain LUC/BOLUC.
- Limited pressure for registration—the only perceived purpose of land registration is to use LUC/BOLUCs for collateral.

D. SUPPORTING INSTITUTIONS

Organization for Development of Land Reserves (ODLR). ODLR is a new organization. It is an income-earning body, an SOE with public utility function. Established under the people's committee of the province or city under central authority ("provincial people's committee"), the ODLR has the following functions: 1) to pay compensation and conduct site clearance in cases

of land recovery after land use zoning and planning have been proclaimed but when there is as yet no investment project; 2) to receive assignments of LURs in areas for which zoning provides that the land must be recovered and where land users have had to move to other places before the state issued the decision on land recovery; 3) to manage the land reserves with respect to land already recovered; and 4) to organize auctions of LURs pursuant to a decision of a competent state body in respect of land allocated by the state for management (see Article 10 of Decree 181).

Organization providing land management/use services (OLS). OLS is now recognized as a professional organization. It is an income-earning body and an enterprise is licensed to provide land management and land use services. Activities of an OLS include: 1) consultancy on land prices; 2) consultancy on formulation of land use zoning and planning; 3) services of land measurement and formulation of cadastral maps; and 4) services of information about land.

Notary. The new Civil Code effective 1 January 2006 stipulates that residential housing sale contracts and long-term lease contracts must be notarized and certified unless otherwise provided by law. These provisions leave room for the implementing decree to permit sale/lease contracts of real estate developers to be exempt from notarization/certification. This notarization/certification procedure is currently a significant hurdle for real estate developers. The public notary generally refuses to certify pre-sale contracts and sales contracts that are inconsistent with its prescribed form. Any exemptions from the notarization/certification procedure will be welcomed by the business community.

E. SOCIAL DYNAMICS

The Land Law and Decree 181 contain adequate provisions for including the details of the ownership of houses and other buildings on LURC and many LURCs issued since December 2003 do contain such details. However, the Ministry of Construction recently recommended to the government that it issue a decree on the ownership of houses and other constructions attached to land.

There was much debate over this proposal, both in the National Assembly and among the public. The government accepted the recommendation and issued Decree 95/2005/ND-CP on Issuing Certificates of House Ownership Rights or Construction Work Ownership Rights. This Decree provides for separate ownership certificates to be issued by people's committees of provinces and districts or departments of construction in provinces and districts to issue the certificates on behalf of the relevant people's committee. This Decree is generally viewed as unnecessary. It undoes the very sound and useful provisions of the Land Law and Decree 181. As these provisions have not been repealed, they must be followed in parallel with the provisions of Decree 95. The provisions of Joint Circular 05/2005 under the Land Law and Decree 181 must also be followed. This could create conflicting house and building ownership situations.

Practitioners in the field generally consider the requirement for a LURC and a House Ownership Rights Certificate (HORC) as unnecessarily complicated and as a deterrent to many people who would otherwise like to raise finance on the security of a mortgage of a LURC and house. Decree 95 is silent on whether a HORC can be transferred, leased, inherited, or mortgaged in the same way as LURC. It is also silent on whether, and if so where, a HORC can or must be registered.

Some people believe that LURCs must be registered in land registries established under the Land Law, while others believe that they should be separately registered by Departments of Construction in provinces and districts, since these departments are required by the decree to retain a copy of the original certificate. Others believe that the HORCs should be registered as personal property with the Ministry of Justice registry under the provisions of the Civil Code.

Decree 95 is also silent on whether a HORC can be mortgaged as part of a mortgage over a land use right, or whether a separate mortgage is needed. In default of specific provisions in the decree, a HORC holder must rely on the provisions of the Civil Code for his or her ability mortgage, transfer, will, or lease a HORC.

As they are structured in Decree 95, HORCs appear to be a form of personal property. They could well fall under the definition of property in the Civil Code. In reality they are part of real property attached to land. They should not be dealt with separately.

The National Assembly in 2006 discussed, in the context of a proposed law on property registration, the matter of LURCs and HORCs and whether they should be separate. The National Assembly also discussed whether house and building ownership needs to be registered other than as part of the land use right registration.

There are also concerns that the added work of preparing and notarizing one mortgage over two separate certificates, and the costs involved will deter many low income and poor people from applying for mortgage finance for housing purposes. The same people are also concerned that two mortgages will have to be prepared: one for the LURC and one for the HORC.

The following acts are deemed administrative offences relating to land use and, as such, are subject to administrative penalties: using land other than for the approved purpose; encroaching on or appropriating land; degrading land; causing obstacles to the use of the land of others; dealing with land use rights illegally or other than in accordance with administrative procedures; intentionally failing to register the correct type of land or upon change of purpose of use; failing to pay land compensation, land use fees, or land rent promptly; intentionally causing obstacles to the allocation, leasing, or recovery of land; failing to return land to the state in accordance with a recovery decision; moving the landmarks of zoning or safety corridor; interfering with land documents; and other acts relating to the provision of land management/use services.

The length of court proceedings and difficulties with the enforcement of court judgments also contribute to the delay in realization of assets. The courts have limited ability to enforce attendance at civil or commercial proceedings and do not enforce their judgments. Judgments are enforced by a separate agency under each provincial or district people's committee. Only as a last recourse will credit institutions bring cases to the courts for resolution. Arbitral awards also can be difficult to enforce, discouraging creditors from using this method of recovering debts or realizing securities.

F. RECOMMENDATIONS

- Facilitate the better use of land use rights and assets purchased with loan proceeds to help low income and poor borrowers (who are currently focused on unsecured lending) access finance from banks for the purchase of, or improvements to, houses.
- Expedite land titling reform by accelerating the issuing of LURCs in urban areas. Resolve the debate on land use rights title as possible under the provisions of the Land Law, Decree 181, and Joint Circular 05/2005
- Amend the Land Law or Decree 181 or both to make it clearer that buildings and other structures attached to land are an integral part of the land use right or lease over land. The misconception that buildings on land that is held under land use rights or lease cannot be owned automatically by the owner of the land use right or leasehold interest should be dispelled by more specific provisions in the Land Law or Decree 181.
- Promote the use of LURs be used as securities by low income and poor borrowers for housing; they need to have clear title through LURCs or BOLUCs and there needs to be an open and more transparent market in land so that realistic valuations of land use rights and assets on land for all purposes are easier to obtain.
- To encourage the use of immovable property purchased with the loan proceeds as securities, either the National Assembly or the Government should seriously reconsider the state of the law relating to the ownership of land use rights and buildings attached to land and undertake a comprehensive revision of it, removing unnecessary references to it in the Civil Code and amending the Land Law to ensure that all of the law relating to land use rights and leasehold tenures of land and the ownership of buildings and other structures attached to land are kept together under the Land Law. There are available in Vietnam, at present, a number of international consultants with considerable expertise in land tenure and titling systems in many countries. They could readily assist with such a revision of the Land Law and Decree 181.

V. SECURED TRANSACTIONS LAW

A. INTRODUCTION

Secured lending is an essential element of an effective and vibrant market economy. It allows a business or a person to borrow more funds at lower cost while reducing the risk to the lender. A modern secured lending environment also allows a business or person to borrow and retain possession of their assets, including moveable and immovable property, thus increasing liquidity.

A number of elements constitute an effective secured lending environment. The lack of any one element will impair the entire system. The legal framework must allow for the taking of secured interests and their registration with a state-sanctioned authority. An effective registration system in turn requires a functioning registry. Finally, should the debtor default, resulting in a need to exercise the creditor's rights, there must be effective enforcement.

Only two of these elements—the legal framework and the registry—are present in Vietnam. The ineffective enforcement system, which is a feature of the entire legal system, has stunted the growth of lending and the economy in general.

The legal regime for secured interests in property in Vietnam is sound. The basic framework is in the new Civil Code, which includes important changes to the framework for secured transaction. The Civil Code articles on secured transactions are implemented by Decree No. 163 (2006) on Secured Transactions (163/2006/ND-CP, 29 December 2006).

The registry for immovables is computerized, functions rapidly and inexpensively, and enjoys excellent reviews from users. The only significant shortcoming of the registry is its current inability to transmit a new registration in “real time” to the centralized National Database. Rather, the registrations in the three centers currently used—Hanoi, Da Nang, and Ho Chi Minh City—are emailed each evening to be entered in the National Database. This deficiency can be remedied by linking the three systems to the National Database. Another change that would enhance the system and promote collateral lending on movables would be an increase in the number of registration centers. This would help promote collateral lending outside the three main cities, and help promote the growth of SMEs and business in less populated areas.

B. LEGAL FRAMEWORK

The revised Civil Code made key changes to the legal framework for secured transactions. The revisions eliminated the distinction between pledges and mortgages on the basis of whether the assets are moveable or immovable. Under the new provisions, the relevant distinction is who holds the security asset: the transaction is a pledge when the secured party holds the asset, and a mortgage when the secured property is retained by the securing party. Thus, there can be a pledge (where the asset is held by the lender) and a mortgage (where possession of the asset will be retained by the borrower) for both movables and immovables.

This change in the Civil Code initially caused some confusion with respect to some intangible property, such as book-entry shares and contractual rights that are difficult to hand over. Decree

163 eliminates some of this confusion by providing that security over the right to claim a debt takes effect as a mortgage. The Decree also provides that the right to claim a debt can be mortgaged without the prior consent of the debtor.¹⁸

Decree 163 on Secured Transactions makes several improvements over the prior regulatory framework.¹⁹ It—

- Eliminates the cumbersome requirements under prior regulations on valuation and holding of documentation related to secured property.
- Eliminates the confusing parallel provisions on realization of secured property.
- Provides for the continuation of security transaction after merger, consolidation, or transformation of the securing party; previously, all security transactions terminated upon such an event.
- Makes optional the execution of an annex to the security document when secured future property is formed or comes into the possession of the securing party; the execution of an annex was previously mandatory.
- Addresses situations where the secured property is not owned by the securing party (i.e., leased property), and provides for how to determine priority between the secured party and the owner.
- Strengthens the position of the secured party on enforcement by providing that secured property can, in many cases—such as where the secured property consist of shares or is in danger of losing value—be realized without any waiting period.
- Allows the secured party to seize the secured property directly in some circumstances.

Despite these improvements, the Decree raises a few concerns. Decree 163, unlike prior regulations, does not provide for the priority of application of the proceeds of realization between reimbursement of expenses for the realization, repaying the outstanding principal and interest. Also, it is not clear under Decree 163 whether property attached to land can be mortgaged separately from the underlying land use right.

Decree 163 requires registration of the security transaction in certain cases, including—

- Mortgages of land use rights.
- Mortgages of forest land use rights, and ownership of planted forest land for production.
- Mortgages of aircraft and ships.
- Mortgages of a single item of property as security for performance of several obligations.
- Other cases as stipulated by law.

In all other cases, the security transaction is registered if so agreed by the parties or requested by one of them. Unless otherwise required by law, notarization of security transactions is optional under Decree 163.

¹⁸But, it is not clear if this provision in Decree 163 will take precedent over a contractual provision requiring the debtor's consent.

¹⁹The prior regulations specifically repealed by Decree 163 include Decree 165 (1999), Decree 178 (1999), and Decree 85 (2002).

A new Ordinance on Registration of Secured Transactions is under development. When enacted, it is expected to achieve several things, including—

- Making the existing decree an Ordinance which has a higher level of importance.
- Further elaborating on some provisions in the Civil Code.
- Providing detailed provisions regarding registration, priorities, etc., thus providing borrowers and lenders with more guidance and certainty.

C. IMPLEMENTING INSTITUTIONS

The **National Registration Agency for Secured Transactions** oversees the registry for movables. It comes under the Ministry of Justice. The Agency has three locations for registrations: Hanoi, Da Nang, and Ho Chi Minh City. Users give it high marks for relative speed for registration, friendly staff, and low cost.

By law, registration can take up to three days. In practice, it normally takes only a few hours. The cost of a registration is low—only 60,000 Vietnamese *dong* (less than \$4).

The current procedure is for the registrations to be taken in by one of the three locations, and then each location e-mails the data at the end of the day to be entered into the National Database. That means that the data is only “centralized” at day’s end, and not in “real time”.

With respect to the registration of secured interests in land use rights, they are housed in the **Ministry of Natural Resources and Environment**. Registration is also just 60,000 *dong*. Although theoretically registration should be easy, requiring only a form to be filled out, the staff at the registration offices apparently makes registration, and the obtaining of information, somewhat difficult.

The draft Ordinance contains detailed provisions on registration. One of these provisions deals with the ability to register by fax and Internet. This shows the “modernity” of the collateral regime, and how it is intended to make the registration process user-friendly.

There is an issue with data centralization. Currently, the three different registries for movables maintain separate computerized databases, and unification of filings occurs only at the end of the day. This means that, in the short term, a registration at one location is not known at other locations until the end of the day. The cost of linking all the registration centers should not be very great.

There is also an issue relating to the limited number of registration centers. Although the three locations of Hanoi, Da Nang, and Ho Chi Minh City obviously cover the greatest number of possible business registrants, and many individual registrants, the cause of SME development, especially in rural areas, would be furthered if more centers were opened in those areas. The ability to register by fax and Internet may ease the burden somewhat.

The **courts** are important implementing institutions with regard to secured transactions. The law does permit filing a claim for execution on collateral for non-payment. The courts are considered generally competent to deal with issues of collateral.

It is in the area of enforcement, however, that more serious problems arise. The **Enforcement Agency** has sufficient authority to execute judgments against collateral. They fare poorly, however, in actually carrying out their function effectively. Often, debtors simply sell the asset which is collateralized, and the Enforcement Agency takes no action. This lack of adequate authority to execute civil judgments is expected to be addressed in the new Judgment Enforcement Code.

D. SUPPORTING INSTITUTIONS

The performance of supporting institutions is mixed.

Notarial services for collateral registration are not complex or burdensome, although they may be relatively expensive. There is a lack of notaries in outlying areas. If secured lending is to be increased in rural areas, notarial services must be more readily available there.

Other than **local lawyers or consulting firms**, there are no services specifically devoted to filing or registration assistance services. This does not appear to be a major constraint, however, since registration of movables is easy, and fax and Internet registration are possible. Registration of immovables can be improved, and the number of locations for registration of movables should be increased.

E. SOCIAL DYNAMICS

The “supply” and “demand” sides of the social dynamics equation also present a mixed picture.

Demand. The head of the office responsible for the movable registry is a recognized expert and is highly regarded. She and other government officials promote an efficient and modern collateral system.

International lending institutions and donor agencies, notably the World Bank and the Asian Development Bank, have provided assistance in developing the registry and supporting operations. USAID/STAR supported reform of the legal framework with regard to the revision of the Civil Code and development of the implementing decree. Despite relatively strong international interest, **local professional associations** and **local trade and special interest groups** do not seem to have committees that deal with collateral issues, regularly provide input on laws, or conduct programs for their members and the general public. An exception to this lack of interest and support is the **Vietnam Chamber of Commerce and Industry**.

On the other hand, **financial institutions**, lenders, etc., actively lobby the government to improve the collateral law system; universities offer courses on collateral laws and secured lending.

Supply. The demands described above have generated responses. On the legislative front, there is the major response of the new collateral regime as evidenced by the major revisions in the new Civil Code and the new implementing regulations.

Although there are no formal mechanisms for input by the business and professional communities on proposed legislation, the government frequently reaches out to these sectors for input on laws and regulations on an *ad hoc* basis. Relatively frequent changes in decrees and circulars, however, have led to some uncertainty.

F. RECOMMENDATIONS

- Engage in the relatively straightforward process of networking the three pledge registries for movables so that pledges can be entered into the National Database in real time.
- Increase the number of pledge registry offices for movables.
- Review the functions and processes of the mortgage registry office land use rights for the purpose of improving efficiency, effectiveness, and user satisfaction.
- Increase the overall effectiveness of the secured transactions regime in Vietnam—with respect to both movable and immovable collateral against loans—by 1) mapping the system of enforcement of judgment (so that all judicial and administrative processes are clearly understood), reviewing it for efficiency and effectiveness, and significantly reforming it.

VI. BANKRUPTCY LAW

A. INTRODUCTION

On 15 October 2004, a new Bankruptcy Law replaced Vietnam's previous legal framework (a law and decree that had taken effect in 1993) that addressed the dissolution or reorganization of insolvent enterprises. Practicing lawyers and state officials generally view the new Bankruptcy Law as an improvement over its predecessor because it clarifies and streamlines the conditions under which companies that cannot pay their debts may enter into bankruptcy. The new law is not yet relevant or useful, however, to the communities that need it most—Vietnam's increasingly large number of registered private enterprises and their stakeholders, including investors, creditors, and employees. Rather, critical rehabilitation and liquidation procedures established by the law are vague and incomplete. Regulations that might resolve these deficiencies are still undeveloped.

The institutions charged with implementing the new Bankruptcy Law—in particular, the Economic Courts and Trustee Committees—are ill-equipped to handle bankruptcy effectively and on a meaningful scale. Similarly, there is virtually no capacity within the supporting environment—including valuation professionals, lawyers who are fully versed in the bankruptcy process, or even the media—to bolster implementation of the law.

Perhaps most importantly, the social dynamics relating to enterprise insolvency in Vietnam do not support the use of bankruptcy law as a positive force in the Vietnamese economy: bankruptcy is not viewed as a mechanism for reducing risk faced by lenders and other investors, for restoring stalled assets into productive use, or for improving a country's overall competitiveness. Instead, the emphasis of the law itself and its use since enactment unduly focus on punishing officers and directors who oversee insolvent companies, further stigmatizing business failure. Although insolvency law indeed can be a useful tool for encouraging improved enterprise oversight, the failure of a business should not be viewed inherently as a disgraceful event or a reason to bar an individual from future entrepreneurial endeavors. Vietnam's challenges with respect to bankruptcy thus lie in promulgating regulations that remedy the deficiencies of its existing framework, strengthening the capacities of key bankruptcy-related institutions, and changing the mindset among businesspeople, lawyers, government officials, and the public about the fundamental importance of bankruptcy law in a market economy.

B. LEGAL FRAMEWORK

An English-language translation of Vietnam's Bankruptcy Law (No. 21/2004/QH11), as entered into force on October 15, 2004, is available from the Asian Legal Information Institute at <http://www.asianlii.org>. The administrative guidance that the Judicial Council has reportedly developed for the Economic Courts since the law's enactment is not available in English.²⁰ Given the importance to potential foreign investors of access to information generally, and insolvency law specifically, both the Bankruptcy Law and any related guidelines that currently

²⁰Also on this Web site is "The Supreme People's Court of Vietnam: Benchbook Online," intended as a manual for judges to improve their expertise and facilitate their daily duties. The bench book was created with technical assistance from the Australian Agency for International Development.

exist should be readily accessible through the primary databases for this sort of information, such as through the International Insolvency Institute's Web site (www.IIIGlobal.org), or through a state-sponsored electronic legal database. USAID/STAR is providing support for the Supreme People's Court to develop a SPC web page in 2006, a move that should greatly increase access to information related to the courts and should alleviate some of the lack of transparency in this area.

The World Bank's 2004 Report on the Observance of Standards and Codes (ROSC), entitled *Vietnam: Insolvency and Creditors Rights Systems*,²¹ includes a detailed, Principle-by-Principle Assessment of the new law.²² Notwithstanding the considerable work and consultations t poured into the drafting process,²³ the World Bank is highly critical of the end product. Among the most significant, pressing, and still unaddressed deficiencies identified by the Bank in 2004 are the following—

- The applicability of the new law is unclear. While it purports to apply to all enterprises and cooperatives, it also states that the government will provide a list of special enterprises and cooperatives that operate in the defense, security, financial, banking, insurance, and essential public service domains to which the law will apply. It is not clear if this list has been prepared and/or published.
- The new law does not include an effective, modern rehabilitation procedure to save viable businesses. It lacks guidelines for effective rehabilitation, provisions for communicating adequate information to creditors, and systems for independent review of pertinent information.
- The new law lacks sufficient detail, clarity, and timelines with for orderly liquidation. Certain fundamental concepts are not clearly defined, such as the concept of “fair and equitable treatment” of similarly situated creditors holding similar claims.
- The role of the Trustee Committee—the body charged with overseeing the liquidation of an enterprise—is insufficiently developed in the new law, and there is virtually no mechanism for a Creditors Committee to properly assume a contributory oversight role. Moreover, the apparent assignment of the Economic Court judge to chair the Creditors Committee and, if the enterprise is to be rehabilitated, to oversee that process, are inappropriate roles that do not match international best practices. Oversight of liquidation and rehabilitation is a function more properly reserved for qualified bankruptcy administrators, a corps of professionals who are knowledgeable about business matters and capable of restoring an enterprise's financial wellbeing, which may include restructuring debt, changing business practices, improving methods of corporate governance, or even selling the enterprise as a going concern. In its current form, the new law fails to assure creditors sufficient that key decisions will be made by individuals who expert and independent.
- The new law over-emphasizes the perceived relationship between business failure and criminal activity—and, as a result, as more than one observer has confirmed, the law is currently used “only when there is a criminal issue.” The new law contains various

²¹World Bank, *Report on the Observance of Standards and Codes (ROSC), Vietnam Insolvency and Creditor Rights Systems*, 2004 (hereinafter, *World Bank Report*).

²²*Id.*, Annex I.

²³See, e.g., Charles Booth, “Drafting Bankruptcy Laws in Socialist Market Economies: Recent Developments in China and Vietnam,” 18 *Journal of Asian Law* 1, 2004.

prohibitions against individuals involved in the management of a bankrupt enterprise, preventing them from holding similar positions or establishing new enterprises for one to three years. The ban is absolute for those involved with SOEs (although an exemption exists when the bankruptcy was caused by *force majeure*). With these and other emphases on punishing officers and directors of insolvent companies, the law in effect discourages entrepreneurship. The World Bank suggests a number of alternative approaches to penalizing fraudulent activity in the business arena *without* unduly jeopardizing the vital concept of limited liability *or* perpetuating the stigma against businesspeople whose ideas or efforts simply fail to succeed in Vietnam's increasingly competitive marketplace.

There do not appear to be plans to make major revisions to the new Bankruptcy Law. Many, though not all, of the new law's deficiencies could be remedied by the promulgation of regulations that clarify roles and responsibilities, define ambiguous terms, and provide greater detail about procedures.²⁴ The clear recommendations made by the World Bank's detailed Principle-by-Principle Assessment should be a starting point and major reference source for those filling the legal framework's many gaps. Regulatory drafters should also look to the key sources of guidance pertaining to bankruptcy in the international arena, including: the World Bank's *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* (April 2001), the International Monetary Fund's *Orderly and Effective Insolvency Procedures* (May 1999), the Asian Development Bank's *Good Practice Standards for an Insolvency Regime* (April 2001), the European Bank for Reconstruction and Development's *Insolvency Checklist* (2002), and the many sources of guidance provided by the International Insolvency Institute.

Finally, it is worth calling attention to one of the most significant and unorthodox aspects of the new law: it excludes from the bankruptcy process *fully secured creditors*, who theoretically must rely exclusively on Vietnam's system of enforcement of secured transactions (including those pertaining to real and personal property) to collect upon their unpaid debts. Such a framework would be highly inappropriate in a more mature commercial environment: it would leave a critical set of players out of the insolvency equation, particularly where there is a chance for enterprise rehabilitation. On the other hand, this approach can be perceived for the time being as representing an appropriate mid-term strategy for encouraging asset-based lending in Vietnam: secured creditors at this point may prefer existing enforcement mechanisms through the secured transactions framework over the uncertainty of legal processes under the Bankruptcy Law. However, it will be necessary to revisit and likely amend this aspect of the Bankruptcy Law in the future, bringing fully secured creditors into their appropriate place within Vietnam's legal framework.

C. IMPLEMENTING INSTITUTIONS

The Economic Courts are reportedly handling bankruptcy cases at a rate that is somewhat greater than the approximately 5.5 cases per year that were resolved between 1993 and 2004.²⁵ Interviews with a variety of judges and lawyers provide a rough estimate of 15–20 bankruptcy cases filed in Hanoi and Ho Chi Minh City between October 2004 and October 2005. Although a few of these cases concern the insolvency of private enterprises, most deal with financially

²⁴*World Bank Report*, page 5.

²⁵See Phillips Fox, "Vietnam's New Bankruptcy Law," *Vietnam Legal Update*, August 2004, page 7.

troubled SOEs, and most cases, whether they concern SOEs or private enterprises, are said to take place for the purpose of subjecting officers and directors to personal liability or criminal prosecution. The Vietnam Chamber of Commerce and Industry estimates that 55 to 75 percent of Vietnam's approximately 128,000 registered enterprises are "operational."²⁶ Thus, the Economic Courts appear to be formally dealing with a small fraction of those companies that would qualify under the new law as bankrupt—that is, unable to pay their due debts upon demand by a creditor.²⁷

Whether they see five cases a year or 50, however, the Economic Courts lack the capacity to deal with the challenges presented to them under the new Bankruptcy Law. Judges have little understanding of the principles behind swift and fair dissolution of insolvent businesses and they specifically lack facility with the new law. Other than limited guidelines reportedly issued by the Judicial Council, the Economic Courts have not yet received clear instructions regarding the process of rehabilitation and liquidation.²⁸ The new law assigns Economic Court judges as chairs of the Creditors Committees, and judges appear to interpret the law as an assignment to chair the Trustee Committee. *Both* of these roles undercut the need to have a single judge overseeing the entirety of the process from an appropriate vantage point of neutrality and independence. Rather than micro-managing a case from start to finish, judges, in accordance with international best practice, should monitor the work of Administrators, resolve disputes among stakeholders, and enforce compliance by all parties with deadlines and other requirements. Significant judicial capacity-building, with an emphasis on understanding the principles behind bankruptcy law generally, including the appropriate roles of various stakeholders, is essential if the new Bankruptcy Law in Vietnam is to have any meaningful impact in the long term.

Administrators. Under the new law, the formal role of Administrator seems to be held by the Trustee Committee, which consists of a judgment enforcement officer, an officer of the court (typically interpreted as the judge), representatives of the creditors and the debtor, and employee or trade union representatives.²⁹ The Trustee Committee handles the liquidation of an insolvent enterprise; where the company is to be rehabilitated, the law seems to return management responsibilities back to the company's existing officers and directors. Due to these legislative constraints, a corps of independent professionals who are qualified to serve as bankruptcy Administrators will not develop in Vietnam. Instead, the administrative role is diluted into Trustee Committees that are dominated by state players who are generally unfamiliar with the details of business administration and unlikely to have clear authority or sufficient impartiality to make the process work effectively.

Administrators handling the liquidation of an insolvent enterprise should have knowledge of the Bankruptcy Law and adequate experience in commercial and financial matters. Administrators should understand that a crucial aspect of their role is to maximize the value of assets returned to creditors. Administrators charged with rehabilitating a company must be capable of restoring the enterprise's financial wellbeing, which may include restructuring debt, changing business

²⁶VCCI, "Private Sector Firms: Size Matters," 8 *Business Issues Bulletin*, June 2005, page 1. More recent data provided by the VCCI suggest that 30–40 percent of registered firms have not been active in 2004; this number fell to about 20–25 percent in 2005.

²⁷Bankruptcy Law, Article 3.

²⁸The AusAID-supported bench book may overcome some of the practical problems in applying the law.

²⁹Bankruptcy Law, Article 9.

practices, improving methods of corporate governance, or even selling the enterprise as a going concern. They also should be impartial. The absence of this critical implementing institution in the law and in practice means that, for the immediate future, implementation of the Bankruptcy Law will remain weak and ineffective.

Creditors. The fact that the new Bankruptcy Law excludes fully secured creditors means that the community of creditors who are chiefly interested in the law's fair and prompt execution—through a process that maximizes the value of the enterprise's assets—are the *unsecured* creditors. This group includes merchants who did not formally secure the goods they provided to the debtor against clearly defined collateral and companies or individuals who provided services (including labor, professional services, utilities, etc.) against the mere promise or expectation that the debtor would pay. Through the law's direction that the judge will chair the Creditors Committees, this group is already at a disadvantage; through the law's practical exclusion of fully secured creditors, the remaining creditors further lack the influence and experience of larger, more stable and secure enterprises, such as banks.

