The Laws of Vietnam Affecting Foreign Investment**

The lack of U.S. economic and political relationships with Vietnam since 1975, caused by the United States trade embargo, has deprived us of witnessing personally the eighteen-year evolution of Vietnam from a country devastated by war into a market-centered economy. Today in Vietnam both private and public...
economic sectors have become magnets that are drawing an accelerating flow of businessmen who seek to make substantial investments.\(^2\)

This transformation began in 1986 after almost a century of colonialism that kept Vietnam as a primarily rural and agricultural economy bereft of industrialization; a forty-year long war for independence that produced further drain on its people; and more than ten years of disappointing economic performance as the result of central planning mismanagement after 1975. The move to a new open-door economic policy of accepting and encouraging private market pluralism became known as *Doi Moi.*

The dynamic drama of this evolution is epitomized by the statement attributed to Dang Xuan Ky, a member of the central committee of the Communist Party in Vietnam who, upon being reminded that Ronald Reagan used to say that the best government is the government that governs least, is reported to have replied, "I agree with Reagan. This is correct thinking."\(^3\)

In furtherance of its quest for economic prosperity, the National Assembly promulgated on December 29, 1987, its Law on Foreign Investment, the first of a continuing series of reforms to create legal structures conducive to foreign investment in Vietnam's new private market economy.\(^4\) On June 30, 1990, the National Assembly promulgated its Law on Amendment of and Addition to a

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2. Annual total approvals by the State Committee for Cooperation and Investment (SCCI, the state agency responsible for approving foreign investment projects) have been as follows: 37 (1988), 69 (1989), 108 