Regulatory Drafters. Without a set of clear regulations that conform to international best practices, Vietnam's insolvency regime has no chance of meaningful impact. When the process for drafting regulations takes place, technical assistance from bankruptcy experts with in-depth experience in market economies will be critical. As noted in the final draft of the European Union's *Needs Assessment for Trade Related Assistance in the Period 2007–2012* of July 2005, bankruptcy is among the areas that the Office of National Assembly has cited as presenting the greatest challenges in legal drafting.³⁰ To the extent that the Judicial Council of the Supreme Court continues to issue guidance pertaining to implementation of the Bankruptcy Law, it should similarly receive access to all available resources and technical assistance. All groups involved in drafting regulations or other guidance on the law must coordinate their activities carefully with one another.

D. SUPPORTING INSTITUTIONS

Lawyers. The fact that very few bankruptcy cases have taken place under the new law, and that very few occurred under the previous law, means that only a small set of lawyers in Vietnam have direct experience in the field. Experience is growing, however, as an increasing number of SOEs are placed into bankruptcy. The availability of comprehensive continuing legal education in bankruptcy, particularly as it relates to smaller private enterprises, is necessary. One possible forum for an intensive Bankruptcy Law course for lawyers might be the Vietnamese Lawyers Association.

Banks are generally not yet part of the community of creditors involved in the Bankruptcy Law, given that their loans are typically fully secured. Thus, as previously stated, the legislative exclusion of fully secured creditors from the Bankruptcy Law means that unsecured creditors cannot benefit from the expertise or bargaining strength of large institutional creditors.

³⁰European Union, *Needs Assessment for Trade Related Assistance in the Period 2007–2012: Vietnam*, 26 July 2005, page 67.

Appraisers/Valuation Professionals. It is widely agreed that professionals charged with valuation of assets and liabilities of insolvent companies in Vietnam are not consistent, accurate, or accountable. Intangible assets present a particular source of confusion and disparity.³¹ Although expertise is growing, particularly as foreign companies demand consistent and credible valuation skills pertaining to their assets and investments in Vietnam, there is a clear demand for significant technical assistance in this area.

Business Associations, including the *Vietnam Chamber of Commerce and Industry*, smaller sector-specific or regional business groups, and even the community of foreign Chambers of Commerce, can be regarded as resources in the overall effort to improve access to and understanding of commercial law in Vietnam, including bankruptcy.

Company registers, tax authorities, and other local agencies. Although statistics are maintained concerning the registration of new businesses, Vietnam currently does not have a means of monitoring the “disappearance rate” of new firms.³² In an effort to improve public understanding of the new Bankruptcy Law, the information and statistics maintained by different agencies should be tapped as potential sources for understanding the actual rate of insolvency in Vietnam.

Law faculties generally include bankruptcy in their commercial law curricula; however, they lack sufficient resources and faculty to teach the subject in a way that adequately captures both recent events and critical underlying principles.

Media. To date, there does not seem to have been any formal media training on the issue of bankruptcy. Thus, an enormous opportunity to educate the public about the benefits of a functioning insolvency system, while also countering the stigma associated with business failure, is not yet being realized.

E. SOCIAL DYNAMICS

The persistent stigma attached to business failure in Vietnam is an enormously powerful dynamic that interferes with the effective implementation of the new Bankruptcy Law, and, without considerable effort to alter the common mindset, will do so for years to come. As the World Bank notes, there are many reasons why businesses fail, and, particularly with respect to private enterprises, most failures have little to do with criminal conduct or even managerial incompetence—

Business failure is a natural consequence of entrepreneurial risk-taking which is to be encouraged. Bankruptcy can occur without any improper conduct by management—for example, if the business just was not able to make a profit as demand changed or costs increased due to matters beyond the control of management. Or it could just be that, despite reasonable attempts, the business was simply unable to break into a market; or perhaps the international markets changed (which is common at present) and other companies in other countries had a competitive advantage. It could also just be that a domestic competitor was more efficient, clever or lucky. Management of every bankrupt

³¹See “State-owned firms restructure for good,” *Viet Nam News*, 13 September 2005, page 2.

³²VCCI, “Private Sector Firms: Size Matters,” 8 *Business Issues Bulletin*, June 2005, page 2.

company should not be penalized, unless some evidence of fraud or grossly negligent or reckless behavior can be identified.³³

Transforming Vietnam's cultural framework for understanding Bankruptcy Law into an appreciation of entrepreneurial risk—particularly with respect to private enterprises, which do not enjoy the subsidies and support afforded SOEs—represents an enormous challenge. It should nonetheless be attempted through revisions of the law and strengthening of the various pertinent implementing and supporting institutions.

F. RECOMMENDATIONS

- The government should develop bankruptcy regulations that significantly detail, clarify, and correct deficiencies in the law. Extensive donor assistance that emphasizes international best practices in the field should be accessed and engaged by the drafting agencies.
- New regulations should underscore the importance of bankruptcy Administrators—rather than Trustee Committees or the judges themselves—in managing the critical aspects of liquidation and, where necessary, reorganization. Judges should merely act as overseers, charged with monitoring the work of Administrators, resolving disputes among stakeholders, and enforcing compliance by all parties with deadlines and other requirements.
- Assuming new regulations allow for the development of a corps of professional bankruptcy Administrators, significant technical assistance and training should be provided in this field.
- When the time comes for revision of the law, fully secured creditors should be integrated as a key player in the insolvency process, particularly with respect to business reorganization.
- Economic Court judges—or, as recommended by the World Bank, a subset among them specifically designated as bankruptcy judges—should receive comprehensive training in the new law's concepts and procedures and the underlying principles of formal insolvency in a market economy.
- Supporting institutions, such as bar associations, business groups, universities, and the media, should be engaged as part of a significant public education initiative that emphasizes the importance of formal exit procedures and the removal of social stigma and perceptions of criminal behavior that currently attach to bankruptcy.
- For the benefit of potential foreign investors who will be interested in the state of Vietnam's bankruptcy system, an English-language version of the new law (and all related guidance and regulations) should be posted on commonly accessible Internet sites.

³³*World Bank Report*, Appendix, page 19.

VII. COMPETITION LAW AND POLICY

A. INTRODUCTION

Vietnam's Competition Law was passed by the National Assembly on 9 November 2004, and came into effect on 1 July 2005. The law is the product of years of planning, dating back to 1997, and the result of a four-year drafting process that saw the circulation of fifteen separate drafts. The Competition Law is the first of its kind in Vietnam. Some of the law's implementing regulations have yet to be enacted, and drafts of the regulations are being circulated.

The original impetus for Vietnam to adopt a competition law appears to have been the product of an indigenous recognition that market-based economies typically have competition laws, and that Vietnam's economy and its people might benefit from such a law. In addition to domestic demand for the law, development of the Competition Law drew much interest, and varying degrees of support, from a myriad foreign donor organizations, including the United Nations Conference on Trade and Development, the United Nations Development Program, the World Bank, and the governments of the United States (primarily through the U.S. Federal Trade Commission), Canada, the European Union and its various member states, Switzerland, Australia, Japan, Taiwan, and South Korea.

The biggest challenge facing the development of Vietnam's Competition Law is the question of what ends the law will actually serve. Some see in the law the potential to control large and unwieldy SOEs and state monopolies that make up a significant portion of the Vietnamese economy.³⁴ Others see in the law the potential to check the threat to Vietnamese businesses from foreign competition, as Vietnam's economy is liberalized in accordance with Vietnam's foreign treaty commitments, such as the Bilateral Trade Agreement with the United States and its accession to the WTO in January 2007.³⁵ All, however, appear to recognize that whatever its aims, Vietnam's Competition Law contains many new concepts that are unfamiliar to Vietnamese businesspeople, those who advise companies doing business in Vietnam, and even the government officials charged with enforcing the law.

B. LEGAL FRAMEWORK

The Competition Law establishes the basic substantive provisions of the law; it creates two new institutions charged with enforcing the law—the Competition Administration Department (VCAD) and the Competition Council; and it sets forth the general procedures for these

³⁴Even with the Competition Law, in order for the full disciplining force of competition to take hold in Vietnam, additional steps need to be taken to remove impediments to doing business in Vietnam, including eliminating disadvantages private businesses face (relative to the state-owned sector) in terms of access to credit and land and additional regulatory burdens (e.g., licensing and inspections).

³⁵See, e.g., Trinh Anh Tuan, "Competition Environment and the Urgency of Competition Law in Vietnam" (undated, unpublished manuscript), page 4: "Like any other transition economy[y], Vietnam is facing the challenge that foreign enterprises will abuse the advantage of trade liberalization to impose their own restrictions like price fixing, dumping, other abuses to distort fair competition on the market. Therefore, to arrange all necessary legal tools in the process of economic integration, Vietnam need[s] to have [a] competition law."

institutions to investigate and enforce the law. This section provides an overview of some of the substantive provisions of the law, while the next section deals with the implementing institutions.

The substantive provisions of the law fall into two broad categories: (a) “acts of restriction on competition,” which in the United States is referred to as antitrust law; and (b) “unfair competition,” which in the United States is referred to as consumer protection law and business tort law.

Chapter II of the Competition Law sets out the business practices constituting “acts of restriction on competition.” The prohibited practices are fairly typical of those found in antitrust laws around the world. Specifically, Chapter II includes sections dealing with agreements restricting competition, abuse of dominant and monopolistic positions, and economic concentration (which in the United State is referred to as mergers and acquisitions). It also includes relatively elaborate procedures for businesses to obtain exemptions from the law from either the Minister of Trade or the Prime Minister, depending on the circumstances. Grounds for exemption from agreements restricting competition appear to include instances where an agreement may create efficiencies or be the product of potentially pro-competitive standard setting activities (which can be good), but exemptions also are possible for the protection of SMEs and export cartels (which can be pernicious).³⁶ With respect to possible exemptions for economic concentration, grounds for exemption include SMEs where even after the consolidation the merged entity remains within the government’s definition of an SME; exemptions for concentrations where at least one of the merging parties is deemed a failing firm; and exemptions if the concentration is found to result in a firm that will expand exports or contribute to socioeconomic development or technological advancement.

Perhaps the most noteworthy feature of Vietnam’s Competition Law is its heavy reliance on market shares as one of the main determinants—if not the key determinant—for delineating most antitrust violations. Each of the three major classes of restrictions on competition features market share as a prominent element of proof. Thus, certain agreements restricting competition, such as price fixing and market divisions among horizontal competitors (but not bid rigging or group boycotts), require, as a predicate to finding a violation of law, that the combined market share of the parties to the agreement is 30 percent. Abuse of dominance also requires proof of a 30 percent market share, while a group of businesses acting together (or in parallel) may be found to be dominant if they have a combined market share of 50 percent where two businesses are involved, at least 65 percent market share for three businesses, and at least 75 percent market share for four businesses. Lastly, economic concentrations are not permitted where the merged entity will have a 50 percent or higher market share.

Experience from the United States, the European Union, and other countries with a history of enforcing antitrust laws shows that market share tests can be under-inclusive or over-inclusive, and, in any event, difficult to administer. For example, horizontal agreements among competitors to fix prices, divide territories or markets, allocate customers, or limit production or sales are almost always harmful to competition, and it would be better to dispense with a market share test and treat these practices in the same way that Vietnam’s law currently deals with bid rigging and

³⁶“SME” is not defined in the Competition Law, but Government Decree 90 (2001) defines an SME as a domestic enterprise having a registered capital of no more than 10 billion *dong* or employing on average no more than 300 employees in a year.

group boycotts. In cases involving allegations of abuse of dominance, a dominant position may be the product of superior business skill rather than anticompetitive conduct. And, in any event, as long as market entry is relatively easy, a large market share may not be a meaningful indicator of dominance or a monopoly position. Moreover, in order to calculate market shares, one must first define the relevant market, which experience has shown can be a very difficult, imprecise, and time-consuming process.

The worthy intent of Vietnam's market share test appears to be to limit application of the law to agreements that likely injure competition. The decision to rely so heavily on market share also appears to result from the hope that bright lines will facilitate government enforcement and business compliance. Interviews in Vietnam reveal that adoption of the market share tests may reflect the fact that some conflate market share with market power, while others believe that alternative (potentially better) ways to measure or estimate market power simply are not currently feasible in Vietnam.

Additional noteworthy features of Vietnam's Competition Law are that: SOE are subject to the law, as are foreign enterprises operating in Vietnam; "state administration authorities" (i.e., other governmental entities) are expressly limited in their ability to interfere in markets, though how this will be enforced remains unclear; and "state monopolies" are included within the law's sweep, although the power of VCAD and the Competition Council to deal with them is limited. The Competition Law only empowers VCAD or Competition Council to deal with state monopolies in those circumstances where the state monopoly is acting outside its monopoly grant. Otherwise, the authority to regulate monopolies—including decisions concerning the quantities, volumes, prices, and goods and services to be produced—remains in the hands of "the state," and the Competition Law has nothing more to say about this.

With respect to "unfair competition," Chapter III of the Competition Law contains seven sections that describe 10 categories of possible violations. Vietnam's approach to unfair competition falls within the mainstream of competition laws around the world. These provisions, for example, are commonly found in competition laws in Europe, where they are also enforced by governmental agencies. These violations include: providing false or deceptive information regarding trade names, business logos, packaging, and geographic origination; infringing business secrets; coercing others to engage or not engage in business; disparaging other businesses; disrupting other businesses; false and deceptive advertising; false or deceptive sales promotion activities; and illegitimate "multi-level sales." Chapter III also prohibits actions by trade associations to refuse membership or require the resignation of a member where these actions are discriminatory in nature and put a business in an unfavorable competitive position.

Among the provisions constituting "unfair competition" is one restricting comparative advertising. While this provision was once common in European competition laws, this is no longer the case. Germany, for example, abandoned its prohibition against comparative advertising some years ago. The move toward accepting comparative advertising arises from the recognition that one important dimension in which competition takes place in market-based economies is through the supply of information to consumers.

The Competition Law does not include any express statement about its purposes or goals. (A review of other Vietnamese laws reveals that it is common practice not to include any

perambulatory language setting forth the purpose of the given law.) Moreover, much work fleshing out the law is still left to the development of implementing regulations. Indeed, a number of government decrees were being drafted in 2005–2006, including delineation of the law’s administrative fines and penalties, and establishment of the Competition Council. Until all of the implementing regulations are in place, and VCAD and Competition Council have started to perform their law enforcement duties in earnest, it is not possible to say how the Competition Law will develop, how transparent its procedures and decision-making will be, and what ends the law will actually serve.

C. IMPLEMENTING INSTITUTIONS

The Competition Law creates two governmental organizations charged with implementing the law: VCAD and the Competition Council. VCAD is responsible for investigating possible violations of law. The Competition Council, which has yet to be formed, is a quasi-judicial body charged with determining whether sufficient grounds exist for finding a violation of the law, once VCAD completes its investigation and recommends further action.

VCAD is part of the MOT, and it currently has twenty employees. The professional staff consists primarily of people trained in either law or economics. Most of the staff is relatively young, and they have come to VCAD either directly from the university or the private sector. Few have prior government experience. VCAD has plans to expand its staff to 150 employees, but there is no definitive timetable or budgetary commitment from the government for this expansion.

As the first-line agency responsible for enforcing the Competition Law, VCAD has the authority to investigate possible violations of the law either upon its own initiative or in response to a complaint from any party that believes its rights have been infringed. VCAD may also impose penalties for acts found to constitute unfair competition, and may assist the Minister of Trade and the Prime Minister in determining whether to grant exemptions from the law’s application. In addition to its responsibility for enforcing the Competition Law, VCAD is charged with enforcing Vietnam’s antidumping and countervailing duties laws. Implementing regulations for antidumping are in place, and VCAD has begun to enforce the antidumping laws. No antidumping case or investigation has yet advanced to a decision due to the slow pace at which implementation capacities for anti-dumping are being developed. One source noted that the slow pace is preferred by some parties involved.

Some, including foreign donor organizations, have raised concerns about the same agency being responsible for promoting competition and enforcing antidumping laws. Only a few countries in the world—notably Panama and Peru—mirror this situation. The concern is that these two bodies of law have very different bases and objectives. While competition law is intended to promote vigorous competition for the benefit of consumers, antidumping laws are used to limit certain types of foreign competition in order to prevent injurious effects on domestic producers. In addition to the tensions between these bodies of law, there is some concern that political pressure to pursue antidumping actions may result in a major drain on VCAD’s extremely limited resources. The opportunity costs of pursuing an antidumping agenda could come at the expense of developing the pro-competition agenda.

There is an expectation that VCAD and Competition Council may some day—“when conditions arise,” as one government official put it—evolve into autonomous bodies that operate independent of the MOT. But currently, there may be advantages, at least from the standpoint of access to resources, for the fledgling VCAD to remain subordinate to the larger MOT.

D. SUPPORTING INSTITUTIONS

In addition to creating VCAD and the Competition Council, Vietnam’s Competition Law assigns responsibility to help enforce the law to a number of other governmental entities, including the Prime Minister, the MOT, and the courts.

The **Prime Minister** has the power to appoint and dismiss the head of VCAD, as well as the power to appoint the members and chairman of the Competition Council. The Prime Minister also has significant substantive responsibility for considering and granting exemptions to the law. Additionally, the government is charged with writing the follow-on regulations, including those setting forth procedures for making public a decision of exemption, prescribing additional acts that may constitute unfair competition, establishing VCAD’s organization, determining fees and fines, and providing for other regulations as necessary.

The **Minister of Trade** is charged with providing the Prime Minister with recommendations for the head of VCAD and members of the Competition Council, appointing VCAD’s investigators, granting certain exemptions from the law, and reviewing complaints about VCAD’s decisions.

The Competition Law includes provisions giving responsibilities for adjudicating disputes that arise under the law to the courts. The **Provincial People’s Courts** are empowered to hear administrative lawsuits against the decisions of the Competition Council. The Courts may also be called upon to help resolve claims of damages resulting from instances when VCAD has entered an injunction to prevent the continuance of certain behavior. The Supreme People’s Court may hear appeals from decisions of the Provincial People’s Courts, and is also charged with helping to “detail and guide” the implementation of the law.

Other notable supporting institutions include Vietnam’s universities and think tanks. Several of Vietnam’s law schools and university economics departments, such as those at the Hanoi National University, Ho Chi Minh City National University, and the Hanoi Law University, offer courses that deal with competition policy and competition-related issues. Additionally, with the assistance of donor organizations and foreign universities, Vietnam has sent academics and graduate students abroad to obtain advanced degrees in microeconomics.

The **Central Institute for Economic Management (CIEM)**, a government think tank within the Ministry of Planning and Investment, has a strong market orientation and a talented staff composed primarily of economists and researchers. CIEM had an early role in the development of competition law in Vietnam, sponsoring competition policy studies and workshops as far back as 1997. Although CIEM’s involvement in the law’s development diminished significantly after the MOT was given the lead role in developing the Competition Law, the CIEM remains a potentially important resource to VCAD for preparing research and providing other forms of assistance. CIEM’s assistance to VCAD should be encouraged.

E. SOCIAL DYNAMICS

Much uncertainty exists about the ends that Vietnam's Competition Law will be used to serve in practice, given that: (a) the passage of the law is so recent; (b) the government has yet to enact all of the implementing regulations; (c) VCAD and the Competition Council have yet to begin enforcing the law; and (d) many of the law's core concepts are unfamiliar to many both within and outside the government.

There do not appear to be any major forces—either within or outside the government—that strongly oppose the law's implementation. Instead, the law's existence is an accepted fact, and many who were closely following the Competition Law's early development appear to have moved on to other projects and concerns. VCAD is building up its institutional capacity, while the Competition Council has yet to be established.

There is, however, concern among some government officials, as well as outside observers, that the Competition Law may end up being used to stifle, rather than to promote, competition. Some have suggested that it would have been wiser to let some real competition emerge first—by means of the other significant commercial law reform efforts taking place in Vietnam, such as reducing the impediments that prevent small and medium enterprises from competing with SOEs—before fully implementing the Competition Law and the administrative apparatus required to enforce it. Ironically, some of the gains in competition made through other reforms, such as those in the Enterprise Law, could be hampered through the misapplication of the new Competition Law. Others have suggested that the government would have wiser to first implement a law with the aim of de-concentrating monopoly industries and “equitizing” (privatizing) the government's significant business holdings before implementing a law whose purpose is to remedy private business conduct that may harm competition through the acquisition, exercise, and maintenance of market power.

Socialization of the law—that is, educating the public, businesses, government, political leaders, and other stakeholders about the law—is of utmost importance.³⁷ Most laws that work do so because they are followed out of general acceptance, not out of fear of force. But the law must first be understood, and it must be perceived to be fair and legitimate. VCAD has sponsored seminars to help educate businesses and other stakeholders about the law throughout Vietnam. According to VCAD staff, businesses have generally been fairly receptive to the law, although they have expressed concern about the potential threats posed by large-scale enterprises. Despite these promising efforts, meetings with Vietnamese businesses and business organizations suggest that additional socialization activities are required.

F. RECOMMENDATIONS

- The Vietnamese government should enact the remaining regulations called for in the Competition Law, including establishing the Competition Council.

³⁷See William Kovacic, “Capitalism, Socialism, and Competition Policy in Vietnam,” *Antitrust*, Summer 1999, page 59: “Without extensive efforts to instill in government leaders and social constituencies a sense of the rationale for competition and the appropriate role for government intervention, the competition policy [is] prone to be applied in ways that retard economic progress.”

- The Vietnamese government should increase the resources allocated to VCAD significantly, given VCAD's multiple responsibilities for competition law, consumer protection law, and antidumping law enforcement.
- VCAD and the Competition Council should conduct socialization programs for the public, businesses, government, academics, judges, and other stakeholders to educate them about the rationale for competition policy and application of the Competition Law.
- The foreign donor community should provide technical assistance to VCAD and the Competition Council in the following areas: (a) planning and setting priorities; (b) assistance in drafting any required implementing regulations; (c) developing internal operating procedures for handling complaints, investigations, and exemptions; and (d) training staff in case screening and investigative techniques.

VIII. COMMERCIAL DISPUTE RESOLUTION

A. INTRODUCTION

An effective commercial legal and institutional environment requires a system that quickly and fairly adjudicates disputes between parties as inexpensively as possible.

Vietnam presents an interesting situation, in that businesses have traditionally shunned courts and have sought other ways of settling disputes. Nonetheless, Vietnam has a comprehensive court system, and as Vietnam expands its economy, attracts foreign investors, and becomes more integrated into international commerce and trade, the courts are becoming increasingly important.

Vietnam has also been expanding and “modernizing” its system of alternative dispute resolution (ADR). ADR, while it does not replace the courts, provides another venue for the resolution of disputes and offers alternatives for parties to settle their disputes.

This Diagnostic revealed near-universal consensus that the court system is held in generally low esteem by the business community and the general public, that it is viewed as not always providing the fairest of results dispensed with the greatest impartiality and independence, and that major reforms are needed to help ameliorate these major deficiencies.

On the other hand, ADR was viewed as making progress, although haltingly, and that with certain changes it could increase its acceptance by the business and legal communities. Increased use of ADR has, in other countries, spurred the courts to improve.

B. LEGAL FRAMEWORK

The status of the courts in Vietnam is a direct outgrowth of the country’s history. In addition to the traditional importance of (Confucian) morality, Vietnamese rural life centered upon the life of the village. The autochthonous nature of village life is reflected in such age-old sayings as, “The laws of the emperor are less than the customs of the village,” and “The village association is a small court.” These sayings reflect the fact that in the first half of the fifteenth century, the head of the village was an official appointed by the central government; but after the 1460s, it was quite common for the head to be a local villager with some administrative experience. Over time, the leadership moved to a council of elders with local responsibility for matters like dispute resolution.

The French colonial authorities established administrative and judicial systems that catered to the expatriates and a handful of indigenous traders involved with continental merchants; the vast majority of domestic tradespeople preferred other avenues.³⁸

³⁸LeadCo Viet Nam Legal Counselors, *Judicial Independence & the Rule of Law—Viet Nameese Experiences*, pages 3-4.

Both after independence in 1945 and the unification of the country following the Vietnam War, the Vietnamese system of courts was constructed with few resources and little training. Judges often received no more “justice” according to party policy. Vietnamese court development therefore took place under very difficult circumstances.³⁹

Today, judges are regarded as bureaucrats with no particular status. Historically, judges and courts have not been relied upon to deliver justice. Instead they have been seen as instruments or tools of the state that implement the will of rulers, rather than as dispensers of impartial and reasoned decisions.⁴⁰

The socialist conception of “rule of law” in Vietnam is much closer to “state rules” or “rules of the state.”⁴¹ Vietnamese courts are accountable to the National Assembly according to the most recent Resolution of the National Assembly and additional provisions of the Vietnamese Constitution of 1992. Interconnections between politics and law are therefore many and blurred.

As the LeadCo authors note,

Under the Constitution, courts are accountable to the National Assembly and this reflects their subordination to political authority. This means that the courts sit as part of a political structure of the state in turn led by the Communist Party of Vietnam.⁴²

C. IMPLEMENTING INSTITUTIONS

The **Supreme People’s Court** is the highest court. It is composed of an Economic Division, a Criminal Division, a Civil Division, a Labor Division, and an Administrative Division. Since 1992, judges have been appointed.

The courts of first instance in most civil and criminal cases are the **District People’s Courts**, which are in each administrative district.

Courts of appeal for District Court cases are the **Provincial Courts**; there is one in each province of the country. The Provincial Courts also act as courts of first instance in certain cases.

The Provincial Courts have divisions, including Economic Divisions.

The **Economic Court** was established on 1 July 1994 to hear disputes among private business interests. Pursuant to the Civil Procedure Code, it has jurisdiction in a number of areas, such as cases—

³⁹LeadCo Viet Nam Legal Counselors, *Judicial Independence & the Rule of Law—Viet Nameese Experiences*, pages 3-4, citing the leading work on the history of the Vietnamese courts by Dr Penelope Nicholson. See: Nicholson, P and Ngyuen T.M. (2000). “Commercial Disputes and Arbitration in Vietnam,” *Journal of International Arbitration* 17(15) (2000) pages 1-18, and Nicholson, P “Judicial Independence and the Rule of Law; the Vietnamese Court Experience,” *Australian Journal of Asian Law* 3(1) (2001) pages 37-58.

⁴⁰LeadCo Viet Nam Legal Counsellors, *Judicial Independence & the Rule of Law—Viet Nameese Experiences*, pages 3-4

⁴¹Id. pages 6-7.

⁴²Id. pages 6-7.

- Involving economic contracts between legal persons.
- Between a legal person and an individual with a registered business.
- Between a company and its members.
- Between company members regarding the establishment, operation, and dissolution of the company.
- Relating to shares, bonds, etc.
- Involving bankruptcy.

District Courts can only hear cases involving an economic contract between Vietnamese with a value of less than 50 million *dong* (approximately \$3,100). Provincial Courts hear all other cases. As a general matter, the Supreme People's Court has jurisdiction to hear appeals.

There was near-unanimous agreement among interviewees that the courts lack the confidence of the business community, who are loath to bring cases to the courts. A World Bank *Private Sector Development Note on Promoting Business to Business Commercial Contracts in Vietnam* remarks that—

- “Firms, in general, have no confidence in the ability of Vietnam’s legal system to help them resolve a dispute or enforce a contract. Even when a serious contractual dispute arises that could potentially threaten the firm’s commercial viability, it is very rare for firms to resort to formal procedures such as arbitration or Court. In Hanoi, with a population of more than 10,000 firms, only 70 cases were brought to the Economic Court in 2003, and 20 to the International Arbitration Center under the Vietnam Chamber of Commerce and Industry (VCCI).”⁴³
- “Firms tend to regard the option of going to Court as a waste-of-time/money or too risky as the outcome is totally unpredictable. Because of the conflicts and overlaps in the three main laws dealing with contracts, and limited capacity of judges (who generally do not have adequate training to handle economic cases), firms cannot even be confident about which law will be applied to their cases, or which court it will be heard in.⁴⁴ The costs of pursuing formal procedures can be substantial, both in the form of legal and official court costs, and unofficial costs, such as “incentive fees” needed to enforce a Decision. A firm that takes his [sic] case to Court, also risks damaging his [sic] reputation, as this is not regarded as appropriate business practice except in extremely serious cases. All this effort, risk and cost, can be a waste of time as the current laws makes it easy for the other party to block the process. Finally, even if the firm succeeds in getting a Court Decision in their favor they then face the greatest challenge of all - which is to get the Decision enforced.”⁴⁵

⁴³Amanda Carlier and Son Thanh Tran, *World Bank Private Sector Development Note on Promoting Business to Business Commercial Contracts in Vietnam*, January 2005, page ii.

⁴⁴The revised Civil Code (effective 1 January 2006) abolished the Ordinance on Economic Contracts, reducing the number of laws governing contracts, and eliminating some of the overlaps and confusion that existed under the prior legal framework. Today, the Civil Code and the new Commercial Law (also effective 1 January 2006) regulate contracts in Vietnam.

⁴⁵*Ibid.*

These observations underscore the fact that arbitration is underutilized, that corruption in the form of “incentive” payments is common, and that the ability for businesses to effectively engage in contractual relations is hampered by the lack of effective enforcement.

Arbitration. The Ordinance on Commercial Arbitration, No. 08/2003/PL-UBTVQH11, adopted 23 February 2003 and effective 1 July 2003, along with the new Civil Procedure Code (both supported by USAID/STAR), established a new regime for arbitration in Vietnam. The Ordinance expanded the scope of application to all commercial activities in accordance with UNCITRAL Model Law principles, allows businesses to choose the type of arbitration to be used, and allows foreign businesses to use international arbitration (although still limiting domestic firms to domestic arbitration). Parties to disputes with foreign elements also can select the substantive and procedural laws to govern the arbitration proceedings. The arbitral award is binding, and the Enforcement Authorities can be asked to enforce the award. As a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, foreign arbitral awards are (theoretically) enforceable in Vietnam.

Despite the seeming efficacy of the ordinance, major problems remain. For example, enforcement of foreign arbitral awards has been denied because the award was deemed not to be a commercial activity, as defined in the old Commercial Law, where only 14 activities were deemed to be commercial activities. In one particularly egregious case, an Australian arbitral award arising out of a construction contract was not enforceable in Vietnam because construction was not a commercial activity under the old Commercial Law. The new Commercial Law, which became effective 1 January 2006, broadens the definition of “commercial activity” and thus should make more foreign arbitral awards enforceable in Vietnam. This is especially important because few foreign arbitral awards have been heard by the Vietnamese courts for enforcement, and even fewer enforced. We were informally informed that only six awards have been brought to the courts for enforcement in the last two years, and only three have been enforced.

The main Vietnamese arbitration center, the Vietnamese International Arbitration Center (VIAC) at the Vietnam Chamber of Commerce and Industry, requires that VIAC arbitrations use VIAC rules. Unfortunately, these rules are, in some respects, not consistent with standard international rules, such as the International Court of Arbitration (ICC) rules.

There are five arbitral centers in Vietnam, three of which are run by VIAC (which handles the largest number of arbitrations). It has been reported that the number of cases handled by VIAC in Hanoi totaled 91 for the years 2000–2004, with an additional 12 cases being handled in the first nine months of 2005. The number of arbitrators listed for that center is 73, out of a total of 133 (the latter number is the total for all three VIAC centers along with those at the other two arbitral centers in the country). Additional arbitration centers outside the scope of VIAC have been established in Hanoi and Ho Chi Minh City.

In the view of the Vietnam Lawyers Association (discussed under “Supporting Institutions” below), the Ordinance on Commercial Arbitration is adequate, although its effect has been limited. One intended goal was to reduce the burden on the courts, but according to the Association, arbitration must be developed further in Vietnam, and there is a particular need to increase the number and quality of the arbitrators themselves.

The Ministry of Justice is preparing a new Law on Commercial Arbitration that will supplant the Ordinance. It is expected that the Law will conform to international best practices, and address the deficiencies in the ordinance to strengthen the framework for commercial arbitration in Vietnam.

The World Bank PSD Note quoted earlier gives six reasons why firms avoid or refuse to take legal action, with examples from the courts. They are—

- Reputation/image damage;
- The outcome of going to courts is totally unpredictable;
- Cost;
- Waste of time: the structure of the law makes it easy for the other party to frustrate/block the process;
- Corruption;
- Difficulties in getting decisions enforced.⁴⁶

Many of these issues are less burdensome within ADR, or are found to a lesser extent. Thus ADR should be promoted in Vietnam to ease the burden on the courts, develop a group of “neutrals” trained in commercial matters, offer a forum that provides greater confidentiality, and act as a spur to the courts to reform their processes and enhance their capabilities.

In a proposal to link court litigation and ADR, the Vietnam Lawyers Association (VLA) reported that it would like to propose to the National Assembly that a case could only go to court after it failed at the arbitration center. This would be a variation on the present situation, in which there is mandatory “conciliation” in the courts prior to a case proceeding to a regular litigation.

Lack of Effective Enforcement. Enforcement of judgments is not handled by the courts, but is handled instead by the Enforcement Agency of the Ministry of Justice. (Sometimes, other parties, such as People’s Councils, get involved in enforcement, but the main actor is the Enforcement Agency). There are major issues involving enforcement, some stemming from the relationship of the Agency to the courts, and some from rights of individuals, which hamper enforcement.

In practice, the Enforcement Agency tends to “look over the shoulder” of the courts, and often will decide on its own whether the decision of the court was proper and should be enforced. This means that enforcement is not automatic, that not all judgments will be enforced, and that those are enforced can take an inordinate amount of time.

There is also the issue of the inability of the Enforcement Agency to uncover personal or enterprise assets. Sometimes, debtors simply sell the asset that is collateralized, without the Enforcement Agency taking any action.

A new Judgment Enforcement Code was drafted and debated in the National Assembly in 2006. It represents a major institutional development, but will require considerable effort to implement.

⁴⁶Id., pages 11-12.

The Judgment Enforcement Agency established by the Ministry of Justice, as contemplated by draft law, would be more effective than the current agency.

D. SUPPORTING INSTITUTIONS

The **Vietnam Lawyers Association** (VLA) is a major institution in Vietnam, established 50 years ago. It has 32,000 members nationwide, organized along the lines of a central organization, with “branches” at the provincial, city, district, and commune levels.

The VLA could be referred to as the “Vietnam Jurists Association,” since it consists of all people working in the legal profession, including people with the government and those not acting as lawyers. (There is a Bar Association that includes only lawyers.)

According to the VLA, the National Assembly consults with it on all important laws and regulations. Members of the VLA with specialized knowledge comment on legislation and regulations within their specialty. The VLA is also asked to help draft key legislation—for example, it led drafting of the Ordinance on Commercial Arbitration, with extensive support from USAID/STAR.

Other areas in which the VLA is active are—

- Legal awareness
- Legal aid
- Legal clinics for law schools
- Legal clinics for the poor, invalids, victims of Agent Orange, and victims of natural disasters.

The VLA has made efforts to strengthen ties with other law societies, such as the American Bar Association and the Chinese Lawyers Association. The VLA has also organized workshops jointly with Chinese lawyers at the Vietnamese/Chinese border on issues such as trade at the border and trade in drugs, women, and children.

Another important supporting institution is the **Vietnam Chamber of Commerce and Industry** (VCCI). It maintains dialogue with the government on various laws, such as enforcement, bankruptcy, company registration, and property registration. VCCI also operates the Vietnam Business Forum, where relevant draft laws and regulations are posted for public comment.

E. SOCIAL DYNAMICS

Discussions with Vietnam Government officials and other parties, such as the Vietnam Chamber of Commerce and Industry, indicate a strong desire to improve the business environment in order to achieve economic growth. This growth is seen as the main way for Vietnam to be able to create jobs for the 1.5 million new job-seekers each year.

Thus, there is a demand for improved laws not just from the private sector, but from the government as well. The U.S.-Vietnam BTA, with its specific requirements for commercial

arbitration procedures, and Vietnam's 2007 admission to the WTO are also adding pressure for new and improved laws, which will hopefully lead to an improved economic environment.

Translating the new legal framework into improvements in the court system will take considerable time and effort. Although contemplated by both the U.S.-Vietnam BTA and the WTO, independent and impartial courts are not currently the norm in Vietnam, and their development will, necessarily, take place within the Vietnamese political and social structure.

Nonetheless, the government has seen the need to improve commercial dispute resolution, and has responded by passing the Ordinance on Commercial Arbitration (now being "upgraded" to a law). There is strong demand on the part of the private sector as well as other parties, such as the Vietnam Lawyers Association and the Vietnam Chamber of Commerce and Industry, to have a vibrant commercial arbitration sector. The U.S.-Vietnam BTA also encourages the use of arbitration in certain cases (e.g., Chapter I, Article 7 and Chapter IV, Article 4).

Indeed, various forms of ADR seem more attuned to the traditions in Vietnam of settling disputes amicably, outside of the courts. Even commercial arbitration might be preferable to some parties as compared to court litigation—although arbitration is binding and enforceable, it comes about by consent of the parties. Since there is an aversion in Vietnam to "displaying one's dirty laundry in public," the element of confidentiality in alternative dispute resolution, which is not found in court litigation, is an additional incentive.

F. RECOMMENDATIONS

- Develop a clear and consistent plan for the reform of the courts and a judgment enforcement system. Develop a plan for how the government will coordinate and maximize donor assistance to the courts.
- Reconcile goals for reform with the fundamental inconsistency between traditional notions of judicial independence and judicial subservience to the National Assembly.
- Increase the number of trained arbitrators.
- Educate the public with respect to arbitration.
- Reform the Ordinance on Commercial Arbitration to allow domestic firms access to international arbitration.
- Improve the enforcement regime for court judgments. Absent effective enforcement, many reform efforts will not succeed.

IX. COURT ADMINISTRATION

A. INTRODUCTION

As in many countries, court administration in Vietnam is not itself a profession. Rather, although the low-level position of “court clerk” is contemplated by Vietnamese law, the processing of cases, including their intake, assignment, noticing of parties, overall case management, formal disposition, recordation of results, and other tasks is managed initially by junior lawyers on a career track to become judges, and then by the judges themselves. Court administration as a discipline is underdeveloped. The absence of timely, accurate, and open processes results in opportunities for corruption and other failures in the judicial process. A well-functioning court administration system should include the following elements to increase the openness and accountability of the courts—

- Case tracking and management.
- Preservation of comprehensive and accurate case records.
- Ready location of case records.
- Prevention of the subversion of the judicial process through destruction or concealment of records.
- Preservation of the legal rights of the public.
- Facilitation of appellate review in a timely and non-duplicative fashion.
- Support for the enforcement process.

Although visits to two Economic Courts in Vietnam—Ho Chi Minh City and Hanoi—revealed relative order, extensive reports from lawyers, court staff, and other interested parties indicate that deficiencies in court administration decrease public confidence in the courts in Vietnam.

B. LEGAL FRAMEWORK

The administration of courts falls under the authority of the Civil Procedure Code, supported by USAID/STAR, which took effect on 1 January 2005, and the Law on Organization of the People’s Courts, which took effect in 2002. The latter law is reportedly scheduled for amendment in the near future. The Civil Procedure Code sets forth the general jurisdiction of the various types of civil courts in Vietnam and the overall procedures for resolution of civil matters, from the filing of petitions to the disposition of the case. The Civil Procedure Code mandates that all civil matters must undergo attempts at settlement prior to formal resolution through a trial. The Civil Procedure Code also addresses the resolution of cases through formal arbitration, including the process for enforcement of arbitral awards.

The Law on Organization of the Courts sets forth the administrative structures of all the courts, including the Supreme People’s Court (the court of last resort), the Provincial Courts, and the District Courts. With respect to the 64 Provincial courts—which incorporate Vietnam’s system of Economic Courts—the guiding structure is found at Article 27 and Article 30 of the law, which incorporate the ideas of an “assisting apparatus” and the position of “court clerk.”

Article 27.

1. The organizational structure of the People’s Court of a province or centrally-run city is composed of:

- a) The Committee of Judges;
- b) The Criminal Court, the Civil Court, the Economic Court, the Labor Court, the Administrative Court; in case of necessity, the National Assembly Standing Committee shall decide to set up other specialized courts at the proposal of the chief judge of the Supreme People’s Court;
- c) The assisting apparatus.

2. The provincial/municipal People’s Court has a chief judge, deputy-chief judges, judges, people’s jurors and court clerks.

Article 30.

1. The specialized courts of the provincial/municipal People’s Courts shall have a chief judge, deputy-chief judges, judges and court clerks.

...

3. The Economic Courts of the provincial/municipal People’s Courts shall have the following tasks and powers—

- a) To conduct first-instance trials of economic cases according to the provisions of the procedural law;
- b) To conduct appellate trials of economic cases where the first-instance judgments and/or rulings of lower courts have not yet taken legal effect but have been appealed and/or protested against according to the provisions of the procedural law;
- c) To settle bankruptcy according to law provisions.

At least 126 out of Vietnam’s 664 District Courts currently have the authority to handle economic cases and it is expected that this number will grow in the future. Perhaps based on the fact that the District Courts are smaller and have access to fewer resources than the Provincial Courts, the law anticipates that, although the District Courts have their own “assisting apparatuses,” the chief judges and deputy chief-judges are essentially responsible “to organize trials” and “to report on activities of their courts.” Specifically, Articles 32 and 33 of the law provide as follows—

Article 32.

1. The People’s Court of a rural district, an urban district, a provincial capital, or a provincial city shall have a chief judge, one or two deputy-chief judges, judges, people’s jurors, court clerks.

The People’s Courts of rural districts, urban districts, provincial capitals or provincial cities shall have their own assisting apparatuses.

2. The People’s Courts of rural districts, urban districts, provincial capitals or provincial cities are competent to conduct first-instance trials of cases as provided for by the procedural law.

Article 33.

1. The chief judges of the People’s Courts of rural districts, urban districts, provincial capitals or provincial cities shall have the following tasks and powers—

- a) To organize trials and other works according to law provisions;
- b) To report on activities of their courts before the People’s Councils of the same level and to the immediate superior courts.

2. The deputy-chief judges shall assist the chief judges in performing their tasks according to the latter’s assignment and be answerable to the chief judges for the assigned tasks.

Other laws affecting (or depending upon) the administration of courts include the existing Ordinance on Judges and Assessors of the People’s Courts (2004), the Ordinance on Commercial Arbitration, and the Ordinance on the Execution of Civil Judgments, which is expected to be replaced in 2007 by a new Judgment Enforcement Code.

The Communist Party of Vietnam has developed a “Roadmap for Reform” of Courts, which aspires to various improvements to the court system through 2010, including reforms in court administration. The entire roadmap is not publicly available (although parts of it have recently been made public, representing a major advance in transparency), nor is the extent to which judges and court users contributed to its development at all clear. Various sources, including persons interviewed for this Diagnostic, described the roadmap as generally directed toward the following goals—

- To strengthen the role of the courts and strengthen the independence of the courts.
- “To bring the court into its rightful place in society.”
- To implement reforms to the “institutional arrangement” of the judiciary.

One possible aspect of this roadmap, Decision 49 of the Politburo, dated 2 June 2005, reportedly requires that all judgments rendered by the Supreme Court, which consists of about 120 judges, be published. With assistance from USAID/STAR Project, 103 Supreme Judicial Council decisions, rendered during 2000–2004, were published in July 2005.

C. IMPLEMENTING INSTITUTIONS

The numerous reports and observations gained by the Diagnostic team concerning the administration of commercial cases were, both in the Provincial Courts and in the District Courts, striking in their overall lack of consistency. One lawyer mentioned that confusion frequently exists (among judges *and* lawyers) over which division should hear a case, the Economic or Civil Court. It further appears that procedures for case management and tracking vary not only from court to court, but from case to case. Many interviewees stated that, for the

most part, judges in both the Provincial and District Courts handle the administrative aspects of economic cases. Once the Chief Judge has assigned the case, the judges or their staff handle tasks such as notifying parties, scheduling and re-scheduling hearings, engaging in settlement discussions, collecting evidence (including taking notes at hearings), and disposing of the case. One lawyer said that it is often necessary to consult a judge *prior* to the actual filing of a petition, for the purpose of getting the judge's opinion on how a complaint should be framed.

It should be noted that the full court system has recently been unified under the administration of the Supreme People's Court (before, the local courts were administrated by the Ministry of Justice). At all levels, however, the courts are under-funded, many judges are not adequately qualified or trained, and salaries are low.

In the observed Provincial/Economic Courts, there were offices for the official intake and recording of new cases. Fees are charged for the initiation of a case. In Ho Chi Minh City, intake lawyers (who themselves are on track for eligibility to become judges) entered cases into both an automated system, designed in-house by one or two information technology professionals, traditional ledger books. The intake office revealed both order and disarray in various systems: although the automation functions seemed straightforward and capably applied, case files seemed to be kept in a disorderly fashion.

District courts reportedly operate with little, if any, automated functions. One observer commented that, for the administration of justice to improve in Vietnam, "It is very urgent for us to improve the capacity of the District Courts."

One aspect of court administration that did not become clear to the Diagnostic team was the process of scheduling case events. On the one hand, judges were mindful of both the requirement that settlement of cases be attempted and that they have a four-month time frame during which a trial must be conducted. Yet how judges coordinate among themselves (for example, for the purpose of securing access to a courtroom) and with the parties before them was unclear, particularly in light of the high degree of autonomy held over the administration of each case.

Similarly unclear was the process for case closure—how cases are deemed closed, how records are stored and archived, and how statistics concerning the administration of justice can be derived from these closed cases. As detailed in other chapters of this Report, enforcement of judgments is both unwieldy and ineffective in Vietnam. For instance, upon a final decision, the decision can be appealed for up to three years, and requests for appeals can be made by third parties who are not litigants to the case.

D. SUPPORTING INSTITUTIONS

The **Judicial Council** of the Supreme People's Court consists of 17 judges who review and decide upon selected Supreme People's Court decisions and have the authority to review any other court judgment. The Judicial Council also promulgates guidelines and other sources of assistance to judges and courts. In this latter capacity, the Judicial Council is in a position to significantly direct the process of court administration reform.

The **Institute for Judicial Science** consists of many lawyers, operating with the input of judges, and is an important source of support for the judiciary. The Institute—

- Drafts laws and regulations assigned to the judiciary by the National Assembly (i.e., laws that directly involve courts).
- Drafts guidelines to be issued by the Judicial Council to assist the lower courts.
- Coordinates donor assistance to the Courts.

There are many **court-related, donor-funded initiatives** relating directly or indirectly to court administration in Vietnam. They include the following—

- Denmark
 - Judicial training
 - Information technology projects that improve case-flow management in 64 Provincial Courts
 - Case-management software
 - Case accessibility through the Internet
 - Studies on judicial selection
 - Other assistance to economic courts
- United Nations Development Program
 - Judicial capacity-building in the District Courts
 - Overall needs assessment (2001)
 - Strengthening of the role of administrative courts
- Japan
 - Preparation of a manual on how to draft decisions
 - Assistance with the establishment of criteria for selecting judgments for publication
- Australia
 - Development of a bench book for judges available online and in loose-leaf format⁴⁷
 - Bench book training
- USAID/STAR
 - Judicial training in IPR
 - Support for drafting of the Civil Procedure Code and related implementation guidelines
 - Publication of Judicial Council decisions (2004–2005)
 - Supporting the Ministry of Justice efforts to draft a Judgment Enforcement Code, and Supreme People’s Court efforts to revise the Ordinance on Procedures for Settling Administrative Cases
 - Developing the Supreme People’s Court Web site

⁴⁷Available at <http://www.asianlii.org>.

- Support of initial efforts to revise the Law on the Organization of Courts, a new Law on “Contempt,” and a new Administrative Procedure Code

E. SOCIAL DYNAMICS

The demand for reform of the commercial courts in Vietnam is high from the private sector, and the government appears receptive to assistance in addressing change. The international donor community provides a ready supply of technical assistance for reform; however, a lack of coordination among donors and by the implementing agencies undermines the message of reform. Although all of the donor-supported initiatives listed above are valuable and important in principle, and individual projects and actors do share information about their respective process, there does not yet appear to be an organized coordination among donors providing assistance in court administration. Particularly with respect to the automation of court processes, the need for increased coordination, and consequently a more efficient use of assistance funding, is significant.

Demand for reform of the courts comes from both within and outside of the system. Judges are frustrated over the lack of resources at their disposal, both in terms of procedural guidance and tools for doing their work. Local lawyers and members of the private sector are angered by the vast number of rent-seeking opportunities throughout the process. Court users and local lawyers expressed a general lack of confidence in this critical branch of government.

F. RECOMMENDATIONS

- Publish the “Roadmap for Reform” of Courts so that it is a public document, subject to review, debate, and input from all interested parties.
- The Courts, in particular the Supreme People’s Court, the government, the Party, and the donor community should transform the current approach to court reform to a formal, long-term scheme, one that institutes a common form of case management, tracking and recordation throughout the country. The scheme should also entail a comprehensive system of long-range planning for integration of automation into the courts. It should consider the use of case differentiation (the practice of subjecting cases to different treatment according to their level of complexity), thereby allowing simple cases to flow through the system more efficiently.
- Research the concept of judicial independence in a single party state, and introduce it as a topic of discussion. Although interest in judicial independence is high in Vietnam, there simply is no consensus among the various interested parties as to what this concept actually means.
- Encourage law schools to provide extensive training on legal and judicial ethics in order to address concerns over rent-seeking.

X. FOREIGN DIRECT INVESTMENT

A. INTRODUCTION

Vietnam has considerably improved its environment for foreign direct investment (FDI) in recent years.⁴⁸ The recently passed Investment Law (IL) and Enterprise Law (both effective on 1 July 2006) to a large extent leveled the playing field by eliminating many distinctions and differences in treatment between domestic and foreign investors, and between private and state-invested enterprises. Nonetheless, a truly common legal framework has yet to be achieved. Also, the promulgation of key implementing regulations was significantly delayed, causing concern and confusion among investors—both domestic and foreign—as to which rules applied and how to organize new investments or changes to existing ones.

In addition to these IL-specific issues, three issues of long-term, fundamental interest to foreigners rise to the top of their list: 1) treatment of IPR; 2) the role of SOEs; and 3) the pervasiveness of corruption throughout Vietnam. Intellectual property is discussed in another chapter in this Report; the role of SOEs and corruption are cross-cutting issues discussed in Chapter I. Foreign investors in Vietnam also express concern about a number of specific issues ranging from the overall environment for trade, to tax and customs issues, to an overly rigid labor and employment environment, to a court system that struggles to achieve fair, swift, and predictable resolution of disputes.⁴⁹

Comparing Vietnam to the World: The Rankings that Foreign Investors Notice

Ease of doing business: 104 out of 175

World Bank *Doing Business in 2006*

(*Doing Business* also identifies Vietnam as the third fastest reforming country in the world)

Growth competitiveness: 77 out of 127

World Economic Forum *Global Competitiveness Report, 2006*

Corruption: 111 out of 163

Transparency International, *Corruption Perceptions Index, 2006*

GDP per capita: 157 out of 229;

Purchasing power parity: \$3,100

CIA World Factbook, 2006

B. LEGAL FRAMEWORK

The legal framework through which FDI enters a country and is then regulated consists of the country's constitutional provisions, laws, regulations, policies, and practices that define the rights and obligations of both the foreign investor and the host state. In Vietnam, as in other countries, bilateral treaties or multilateral trade agreements are also an intrinsic part of this framework.⁵⁰ A key, comprehensive source of information on Vietnamese law of particular

⁴⁸For a summary of specific trends in FDI in recent years, see European Union, *Needs Assessment for Trade Related Assistance in the Period 2007-2012*, 26 July 2005, pages 24-27 (hereinafter *EU Needs Assessment*).

⁴⁹See, e.g., American Chamber of Commerce in Vietnam Position Paper, "Key Issues for WTO Accession" (12 September 2005) (hereinafter "AmCham Key Issues Paper").

⁵⁰Vietnam's major trading relationships (the Bilateral Trade Agreement with the United States, other bilateral and regional agreements and organizational memberships, its membership in the World Trade Organization, etc.) are exhaustively detailed in U.S. Vietnam Trade Council Education Forum, *Catalog of Legal Updates: Vietnam Trade Policy Regime* (September 15, 2005) (hereinafter *Catalog of Legal Updates*) and the recent *EU Needs Assessment*, Chapter VI ("Framework for Trade and Investment").

interest to foreign investors is the *Catalog of Legal Updates: Vietnam Trade Policy Regime*, produced and regularly updated by the U.S. Vietnam Trade Council's Education Forum.

The Law on Foreign Investment. For nearly 20 years, Vietnam has made steady progress toward opening up its legal system to support not only domestic private enterprise, but also FDI, including the ability of foreigners to establish production facilities *or* become significantly involved in the operations of existing domestic enterprises. The commencement of *doi moi* (“renovation”) in 1986 led to many immediate changes underscoring Vietnam’s interest in tapping outside sources of capital, including the enactment of its first Law on Foreign Investment in 1987. In its continued efforts to encourage FDI, the National Assembly amended that law twice, replaced it entirely in 1996, and amended it again in 2000.⁵¹

Over the course of the law’s various iterations, as well as through key implementing regulations, Vietnam generally has acknowledged and integrated certain fundamental concepts of interest to foreign investors. These principles include equality with domestic enterprises in state pricing of inputs, elimination of compulsory requirements on importing and exporting, liberalization of policies concerning technology transfer and hiring employees, and unencumbered repatriation of profits.⁵² Pursuant to Ordinance 41-2002-PL-UBTVQH10 on Most Favored Nation and National Treatment, dated 25 May 2002, Vietnam is required to afford the same treatment to foreign investors as it provides to domestic entities, and, with certain not-insignificant exceptions,⁵³ to grant “national treatment” to foreign goods that have lawfully entered the country—that is, the same treatment afforded domestic goods. This ordinance is quite general, however, and its efficacy remains to be seen.

In its drive to accede to the WTO, which generally mandates equal treatment of foreign and domestic enterprises, Vietnam amended its legal framework and corporation framework in support of FDI again. The Investment Law and Enterprise Law of 2005 (both took effect 1 July 2006) aim to unify the principles for investment in Vietnam for domestic and foreign investors. Specifically, the IL consolidates the previous Law on Foreign Investment and the Law for Domestic Investment Promotion. The IL eliminates various restrictions on foreign investors, allowing them to conduct businesses in all sectors not specifically prohibited or restricted by law, and permitting them to choose the most appropriate legal form for their enterprise, as provided in the EL. The IL also vastly improved the dispute settlement mechanisms for investment disputes in which one or more parties are foreign investors by allowing those disputes to be resolved either in international arbitration or by a Vietnamese court or arbitration body. In addition, disputes between a foreign investor and the state can be resolved by international arbitration if so provided for in an international treaty to which Vietnam is a party, such as International center for Settlement Of Investment Disputes (ICSID),⁵⁴ or in a contract between the investor and “a

⁵¹See Baker and McKenzie, *Doing Business in Vietnam*, Vietnam Offices, 2001, page 5.

⁵²See generally *Business Issues Bulletin*, supra note 14, page 1; see also U.S. Vietnam Trade Council Education Forum, *The U.S.-Vietnam Bilateral Trade Agreement: A Survey of U.S. Companies on Implementation Issues*, 10 May 2004, pages 38-45 (hereinafter *USVTC Implementation Survey*).

⁵³The exceptions include (a) procurement conducted by the Government of Vietnam; (b) Government subsidies and supports provided to domestic manufacturer and their use of domestic content products; (c) time-allotment restrictions on broadcasting and television production; and (d) domestic transportation costs calculated on the basis of commercial activities of transportation. *Catalog of Legal Updates*, page 97.

⁵⁴Vietnam is not a member of ICSID.

representative of a competent State body.” These provisions are expected to make financing of foreign investment projects in Vietnam easier and less expensive.⁵⁵

For foreign-invested projects with less than 300 billion *dong* (approximately \$18,880,000) in invested capital and in non-conditional sectors, the IL requires investment registration and certification. Projects with invested capital of 300 billion *dong* or more, as well as investments in certain conditional sectors, are subject to investment evaluation and certification. Regardless of whether a foreign-invested project is subject to investment registration or evaluation, the investment certification amounts to a business registration, continuing the one-stop shop practice.⁵⁶

The IL does not expressly alter the current 30 percent limit on capital contribution and purchase of shares by foreign investors in Vietnamese companies; instead, the IL provides that the government shall regulate the ratio of capital contribution and purchase of shares by foreign investors.⁵⁷ However, such regulations have not yet been published.

Decree 108 (effective 25 October 2006) is the key implementing document for the IL provisions on direct investment.⁵⁸ Among other things, it lays out which agency has authority to approve investment projects and the procedures. Pursuant to Decree 108, most projects are subject to approval by the relevant people’s committee or, where one exists, the provincial/municipal zone management committee; projects in conditional sectors are subject to approval by the Prime Minister. Investment certificates are issued by the people’s committees or management committees, except in specialized sectors, such as banking and insurance, when the certificate is issued by the relevant line ministry. The Ministry of Planning and Investment no longer has any approval authority over investment projects. In addition to these procedures, the decree details the rights and obligations of investors, describes forms of investment, identifies sectors and geographical areas entitled to investment incentives, details provisions for implementation of investment projects, and identifies state administration of investment.

Decree 101 (dated 21 September 2006) governs the transition of FIEs and business cooperation contracts (BCCs) established before the IL to the new legal framework. Transformation is not mandatory, but the operation and duration of FIEs and BCCs that opt not to transition will be limited to those stated in their original investment license. Under Decree 101, an FIE can either re-register or convert to a new form of enterprise; an existing BCC can only apply for replacement of the investment license with an investment certificate; it cannot change its corporate form.

⁵⁵Disputes between domestic investors and disputes between a domestic investor and the state still must be resolved by a Vietnamese court or arbitration body.

⁵⁶By contrast, the investment registration and certification of domestic invested projects is in addition to the separate step of business registration.

⁵⁷Although the Vietnamese government announced in March 2005 that restrictions on shareholdings of foreign investors in certain Vietnamese companies would be eased, that change has not been forthcoming in practice. See, e.g., *AmCham Key Issues Paper*, page 1. The current shareholding restrictions are set forth in various Decisions and Circulars, as detailed in the *Catalog of Legal Updates*, *infra* note 59, Section 8.8.

⁵⁸The IL’s provisions on indirect investment are implemented through decrees and other documents issued pursuant to the Law on Securities.

Labor and employment laws. The Vietnamese Labor Code, adopted in 1994, met a number of international labor standards, including the conditions of work. Vietnam has worked with the International Labor Organization (ILO) and the United Nations Development Program (UNDP) to improve protection of worker rights. In 2002 the National Assembly approved amendments to the Labor Code (effective 2003) that improved collective bargaining and strike and dispute settlement procedures, expanded the scope of the labor law, and augmented social safety nets. The government has ratified a number⁵⁹ of core ILO conventions, including Convention 182 on the Worst Forms of Child Labor and Convention 138 on Child Labor, and is considering ratifying those on forced labor.

The notion of “at will” employment, that is, the right of employers to “hire and fire” employees according to the business needs of the enterprise, or for no reason at all, is not found in Vietnamese labor law. The Labor Code (2003) and its implementing regulations stipulate that once an employee has worked beyond the duration of an initial definite-term contract (for which there is a limit of two during the course of an employment relationship), dismissal can take place only “for cause”—that is, the employee’s action must fall within an enumerated list of actions that warrant dismissal. The law also establishes a rigorous set of formalities pertaining to employee discipline prior to dismissal.

Currently, Circular 24 (dated 26 September 2005) caps the number of foreigners that an enterprise may hire at three percent of the overall workforce. Circular 24 amended Circular 04 of 2004, which provided guidance for the implementation of Decree 105 of 2003, which, in turn, implemented the 2003 Labor Code. Circular 24 provides exceptions for businesses that operate in special sectors and employ a small number of people, and for businesses that have not yet begun production. These businesses may request authorization to hire foreigners in excess of the three percent cap for jobs that cannot be filled by skilled Vietnamese employees. The circular also clarifies the following categories: “foreigner with high technical skills” and “foreigner with many years working experience in their profession.” Foreign investors report that the three percent limit generally is not a problem with respect to large manufacturing concerns; however, where professional services such as information technology management are concerned, the cap restricts the import of badly needed know-how into the private sector.

Land Use. Pursuant to Vietnam’s Constitution, all land is owned by the people and is administered by the state. Land use rights may be granted for stable and long-term use. Although the legal framework pertaining to land use is gradually achieving clarity, considerable confusion exists over the right of foreigners to hold, build on, and otherwise use land.⁶⁰ Moreover, observers say, land use disputes in Vietnam drag on for months, even years. The confused condition of land use rights is a significant disincentive for foreigners considering investment in Vietnam, as detailed in this Report’s chapter on Real Property.

C. IMPLEMENTING INSTITUTIONS

The **Ministry of Planning and Investment** (MPI) is the central-level state administrative agency for investment. The provincial Departments of Planning and Investment are the

⁵⁹A complete list of the ILO Conventions ratified by Vietnam is available from the ILO Web site at <http://www.ilo.org>.

⁶⁰*Catalog of Legal Updates*, infra note 59, pages 110-11.

corresponding provincial-level administrative bodies. Under the IL and Decree 108, MPI no longer has any investment approval authority. MPI is no longer the certificate-issuing body for investment projects subject to approval by the Prime Minister. Instead, approvals of investment projects are handled either by the **Prime Minister** or the relevant **local people’s committee or management committee**. The Prime Minister approves projects in conditional sectors. The decentralization of investment project approval by people’s or management committees continues the trend started in 1996 when the government began decentralizing the license approval process, empowering local people’s committees to license investment projects within certain limits.⁶¹ As illustrated by the *Provincial Competitiveness Index* (PCI) developed by the USAID-sponsored Vietnam Competitiveness Initiative,⁶² certain provinces have developed a clear awareness that the clarity and effectiveness of their administrative processes has a direct effect on their potential for attracting investment. The PCI shows that even the strongest “structural conditions” for investment cannot override the importance of a sound regulatory framework and local government that is committed to enabling the path toward greater investment.⁶³

The MPI has developed attractive and effective promotional materials, publishes a widely-read periodical called the *Vietnam Investment Review*, is engaged in a variety of investment promotion activities, and is otherwise generally prepared to respond to inquiries from foreigners about the various opportunities for investment in Vietnam. In its promotional activities, MPI focuses on the following “selling points”: (a) Vietnam respects and values foreign investor; (b) Vietnam is socially and politically stable; and (c) Vietnam possesses strong human and natural resources. MPI identifies two of Vietnam’s fundamental disadvantages in the eyes of foreign investors as: (a) its limited infrastructure; and (b) the relatively small size of its market.

Observers say that the **National Assembly** (NA), as it presses forward with its agenda to bring Vietnam’s legal framework into conformity with international standards, has been receptive to the input of affected constituencies, including the private sector and foreign investors. This pattern continued with the passage of the IL, as the NA responded to the concerns of the domestic and foreign business community during deliberations over the draft. The NA has demonstrated increasing levels of independence and accountability in recent years. For example, NA delegates are not required to be Party members; the NA’s proceedings are televised; and the media subjects NA activity to an increasing degree of scrutiny and analysis.

Vietnamese **courts** may play an “implementing” role in the experience of foreign investors, but reports about their competence are overwhelmingly negative. As one long-time expatriate commented, “I cannot imagine taking anything to the courts,” due to what is perceived to be their hostility to foreigners, their lack of understanding of modern commercial law concepts, their administrative sluggishness, their general incompetence, and their corruption. One lawyer

⁶¹Under the prior investment licensing regime, the people’s committees in Hanoi and Ho Chi Minh City could approve projects valued at less than \$10 million; elsewhere, people’s committees could license projects having an investment capital of less than \$5 million.

⁶²USAID/Vietnam Competitiveness Initiative/Vietnam Chamber of Commerce and Industry, *The Provincial Competitiveness Index on the Business Environment in Vietnam: Summary Report*, May 2005 (hereinafter PCI). The PCI for 2006 repeated this clear link between a good economic regulatory system and attracting investment.

⁶³*Id.*, page 1.

explained that her firm encourages foreign direct investors to avoid the courts entirely by including arbitration clauses in their contracts so that all disputes flow to an international arbitration authority, rather than to a Vietnamese court or domestic arbitration tribunal. Another foreign businessman described two court experiences pertaining to the enforcement of contracts (labor and construction) that convinced him that district and provincial court judges were either utterly unversed in Vietnamese law or swayed by “informal payments” from the opposing party. With respect to IPR, although a core group of judges has received training for the purpose of becoming “IPR specialists” by the USAID/STAR Project, the consensus throughout the foreign investment community remains that judges lack fundamental facility with IPR matters and need significant training, regulatory guidance, and mentoring in this area.

D. SUPPORTING INSTITUTIONS

The **Vietnam Chamber of Commerce and Industry (VCCI)**, though not wholly independent from the state,⁶⁴ is an effective advocate on behalf of the interests of the private sector, including foreign investors. With the assistance of USAID/STAR, it has proven to be a strong force in encouraging public input into new laws, and its publications provide frank and high-quality analyses of issues impacting the economy. The VCCI’s *Vietnam Business Forum* is a weekly online publication that provides information of interest to foreign investors. The VCCI’s participation in the *Provincial Competitiveness Index* (2005 and 2006) lends significant credibility to the initiative among its target audience, i.e., public officials within individual provinces. VCCI plays a role in marketing Vietnam to potential foreign investors through trade shows, participation in trade missions, and other methods.

The **U.S. Vietnam Trade Council (USVTC)** is also a strong and effective voice on behalf of foreign and domestic private investors in Vietnam. Established in 1989, USVTC was instrumental in organizing private sector support for the negotiation of the U.S.-Vietnam Bilateral Trade Agreement and again played an important role in support of Vietnam’s efforts to accede to the WTO. USVTC provides significant training and technical assistance to key officials and ministries, and its publications, most especially its *Catalog of Legal Updates*, are “required reading” for potential foreign investors. **USVTC’s Education Forum** works with representatives of the international trade community (including the U.S. Consulate, American legal practitioners, the Vietnamese legal community, and businesses) to establish a public library containing resources and references on IPR law. Housed in a section of the General Sciences Library in Ho Chi Minh City, this project aims to build the capacity of local lawyers, judges, law students, and businesspeople so that they are better able to address specific IPR issues arising from Vietnam’s economic integration.

Several international chambers of commerce, including the **American Chamber of Commerce** and the **European Chamber of Commerce**, are important resources for foreign investors seeking to do business in Vietnam. These groups provide significant information and networking opportunities, and also represent the interests of foreign investors to various government organizations engaged in legislative reform.

⁶⁴See *EU Needs Assessment*, pages 98-99.

USAID/STAR provided technical assistance to the development of the IL and the EL, as well as a large number of other laws and regulations necessary for Vietnam to implement the U.S.-Vietnam BTA and join the WTO. The USAID/STAR Project started in the fall of 2001, and is now in its 6th year of providing technical assistance to over 45 Vietnamese government agencies. USAID/STAR has enjoyed unprecedented access to government agencies in the development of key legislation—starting with support to the agency responsible for developing the legislation, through the National Assembly as it debates and adopts the legislation, and, finally, with the agency charged with drafting implementing regulations.

The quality of **business support services** in Vietnam varies. There is a relatively strong representation of international law firms and consulting services in Hanoi and Ho Chi Minh City. They provide legal guidance and representation, as well as a range of accounting, auditing, valuation, and consulting services. These firms generally adhere to the highest international standards pertaining to their respective professions, but they are expensive and generally inaccessible to all but the largest international corporations (or the most promising domestic ones). Domestic law firms and consulting services are improving as their staffs increasingly offer skills (including foreign language skills) developed through working and studying elsewhere in the region and the world. A common complaint of foreign investors, however, remains the challenge of finding strong professional, managerial, and technical expertise among local practitioners. And, as further discussed below, one aspect of professional services that leaves potential investors enormously uncomfortable and diminishes their desire to invest in Vietnam is the common practice of paying domestic firms to negotiate the system of “informal charges” that exist throughout the regulatory framework.

E. SOCIAL DYNAMICS

Corporate governance. Domestic enterprises in Vietnam seeking increased access to capital must consider how they look in the eyes of a potential foreign investor. Namely, what is the *risk* that an investor faces by getting involved with the business? Risk analysis has many components, having to do both with factors beyond the company’s control (the quality of the courts, the country’s security situation, the market for goods, the local infrastructure, etc.) *and* with factors very much within the company’s control (the quality of its record-keeping, the professionalism of its officers and directors, the soundness of its employee relations, and so forth). These latter items constitute matters of corporate governance, an area that holds considerable room for improvement in Vietnam. Observers commented that although there is a great deal of foreign capital that could potentially flow into Vietnamese businesses, the absence of strong corporate governance practices in both private and publicly-held companies is a major obstacle to increased foreign investment, and a reason why most FDI is done through 100 percent foreign-owned entities. One businessman said that he was even aware of foreign investors who wished to *divest* their existing interests in Vietnam firms, due to the firms’ lack of meaningful and honest corporate governance practices. The strong corporate governance provisions in the EL may overcome some of these concerns over time, as Vietnamese enterprises develop a sounder understanding of the benefits of better, more transparent corporate governance practices.

Access to information. Potential foreign investors need information—clear, reliable and consistent information. Any country may improve its chances of attracting FDI by providing

unambiguous and accessible information on laws, rules, procedures, and the business environment generally. Among Vietnam's relative strengths and continued improvements compared to other emerging markets is the wealth of information that is available about its laws and economy, and the many sources (including implementing, supporting, and donor institutions) that provide it. The body of available information, however, is not complete: key Party initiatives that deeply concern the public, such as court reform and anti-corruption initiatives, are often not developed in an open and transparent manner.

Vietnam as a market. The “market-seeking” investor aims to *expand its markets*, having found that its home market is already saturated with certain types of goods or services, or that another economy demonstrates a particular demand for (and ability to support) the new product or service. Given its relatively low *per capita* income, Vietnam has not begun to realize its potential as a market for foreign investors. More FDI is likely to flow to Vietnam as its GDP and personal incomes grow.

Domestic suppliers for foreign enterprises. The European Union recently pointed out that, “although FDI and the foreign sector is becoming an important contribution to the capacity for production and exports, there are few linkages between foreign and local firms, so that the benefits from FDI are not as large as expected.”⁶⁵ Individuals asked about foreign engagement of domestic services had a variety of comments on this matter. With respect to use of domestic goods, they said, the major tipping points for foreign enterprises are the quality of the goods and the local company's reputation for on-time delivery. With respect to services, foreign enterprises exhibit a strong bias toward international service providers. Foreign investors and firms are required to use domestic distributors for their goods.

F. RECOMMENDATIONS

- Promulgate all regulations necessary to effectively implement the IL as quickly as possible to avoid uncertainty about the rules governing investment in Vietnam.
- Eliminate all unnecessary, burdensome, and duplicative regulatory procedures and requirements related to investment through a transparent process under strong central-level leadership.
- Direct programs on corporate governance, with an emphasis on attracting foreign capital, toward Vietnam's mid-size and larger domestic firms.
- Continuously catalog, monitor, coordinate, and leverage the wide variety of FDI-related donor initiatives.

⁶⁵*EU Needs Assessment*, page 26.

XI. INTERNATIONAL TRADE LAW

A. INTRODUCTION

At least three sources set forth in exhaustive detail Vietnam's current legal framework pertaining to international trade: 1) the *Catalog of Legal Updates: Vietnam Trade Policy Regime*, published and regularly updated by the U.S. Vietnam Trade Council's Education Forum;⁶⁶ 2) the European Union's July 2005 *Needs Assessment for Trade Related Assistance in the Period 2007-2012*;⁶⁷ and 3) the Office of the U.S. Trade Representative's *2005 National Trade Estimate Report on Foreign Trade Barriers* (Vietnam chapter).⁶⁸ Rather than reiterating the content of those documents, this chapter summarizes the most recent critical information pertaining to Vietnam's legal framework for trade. It then focuses on the challenges facing Vietnam's trade-related institutions (both implementing and supporting) and the social dynamics that relate directly to Vietnam's ability to meet its trade-related goals.

Although Vietnam has nearly succeeded in constructing a legal framework that can support a dynamic environment for international trade, its many potential trading partners continue to look for stronger evidence of a genuine commitment to a level playing field between domestic companies and international firms. Evidence of this commitment is sought in such primary areas as subsidization of SOEs, customs, IPR, and overall compliance with existing trade agreements. Vietnam also faces the challenge of bolstering implementation of its own domestic trading laws, such as anti-dumping and countervailing duty provisions, and in developing stronger capacities generally with respect to regional and international trade.

B. LEGAL FRAMEWORK

WTO Accession. On 11 January 2007, Vietnam became the 150th member of the WTO. Membership in the WTO followed more than 11 years of multilateral and bilateral WTO negotiations, and built upon five years of successful implementation of the U.S.-Vietnam BTA. As designed by the Vietnamese and U.S. governments, the U.S.-Vietnam BTA was a stepping stone to the WTO. Many of the legal reforms that had to be completed before WTO accession were made by Vietnam during the process of implementing the U.S.-Vietnam BTA. Vietnam's commitments are specified in the Working Party Report, Tariff Schedule, and Service Schedule. These documents are available online from the WTO web site.⁶⁹ Vietnam's National Assembly ratified the WTO Accession Protocol using the legal framework provided by the recently-enacted Law on Treaties, which allowed for the first-time amendment to several laws through one legal instrument (akin to an omnibus bill). The Law on Treaties also clarifies how treaty commitments such as the WTO's should be enacted into domestic law.

⁶⁶U.S. Vietnam Trade Council Education Forum, *Catalog of Legal Updates: Vietnam Trade Policy Regime*, 15 September 2005 (hereinafter *Catalog of Legal Updates*).

⁶⁷European Union, *Needs Assessment for Trade Related Assistance in the Period 2007-2012*, 26 July 2005 (hereinafter *EU Needs Assessment*).

⁶⁸Office of the U.S. Trade Representative, "Vietnam," *2005 National Trade Estimate Report on Foreign Trade Barriers*, 30 March 2005 (hereinafter *National Trade Estimate*).

⁶⁹http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#vnm.

The following summary of Vietnam's commitments is sourced from information available from the WTO and summarized in the January 2007 *U.S. Vietnam Trade Council Catalog of Legal Updates*.⁷⁰

Goods Commitments. For the majority of agricultural and non-agricultural goods, Vietnam is promising ceilings (or “bound” rates) on duties ranging between zero and 35 percent. Some of these involve reductions phased over periods up to 2014, the precise end date varying from product to product.

Among products with higher ceilings are: alcoholic drinks, tobacco products, instant coffee, and some related products; new and used motor vehicles and components; and roof tiles. Used vehicles less than five years old can be charged additional flat-rate duties up to specified limits.

These “bound” rates are legal ceilings. The actual duties that Vietnam can charge (the “applied” rates) can be lower than the committed rates. Among the details of Vietnam's commitments is a promise not to charge higher applied rates on rapeseed (also known as colza or canola) and derived meal, oil, and other products than the duties actually charged on soy products, thus allowing the oilseed products to compete with soy.

In the separate working party report, Vietnam has also reserved the right to charge applied duties in the form of specific duties (e.g., dollars per ton) instead of percentages of the price (*ad valorem*) so long as the result stays below the committed ceilings.

A handful of products are going to be protected with tariff quotas (higher duties for quantities outside the quotas, and lower duties for quantities within the quotas): eggs, tobacco, sugar, and salt (which Vietnam says is the main income source for 100,000 poor farmers in coastal areas). However, Vietnam will expand the quotas until they disappear according to agreed timetables.

Vietnam has also signed the “plurilateral” Information Technology Agreement (“plurilateral” meaning only some WTO members have signed). For these products, Vietnam has agreed to allow imports in duty-free. In some cases, the zero duty will apply immediately; in others it will be achieved gradually over periods ending in 2010 to 2014.

In agriculture, Vietnam has promised not to subsidize exports. It will be allowed to support its farmers domestically with trade-distorting supports (“Amber Box” or “Aggregate Measurement of Support”, i.e., supports that have a direct impact on prices or quantities produced) of up to 3,961.5 billion *dong* (about \$246 million) in addition to the usual allowance for developing countries (known as *de minimis*) of up to 10 percent of the value of domestic agricultural production. As with all WTO members, Vietnam can also spend unlimited amounts on supports that do not distort trade (“Green Box” supports).

⁷⁰See http://www.wto.org/english/news_e/pres06_e/pr455_e.htm and *Catalog of Legal Updates*, 16 January 2007.

Services Commitments. Vietnam has made commitments on a range of services. In some cases, Vietnam reserves the right to limit foreign ownership of service companies operating in Vietnam—for example, in some telecommunications services the eventual limits can be 49 percent or 65 percent, depending on the service. In a few cases, e.g., accountancy, permitted foreign ownership is immediately 100 percent. In many cases, the permitted foreign ownership is phased in to reach 100 percent after a few years (for example, express delivery courier services after five years).

As is normal in this sector, the effect of the commitments depends also on complex relationships with domestic regulations—for example in the first two years, 100 percent-foreign-owned architectural firms can only serve foreign companies. The commitments and some of the regulations are in the “schedule” (lists) of commitments; other information on the regulations is in the working party report.

Multilateral Commitments. The working party report outlines the economic context and the institutional and legal framework. It includes Vietnam’s commitments to undertake reforms or to preserve reforms that have been introduced in order to secure membership. Among the commitments are—

- **WTO agreements dealing with rules:** Vietnam will comply with the Customs Valuation, Rules of Origin, Pre-shipment Inspection, Anti-dumping, Safeguards, Subsidies, and Trade-Related Investment Measures agreements, with some provisions phased in over a period.
- **Foreign exchange:** Vietnam will abide by IMF and WTO rules.
- **State enterprises:** commercial business (i.e., business that is not conducted to supply the government) will be conducted on commercial terms without interference from the government. A number of products are listed as subject to state trading enterprises because of consumption restrictions, for cultural and moral reasons, or because they are “natural monopolies”: tobacco products, petroleum, cultural products such as newspapers, journals, and audio-visual materials, and aircraft.
- **Privatization and equitization of state enterprises:** this will be handled transparently, with Vietnam supplying annual reports while the program lasts.
- **Pricing and price controls:** Vietnam will comply with WTO agreements and notify the WTO of actions it takes to control prices.
- **Policy-making and enforcing framework:** a number of administrative and legal structures have been introduced or strengthened so that WTO provisions are applied, including the possibility of investigation and judicial review to deal with related complaints.
- **Trading rights (the right to import and export):** this was a subject of tough negotiations partly because of different registration procedures for foreign and domestic traders. A new law has now harmonized the procedure for both. Among the many additional details are a commitment that all foreign firms and individuals will be able to engage in importing and exporting as importers/exporters “of record” so long as they register, and importers will be able to choose their domestic distributors.
- **Excise duties:** the different duties charged on alcoholic drinks attracted particular attention during negotiations. Vietnam has agreed to simplify the structure within

- three years by applying a single rate for all forms of beer and a single rate for all spirits containing 20 percent alcohol or more. This has allayed concerns from some countries that the previous structure might discriminate against imported beers that have different packaging, or against imported spirits with higher alcohol content.
- **Quantitative and other restrictions:** quotas, bans, and other restrictions will be abolished, including import bans on cigarettes, cigars, and used vehicles; alternatively, these restrictions will only be applied according to WTO rules.
 - **Export restrictions:** Vietnam maintains export controls on products such as rice and some wood products and minerals (to prevent illegal exploitation). It pledges to apply controls on these products in a way that conforms to WTO agreements.
 - **Standards:** Vietnam will apply the Technical Barriers to Trade and Sanitary and Phytosanitary Measures agreements without a transition period.
 - **Government procurement:** Vietnam will consider signing the Government Procurement Agreement after it has become a WTO member.
 - **Intellectual property:** almost 33 pages of the report describe in detail the administrative and legal set-up in the country. Vietnam will comply with the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement immediately, without any transition period.

U.S.-Vietnam Bilateral Trade Agreement. Implementation of Vietnam’s landmark U.S.-Vietnam BTA with the United States, entered into force on 10 December 2001, continues to produce results that benefit the Vietnamese economy. By normalizing economic relations between the two countries, the U.S.-Vietnam BTA effectively opened the U.S. market overnight for Vietnamese exporters. Bilateral trade and investment have boomed since the U.S.-Vietnam BTA came into effect.⁷¹ Vietnamese exports to the U.S. have grown more than eight-fold from 2001 to 2006, while U.S. exports to Vietnam have more than doubled. The U.S. is now the largest market for Vietnamese exports. U.S. foreign investment into Vietnam has increased rapidly as well. As shown by a recent study by the Vietnamese Foreign Investment Agency and USAID/STAR, “U.S.-related” FDI, which includes FDI sourced directly from the U.S. combined with FDI from U.S. overseas subsidiaries operating in third countries (such as Singapore), has grown almost five-fold since the U.S.-Vietnam BTA came into effect. U.S.-related FDI has been a leading source of FDI into Vietnam over the last three years.

U.S. exports to Vietnam were around \$1.1 billion in 2006, down slightly from 2005. Although the longer-term growth trend of U.S. exports to Vietnam since U.S.-Vietnam BTA implementation averages around 20 percent a year, it is widely agreed that the American presence in Vietnam is well below its potential.⁷²

The U.S.-Vietnam BTA, which was built on a framework of WTO principles, required that Vietnam make major reforms in many aspects of trade in goods and services, IPR protection, development of investment relations, trade facilitation, transparency, and the right to appeal administrative determinations. The U.S.-Vietnam BTA also contains requirements for improving

⁷¹See the Central Institute for Economic Management and STAR-Vietnam, “Assessment of the Five-Year Impact of the U.S.-Vietnam Bilateral Trade Agreement on Vietnam’s Trade, Investment, and Economic Structure.” National Political Publishing House, 2007.

⁷²See Michael W. Marine, “Taking Stock,” Speech at the Annual Meeting of the American Chamber of Commerce, Hanoi, Vietnam, 21 September 2005.

the legal and judicial systems necessary to provide effective means for resolving commercial disputes and protecting property rights. In particular, the transparency and right to appeal obligations required fundamental improvements in economic governance. Laws and regulations had to be published before coming into effect, administrative and regulatory procedures had to be open, and businesses and citizens had to have the right to protest government decisions through open administrative procedures—with due process, written rulings, and, as a last resort, appeal to the courts.

Since 2001, the National Assembly in Vietnam has adopted a vast number—more than 50—new or amended laws and ordinances to conform to the country’s commitments in the U.S.-Vietnam BTA, with an additional five U.S.-Vietnam BTA/WTO-related laws scheduled for adoption in 2007 (including the Judgment Enforcement Code). In this regard, the U.S.-Vietnam BTA provided a five-year head start to accomplish many of the legal reforms required for WTO accession.

Key new or amended laws adopted to implement the U.S.-Vietnam BTA (and join the WTO) include the following—⁷³

- Ordinance No. 41 on MFN and National Treatment (1 October 2002)
- Ordinance No. 43 on Post and Telecommunications (1 October 2002)
- Law No. 02 on Amendment of Law on Promulgation of Legal Instruments (Law on Laws) (2003)
- Ordinance No. 08 on Commercial Arbitration (1 July 2003)
- Law No. 03 on Accounting (1 January 2004)
- Law No. 04 on Statistics (1 January 2004)
- Law No. 07 on Amendment of Law on Value Added Tax (1 January 2004)
- Law No. 08 on Amendment of Law on Special Sales Tax (1 January 2004)
- Law No. 10 on Amendment of Law on the State Bank of Vietnam (1 August 2003)
- Ordinance No. 23 on Food Safety and Hygiene (1 November 2003)
- Law No. 13 on Land (1 July 2004)
- Law No. 16 on Construction (1 July 2004)
- Law No. 19 on Criminal Prosecution (amended) (1 July 2004)
- Ordinance No. 20 Against Dumping of Imported Goods (1 October 2004)
- Law No. 20 on Amendment of Law on Credit Institutions (1 October 2004)
- Law No. 21 on Bankruptcy (15 October 2004)
- Law No. 22 on Inspection (1 October 2004)
- Civil Procedure Code, No. 24 (1 January 2005)
- Law No. 26 on Amendment of and Addition to Law on Complaints and Denunciations (1 October 2004); amended again by Law No. 58 (1 July 2006)
- Ordinance No. 22 on Measures Against Subsidized Goods Imported into Vietnam (1 January 2005)
- Law No. 27 on Competition (1 July 2005)
- Law No. 31 on Promulgation of Legal Instruments of People’s Councils and People’s Committees (1 April 2005)
- Civil Code, No. 33 (1 January 2006)

⁷³The date is a reference to the effective date of the law/ordinance.

- Commercial Law, No. 36 (1 January 2006)
- Law No. 41 on Conclusion, Accession to and Implementation of International Treaties (1 January 2006)
- Law No. 42 on Amendments of Law on Customs (1 January 2006) (amends the Customs Law adopted in 2001)
- Law No. 45 on Import and Export Duties (1 January 2006)
- Law No. 49 on Negotiable Instruments (1 July 2006)
- Law No. 50 on Intellectual Property (1 July 2006)⁷⁴
- Law No. 51 on Electronic Transfers (1 March 2006)
- Law No. 55 on Anti-Corruption (1 June 2006)
- Law No. 59 on Investment (1 July 2006)
- Law No. 60 on Enterprises (1 July 2006)
- Law No. 65 on Lawyers (1 January 2007)
- Law No. 70 on Securities (1 January 2007)
- Law No. 68 on Standards and Technical Regulations (1 January 2007)
- Law No. 82 on Notarization (1 July 2007)

The USAID/STAR Project provided technical assistance to a large number of Vietnamese government agencies in the development of almost all of the above draft legislation, including the Ministries of Justice, Trade, Finance, Science and Technology, and Planning and Investment, and to the Office of the Government, the Supreme People’s Court, the State Securities Committee, the Inspectorate General, the State Bank, and the National Assembly as it debated the draft legislation.

In addition to these legal reforms, the U.S.-Vietnam BTA committed Vietnam to opening up its markets. Many of the market-access commitments “will be” introduced over two to 11 years; nonetheless, Vietnam agreed to open a range of investment areas and more than 20 of its service sectors to greater U.S. competition. These market-access commitments were instrumental in spurring on reforms in key sectors, such as banking, to ensure the competitiveness of the domestic sector. The U.S.-Vietnam BTA required Vietnam only to reduce tariffs for approximately 250 (of more than 10,000) tariff lines (phased in over time). Deeper reductions in tariff levels and greater market access for services were left for the multilateral WTO accession negotiations.

Today, the legal framework necessary to conform to the U.S.-Vietnam BTA (and WTO) is, largely, in place. A remaining challenge is the effective implementation of the many new laws in a way that avoids unduly burdening the private sector with too many regulatory procedures, licensing requirements, approvals, etc. The adoption of such a large number of reforms has reportedly increased administrative red tape, permits, inspections, and the general regulatory burden on businesses. Therefore, over the next several years there should be a greater focus on building the capacities of Vietnam’s institutions to implement and enforce the new legal framework. This will be increasingly important as Vietnam fine-tunes the legal system to fully conform to the WTO commitments.

⁷⁴Vietnam also acceded to a number of international IP conventions. These are discussed in more detail in Chapter XVI on Intellectual Property.

ASEAN Free Trade Agreement (AFTA). The ASEAN Free-Trade Area (AFTA) covers the 10 countries of the Association of Southeast Asian Nations (ASEAN)⁷⁵ and has resulted in the reduction of tariffs for over 4,000 categories of products since 2000. Yet implementation of AFTA tariff provisions has proven challenging. Several factors may be responsible for low ASEAN compliance. First, the paperwork involved is said to be arduous, and many businesses are unaware that the concessionary tariffs even exist. For countries with low tariffs in general, such as Singapore, the difference between the Common Effective Preferential Tariff (CEPT) and the ordinary rate might not be considered significant. The countries with high tariffs, like Myanmar, are reluctant to cut into their own revenue by promoting exploitation of the CEPT.⁷⁶

Despite AFTA's charge to remove trade barriers in the region, an increasing proportion of Vietnam's exports are sold to non-ASEAN countries. The ratio of Vietnam's exports to the other ASEAN members has dropped from 19.3 percent of the country's total exports in 1995 to 14.7 percent in 2004.⁷⁷ Moreover, as pointed out by the European Union, the regional integration process in Southeast Asia is "uneven and directed towards asymmetrical commitments and overlapping agreements, such as those concluded with the framework of ASEAN, APEC [Asia-Pacific Economic Cooperation] and bilateral agreements."⁷⁸ Inadequate regional implementation, overlapping commitments, and ongoing uncertainty over how to cope with goods coming from China point to an immediate need for Vietnam to consolidate its trade commitments and, where appropriate, clarify and accede to the regional authority that it has joined.

Tariffs. Vietnam's Tariff Schedule is now consistent with the ASEAN Harmonized Tariff Nomenclature, which is itself based on the Harmonized System (HS) 2002 of the World Customs Organization. Three tariff rates apply to goods imported to Vietnam: 1) normal trade relations (NTR)/Most Favored Nation (MFN) rates, which apply to all WTO member countries; 2) Common Effective Preferential Rates, which in theory (though not in practice, as noted above) apply to goods imported from ASEAN countries; and 3) general tariff rates, which are 50 percent higher than NTR/MFN rates.⁷⁹ Vietnam continues to implement certain tariff reductions agreed to in the U.S.-Vietnam BTA. Vietnam's WTO tariff schedule is now available online at the WTO Web site.

Trade Remedies. A series of ordinances enacted in 2004 aimed to regulate imports to Vietnam in anticipation of more vigorous trade activity in the future.⁸⁰ Ordinance 42 allows Vietnam to take protective measures in order to safeguard its domestic manufacturing industries against serious losses when there is a sudden increase in import of goods such that domestic manufacturers are threatened. Ordinance 20 is Vietnam's Antidumping Law; it prescribes a range of measures to prevent and counteract dumping when the MOT concludes that imported goods have been dumped at a significant dumping margin, that the volume and value of goods dumped is not insignificant, and that the dumping of goods causes, or threatens to cause, significant loss in a domestic manufacturing industry. Ordinance 22 is an "anti-subsidy

⁷⁵Brunei, Indonesia, Malaysia, the Philippines, Singapore, Thailand, Cambodia, Laos, Myanmar, and Vietnam.

⁷⁶"Free Trade in South-East Asia: More Effort Needed," *The Economist*, 29 July 2004.

⁷⁷"Exports to ASEAN down despite tariff cuts," *VNEconomy*, 6 September 2005.

⁷⁸*EU Needs Assessment*, Section III.3.

⁷⁹*National Trade Estimate*, pages 657-58.

⁸⁰For more detail on these ordinances, see *Catalog of Legal Updates*, Section 5.13.

measure” that creates two means of redressing a MOT finding that a government has unduly subsidized a product that is imported into Vietnam—1) an anti-subsidy duty; and 2) a formal means of encouraging the government at issue to terminate or reduce its subsidy. These ordinances conform to the basic principles of the corresponding WTO agreements on antidumping, countervailing duties, and safeguards.

Trade remedy investigations are carried out by the Competition Authority within the MOT. The authority also carries out investigations under the Competition Law. Currently, the capacity to effectively undertake trade remedy investigations and implement the ordinances is low due to a lack of technical capacity within both the MOT and the supporting community that might otherwise be involved in identifying and responding to inappropriate trading activity. Due in particular to Vietnam’s concern over unduly subsidized or dumped imports from China, there is increased urgency to develop these capacities.

IPR. The state of intellectual property rights is of enormous concern to foreign enterprises, both importers and exporters. This topic is detailed in the intellectual property chapter of this Report.

C. IMPLEMENTING INSTITUTIONS

The portfolio of the **MOT** extends across the areas of import and export; domestic goods circulation and trade services; consumer protection; competition; anti-monopoly; anti-dumping; electronic commerce; market management; and trade promotion. The ministry is the principal ministerial authority in bilateral, regional, and multilateral trade negotiations. The European Union recently expressed concern over the capacity of the MOT to fulfill the entirety of its portfolio of obligations—

The capacity of the small team of trade policy experts and negotiators of the MOT is stretched to the limit. They are overcharged as a result of a large number of multilateral and bilateral WTO accession and regional integration negotiations. The WTO accession-related law-making process has not yet finished either. As a result, MOT has difficulties to develop strategies on Vietnam’s participation in regional economic integration in Asia and bilateral trade negotiations. The MOT has very limited capacities to conduct economic research, though the need for WTO and AFTA impact studies is substantial.⁸¹

The inter-ministerial **National Committee on International Economic Cooperation** (NCIEC) is the highest forum for trade policy formulation. NCIEC is an advisory body of the Prime Minister and only agencies of the government are represented. Ministries involved in WTO accession negotiations have established both a WTO Task Force and WTO “focal points.” Overall coordination of the accession negotiations is carried out in the framework of NCIEC, but on a day-to-day basis, the MOT is the main coordinating body. The MOT is responsible for disseminating information about the WTO accession and other trade negotiations to the provinces, the business community, and civil society.⁸²

⁸¹Id.

⁸²*EU Needs Assessment*, Section IV.2.

In any country, the **Customs Agency** is often viewed as the “face” of a country’s commitment to trade—the effectiveness and professionalism of its officers generally reveal whether trade is viewed by the state as an opportunity for economic development, or as a way-station for bureaucracy, political favoritism, and individual enrichment. At this time, the Vietnam’s customs agency—withstanding a variety of legislative, regulatory, and implementing improvements⁸³—is perceived as corrupt. The challenges facing the Customs Department are discussed in Chapter XII on Flow of Goods and Services.

The **Ministry of Health** (MOH) regulates the sale and distribution of pharmaceuticals in Vietnam, and is charged with development and enforcement of technical regulations for pharmaceuticals. Frequent trade-related complaints about the MOH include the lack of capacity and commitment to level the playing field for pharmaceuticals in Vietnam, and transparency and consistency with respect to the licensing procedures.⁸⁴

D. SUPPORTING INSTITUTIONS

The institutions that sustain an environment conducive to trade permeate a society. Several of Vietnam’s key supporting institutions—including the **Vietnam Chamber of Commerce and Industry**, and foreign organizations like the **U.S.-Vietnam Trade Council** and the various **international chambers of commerce**—are discussed in this document’s chapter on FDI. Key supporting institutions in Vietnam also include—

The **media**. Vietnam has a relatively robust media, including newspapers, magazines, television stations, and Internet-based media, which generally regard trade with foreigners as a desirable concept. Among Vietnam’s relative strengths compared to other emerging markets is the wealth of **information** that is available about its laws and economy, and the many sources (including implementing, supporting, and donor institutions) that provide it. On the other hand, observers have identified weaknesses in certain types of information that are available to potential trading partners, including updated laws and regulations, schedules for other fees, and even clear statements of licensing procedures. Donor-supported improvements, such as the publication of some court decisions, better use of the Official Gazette, and development of libraries and Internet resources, has strengthened the information environment, yet there still does not seem to be a clear and open commitment to the free flow of information at all levels of government.

Donors. The donor community is a key player—or set of players—in the supporting environment for trade in Vietnam. For example, the Vietnam Business Forum, organized and co-chaired by the Ministry of Planning and Investment (MPI) and the World Bank/IFC, meets twice a year just before the Donor Consultative Meetings to provide strategic guidance and technical assistance. Sectoral committees meet more often over the course of the year. A challenge for Vietnam is to manage the enormous outpouring of support from a multitude of multilateral, regional, and bilateral sources. Although donors themselves endeavor to coordinate their activities, there is a clear consensus that coordination could be more effective, and donors must rise to this particular challenge. A proper starting point in the short-term could be the universe of trade-related needs identified by the European Union in its recent *Needs Assessment for Trade*

⁸³See, e.g., STAR-Vietnam, “Workplan for 2005 and Report on Project Activities Completed in 2004,” 6 June 2005, pages 27-28.

⁸⁴*National Trade Estimate*, page 661.

Related Assistance. Beginning with the scores of technical assistance options listed in the *Needs Assessment*, along with an updated digest of donor activities currently taking place, a coordinated plan could be devised among the donors and with the Vietnamese Government for the most effective use of resources in the short-, mid-, and long-term. The UK Department for International Development (DFID) and AusAID have launched an effort to coordinate the implementation of Vietnam's WTO commitments through a multi-donor trust fund. This effort is being coordinated by the World Bank.

E. SOCIAL DYNAMICS

Although Vietnam is regarded as a very promising country with which to trade, it also is at a critical point in the development of its long-term reputation and perceived desirability as a trading partner. A series of technical and social challenges confront Vietnam as it strives to enter its post-WTO accession phase, including—

- Reconciliation of the content of the various sources of trade law so that those attempting to navigate the system are not foiled by inconsistencies.
- Removal of the state from enterprises and industries where it does not belong, with the understanding that doing so will liberate opportunities for growth in the private sector.
- Realization of the far-reaching changes that are anticipated through the new legal regime through capacity-building of implementing and supporting institutions.
- Long-range planning by the state in the area of information technology, which can represent an enormous boost to productivity, but also can constitute an overwhelming expense fraught with administrative challenges.
- Greater integration of private sector perspectives into policy development mechanisms.
- Concentrated efforts to respond to areas of particular concern to outsiders, including customs, IPR protection, and corruption.

All of these challenges require an assessment of options, a declaration of priorities, and strong coordination within the donor community.

F. RECOMMENDATIONS

- Fully implement all of the market access commitments in the U.S.-Vietnam BTA and WTO. Compliance with the U.S.-Vietnam BTA will be viewed by potential trading partners as a basis for whether to do business in Vietnam.
- Assess and evaluate commitments to AFTA, with a view to determining the value of acceding to its commitments and enforcing similar acceptance and implementation by its partners.
- Single out the MOT for technical assistance and capacity building, with special attention given by donors to coordination of assistance and leveraging of resources.
- Donors should engage in a coordinated plan for the most effective use of resources in the short-, mid-, and long-term, beginning with the scores of technical assistance options listed in the EU's *Needs Assessment for Trade-Related Assistance*, along with an updated digest of donor activities currently taking place.

XII. FLOW OF GOODS AND SERVICES

A. INTRODUCTION

In 2005, flows of goods in and out of Vietnam totaled more than \$58.4 billion. Of these flows, \$32.2 billion in goods were exported, while \$36.8 billion were imported.⁸⁵ This output includes Economic Processing Zones (EPZs) and Industrial Parks (IPs), which account for 38 percent of the country's production value.⁸⁶ Together, these zones attracted just over 50 percent of FDI. Top trading partners included the United States, China, Japan, Taiwan, and Singapore, and top traded goods involved petroleum and petroleum products, agricultural products, textiles and apparel, and fishery products. In 2006, China became Vietnam's top trade partner with \$8.7 billion of two-way trade, overtaking the U.S. share of \$7.6 billion. The United States, however, remained Vietnam's largest export market.

VIETNAM'S TOP TRADING PARTNERS, 2004 (percent of trade)

<u>Exports</u>	
US	18.8
Japan	13.2
China	10.3
Australia	6.9
Singapore	5.2
<u>Imports</u>	
China	13.9
Taiwan	11.6
Singapore	11.3
Japan	11.1
South Korea	10.4

Source: EIU Vietnam Country report, 2005

Vietnam has made numerous changes to the laws and regulations governing trade in goods and services, creating an environment that supports the import and export of goods and services. While a sound legal framework is largely in place, the flow of goods and services among Vietnam's trading partners is encumbered by institutions that operate less than optimally. In key industries where Vietnam is struggling to achieve or maintain competitiveness, such as apparel, trade facilitation costs help make or break the industry. Although there has been some recent progress, serious obstacles hinder the efficient and secure movement of trade across Vietnamese borders. Major challenges facing Vietnam include—

1. Upgrading the relevant public agencies, in particular the Customs Agency.
2. Eliminating corruption.
3. Further streamlining of trade processes, including import processes handled by Customs (such as valuation).
4. Greater integration of border institutions.
5. Stronger cooperation between the public and private sectors.

To facilitate goods and services flows, Vietnam should continue to improve the laws, institutions, and operations of its trade-related institutions. Modern institutions must be managed, staffed, and equipped to achieve the appropriate balance between

TOP TRADED GOODS, 2004 (percent of traded goods)

<u>Top Export Products</u>	
Crude Oil	22.1
Textiles and apparel	17.1
Footwear	10.5
Fishery products	9.4
Electronic Products	4.1
<u>Top Import Products</u>	
Machinery, equipment, and parts	17.5
Refined petroleum	11.5
Steel	8.3
Materials for textiles	7.2
Cloth	6.0

Source: EIU Vietnam Country Report, 2005

⁸⁵World Bank Key Development Indicators; see www.worldbank.org

⁸⁶Vietnam Ministry of Industry and Planning.

facilitation and control, and to provide reduced trade transaction costs. Vietnam's Customs Agency Institute is making progress in developing more modern and reliable services through a major upcoming reorganization effort sponsored by the World Bank, which should result in numerous and significant changes to its regulations, organization, and operations.

This chapter analyzes the legal, institutional, and operational constraints that impede trade expansion and recommends ways to minimize those constraints. First, the analysis focuses on Vietnam's legal framework for trade in goods and services and for the primary trade administration institution, Customs. Second, the chapter considers the institutional issues regarding Customs management, organizational capacity, and operations. Third, the chapter reviews other key public institutions involved in trade facilitation, including the MOT, Ministry of Agriculture and Rural Development, the Ministry of Health, and the police, along with their respective roles in trade facilitation. Lastly, this chapter provides recommendations for improving trade facilitation in Vietnam.

B. LEGAL FRAMEWORK

This section first discusses the legal framework for trade in goods and services; it then discusses the legal authority applicable to the facilitation of trade in Vietnam. Both elements—the legal framework and a conducive trade facilitation system—are necessary for any country to reap the full benefits of economic integration.

Trade in Goods and Services. The legal framework for trade in goods and services in Vietnam has been significantly reformed in the past five years. Many of these reforms were adopted in order for Vietnam to implement its commitments under the U.S.-Vietnam BTA and join the WTO. The U.S.-Vietnam BTA became effective on 10 December 2001, and Vietnam joined the WTO on 11 January 2007.

The Ordinance on MFN and National Treatment in International Commerce (No. 41, effective 1 October 2002) guarantees MFN and national treatment to imports and exports, services and foreign-service providers, investment and foreign investors, and foreign holders of IP rights. Under the ordinance, MFN status is applicable where required by Vietnamese law, an international treaty, to countries with which Vietnam has reciprocal MFN arrangements, and other cases as determined by the government. MFN extends to taxes, fees, and other charges relating to import/export, payment methods and transfers, regulations and procedures, taxes and indirect charges for imports, quantitative restrictions and import/export licenses, and other legal regulations affecting orders, purchases, transportation, distribution, and warehousing in Vietnam. The ordinance defines “national treatment” as the provision of treatment no less favorable than that provided to domestic goods and services. Both MFN and national treatment are subject to certain exceptions, including preferential treatment arrangements with other countries (MFN) and government procurement, subsidies and supports, and domestic transportation costs (NT). USAID/STAR provided technical assistance in drafting this ordinance.

While the U.S.-Vietnam BTA required Vietnam to reduce tariffs for only 261 line items over a phased-in period of time, the commitments made as part of the WTO accession require Vietnam to lower tariffs much more substantially. The WTO accession agreement requires that Vietnam bind all of its tariffs with the WTO. It will reduce its overall current average of bound tariffs

from 17.4 to 13.4 percent on an annual basis, with some cuts upon accession and others occurring largely five to seven years after accession. The average tariff for agricultural products will decline from 23.5 to 20.9 percent after about five years, and for industrial products from 16.8 to 12.6 percent after five to seven years. Vietnam agreed to duty-free imports for products covered by the WTO's Information and Technology Agreement, and will lower tariffs to zero or close to zero for many products covered by the Chemical Harmonization Agreement, the Agreement on Trade in Civil Aircraft, and for construction equipment, medical equipment, and pharmaceuticals. These sectoral agreements will be implemented over a three- to five-year period. After full implementation of the WTO tariff cuts, most imports will face tariffs less than 15 percent—other than a few exceptions, bound tariffs will be between zero and 35 percent. All import quotas will be eliminated. Vietnam, however, reserved the right to maintain tariff quotas on four products—sugar, eggs, unprocessed tobacco, and salt. The agreement allowed Vietnam to restrict several sensitive products (including tobacco, petroleum products, cultural products, and aircraft) to state traders, effectively permitting quantitative restrictions. Vietnam made commitments, in some cases phased in over three years, to eliminate discriminatory aspects of its excise tax regime, of particular importance for alcohol products. Vietnam was allowed to maintain export controls on rice.

The new Commercial Law (CL) (effective 1 January 2006) is the fundamental legal instrument regulating trade in goods and services. The CL revisions were made in tandem with the reforms to the Civil Code, in particular the Civil Code provisions on contracts. (The revised Civil Code also took effect on 1 January 2006.) Key innovations in the CL include a broader definition of “commercial activity” to include sale of goods, provisions of services, investment and other activities “for profit-making purposes,” and the expansion of coverage to include trade in services. The CL also clearly defines the relationship of the CL to the Civil Code and other legislation regulating specialized commercial activities, giving primacy to specialized legislation over the CL and the Civil Code, thus eliminating the confusion that previously existed.

A number of decrees and circulars have been promulgated to implement the CL, including the Decrees on Origin of Goods: International Sales and Purchases, Agency, Processing, Transit of Goods, and Prohibited/Restricted Imports; Commercial Assessment Services; Franchising; Representative Offices and Branches of Foreign Business Entities; and Trading and Distribution. The relatively general provisions in the CL on provision of services must be read in conjunction with sector-specific laws and regulations developed by the relevant ministries and state agencies for each business sector, such as banking, insurance, tourism, distribution, etc., to discern the regulatory requirements for the sector.

Generally, with the adoption of the CL and the implementing regulations, Vietnam has satisfied many of its U.S.-Vietnam BTA and WTO commitments with respect to trade in goods and services. However, the rights of FIEs to engage in trading and distribution activities remain an area of concern to existing and potential foreign investors. The U.S.-Vietnam BTA committed Vietnam to allow, three years after entry into force, American companies to establish joint-ventures with Vietnamese partners to engage in distribution services; seven years after entry into force, the U.S.-Vietnam BTA committed Vietnam to allow the establishment of 100 percent U.S.-invested distribution companies. The first retail outlet can be established “as of right” ; subsequent outlets are subject to approval on a case-by-case basis. Vietnam's WTO commitments with respect to distribution establish commitments for all foreign distribution

service providers. Distribution is also regulated by the Investment Law, in addition to the CL. To implement the commitments with respect to trading and distribution, the government promulgated Decree 23 on Trading and Distribution (effective 12 February 2007). The Decree conforms to Vietnam's WTO commitments, and authorizes, subject to prior approval from the MOT, the issuance of business licenses to FIEs to engage in trading and distribution activities. However, citing the lack of an implementing circular, the MOT is not currently considering licensing any foreign invested company to import and distribute products in Vietnam.

Vietnam also adopted the Law on Standards and Technical Regulations (effective 1 January 2007) to conform to the WTO TBT Agreement (with support by USAID/STAR). This law completely revamps the system for developing and applying standards and technical regulations in Vietnam. The law, which is applicable to both goods and services, also regulates conformity assessment procedures, and requires that standards and technical regulations must be developed in an open and transparent manner, and, where feasible, based on international standards. The law specifies that conformity to standards is voluntary, while conformity to technical regulations is mandatory. Standards can be developed by organizations, such as trade or business associations. The law also contemplates that the body of existing standards (all of which are mandatory) shall be reviewed and converted into either technical regulations or non-mandatory standards, or discarded. A draft decree is being developed; it is expected that the decree will specify the method and timeline for the conversion of existing standards. A new law on the quality of goods is being developed; it will affect Vietnam's implementation of its standards and technical regulations regime.

Vietnam has adopted three ordinances providing measures for dealing with unfair trade practices when imports are causing, or are likely to cause, injury to the domestic industry. The Ordinance on Safeguards, Ordinance on Anti-Dumping, and Ordinance on Anti-Subsidies are discussed in Chapter XI on International Trade Law.

Trade Facilitation. For a conducive trade facilitation environment, it is critical that the legal and regulatory framework provides the following: 1) adequate and coherent authority structure for the essential trade-related institutions; and 2) clearly stated regulations and procedures for implementing these authorities that strike the balance between facilitation and necessary control.

Overall, Vietnam's legal framework has significantly improved as the country's legislative agenda has been driven by a sustained effort to implement U.S.-Vietnam BTA commitments and achieve WTO membership. Further reform is necessary, however, to create the legal framework for an orderly and efficient trading system. There is positive news regarding the legal framework in that the government continues to make the necessary legal and regulatory reforms.

Legal Authority Supporting Trade Facilitation. Through the U.S.-Vietnam BTA and WTO accession processes, Vietnam has taken strong action in the past five years to establish a more robust legal foundation for trade facilitation. This momentum has led to numerous legal improvements, including the Law on Customs 2001, the revised Law on Import and Export Tariffs, and, more recently, the Law on Amendments to the Law on Customs, effective 1 January 2006. Indeed, Vietnam's rapid and sustained progress in the legal area may provide a model for some other countries in the region. Many of these legal changes have been assisted by USAID/STAR. The following paragraphs highlight a few of the legal advancements.

Customs Valuation. Customs valuation has been one of the major issues afflicting the trading system. Previously, a minimum pricing system and opaque procedures hampered efficient trade. As part of the U.S.-Vietnam BTA and WTO legal reforms, Vietnam enacted laws compliant with the WTO Agreement on Customs Valuation along with other legal reforms, such as the Decree on Post-Customs Clearance Inspection. These legal steps mark major milestones in trade facilitation. As the Diagnostic team learned, however, *compliance* with the new legal framework is lagging, especially in customs valuation, and needs to be improved. Moreover, there is a problem of under-invoicing as brokers and forwarders attempt to reduce duties paid. This clearly makes customs implementation more difficult.

Publication. Customs laws, decrees, and procedural regulations mandate publication of customs rules and procedures that have been implemented by the Customs Agency. For example, the Customs Agency published the Customs Law in five languages (Vietnamese, English, French, Chinese, and Russian) in order to disseminate it to the business community and other interested parties. The Customs Agency also launched a Web site and has drafted a manual providing guidance on customs procedures.

Automation. The legal foundation for automation has been upgraded. Vietnam has passed and is passing laws that allow for electronic data exchange, including the legal validity of electronic documents.

Remaining Challenges for Trade Facilitation Legal Issues. Despite recent progress, such as the duty exemption system on imports used to produce exports, the establishment of a centralized registration for IPR, and improvements in pre-qualifying classification assignments, the overall lack of transparency ranks high among the complaints of businesspeople trading in Vietnam and investing or seeking to invest there. Key legal reforms to improve transparency and efficiency include laws allowing Customs authorities to use of the Harmonized Tariff Schedule (HTS), *ad valorem* duty assessment, internationally accepted rules of origin, EPZs, and IPR. Most importantly, sound enforcement provisions regarding integrity are necessary.

Progress in these legal areas may have major impact on the trading system. The Vietnamese government is working with the USAID/STAR Project to enact these necessary measures and create a sound legal framework. With a sound legal basis established, it will be the charge of the appropriate institutions to execute these reforms, which will require further technical assistance to build institutional capacities and skills to improve implementation in practice. The next two sections of this Report review the institutions accountable for implementation of the legal framework.

C. IMPLEMENTING INSTITUTIONS

At the heart of trade facilitation is Vietnam's primary trade administration institution, the Customs Agency. The Vietnamese Customs Agency has 11 departments with approximately 7,000 employees, including 3,500 Customs inspectors servicing 94 points of entry, 55 of which are at land border locations. The Customs Agency's organization is centralized and includes: 1) the General Department of Customs; 2) provincial, inter-provincial, and city customs departments reporting to the central authority; and 3) customs offices at border gates, customs

inspection groups, and equivalent levels. Although there are many areas within trade facilitation that call out for reform, modernization of the Customs Agency is at the core of Vietnam's trade facilitation priorities. This agency needs an extensive overhaul and should be a primary focus of trade facilitation efforts.

Implementing Institution Factors Supporting Trade Facilitation. Although the Customs Agency needs a major overhaul, there are a number of areas where customs administration is improving, including automation, staffing, and security. Automation is improving in some targeted places, such as the electronic declaration system being piloted by selected airport customs and Hai Phong and HCMC seaport customs. Another positive example relates to adequate Customs staffing levels, such as those at No Bai International Airport, where 120 customs officers operate 24 hours a day, 365 days a week, processing about 1.6 million airport passengers per year. Security improvements include the addition of narcotic detection dogs at key entry ports.

Implementing Institution Issues to Address. The following issues cover major challenges and impediments that the Customs Agency must address in order to improve the flow of goods and provide efficient service to the trade community.

Corruption. Corruption in Vietnam's Customs Agency is the number one complaint from the trade community and others who do business with the Customs Agency. Almost all persons surveyed mention this subject and identified it as the greatest priority. Corruption exhibits itself primarily through "informal payments." Reportedly, all entry documents must be accompanied by an envelope that contains at least a small amount of cash. Without this payment, shipments are delayed, not released, or are subject to extraordinary examinations. The effect of a non-release during regular business hours is considerable.

Automation. Automation is at relatively low levels throughout Vietnam's trade-related agencies, including the Customs Agency. Rather than electronic declarations, a mixed manual-automated process is currently standard for almost all imports. Examples of lack of automation include the main Ho Chi Minh City EPZ and Dong Dang Border Station. At these stations, customs declarations are processed by hand with each page read, sometimes stamped with rubber imprint stamps, and signed by a customs officer. Another customs officer enters the declaration information into a computer system. A third officer then records the number of the new entry into a manual ledger and makes written assignments for examination. This manual process for commercial importation is inefficient, time-consuming, and conducive to corruption. Another example of insufficient systems is vessel manifests, which are not downloaded to either a port authority or customs automated operating system. Instead, print copies are given to the Customs Agency, the port authority, and other government agencies. Users report that as many as seven full copies of an inbound foreign vessel manifest may be required for each arrival. Major efficiencies could be achieved through basic automation. Additionally, opportunities for corruption would be reduced.

Risk Management. Although there are elements of risk management in the Customs Agency, there is no formal system. As a result, examination rates are high. While examination rates have been reduced from 100 percent, they remain in the 40–60 percent range. Additionally, although discrepancies are falling, there is no indication whether this is due to increased

compliance, lack of expertise in identifying discrepancies, or nonproductive examination criteria. Currently, Customs relies on the importer's reputation as the primary basis for defining risk. For example, if an importing company is found to be in violation at any time, they are placed on a "look-out" list and subsequent shipments are scrutinized more closely. Accordingly, some companies get a "green light" based on a good track record. Some Customs officers understand the concept risk management but do not practice it. A better understanding of risk management and mechanism to provide managers with performance feedback are needed.

Duty Assessment, Customs Valuation and Customs Procedures. There are extensive problems with basic duty assessment. There is no apparent consistency and reliability in assessing duty, because there is no centralized center for determining the appropriate tariff classification for imported goods, which is now left at the discretion of individual customs officers, who often (and understandably) do not possess the technical knowledge needed to recognize and appropriately classify increasingly sophisticated imported products. Nor is there an ability to obtain advanced rulings prior to importation. As noted earlier, while Vietnam enacted the WTO Valuation Agreement, customs officials have not fully implemented its requirements. For example, each importation is subject to port-of-entry-level determination of classification and duty assessment when the merchandise arrives. Additionally, the process for protesting a duty classification is time-consuming and unreliable. Overall, customs procedures should be reviewed in order to identify those that are redundant or unnecessary; as necessary, outdated procedures should be replaced with streamlined processes.

Training. Training efforts also need improvement. Customs has a training facility that currently trains new recruits and supervisors. The facility houses the Customs employees for 3–6 month training assignments, or for longer periods of up to two years. While the Diagnostic team did not have access to the training, numerous interviewees reported that training is generally poor and a systemic change is necessary.

Express Courier Handling. Customs services to the dynamic and growing express courier industry are not keeping pace with needs. The Customs Agency operates too slowly and inspects too many parcels. About 40–60 percent of inbound small parcels are opened for examination, even though they are also put through an x-ray. Courier shipments from different companies are treated differently.

Intellectual Property Rights. Customs lacks the training to identify and detain goods for possible IPR violations, and IPR enforcement is sporadic at best. Recent positive changes to the law have occurred, although it is too early to predict how these changes will be implemented.

Border Facilities. While border improvements are a lesser priority than aforementioned trade facilitation issues, they are still required. The Dong Dang border station has no modern primary booths, for example, and it cannot accommodate a smooth flow of traffic and pedestrians. At Dong Dang, the commercial lot is open with no dock space, and loading and unloading of trucks and carts takes place on a dirt lot. There is an examination location for more complex or problematic cargo; however, it is 15 kilometers from the border, and containers pass numerous warehouses and other sites where goods could be unloaded and/or switched before they are examined. While customs officers do have powers of arrest, they have no holding cells or areas adequate to search and detain suspected pirates or smugglers.

Equipment and Tools. Modern customs agencies require modern equipment. Poor examination tools mean that shipments cannot be easily examined. The Customs Agency has little modern equipment, such as x-rays, fiberscopes and “busters.” (A buster allows officers to determine differences in density of cargo and conveyances). Even simple tool boxes with screwdrivers and probes would be useful.

D. SUPPORTING INSTITUTIONS

Although the **Customs Agency** is the main implementing institution for the movement of goods, an efficient trading system relies on other trade-related public sector institutions, trade service providers, *and* the traders themselves, both importers and exporters. Their capacities and performance can result in significant costs (or savings) within the trading system, and optimized trade facilitation depends on their active involvement. Like the Customs Agency, the trade-related public agencies also need sound management, well-trained staff, modern equipment, modern facilitative procedures, and active dialog with the traders to respond quickly and predictably to issues while guarding the safety and security of the country. For example, the effectiveness of the enforcement efforts of the public agencies, particularly in the area of IPR and combating smuggling and the introduction of contraband, directly impacts Vietnam’s trading system and business environment. The trade service providers—transport and logistics—also have a major impact on the system. Uncompetitive, high-cost service providers create a drag on the system and diminish competitiveness.

Major public institutions involved in trade facilitation include the following: Ministry of Agriculture and Rural Development, Ministry of Health, MOT, and the Ministry of Public Security. Each of these organizations plays a role in the trading system, and each has a significant impact on trade transaction costs. The Ministries of Health and Agriculture and Rural Development work with sanitary and phytosanitary issues. The Ministry of Public Security provides general security for the country and enforcement in the detection and investigation of smuggling and mis-declared goods. The MOT serves as the focal point for trade negotiations and provides trading licenses, implements quotas, and issues regulations on import and export processes such as rules of origin.

Major issues encumbering the Vietnamese trading system regarding supporting public and private sector institutions include: 1) a non-competitive environment for trade transportation and logistics; 2) a need for modern customs broker system; 3) a lack of modern management systems within trade-related public agencies; 4) cumbersome, unnecessary bureaucratic demands and procedures in other trade-related agencies; and 5) still inadequate public-private cooperation.

Institutions Supporting Trade Facilitation. Positive aspects of the supporting institutions include a generally capable and professional staff at the MOT. The Vietnamese trade ministry has actively engaged in numerous negotiations and forums over the past decade and has led the country into a new era of more open trade. Active participation in ASEAN and APEC has created broad-based improvements in trade administration and trade facilitation standards. Additionally, Vietnam’s engagement with the United States in a bilateral treaty and the WTO on membership has also resulted in significant improvements.

Additionally, the overall security environment in the country is a major positive aspect of the trade facilitation environment: Vietnam offers one of the safest trading environments in Southeast Asia. Security costs weigh heavily on other countries that are subject to marine piracy and poor road safety for transporters.

Public-private sector cooperation is another positive area for Vietnam as the government has made new efforts to facilitate trade. For example, the public sector frequently invites comments and review from private sector entities on draft laws and regulations.

Lastly, testing and accreditation fees appear to be at an appropriate level. In fact, they are often lower than those applied in other countries. Furthermore, testing and accreditation procedures are established based on the guidelines of the International Standardization Organization.

Supporting Institutions Issues to Address

Trade Transportation and Logistics Services. Greater competition in trade transportation and logistics is critical to improved trade facilitation. Across the various key industries for trade services, the markets are shallow and uneven. Often, state-owned or related companies have special preferences or access. This situation creates major inefficiencies, including poor service and high prices for exporters and importers. For example, courier shipments from different companies are treated differently: shipments from a state-owned company are shipped as baggage on commercial flights and cleared into the country at the international passenger arrival area. Shipments from the other carriers for non-state-owned companies are treated as cargo and take an average of one day, and sometimes more, to be cleared into the country. A delay of one day in the courier business is of great significance and the special treatment of one service over the others gives them a significant and unfair competitive advantage over other couriers. Similar examples, found in other trade services, threaten the basic competitiveness of Vietnamese exports and the investment environment.

Customs Brokers. There is no formal customs broker system in Vietnam. Persons currently acting as customs brokers in Vietnam are unlicensed; this means that any person with enough basic knowledge may serve as a broker. For the most part, freight forwarders and express consignment companies act as the de facto importers and brokers for their clients. International freight operators often enter the imported goods and pay duty amounts on behalf of the client. While this situation works now in a climate of trust, it will not work as international trade grows and becomes more technical and complex. Specialization in various trade services must be encouraged and expanded for the system to develop properly, and this is one key area.

Border Agencies. Border agency cooperation between customs and other agencies enforcing related and/or overlapping laws, such as those pertaining to IPR, is poor. For example, enforcement agencies do not have opportunities to use their authority effectively on customs-generated cases due to lack of cooperation and coordination between themselves and the Customs Agency. In a number of areas, there is no clear definition of the institutions' roles or development of a joint strategy to combat smuggling and other crimes. Furthermore, non-customs key border functions, such as SPS processing conducted by the Ministry of Agriculture and Rural Development, are poorly administered due to unaddressed staffing, training, and equipment needs. The SPS issue alone results in a threat to trade and security. Regarding trade

productivity, traded goods are inefficiently processed due to outdated and elementary SPS review, which leads to increased trade transaction costs from delays. Additionally, human and animal health and safety is at risk without modern processing equipment, training, and staffing, especially in these days of avian flu.

E. SOCIAL DYNAMICS

The social dynamics of trade facilitation indicate a progressive yet challenging environment for significant improvements in the near term. Trade is championed at the highest levels of government, often one of the key determinants for success in improving trade facilitation. Inertia within the bureaucracy below, however, has stifled broad-based progress. Significant advancements will be achieved if a wider spectrum of stakeholders is actively engaged, including the frontline bureaucracy in the trade-related agencies involved in the flow of goods and services, lawmakers, manufacturers, farmers, exporters, importers, shippers, freight forwarders, ports authorities, airlines, and financial institutions.

As previously noted, the working relationship between the executive branch and private industry is improving. The top levels of government are typically pro-business and advocates for more open trade. The highest levels of government maintain a dialogue with the private sector for input into policies. One example of the successes of this cooperation is the input on legislation, which has improved transparency and responsiveness. Although there seems to be the political will to change, not enough urgency is given to reform. As a result, Vietnam performs less well on trade facilitation measures than other countries in the region, such as Singapore and Malaysia.

F. RECOMMENDATIONS

As Vietnam continues to expand trade, it should support several strategic measures that will build a stronger foundation for the operations and administration of the trading system. Chief among these measures is the full-scale modernization of the Customs Agency, as envisioned by the World Bank-sponsored Customs Modernization Project. The government, international development institutions, and the private sector should support and complement this modernization effort. These include the following recommendations.

- Build an active and working integrity program. As noted, corruption is now endemic and integrity measures must be the top priority. Customs and other trade-related agencies should seek to rebuild and maintain integrity in several ways, including the removal of officers. Selective verification of information should be performed on an as-needed basis. Officers should be required to update their financial changes annually. The new training program should incorporate other integrity components. Customs and trade-related agencies should consider implementing a dedicated, anonymous call-line for reporting corruption, and the call-line should be advertised along with the results of information and tips provided. Most importantly, progress and improvement must be assessed against a baseline.
- Develop a competitive market for trade transportation and logistics and fully implement the commitments on trading and distribution rights for foreign-invested businesses. A fully developed and competitive market for trade transportation and logistics should be a primary goal for trade facilitation. These reforms include revision of legal and regulatory

barriers, as well as subsidies and other non-tariff barriers. These efforts could begin with a comprehensive review of the various transportation and logistics sectors that would identify the specific barriers and prioritize sectors for reform. For example, the express courier sector, which is partially liberalized, would be developed to follow best international practice operations using regional leaders as benchmarks (e.g., Singapore). As part of the implementation, the processes involving public institutions would also be upgraded. For example, customs software development promotes an efficient express courier administration based on WCO express consignment guidelines. Developing an efficient distribution system requires broad-based policy reforms of the existing intermodal arrangements, including the establishment of new operational systems. Reforms should be tested before the changes are adopted on a nation-wide basis. Pilot projects to experiment with the principal reform elements should be considered. For example, focusing on pilot corridors based on several selection criteria, to include potential private sector interest and financial and economical viability. The policy framework will be critical to the success of these reforms.

- Help Customs advance modernization efforts. Provide additional training and a training curriculum to increase capacity of those officers who specialize in the following area: a) customs classification and valuation; b) commercial fraud detection; and c) risk assessment and risk management. Incorporate risk assessment and risk management programs, including advanced information technology capabilities/support, strategic sector analysis, and well-developed post-audit procedures, into Customs.
- Implement a risk management system. Risk management is the foundation of a modern Customs agency. A well-developed risk system will identify areas of concern that can easily be developed into specific actions. A risk management system will assist in the restructuring of the institution according to principles of modern public organization management.
- Modernize trade-related processes. Establish a centralized location for importers and customs employees to consistently and accurately determine the classification of goods, the projected duty, and to obtain rulings in advance of importation. Only when trade-related processes have been streamlined and simplified should steps be taken to incorporate IT/electronic processing into the dynamic. This is, however, an important second step. Such automation, which is non-existent presently, must link to both the trade community and customs processing system so that the trader can submit requests online and receive notifications electronically through a Web application.
- Strengthen public-private sector cooperation. Although the public sector has made strides in improving its relationship with the private sector, a stronger and deeper partnership is necessary to promote a more efficient and business-friendly process. A new committee should be established to facilitate public-private sector communications. This committee should focus on becoming an active and useful forum for problem-solving and relationship-building. It should monitor streamlining and standardization of customs procedures. It should include trade-related ministries, including the agriculture and health ministries.
- Improve funding for modernization of trade-related institutions. Revenue generated by current trade service fees should be developed and promoted under a WTO-compliant user/service fee system. This funding should be allocated to priority areas, such as payment of salaries, purchase of equipment and tools, customs modernization, and

upgrading of facilities to help develop a process of electronic pre-arrival payment and release.

- Upgrade IPR enforcement efforts. IPR enforcement reform includes cooperation of the business community in the identification of IPR infringements such as through the International Anti-Counterfeiting Coalition in training personnel involved in registration, detection, and prosecution of IPR-related violations. Regional models should be developed as a regional project and then implemented in all countries. Advice could be drawn from international organizations (such as the World Intellectual Property Organization) as to the design, and funding sought through their sources.

XIII. FLOW OF MONEY

A. INTRODUCTION

In a modern economy, adequate access to credit and foreign exchange is essential to efficient and secure trade. Burdensome foreign exchange requirements drive up the costs of doing business and discourage foreign investors. Poor access to credit for domestic-owned traders impedes start-ups and stifles expansion.

In Vietnam, cross-border transactions reflect a significant amount of monetary exchange. Overall exports and imports in Vietnam increased from \$31.2 billion in 2001 to \$84.7 billion in 2006. Implemented FDI inflows increased from \$2.5 billion in 2001 to \$4.1 billion in 2006.⁸⁷ Remittances rose to an estimated \$3.8 billion in 2004 from \$2.6 billion in 2002 (up from \$31 million in 1991), and revenue earned from Vietnamese working abroad is substantial.

Overall, Vietnam's laws and public and private institutions support these trade-related money flows. Basic trade finance products are generally available to traders, and are now supported by a stronger legal framework. However, the actual use of basic financial instruments such as bills of exchange, promissory notes, and letters of credit is still much lower than would be expected given Vietnam's rapid growth. Foreign currency exchange is available broadly and is fairly easily exchanged for all traders. In fact, Vietnam has made significant strides in this area in the past five years. Just a few years ago, foreign exchange was difficult and limited and there were few trade financial products.

This chapter analyzes legal, institutional, and operational issues regarding trade-related finance and recommends ways to minimize those constraints. First, the analysis focuses on legal framework for the trade-related institutions, the banks, currency exchange providers, and the central bank. Second, it considers the operational and institutional issues regarding trade-finance management and operations. Third, it reviews other institutions involved in trade-finance facilitation—including the export-credit agencies and money laundering agencies—and their role in trade facilitation. Lastly, it identifies major recommendations to improve facilitation of trade-related money flows.

B. LEGAL FRAMEWORK

In Vietnam, the basic legal framework regarding the efficiency and security of basic trade-related financial flows (i.e., letters of credit, currency exchange) is greatly improved and generally sufficient. A new Law on Negotiable Instruments was adopted in 2005, and took effect on 1 July 2006, replacing the 1999 Ordinance on Commercial Papers.⁸⁸ Further developments in the legal framework will be necessary, however, as trade advances.

⁸⁷See the Central Institute for Economic Management and STAR-Vietnam, "Assessment of the Five-Year Impact of the U.S.-Vietnam Bilateral Trade Agreement on Vietnam's Trade, Investment, and Economic Structure," National Political Publishing House, 2007.

⁸⁸The old Commercial Law included provisions on some forms of commercial paper and negotiable instruments that did not meet international best standards. During the process of developing the new Commercial Law (2005),

Legal Issues that Support Trade Facilitation. The legal framework is supported by a number of existing key structures. For example, the legal structure for trade-related finance allows for payment through wire transfers, foreign checks, commercial letters of credit, standby letters of credit, documentary collections, and open accounts. The Trade Finance Guidelines by the International Chamber of Commerce (ICC) are generally applied, and the laws conform to the Uniform Customs and practice for Documentary Credits. Under the law, traders are free to exchange currency at financial institutions. While there are government restrictions on *dong* exchange, respondents identified few issues in obtaining the currency they need to complete transactions. As a result, importers and exporters do not find the legal framework for exchanging payments to be overly cumbersome or complicated.

In fact, recent legal changes in foreign exchange laws and regulations represent major steps in reform. For example, the foreign exchange surrender requirement was reduced from as much as 80 percent in prior years to zero percent in 2003. Additionally, foreign exchange accounts, once off-limits, now are allowed for residents and non-residents with authorized banks in Vietnam. Moreover, other recent changes allow foreign investors to transfer profits and other legal income abroad through authorized banks. As a result, *dong*, once highly controlled and distorted by black market rates, is exchangeable at market rates. Currency options are also allowed by law to a limited number of banks. Laws addressing illegitimate financial flows are in place. Also, foreign banks are allowed to operate within certain limits.

Trade Facilitation Legal Issues to Address. As economic development continues, trade will be facilitated through further liberalization of the exchange rate regime and financial institutions. Greater flexibility with foreign currency and expanded financial services will benefit the trading system. While basic currency restrictions and trade finance products are largely in place, more complex trade finance products will be especially important for the country to develop.

C. IMPLEMENTING INSTITUTIONS

Banks. Vietnam has a growing banking sector that includes private joint-stock and foreign banks. Although the banking system is becoming increasingly diversified, the four big state-owned commercial banks continue to dominate domestic banking: the Vietnam Bank of Foreign Trade (Vietcombank), the Vietnam Industrial and Commercial Bank (Vinccombank), the Bank for Agriculture and Rural Development, and the Vietnam Investment Bank. Foreign banks include HSBC (UK-Hong Kong), Citibank (US), ANZ Bank (Australia-New Zealand), Chohung Vina Bank (Korea), and Deutsche Bank (Germany).

Bank Operations that Support Trade Facilitation. Although Vietnam's financial services sector is in early development stages, domestic and foreign banks provide numerous services that facilitate trade, including deposit, cash, international payment, loan remittance, ATM and Internet banking service, corporate banking, treasury, leasing, basic letters of credit, wire transfers, and foreign exchange. Additionally, banks maintain correspondent relations with international banks. More complex trade finance products have been made available recently. For example, Citigroup Vietnam introduced a new product, Accounts Receivable Finance

these provisions were eliminated in favor of drafting a separate legal document that would meet international standards.

Program (ARFP), announced October 2005, that provides traders with financing based on accounts receivable. Another example of increasing sophistication is the dollar/*dong* currency options service recently provided by Asia Commercial Bank.

Bank Trade Facilitation Issues to Address. Continuing the development of the banking sector is critical to traders. While much progress has been made, more needs to be done to allow more sophisticated product offerings, greater choice of financial services, and greater access to foreign exchange.

The Central Bank. The Central Bank of Vietnam manages exchange rate policy and regulation. The Central Bank has loosened what was previously highly restricted activity on currency exchange, and its operations facilitate trade on a basic level.

Central Bank Operations that Support Trade Facilitation. The institution has sufficient capacity to administer the exchange rate function. Currency exchange occurs at numerous institutions, including banks, currency exchanges, and hotels. Currency exchange rates are competitive, and fees for wiring money abroad are less than 10 percent of the amount of money to be wired.

Central Bank Trade Facilitation Issues to Address. As noted, continuing development and liberalization of the exchange rate regime will provide traders with greater flexibility and more options in financing trade. Converting *dong* into hard currency is subject to availability, which causes FIEs to experience problems in securing hard currency. Easing these restrictions would improve the efficiency of trade finance flows.

D. SUPPORTING INSTITUTIONS

The national supporting institutions that facilitate trade-related finance are relatively few. The **Export Promotion Fund**, which is managed by the Ministry of Finance, provides assistance in the form of interest rate support and direct financial support. As a result of Vietnam's WTO membership, this fund was significantly reformed to secure conformity with WTO requirements. Decision No. 279/2005/QD-TTg established a new trade promotion program for 2006–2010 to be applied in compliance with WTO rules.

The main supporting institution for securing money flows—the **financial crimes enforcement unit**—is working to more effectively address money laundering. It is, however, early in the development of this capacity.

E. SOCIAL DYNAMICS

The overall social dynamics of trade-related trade flows are relatively strong, particular in light of past practices in Vietnam. The increasing access to foreign currency and trade finance credit is a very positive issue in Vietnam. The government, banks, smaller exporters, and potential traders are all interested and focused on the need for change. The number of programs and events for the general public that promote better understanding of trade-related money flows seems insufficient, however. Media coverage of stories is infrequent. A greater awareness and education regarding currency and trade finance operations is necessary for banks and consumers.

F. RECOMMENDATIONS

- Improve the foreign exchange regime. Vietnam's trade-related flows have made much progress in the past five years, but continued liberalization would assist in trade facilitation. Providing greater access to foreign exchange, for example, would assist in repatriation of currency and eliminate uncertainty in this area.
- Increase the availability of trade finance products. While trade products are generally available, it is important to expand the use in practice of basic financial instruments, such as bills of exchange and letter of credit, and to expand the use of other more sophisticated financial tools such as currency swaps and options and inventory leasing.

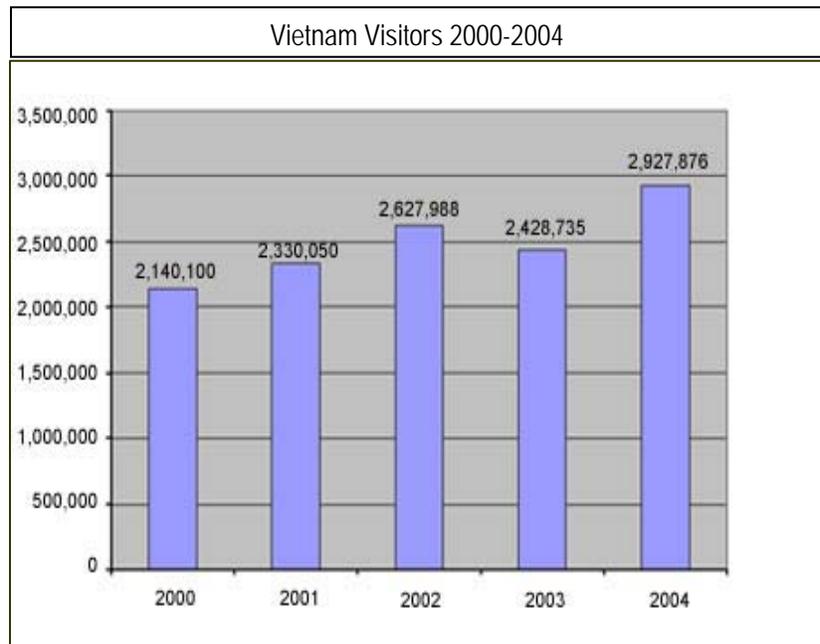
XIV. FLOW OF PEOPLE

A. INTRODUCTION

In the region, Vietnam experiences the second largest flow of people across its borders after Thailand. As shown in the box below, annual visitors to the country were estimated at 3.6 million in 2006, up from 2.9 million in 2004 and 2.4 million in 2003.⁸⁹ In 2004, approximately half of the visitors were tourists. The greatest share of cross-border traffic comes from China at 29 percent, or 778,000 visitors. American, Japanese, Korean, and Taiwanese visitors account for approximately 10 percent each.

Significant overall improvements have been made in Vietnamese laws and public and private institutions with respect to facilitating the flows of people for trade-related purposes. The Vietnamese government has relaxed legal travel restrictions, streamlined processes, and upgraded its automation. Additionally, the safety of foreign travelers is high, as the risk of kidnapping, terrorism, and even street crime is extremely low and rarely affects foreigners. As with flows of goods, services and money, however, Vietnamese institutions need to modernize further.

This chapter analyzes the legal, institutional and operational constraints that impede flows of trade-related people. First, it analyses the legal framework for trade-related visits. Second, it considers the institutional issues regarding people flows. Third, it reviews other key institutions involved in facilitation, such as police. Finally, it identifies major recommendations to improve facilitation of trade-related people flows in Vietnam.



B. LEGAL FRAMEWORK

The legal framework supports the most basic trade facilitation principles, especially for regional movements of business travelers. Relatively restrictive policies and procedures are in place, however, for non-regional visitors regarding tourism and business. Vietnam's legal regime could better accommodate these travelers for the sake of the country's own economic development.

⁸⁹Vietnam National Administration of Tourism, Tourism Statistics 2004, <http://www.vietnamtourism.com>.

Laws and Regulations that support Trade Facilitation. Many of Vietnam’s programs facilitate tourism and business travel. For example, Vietnam has exempted visas for tourists from a number of key countries, such as Japan, South Korea, Denmark, Norway, Sweden, Finland, and ASEAN members. Regarding business travel, Vietnam has recently joined an initiative to facilitate business travel through the APEC Business Travel Card (ABTC) program. Under the ABTC, cardholders will be exempted from visa and resident registration procedures and will be allowed to use express immigration lanes in 16 other countries.⁹⁰ ABTC card holders are allowed 60-day stays during each visit.

Legal and Regulatory Issues to Address. Vietnam can further improve trade facilitation by providing easier, yet secure, access for tourist and business travelers from additional countries. Current law requires a visa for most business and tourist travelers; these visas must be obtained abroad.⁹¹ Vietnam has signed agreements on visa exemption with 38 countries, including s Brunei, China, Indonesia, South Korea, Malaysia, Mexico, the Philippines, Russia, Singapore, and Thailand. However, these agreements mainly apply to diplomatic and official passport holders.

Although tourism visas prove a somewhat small bureaucratic hurdle, procedures for obtaining business visas are a potential obstacle to trade facilitation. Most business travelers must identify a Vietnamese “joint venture” partner or be sponsored by a Vietnamese trade association in order to obtain a simple short-stay business visa. The joint venture partner must obtain an approval letter in advance on behalf of the business visa applicant from the immigration department. These procedures may encumber trade and discourage investment.

C. IMPLEMENTING INSTITUTION

Overall, the major implementing institution, the Immigration Agency, has a clear mission, and its active leadership has made numerous changes in the past decade. A lack of professionalism, however, common to many public agencies, creates difficulties in administration.

Immigration Operations that Support Trade Facilitation. Vietnam’s system for those seeking short-term and longer trade-related stays is considered improved, but still cumbersome. As noted in the legal section, regulations are cumbersome, but not entirely prohibitive. Consular services execute visas with little delay. International visitors who seek an extended stay and work permit benefit from a more facilitative process. The Immigration Agency is seen as responsive to inquiries, and its fees are reasonable. Vietnamese immigration officials use watch lists from the INTERPOL, UN, U.S., and other sources to monitor entry and exit of dangerous persons. This procedure is executed electronically in some sites. Vietnam’s airport tax is nominal and transparently administered; as of December 2006, the airport tax is included in the passenger ticket price, and is no longer collected at the airport.

⁹⁰The ABTC was initiated by Australia in 1996 and has been applied in three founding member countries—Australia, South Korea, and the Philippines. So far, 17 APEC member economies have joined the ABTC program, including Australia, Brunei, Chile, China, Hong Kong, Indonesia, Japan, South Korea, Malaysia, New Zealand, Papua New Guinea, Peru, the Philippines, Singapore, Taiwan, Thailand, and Vietnam.

⁹¹Visas are now issued on arrival at Vietnam’s international airports, provided that the traveler has obtained pre-approval and a visa number. The cost for the visa-on-arrival is \$100.

Immigration Issues to Address. Nonetheless, Vietnam's Immigration Agency has a number of issues to address. For example, documentary requirements are not seen as fairly and transparently executed, and processing times vary. Also, corruption, while less than in other institutions, is seen as troubling within the Immigration Agency. Additionally, information technology is outdated. Officials posted at major border crossings, especially airports, have basic computer equipment for documenting persons, but full computerization has not occurred.

D. SUPPORTING INSTITUTIONS

The Immigration Agency administers the laws, while the **police**, under the **Ministry of Public Security**, provide the law enforcement function, such as detentions and arrests. The police force is considered by some to be a constructive partner. Others consider immigration, police, and customs to be part of a corrupt and inefficient system. The **Vietnamese National Administration for Tourism** is a strong partner in promoting easier flows of people for trade-related purposes. The organization receives support from the government. It has a focused mission and is well-organized. The **legal profession** provides a supporting function to the trade community by intermediating transactions between trade-related people seeking longer stays in Vietnam.

Basic **infrastructure and services** regarding people flows are considered adequate and are improving. Vietnam has two major international airports in Hanoi and Ho Chi Minh City, where there are daily direct flights from many cities in the region, particularly key hubs in Japan, China (Hong Kong), and Thailand. Vietnam is served by many airlines, including Aeroflot, Air France, All Nippon Airways, Asiana Airlines, British Airways, Cathay Pacific, Czech, Emirates, Japan Airlines, Malaysia Airlines, Pacific Airlines, Qantas Airways, Singapore Airlines, Thai Airways, Tiger Air, United Airlines, and Vietnam Airlines. Intra-country airline service accommodates travels with frequent flight between Hanoi and Ho Chi Minh City. Intra-country road travel is adequate due to decent infrastructure, but improvements are necessary. Passenger rail service is generally poor, with improvements being made on key tourist-related routes.

E. SOCIAL DYNAMICS

The concept of improving flows of people for trade-related purposes receives support in Vietnam. The government has made significant changes from the relatively insular regime it administered just a few years ago. People flows in the form of tourism are widely supported and encouraged at all levels—executive branch, legislature, private institutions, and the general public. People flows through business travel have received support for incremental improvement. There is some support in the business community for a more efficient immigration processing system to further facilitate business travelers who seek longer stays.

F. RECOMMENDATIONS

- Reform the visa system for easier access for trade-related visitors. Vietnam should consider revising its visa system for tourism and business travelers to provide greater and easier access for those interested in visiting and trading and investing in the country. Significant trading partners and countries that supply or may supply FDI should receive

primary consideration. Provision of limited-stay visas upon arrival for key trading partners should be part of this review.

- Upgrade the professionalism and modernization of the Immigration Agency. The government should assist the Immigration Agency in implementing an integrity program, including strengthened independent internal affairs. The government should also develop a comprehensive personnel system for the Immigration Agency that would upgrade candidate qualifications, improve recruitment procedures, and establish job-specific performance and evaluation standards.
- Modernize and upgrade automation for people-processing at the border. Development of a stronger information technology system should be pursued. This upgrade should include an enhanced risk analysis system.

XV. FINANCIAL CRIMES

A. INTRODUCTION

Currently Vietnam is not regarded as a country of major concern in the fight against money laundering and terrorist financing primarily because its financial sector is immature and ill-equipped to manage significant money flows. It is suspected, however, that funds related to international crime may be entering into Vietnam for investment in property and other assets, representing a problem that could grow in the absence of adequate attention. As part of its membership of the WTO and its desire to develop a stronger banking system (including a desire to establish bank branches in the United States), Vietnam is focusing its attention on certain financial crime-related policy and legislation, and has established one key institution.

With the 7 June 2005 Decree 74 on anti-money laundering that took effect 1 August 2005, Vietnam has begun to strengthen its policy regime on combating financial crimes. The new decree was developed with some technical assistance from the Asian Development (ADB) and is generally well-known and well-regarded by the private sector. However, the transaction amount that triggers automatic reporting is considered low and creates significant reporting burdens for financial institutions and investigatory burdens for government agencies. While other laws that are relevant to financial crimes do exist, such as a law on fraudulent activities and the 1999 Criminal Code that make money laundering an offense, Vietnam lacks a comprehensive approach to and legal framework for combating financial crimes. While the current system may be sufficient for now, Vietnam will need a more fully developed legal framework in order to encourage additional investment capital from established financial institutions. Decree 74 establishes the Anti-Money Laundering Information Centre (AMLIC) under the State Bank of Vietnam (SBV) as the primary government agency responsible for implementing the anti-money laundering decree. The AMLIC was not yet fully operational during the Diagnostic period. As of July 2006, it had been established its Director had been appointed. At the time of the Diagnostic, the ADB was preparing a technical assistance program to support the implementation of the Decree and build the capacity of the AMLIC.

Vietnam's long and relatively unprotected coastline make it attractive to drug traffickers, and its burgeoning commercial sector with inexperienced businessmen is a target for unscrupulous foreign and expatriate money launders, and others with similar interests. Though the financial sector is currently weak, expected increases in trade mean that Vietnam's financial system must rapidly develop a sound foundation that includes a more comprehensive policy approach to preventing and combating a broader range of financial crimes. Without such an approach, Vietnam's financial sector remains vulnerable to becoming a haven for illicit criminal financial activity. Therefore, USAID and Vietnam should take additional steps in the medium and long term to strengthen and broaden the legal framework concerning financial crimes, strengthen the capacity of implementing institutions to enforce existing rules, continue developing modern policy as necessary, and make supporting institutions feel that they are part of the first line of defense.

B. LEGAL FRAMEWORK

Like that of many countries, Vietnam's legal framework regarding financial-related crimes has been included as subordinate articles in various laws and regulations. Vietnam's 1999 Criminal Code includes provisions that make money laundering an offense and allows for measures such as freezing assets and accounts to facilitate investigations and stop criminal activities. The primary piece of Vietnam's legal framework concerning financial crimes is Decree 74 on anti-money laundering (effective 1 August 2005), which was developed with the support of the ADB. The decree includes many of the definitions, obligations, and measures generally found in anti-money laundering legislation, and establishes an agency with primary responsibility to implement the decree.

Decree 74 applies equally to Vietnamese citizens and foreigners, includes transactions conducted by both that involve Vietnamese assets, and gives precedent to international treaties to which Vietnam is a party. It also provides clear definitions of key terms including "money laundering," broadly defines financial institutions and monetary transactions, and details what "customer identification" means and how to undertake the identification process. The measures include: specific training and processes at financial institutions; customer identification guidelines, requirements, and information needs; requirements for transactions reporting and ways to deal with suspicious transactions; and temporary measures such as seizing assets, freezing accounts, and taking suspects into custody.

Chapter Two outlines the measures available to prevent and combat money laundering. The general measures outlined in Article 7 focus on preventive internal measures that financial institutions, individuals, and organizations involved in financial transactions should undertake. Article 8 describes in detail the requirements for customer identification, including specific types of information about each customer that financial institutions should obtain and maintain. Article 9 outlines requirements for mandatory reporting of large value transactions. Qualifying transactions must be reported to the SBV on a daily basis and are subject to monitoring. Interviewees noted that the thresholds have resulted in numerous daily reports to the SBV, and, while institutions comply with the requirement, it is considered burdensome particularly given the custom of using cash for most transactions such as purchasing motorbikes and houses. Article 10 provides descriptions of what constitutes suspicious transactions, and Article 11 outlines the measures financial institutions should take to combat money laundering. These measures are comprehensive and reflect global standards, and include suspending transactions, freezing accounts, temporarily seizing or holding assets, and taking into custody a person suspected of involvement in money laundering.

The decree does a sound job of identifying three chief agencies responsible for anti-money laundering efforts, and outlining their responsibilities as well as those of supporting ministries and government agencies, inspectors, and people's committees. The decree also establishes the AMLIC (Articles 13 and 14) as the central contact point to receive and process information on money laundering, and coordinate information and documentation on transactions meeting or exceeding thresholds established under the decree. The AMLIC was specifically established to undertake the duties required of the Governor of the SBV in combating financial crimes, and is the interface between the SBV and all other agencies and individuals regarding money laundering. Finally, the Ministry of Public Security (MPS) is also specifically named as an entity

with responsibility for anti-money laundering efforts, and it is “the leading agency...in preventing and combating money laundering criminals; receive and process information on criminals involved in money laundering.” The MPS is also charged with handling investigations into money laundering activities and transactions.

Other ministries and government agencies are charged with cooperating, assisting, and supporting the three primary implementing institutions (SBV, AMLIC, and MPS), and with reporting on anti-money laundering efforts in areas within their responsibility. Specialized Inspectors make reports to AMLIC, retain files for five years, and respond to requests from government agencies. Interestingly, Inspectors do not investigate or even supervise investigations. Instead, MPS organizes investigations and provides guidance to other agencies in conducting preliminary investigations. It is not clear whether one agency is responsible for leading investigations or if each agency would conduct its own investigations in its own area of responsibility. People’s committees shall guide efforts and implement within their function, and coordinate with other agencies on specific cases or transactions.

Vietnam is a party to the major international conventions relating to financial crimes, including: the Convention for the Suppression of the Financing of Terrorism (September 2002), the United Nations Convention against Transnational Organized Crime (December 2000), and the United Nations Convention against Corruption (December 2003). These conventions recognize the importance of financial intelligence units (FIU) to efforts to combat financial crimes, and the AMLIC appears to meet the definition and responsibilities of an FIU as outlined in these international conventions.

The anti-money laundering decree is a good first step towards developing a broader and more comprehensive policy and strategy to combat financial crimes, including money laundering and terrorist financing. As its trade continues to grow and the increased size and scope of trade transactions necessitates a more sophisticated banking system, Vietnam will need a stronger legal framework than the current anti-money laundering decree alone. Specifically, a primary law or series of laws that institutionalize financial crimes policies will need to be developed. Vietnam should begin to focus on developing institutional capacity in addition to developing policy and the legal framework. However, with so many competing priorities for limited resources and ADB’s project plans, further developing the legal framework can take a more medium-term outlook.

C. IMPLEMENTING INSTITUTIONS

In June 2005, the Government of Vietnam, in cooperation with the French Ministry of Interior, conducted training sessions for anti-money laundering professionals, including staff at the Ministry of Public Security. The AMLIC officially opened on 1 August 2005, and is based in Hanoi. The Director and the Deputy Directors are appointed by the SBV. Unfortunately, the Diagnostic team did not have an opportunity to meet with any members of the AMLIC at the time of in-country data collection

The ADB has committed to undertake a project supporting the Implementation of Anti-money Laundering Decree from November 2005 to October 2006.⁹² The ADB project scope focuses on working with the SBV through the AMLIC on three areas—

1. Awareness Education
 - Government institutions: Ministry of Public Security, Ministry of Finance, judges/prosecutors
 - Public awareness highlighting why money laundering is a problem for the economy, and the key points about anti-money laundering
2. Policy Development and Institutional Strengthening
 - Improving reporting requirements policies
 - AMLIC: supporting the establishing of the organization, and assisting in identifying hardware and software needs as well as physical infrastructure planning (AusAID may be interested in further supporting this activity)
3. Training for Investigators
 - Asset valuation
 - Compliance
 - Interview techniques and research
 - FIU best practices

The project was to work in phases over a nine month period with intermittent international consultant support as well as local project experts. The project was also to include a study tour to Malaysia for judges to see how money laundering cases are processed, researched, and adjudicated. One loan condition is membership in at least one international body, which would likely be the Financial Action Task Force (FATF).

To date, Vietnam has yet to become a FATF member but is an Observer to the Asia Pacific Group on Money Laundering. Short-term technical assistance may be needed to help Vietnam develop the requirements necessary for FATF membership. If such assistance does not materialize in the ADB project, compliance support could be a relatively short-term activity.

Given the targeted support of ADB in supporting the implementation of the new anti-money laundering decree, and the low likelihood of significant impact at this nascent stage in Vietnam's financial crimes policy development, USAID should monitor the ABD project but not seek to take on any projects of its own.⁹³

⁹²See the December 2005 Project Report at: <http://www.adb.org/Documents/TARs/VIE/39102-VIE-TAR.pdf>.

⁹³However, given the success of the USAID-funded Indonesia Financial Crimes Prevention Project not only in getting Indonesia removed from the FATF list of Non-Cooperative Countries or Territories (NCCT) a year earlier than anticipated but also in assisting the Indonesia FIU in standing up, building relationships across government agencies and within civil society, and professionalizing its staff and investigators, USAID may consider implementing a similar project. Vietnam is not on the NCCT list and currently is unlikely to be put on the list given its progress in the legislative and institutional realms, but, depending on the breadth and depth of the ADB project, USAID might consider augmenting the support to AMLIC with consistent, longer-term support.

D. SUPPORTING INSTITUTIONS

Most financial institutions, legal professionals, and other entities involved in implementing the new anti-money laundering decree support the decree and view it as a step towards improving the banking and financial sector environment and increasing consumer confidence in the banking system. Banks in particular distributed information on the new decree once it was promulgated in order to explain the requirements and impacts on customers, and to allay initial public concerns.

Most financial institutions, however, do not see themselves as proactive participants in shaping policy or combating financial crimes, and instead only react to requests from authorities (including some requests by the U.S. Embassy through SBV) and undertake reporting as required. A common response was that financial institutions did not have the capability to determine whether or not funds were “clean” and must accept all transactions, following requirements prescribed by law. Financial institutions will respond to requests but do not consider it their responsibility or within their ability to identify suspicious transactions or even meaningfully scrutinize transactions or customer identification documentation. There was also confusion about whether or not there was a legal requirement for reporting transactions, or a clear process for reporting. One interviewee believed that financial institutions only had an obligation to respond to requests from inspectors from the State Inspectorate and Auditing Agency who came to inspect books or sent other requests for information. Most respondents, however, understood that the new decree required reporting transactions above certain thresholds. Targeted public awareness about the impact of the new decree is warranted for financial sector professionals as well as for the general public. The ADB project should include a program of public awareness, and USAID should monitor its progress and suggest or even support training activities for targeted groups.

Business associations catering to securities and financial investors reviewed the new decree and expressed concerns about certain articles, but there are no sustained or ongoing advocacy campaigns. There is no current need for advocacy support in the financial crimes area, but as a broader policy is developed, it would be worthwhile to engage the Association for Securities Companies and the Association of Financial Investors.

E. SOCIAL DYNAMICS

In general, the public does not seem to be well-informed about the negative impact of money laundering on the economy, or about the new decree. The Government of Vietnam has taken some measures to inform the public through billboards and limited campaigns to explain anti-money laundering efforts, banks have provided some educational information on the new decree, and a few civil society organizations have done so as well, but a more comprehensive effort is warranted. Changing the tacit acceptance that corruption is a customary part of doing business is vitally important to avoid the potential for petty corruption to develop into financial crimes of greater magnitude.

Vietnam is fortunate that it is not yet grappling with a serious financial crimes environment. Though there is not currently a dire, urgent need for immediate reform, over the next two years is the time to strengthen the foundation building blocks that the Government of Vietnam has already put into place. Three keys to a more robust financial crimes policy are—

- A broader and institutionalized legal framework underpinned by primary laws instead of reliance on decrees.
- Greater institutional capacity of implementers and understanding by financial institutions and entities of the impact of their important and frontline participatory roles.
- A change to the general societal acceptance of corruption as an ordinary part of doing business.

F. RECOMMENDATIONS

- In the near term, the ADB project supporting the implementation of the new anti-money laundering decree should suffice as the new policy and fledgling institutions take root. USAID should monitor the ADB project, offering support on small training and public education activities.
- In the medium term, the Government of Vietnam and USAID should consider reviewing the applicability and lessons learned of successful USAID projects such as the Indonesia Mission's Financial Crimes Prevention Project. The ADB project will provide initial support to AMLIC however a more sustained (e.g., one to two year-long) program of technical assistance, particularly in operational matters and additional training on investigatory techniques, may be needed.
- In the medium to long term, the Government of Vietnam should begin developing a more comprehensive approach to financial crimes that broadens from just anti-money laundering efforts to include counter-terrorist financing measures and white collar financial crimes. This approach should be equally focused on developing the legal framework as well as the capacity of institutions and entities charged with implementing and supporting the implementation process.

In general, a consistent and real approach—beyond public statements—to eliminating corruption throughout society is critical. Real consequences must be institutionalized, whistleblowers protected, and even minor infractions not tolerated.

XVI. INTELLECTUAL PROPERTY

A. INTRODUCTION

The perception among foreign investors, donors, and local professionals in Vietnam is that piracy and counterfeiting is pervasive in Vietnam.⁹⁴ For example, as noted in the Office of U.S. Trade Representative's 2006 Special 301 Report, *USTR Watch List*, "IPR infringement remains rampant" in Vietnam, with reports that "in some cities, 100 percent of the CDs, VDCs, and DVDs sold are pirated."⁹⁵ Similarly, several interviewees recounted multiple instances of trademarks being infringed, not only by private actors within the Vietnamese economy, but also by SOEs.⁹⁶

In response to international pressure to address and enforce IPR more effectively—most significantly as part of its implementation of the U.S.-Vietnam BTA and WTO accession process—Vietnam enacted a new Law on Intellectual Property in November 2005. Chapter 8 on provisional measures of the 2004 Civil Procedure Code was included in response to Vietnam's U.S.-Vietnam BTA (and soon to be TRIPS) obligations.

Currently, Vietnam is on USTR's "Watch List" of countries that do not provide adequate and effective protection of IPR (although, significantly, it is not among the 13 countries listed on the USTR's "Priority Watch List" for 2006).⁹⁷ An active and concerned international community continues to exhibit enormous interest in whether Vietnam will demonstrate a commitment to IPR beyond the enactment of statutes, and whether Vietnamese society itself will recognize its shared economic interest in curtailing the abuse of intellectual property.

For the purposes of this Report, IPR refers generally to the legal protection afforded industrial property and copyrights and related rights. Industrial property includes patents, trademarks, industrial designs, and geographic indications, protected plant varieties, layout designs of integrated circuits, trade secrets, and protection against acts of unfair competition including unregistered but well-known marks. Copyrights include literary works such as novels, poems, plays, reference works, newspapers, and computer programs; databases; films, musical compositions, and choreography; artistic works such as paintings, drawings, photographs, and sculpture; architecture; and advertisements, maps, and technical drawings.⁹⁸ Rights related to copyright further include those of performing artists in their performances, producers of

⁹⁴The Intellectual Property Rights (IPR) Section was completed following the in-country assessment that occurred in September 2005. The review provided in this section is based on information developed during the assessment, as well as on primary research materials as noted, and dates within this section reflect events following September 2005.

⁹⁵Office of the United States Trade Representative, 2006 Special 301 Report, *USTR Watch List*, pages 13-14.

⁹⁶See *Southeast Asia Commercial Law & Institutional Reform and Trade Diagnostics—Vietnam* (USAID/Booz Allen Hamilton), draft, page 91: "[A]n international trademark-holder, manufacturing apparel in Vietnam, encountered fashion shows that showcased illegally marked clothing produced in state-owned or controlled factories..."

⁹⁷*USTR Watch List*, page 14.

⁹⁸See World Intellectual Property Organization, "About Intellectual Property," available at <http://www.wipo.int/about-ip/en/>.

phonograms in their recordings, and those of broadcasters in their radio and television programs.⁹⁹

B. LEGAL FRAMEWORK

Although Vietnam enacted national legislation pertaining to the protection of intellectual property as early as 1981, IPR as a policy issue has received meaningful government attention only since the enactment of the U.S.-Vietnam BTA, effective 10 December 2001, and as a result of Vietnam's 2006 final push toward admission to the WTO.¹⁰⁰ Prior to the IP Law, the primary legal source for IP norms was Part VI of the Civil Code. Once Vietnam decided to adopt a comprehensive IP Law, there was considerable debate about the appropriate place of the Civil Code IP provisions in the legal framework. The result was that Part VI of the Civil Code was retained but was substantially reduced from 80 articles to 22 articles. In November 2005, the National Assembly passed a comprehensive *Law on Intellectual Property*, which took effect on 1 July 2006. The law consists of 222 Articles, arranged generally as follows—

General provisions	Articles 1–12
Copyrights and related rights	Articles 13–57
Industrial property rights	Articles 58–156
Plant variety rights	Articles 157–197
Enforcement	Articles 198–219
Provisions of implementation	Articles 220–222

In the wake of the new IP Law's enactment, a number of implementing regulations were developed and adopted, including Decree 100, Decree 103, Decree 105, and Decree 106. To further guide the IP Law and the implementing Decrees, the SPC has developed two circulars, one on criminal IP violations and the other on civil litigation involving intellectual property.

The IP Law did not alter the criminal provisions with respect to IP violations. Criminal liability remains the sole purview of the Criminal Code. The Criminal Code contains a number of articles that can be fairly described to cover “intellectual property” crimes, most notably Articles 131, 156, 157, and 171. However, significant deficiencies exist in these Criminal Code provisions when compared to Vietnam's obligations under the U.S.-Vietnam BTA and Article 61 of TRIPS. Given the inability of Vietnam to amend its criminal code prior to WTO accession, Vietnam committed to a stop-gap measure: it will enact guidelines that will enable the criminal law provisions to be applied in a manner that would be consistent with TRIPS Article 61. It is envisioned that amendments to the IP provisions in the Criminal Code will be undertaken in 2008.

The totality of Vietnam's IPR regime now falls under the following laws and regulations—

⁹⁹Id.

¹⁰⁰On May 31, 2006, Vietnam and the United States signed a bilateral market access agreement, thus essentially clearing the way toward Vietnam's admission to the WTO. Final accession to the WTO was expected to take place before the Asia Pacific Economic Cooperation (APEC) summit in November 2006, but was eventually concluded in December 2006, with Vietnam formally joining the WTO on 11 January 2007. See www.wto.org and U.S.-Vietnam Trade Council, information pertaining to WTO Accession by Vietnam, available at <http://www.usvtc.org/trade/wto/index.htm>.

- The Law on Intellectual Property (in effect on 1 July 2006)
- The Civil Code (2005)
- The Civil Procedure Code (2004)
- The Criminal Code (1999) as guided by SPC Circular
- The Law on Customs (as revised in 2005)
- The Law on Competition (2004)
- The Ordinance 44 on Handling the Violation of Administrative Regulations (as revised in 2005)
- The Law on Cinema (passed June 2006)
- The Law on Information Technology (passed June 2006)
- The Law on Technology Transfer (passed 2006; effective 1 July 2007)
- The Decree 106/2006 On Penalties for Administrative Breaches on the Industrial Property Sector
- The Decree 103/2006 Providing Guidelines for Implementation of a Number of Articles of the Law on Intellectual Property with Respect to Industrial Property
- The Decree 105/2006 Providing Guidelines for Implementation of a Number of Articles of the Law on Intellectual Property with Respect to Protection of [IPR]
- The Decree 100/2006 Giving Detailed Regulation and Guidance on the Implementation of Certain Articles of the Civil Code and the Law on Intellectual Property, Copyright and Related Rights

Relevant pending legislation includes the draft Decree on Sanctions for Administrative Offenses against Copyright or Related Rights, the draft Inter-Circular guiding the application of certain provisions of the Law on IP in resolution of disputes over IPR at the peoples' court, and the draft Inter-Circular guiding Criminal Prosecution with regard to certain acts of infringement of IPRs. The USAID/STAR Project devoted a substantial proportion of its overall resources to supporting these many legal reforms and related institutional capacity and training efforts related to improving IPR enforcement.

Technology transfer, which pertains generally to one party making its technology resources available to another—usually the private sector—for the purpose of encouraging economic growth and innovation—remains regulated by Vietnam's Civil Code (Part VI), as well as the Commercial Law and Competition Law. A new Law on Technology Transfer continues the state's control over technology transfers from abroad by continuing the current requirement for registration of technology transfer contracts. The law also introduces sub-licenses for technology service providers, contrary to the trend towards abolishment of sub-licenses.

Vietnam is a member of the World Intellectual Property Organization (WIPO) (1976) and has acceded to the principal multilateral conventions governing intellectual property, including the *Paris Convention for the Protection of Industrial Property* (as of 1949), the *Madrid Agreement on International Registration of Marks* (1949), and the *Patent Co-operation Treaty* (10 March 1993). As part of its commitments under the U.S.-Vietnam BTA,¹⁰¹ Vietnam has acceded to three major international agreements pertaining to IPR: the *Berne Convention on Copyright*

¹⁰¹And under its commitments under the U.S.-Vietnam Bilateral Copyright Treaty (signed on 27 June 1997 and enforceable since December 1997).

Protection for Literary and Artistic Works (26 October 2004); the *Geneva Convention for Protection of Producers of Phonograms against Unauthorized Duplication of Phonograms* (6 July 2005); and the *Brussels Convention relating to the distribution of program-carrying signals transmitted by satellite* (12 January 2006). Chapter II of the U.S.-Vietnam BTA draws its provisions largely from the WTO's TRIPS agreement, which establishes minimum levels of protection that each member state must give to the intellectual property of fellow WTO members.¹⁰²

Vietnam joined the UPOV Union with respect to the protection of new plant varieties on 24 December 2006. Vietnam joined the *Protocol Relating to the Madrid Agreement* (entry into force 11 July 2006)¹⁰³ and the Rome Convention (entry into force 1 March 2007).

Given that TRIPS predates the WIPO Internet treaties and that the U.S.-Vietnam BTA provisions are based on TRIPS, Vietnam was not obligated to join either the WIPO Copyright Treaty (WCT) or the WIPO Performances and Phonographs Treaty (WPPT). Nevertheless, both the WCT and the WPPT were consulted during the development of the IP Law.

In Vietnam, intellectual property violations are addressed almost exclusively through its administrative sanctioning regime. This system has created jurisdiction over IP enforcement across a diverse group of administrative agencies: the Economic Police of Ministry of Public Security, the Customs authorities under the Ministry of Finance, the inspectorate of the Ministry of Culture & Information, the inspectorate of Ministry of Science and Technology, and the Competition Board of the MOT. In each of the 64 provinces, this involves corresponding local departments of (i.e., departments of Science and Technology, Trade, Economic Police, and Culture and Information). The procedure is for these agencies to investigate complaints of infringement and, where found, sanction the violator by a number of actions—most notably by the imposition of a monetary fine and the instruction to cease the infringing activity. This administrative system, although sometimes praised for its ability to take quick, decisive action, is largely seen as unable to deter infringement or offer compensation to the right holder for the harm suffered as a result of the infringement.

This Diagnostic identified the following weaknesses—which in substance remain significant concerns even following the enactment of the new IP Law—within Vietnam's legal framework:

- *IPR enforcement mechanisms remain too dispersed and lack coordination.* The lack of coordination by the administrative enforcement agencies, coupled with the low administrative fines imposed, contribute to the overall inadequacy of enforcement in Vietnam.
- *Few criminals are prosecuted for IP violations.* Although there have been several prosecutions under Articles 156 and 157 for crimes involving “fake goods,” we are unaware of any prosecutions for violations of copyright under Article 131 or for violations of industrial property rights under Article 171.

¹⁰²See the WTO TRIPS gateway, available at http://www.wto.org/english/tratop_e/trips_e/trips_e.htm.

¹⁰³Information pertaining to each of these conventions and the terms of Vietnam's membership can be found at the World Intellectual Property Organization international treaties page, available at <http://www.wipo.int/treaties/en/>.

- *Civil litigation remains untested.* Civil litigation for IPR violations is rare when compared with the faster, less expensive, and more predictable outcomes provided by the administrative enforcement bodies. However, it is anticipated that there may be a shift towards civil litigation under the new IP Law, which contains specific provisions on remedies and offers the availability of preliminary injunctions.

C. IMPLEMENTING INSTITUTIONS

The **Ministry of Science and Technology** (MoST) is the primary government body responsible for administration of Vietnam's IPR regime. Jurisdiction over specific areas of IPR falls into other ministries as well—

MoST—industrial property rights

Ministry of Culture and Information—copyright and related rights

Ministry of Agriculture and Rural Development—new plant varieties

Ministry of Trade—unfair competition

According to the Competition Law and its implementation legislations, the Department of Competition Administration (DCA) under the MOT handles complaints against unfair-competition acts, including misleading instructions (e.g., instructions that contain misleading information about commercial names, business slogans, business logos, packaging, geographical instructions), infringement of business secrets, and advertisement aimed at unfair competition (e.g., imitating another advertising product in order to mislead customers, providing false or misleading information to customers about design, type, packaging, origin of goods, manufacturer, place of manufacturer, processor or place of processing). Despite this grant of jurisdiction over acts of unfair competition to the Competition Board and Vietnam's predisposition for administrative enforcement, it is possible to resort to civil litigation for acts of unfair competition.

Each of these agencies has received significant technical assistance and training from donors such as the United States (through the USAID/STAR Project), the European Union (through ECAP), Japan, (through Japan International Cooperation Agency, JICA), and the Swiss Agency for Development and Cooperation.

With respect to **Customs** border measures protection under TRIPS, the Customs Law and its implementing decree and two circulars (one on copyright the other covering industrial property) were in place prior to the IP Law. The IP Law also contains provisions that codify the IPR border measures regime. However, the current system does not provide Customs officials with *ex officio* authority to act with respect to IPR violations. Instead it is incumbent on the right holder to file an application for assistance in intercepting goods suspected of infringing IP rights. We could not determine whether right holders were utilizing this program and with what success. It appears that more training and resources are required for the relevant Customs officials in order to make the program fully operational.

Finally, a significant implementing institution with respect to IPR in Vietnam is the **courts**. In particular, judges who work within the **economic and civil divisions** of the Provincial Courts will require significant and ongoing training in the understanding and enforcement of intellectual

property. Since 2001, USAID’s STAR Project, often working in close cooperation and with substantial support from the U.S. Patent and Trademark Office, and sometimes in cooperation with the CIPIT Court in Thailand and a Danida project, has provided training to judges on IPR issues under the U.S.-Vietnam BTA, TRIPS, and international best practices. In addition to working with the Supreme People’s Court, USAID/STAR has begun working with the Supreme Peoples’ Procuracy in cooperation with the U.S. PTO and U.S. Department of Justice on IPR training for prosecutors.

D. SUPPORTING INSTITUTIONS

A number of supporting institutions exist to participate in the development of a workable IPR regime in Vietnam. First, Vietnam has established a **National Office of Intellectual Property (NOIP)** and, within NOIP, a **Support and Consultancy Center** aimed at performing the following functions—

- Promoting public awareness of IPR.
- Supporting Vietnamese enterprises in their efforts to take advantage of the protections afforded their intellectual property rights pursuant to the new IPR law.
- Participating in efforts to develop the “national IP system.”
- Supporting national, regional and local authorities in their efforts to enforce Vietnam’s IPR regime.
- Participating in technology transfer activities.¹⁰⁴

This Diagnostic did not determine the relative strength or effectiveness of this agency.

In recent years, **private law firms** that claim specific expertise in the protection and enforcement of intellectual property rights have emerged in Vietnam.¹⁰⁵ Vietnam also has an active, quasi-governmental **Chamber of Commerce and Industry** that has a strong infrastructure for promoting IPR awareness within Vietnam’s private sector.

Although the **law school** curriculum in Vietnam generally aspires to teach students about the fundamental aspects of IPR, meaningful scholarship and teaching in this arena are limited. Over the course of the Diagnostic, those lawyers who demonstrated the clearest grasp of intellectual property law principles and practice were those who had studied abroad (often in Russia) or are currently working in foreign law firms in Vietnam.

IPR rights are increasingly being covered in the print and broadcast **media**; however, the coverage often misstates the law and reveals a general lack of understanding of the nature of IPR and the harm caused by infringements apart from the obvious health and safety concerns.

Throughout its presence in Vietnam, **USAID/STAR** has provided significant technical assistance and training opportunities in the area of IPR. In addition to the judicial and prosecutor training noted above, USAID/STAR has provided technical assistance to support development of many

¹⁰⁴See “The IP Support and Consultancy Center & National Program on Supporting the Development of Enterprises’ IP Assets,” Agenda Item 6-B-iii, 22nd APEC Intellectual Property Expert’s Group Meeting 21-22 February, 2006.

¹⁰⁵See “Intellectual Property Firms in Vietnam,” <http://www.ipmenu.com/ipfirms/vietnam.htm>.

of the legal instruments governing intellectual property and enforcement, including the Civil Code amendments, the recent IP Law, the Civil Procedure Code and the pending Judgment Enforcement Code, the Customs regulations on border measures, and on training local enforcement officials. Similarly, the **EC-ASEAN Intellectual Property Rights Cooperation Program** (ECAP II) is an effort by the European Union to strengthen TRIPS compliance throughout Asia, with a special emphasis on enforcement. In the latter half of 2005, ECAP assisted Vietnam through such means as translating its draft IP Law into English, providing the new IP library at the National Office of Intellectual Property with pertinent CDs and other literature, and supplying NOIP with computer hardware and software. Switzerland has also supported a long-standing technical assistance program to improve the infrastructure for IPR protection.

The **U.S. Vietnam Trade Council** also actively promotes understanding of and compliance with IPR. Its dissemination of regular legislative updates on trade-related activities in Vietnam, including IPR, is an invaluable resource and represents a “best practice” in explaining the country’s legal environment to potential foreign investors. The USVTC also conducts a well-received monthly lecture on IPR at the public library in Ho Chi Minh City. A similar effort in Cambodia or Laos would constitute a much-needed service to the private sector and others.

Finally, among the organizations that are the most vocal about and dedicated to the need to improve adherence to and enforcement of IPR in Vietnam is the **American Chamber of Commerce**.

Several anti-counterfeiting organizations have come into operation over the last several years, as have collective management organizations. Vietnamese businesses are increasingly promoting the use of trademarks and, as a result, are adding domestic pressure to improve IPR enforcement.

E. SOCIAL DYNAMICS

Vietnam’s virtual crisis in the area of IPR was summarized last fall by Michael W. Marine, the U.S. Ambassador to Vietnam—

As Vietnam’s economy modernizes and expands, the focus of production is shifting from “perspiration” to “inspiration” industries. A lack of respect for IPR effectively stifles the innovation needed to fully transform to a market economy. The benefits of IPR protection are really Vietnam’s to lose. Sectors like medical equipment and software development have huge potential here. Lack of IPR protection not only deters foreign investment, it puts Vietnam behind its neighbors in crucial areas of competition.¹⁰⁶

Indeed, during the Diagnostic, representatives of the foreign investment and donor communities reported vast gaps in understanding throughout the country about underlying IPR principles, as well as great ambivalence over the impending IP Law’s actual implementation. Foreign manufacturers in particular reported concern over the damage that widespread counterfeiting in Vietnam will inflict on their reputations *throughout the world*. Foreigners agree that, in the

¹⁰⁶Michael W. Marine, “Taking Stock,” Speech at the Annual Meeting of the American Chamber of Commerce, Hanoi, Vietnam, 21 September 2005.

absence of demonstrable, quantifiable progress in the arena of IPR, Vietnam's relative attractiveness to foreign investors, both as a base for production and a market in the future, will never achieve its potential.

The government has definitely strengthened its commitment to trying to deal with IPR infringement. It is increasingly difficult to buy a personal computer with pirated software, and there have been a number of publicized software "busts." International software providers are working closely with government authorities to increase enforcement.

F. RECOMMENDATIONS

- Reduce the number of administrative agencies engaged in IPR investigation and enforcement and narrow the types of violations subject to their jurisdiction.
- Revise the criminal code provisions to conform to TRIPS.
- The government should commit itself to investigating and banishing IPR violations from all SOEs.
- Vietnam's compliance with its WTO accession commitments, including its commitments to IPR, should be tracked in a methodical and consistent manner.
- In the area of IPR, the Ministry of Science and Technology should be singled out for technical assistance and capacity building, with special attention given by donors to coordination of assistance and leveraging of resources. Assistance to the other ministries charged with implementing IPR should include special programs and training initiatives pertaining to IPR.
- Target the community of supporting institutions—including business associations, law schools, and other institutions of higher learning, NGOs, and even the media—for the purpose of building basic public understanding of the principles of IPR.
- Work with USAID/STAR and ECAP II to target most promising areas of IPR capacity-building, including in particular further training for judges and prosecutors.

ATTACHMENT 1: COMPILATION OF RECOMMENDATIONS

COMPANY LAW AND CORPORATE GOVERNANCE				
No.	Type	Recommendation	Priority	Duration
1	Corporate Governance	Establish a mechanism to identify those businesses that are formally registered but no longer functioning. This process would provide a more accurate picture of Vietnam's formal sector, thus enabling more effective support in the future. It may also serve to better facilitate appropriate use of the bankruptcy regime.	Medium	Short-term
2	Corporate Governance/ Training	Establish a plan for implementation of the EL that leverages the many government and private sector assistance activities in Vietnam, including training of pertinent constituencies, support for public education, and a long-range plan for improved practices of corporate governance for mid-sized and larger companies.	High	Medium-term
3	Corporate Governance/ Training	Continue leveraging both donor assistance and opportunities inherent through the presence of foreign companies to promote the increased professionalization of the business support sector. C. For example, support for university curricula pertaining to commercial law, improved access to internships, on-the-job-training, and continuous skills training for valuation professionals and others would increase the overall ability of professionals to cope in the increasingly complex business environment.	Medium	Medium-term/ Long-term

CONTRACT LAW AND ENFORCEMENT				
No.	Type	Recommendation	Priority	Duration
1	Regulatory Reform	Create a single volume of selected laws (or relevant portions of laws), ordinances, decrees, pertinent Supreme Court decisions, and other sources of authority pertaining to contracts. A single volume, regularly updated and readily accessible in print and electronically, could significantly increase understanding and clarify practices related to contracts and could serve as the basic text for future training of judges, lawyers, and law students.	High	Short-term/ Medium-term
2	Contract Law/Training	Establish a plan for implementing the new contract regime that leverages the many government and private sector assistance activities in Vietnam, including training of judges and other pertinent constituencies, support for public education, and engagement of the media.	Medium	Medium-term
3	Contract/Policy Reform	Strengthen private sector practices, including standardization of business contracts, development of unified self-help practices (including pre-litigation attempts at collection), and increased use of alternative dispute resolution.	High	Medium-term

REAL PROPERTY LAW				
No.	Type	Recommendation	Priority	Duration
1	Regulatory Reform	Facilitate the better use of land use rights and assets purchased with loan proceeds to help low income and poor borrowers (who are currently focused on unsecured lending) access finance from banks for the purchase of, or improvements to, houses.	High	Medium-term
2	Land Titling	Expedite land titling reform by accelerating the issuing of LURCs in urban areas. Resolve the debate on land use rights title as possible under the provisions of the Land Law, Decree 181, and Joint Circular 05/2005.	High	Short-term
3	Regulatory Reform	Amend the Land Law or Decree 181 or both to make it clearer that buildings and other structures attached to land are an integral part of the land use right or lease over land. The misconception that buildings on land that is held under land use rights or lease cannot be owned automatically by the owner of the land use right or leasehold interest should be dispelled by more specific provisions in the Land Law or Decree 181.	Medium	Short-term
4	Land Titling Reform	Promote the use of LURs as securities by low income and poor borrowers for housing; they need to have clear title through LURCs or BOLUCs and there needs to be an open and more transparent market in land so that realistic valuations of land use rights and assets on land for all purposes are easier to obtain.	Medium	Medium-term/ Long-term
5	Property Law/Legislative Reform	To encourage the use of immovable property purchased with the loan proceeds as securities, either the National Assembly or the government should seriously reconsider the state of the law relating to the ownership of land use rights and buildings attached to land and undertake a comprehensive revision of it, removing unnecessary references to it in the Civil Code and amending the Land Law to ensure that all of the law relating to land use rights and leasehold tenures of land and the ownership of buildings and other structures attached to land are kept together under the Land Law. There are available in Vietnam, at present, a number of international consultants with considerable expertise in land tenure and titling systems in many countries. They could readily assist with such a revision of the Land Law and Decree 181.	Medium	Medium-term/ Long-term

SECURED TRANSACTION LAW				
No.	Type	Recommendation	Priority	Duration
1	Land Administration Reform	Engage in the relatively straightforward process of networking the three pledge registries for movables so that pledges can be entered into the National Database in real time.	High	Medium-term
2	Land Administration Reform	Increase the number of pledge registry offices for movables.	Medium	Short-term
3	Land Administration Reform	Review the functions and processes of the mortgage registry office land use rights for the purpose of improving efficiency, effectiveness, and user satisfaction.	High	Short-term/ Medium-term
4	Regulatory Reform	Increase the overall effectiveness of the secured transactions regime in Vietnam—with respect to both movable and immovable collateral against loans—by 1) mapping the system of enforcement of judgment (so that all judicial and administrative processes are clearly understood), reviewing it for efficiency and effectiveness, and significantly reforming it.	Medium	Medium-term

BANKRUPTCY LAW				
No.	Type	Recommendation	Priority	Duration
1	Regulatory Reform	The government should develop bankruptcy regulations that significantly detail, clarify, and correct deficiencies in the law. Extensive donor assistance that emphasizes international best practices in the field should be accessed and engaged by the drafting agencies.	Medium	Short-term/ Medium-term
2	Regulatory Reform	New regulations should underscore the importance of bankruptcy Administrators—rather than Trustee Committees or the judges themselves—in managing the critical aspects of liquidation and, where necessary, reorganization. Judges should merely act as overseers, charged with monitoring the work of Administrators, resolving disputes among stakeholders, and enforcing compliance by all parties with deadlines and other requirements.	Medium	Medium-term
3	Regulatory Reform	Assuming new regulations allow for the development of a corps of professional bankruptcy Administrators, significant technical assistance and training should be provided in this field.	Low	Medium-term
4	Bankruptcy Process	When the time comes for revision of the law, fully secured creditors should be integrated as a key player in the insolvency process, particularly with respect to business reorganization.	Medium	Medium-term/ Long-term
5	Training	Economic Court judges—or, as recommended by the World Bank, a subset among them specifically designated as bankruptcy judges—should receive comprehensive training in the new law’s concepts and procedures and the underlying principles of formal insolvency in a market economy.	Medium	Medium-term/ Long-term
6	Public Outreach	Supporting institutions, such as bar associations, business groups, universities, and the media, should be engaged as part of a significant public education initiative that emphasizes the importance of formal exit procedures and the removal of social stigma and perceptions of criminal behavior that currently attach to bankruptcy.	Medium	Medium-term/ Long-term
7	Public Outreach	For the benefit of potential foreign investors who will be interested in the state of Vietnam’s bankruptcy system, an English-language version of the new law (and all related guidance and regulations) should be posted on commonly accessible Internet sites.	Medium	Medium-term/ Short-term

COMPETITION LAW AND POLICY				
No.	Type	Recommendation	Priority	Duration
1	Regulatory Reform	The Vietnamese government should enact the remaining regulations called for in the Competition Law, including establishing the Competition Council.	High	Short-term/ Medium-term
2	Regulatory Reform	The Vietnamese government should increase the resources allocated to VCAD significantly, given VCAD's multiple responsibilities for competition law, consumer protection law, and antidumping law enforcement.	Medium	Medium-term
3	Training and Public Outreach	VCAD and the Competition Council should conduct socialization programs for the public, businesses, government, academics, judges, and other stakeholders to educate them about the rationale for competition policy and application of the Competition Law.	Medium	Medium-term
4	Institutional Strengthening and Regulatory Reform	The foreign donor community should provide technical assistance to VCAD and the Competition Council in the following areas: <ul style="list-style-type: none"> • Planning and setting priorities; • Assistance in drafting any required implementing regulations; • Developing internal operating procedures for handling complaints, investigations, and exemptions; and • Training staff in case screening and investigative techniques. 	Medium	Medium-term/ Long-term

COMMERCIAL DISPUTE RESOLUTION				
No.	Type	Recommendation	Priority	Duration
1	Judicial System Reform	Develop a clear and consistent plan for the reform of the courts and a judgment enforcement system. Develop a plan for how the government will coordinate and maximize donor assistance to the courts.	High	Long-term
2	Legal Reform	Reconcile goals for reform with the fundamental inconsistency between traditional notions of judicial independence and judicial subservience to the National Assembly.	High	Long-term
3	Judicial Training	Increase the number of trained arbitrators.	High	Long-term
4	Public Outreach	Educate the public with respect to arbitration.	Medium	Short-term
5	Regulatory Reform	Reform the Ordinance on Commercial Arbitration to allow domestic firms access to international arbitration.	Medium	Short-term
6	Enforcement of Court Ruling	Improve the enforcement regime for court judgments. Absent effective enforcement, many reform efforts will not succeed.	High	Medium-term

COURT ADMINISTRATION				
No.	Type	Recommendation	Priority	Duration
1	Regulatory Reform	Publish the “Roadmap for Reform” of Courts so that it is a public document, subject to review, debate, and input from all interested parties.	High	Short-term
2	Court Operations Reform	The Courts, in particular the Supreme People’s Court, the government, the Party, and the donor community should transform the current approach to court reform to a formal, long-term scheme, one that institutes a common form of case management, tracking, and recordation throughout the country. The scheme should also entail a comprehensive system of long-range planning for integration of automation into the courts. It should consider the use of case differentiation (the practice of subjecting cases to different treatment according to their level of complexity), thereby allowing simple cases to flow through the system more efficiently.	High	Long-term
3	Regulatory/ Legislative Reform	Research the concept of judicial independence in a single party state, and introduce it as a topic of discussion. Although interest in judicial independence is high in Vietnam, there simply is no consensus among the various interested parties as to what this concept actually means.	Medium	Medium-term
4	Training	Encourage law schools to provide extensive training on legal and judicial ethics in order to address concerns over rent-seeking.	Medium	Long-term

FOREIGN DIRECT INVESTMENT				
No.	Type	Recommendation	Priority	Duration
1	Regulatory/ Legislative Reform	Promulgate all regulations necessary to effectively implement the IL as quickly as possible to avoid uncertainty about the rules governing investment in Vietnam.	High	Medium-term
2	Regulatory Reform	Eliminate all unnecessary, burdensome, and duplicative regulatory procedures and requirements related to investment through a transparent process under strong central-level leadership.	Medium	Medium-term
3	Corporate Governance	Direct programs on corporate governance, with an emphasis on attracting foreign capital, toward Vietnam's mid-size and larger domestic firms.	Medium	Medium-term
4	Coordination and Oversight	Continuously catalog, monitor, coordinate, and leverage the wide variety of FDI-related donor initiatives.	Medium	Short-term

INTERNATIONAL TRADE LAW				
No.	Type	Recommendation	Priority	Duration
1	Regulatory Reform	Fully implement all of the market access commitments in the U.S.-Vietnam BTA and WTO. Compliance with the U.S.-Vietnam BTA will be viewed by potential trading partners as a basis for whether to do business in Vietnam.	High	Short-term/ Medium-term
2	Procedural/ Regulatory Reform	Assess and evaluate commitments to AFTA, with a view to determining the value of acceding to its commitments and enforcing similar acceptance and implementation by its partners	High	Medium-term
3	Institutional Building	Single out the MOT for technical assistance and capacity building, with special attention given by donors to coordination of assistance and leveraging of resources.	Medium	Medium-term/ Long-term
4	Technical Coordination	Donors should engage in a coordinated plan for the most effective use of resources in the short-, mid-, and long-term, beginning with the scores of technical assistance options listed in the EU's <i>Needs Assessment for Trade-Related Assistance</i> , along with an updated digest of donor activities currently taking place.	High	Medium-term/ Long-term

FLOW OF GOODS AND SERVICES				
No.	Type	Recommendation	Priority	Duration
1	Procedural Reform/ Regulatory Reform/ Training	Build an active and working integrity program. As noted, corruption is now endemic and integrity measures must be the top priority. Customs and other trade-related agencies should seek to rebuild and maintain integrity in several ways, including the removal of officers. Selective verification of information should be performed on an as-needed basis. Officers should be required to update their financial changes annually. The new training program should incorporate other integrity components. Customs and trade-related agencies should consider implementing a dedicated, anonymous call-line for reporting corruption, and the call-line should be advertised along with the results of information and tips provided. Most importantly, progress and improvement must be assessed against a baseline.	High	Medium-term
2	Procedural Reform	Develop a competitive market for trade transportation and logistics and fully implement the commitments on trading and distribution rights for foreign-invested businesses. A fully developed and competitive market for trade transportation and logistics should be a primary goal for trade facilitation. These reforms include revision of legal and regulatory barriers, as well as subsidies and other non-tariff barriers. These efforts could begin with a comprehensive review of the various transportation and logistics sectors that would identify the specific barriers and prioritize sectors for reform. For example, the express courier sector, which is partially liberalized, would be developed to follow best international practice operations using regional leaders as benchmarks (e.g., Singapore). As part of the implementation, the processes involving public institutions would also be upgraded. For example, customs software development promotes an efficient express courier administration based on WCO express consignment guidelines. Developing an efficient distribution system requires broad-based policy reforms of the existing intermodal arrangements, including the establishment of new operational systems. Reforms should be tested before the changes are adopted on a nation-wide basis. Pilot projects to experiment with the principal reform elements should be considered. For example, focusing on pilot corridors based on several selection criteria, to include potential private sector interest and financial and economical viability. The policy framework will be critical to the success of these reforms.	Medium	Medium-term/ Long-term

3	Procedural Reform/ Training	Help Customs advance modernization efforts. Provide additional training and a training curriculum to increase capacity of those officers who specialize in the following area: a) customs classification and valuation; b) commercial fraud detection; and c) risk assessment and risk management. Incorporate risk assessment and risk management programs, including advanced information technology capabilities/support, strategic sector analysis, and well-developed post-audit procedures, into Customs.	High	Long-term
4	Procedural Reform	Implement a risk management system. Risk management is the foundation of a modern Customs agency. A well-developed risk system will identify areas of concern that can easily be developed into specific actions. A risk management system will assist in the restructuring of the institution according to principles of modern public organization management.	High	Short-term/ Medium-term
5	Procedural Reform	Modernize trade-related processes. Establish a centralized location for importers and customs employees to consistently and accurately determine the classification of goods, the projected duty, and to obtain rulings in advance of importation. Only when trade-related processes have been streamlined and simplified should steps be taken to incorporate IT/electronic processing into the dynamic. This is, however, an important second step. Such automation, which is non-existent presently, must link to both the trade community and customs processing system so that the trader can submit requests online and receive notifications electronically through a Web application.	Medium	Long-term
6	Regulatory Reform/ Procedural Reform	Strengthen public-private sector cooperation. Although the public sector has made strides in improving its relationship with the private sector, a stronger and deeper partnership is necessary to promote a more efficient and business-friendly process. A new committee should be established to facilitate public-private sector communications. This committee should focus on becoming an active and useful forum for problem-solving and relationship-building. It should monitor streamlining and standardization of customs procedures. It should include trade-related ministries, including the agriculture and health ministries.	Medium	Short-term
7	Budget Planning	Improve funding for modernization of trade-related institutions. Revenue generated by current trade service fees should be developed and promoted under a WTO-compliant user/service fee system. This funding should be allocated to priority areas, such as payment of salaries, purchase of equipment and tools, customs modernization, and upgrading of facilities to help develop a process of electronic pre-arrival payment and release.	High	Short-term/ Medium-term

8	Regulatory Reform/ Training	Upgrade IPR enforcement efforts. IPR enforcement reform includes cooperation of the business community in the identification of IPR infringements such as through the International Anti-Counterfeiting Coalition in training personnel involved in registration, detection, and prosecution of IPR-related violations. Regional models should be developed as a regional project and then implemented in all countries. Advice could be drawn from international organizations (such as the World Intellectual Property Organization) as to the design and funding sought through their sources.	Medium	Short-term/ Medium-term
---	--------------------------------	---	--------	----------------------------

FLOW OF MONEY				
No.	Type	Recommendation	Priority	Duration
1	Regulatory Reform	Improve the foreign exchange regime. Vietnam's trade-related flows have made much progress in the past five years, but continued liberalization would assist in trade facilitation. Providing greater access to foreign exchange, for example, would assist in repatriation of currency and eliminate uncertainty in this area.	Medium	Short-term/ Medium-term
2	Procedural Reform	Increase the availability of trade finance products. While trade products are generally available, it is important to expand the use in practice of basic financial instruments, such as bills of exchange and letter of credit, and to expand the use of other more sophisticated financial tools such as currency swaps and options and inventory leasing.	Medium	Medium-term

FLOW OF PEOPLE				
No.	Type	Recommendation	Priority	Duration
1	Modernization of Processes	Upgrade the professionalism and modernization of the Immigration Agency. The government should assist the Immigration Agency in implementing an integrity program, including strengthened independent internal affairs. The government should also develop a comprehensive personnel system for the Immigration Agency that would upgrade candidate qualifications, improve recruitment procedures, and establish job-specific performance and evaluation standards.	Medium	Medium-term
2	Training and Education	Modernize and upgrade automation for people-processing at the border. Development of a stronger information technology system should be pursued. This upgrade should include an enhanced risk analysis system.	Medium	Short-term

FINANCIAL CRIMES				
No.	Type	Recommendation	Priority	Duration
1	Regulatory Reform	Ensure the ADB project supporting the implementation of the new anti-money laundering decree should suffice as the new policy and fledgling institutions take root. USAID should monitor the ADB project, offering support on small training and public education activities.	Medium	Short-term
2	Regulatory Reform	Support the Government of Vietnam and USAID in reviewing the applicability and lessons learned of successful USAID projects such as the Indonesia Mission's Financial Crimes Prevention Project. The ADB project will provide initial support to AMLIC; however, a more sustained (e.g., one to two year-long) program of technical assistance, particularly in operational matters and additional training on investigatory techniques, may be needed.	Medium	Medium-term
3	Regulatory Reform	Support the Government of Vietnam in developing a more comprehensive approach to financial crimes that broadens from just anti-money laundering efforts to include counter-terrorist financing measures and white collar financial crimes. This approach should be equally focused on developing the legal framework as well as the capacity of institutions and entities charged with implementing and supporting the implementation process.	Medium	Medium-term

INTELLECTUAL PROPERTY				
No.	Type	Recommendation	Priority	Duration
1	Procedural Reform	Reduce the number of administrative agencies engaged in IPR investigation and enforcement and narrow the types of violations subject to their jurisdiction.	High	Medium-term
2	Legislative Reform	Revise the criminal code provisions to conform to TRIPS	High	Short-term
3	Regulatory Reform	Support the government in investigating and banishing IPR violations from all SOEs.	Medium	Short-term/ Medium-term
4	Procedural Reform	Vietnam's compliance with its WTO accession commitments, including its commitments to IPR, should be tracked in a methodical and consistent manner	Medium	Medium-term
5	Capacity Building	Support the Ministry of Science and Technology in receiving technical assistance and capacity building, with special attention given by donors to coordination of assistance and leveraging of resources. Assistance to the other ministries charged with implementing IPR should include special programs and training initiatives pertaining to IPR.	Medium	Medium-term/ Long-term
6	Public Outreach/ Public Awareness	Target the community of supporting institutions—including business associations, law schools, and other institutions of higher learning, NGOs, and even the media—for the purpose of building basic public understanding of the principles of IPR.	Medium	Short-term/ Medium-term
7	Capacity Building/ Training	Work with USAID/STAR and ECAP II to target most promising areas of IPR capacity-building, including in particular further training for judges and prosecutors	Medium	Long-term

Skip Kissinger, USAID/RDMA
Tel: ++662-263-7466
Email: skissinger@usaid.gov

Nick Klissas, USAID/EGAT
Tel: 202-712-0115
E-mail: nklissas@usaid.gov

Charles A. Schwartz, USAID/EGAT
Tel: 202-712-1761
E-mail: cschwartz@usaid.gov

Andrew Mayock, Booz Allen Hamilton
Tel: 703-902-5570
E-mail: mayock_andrew@bah.com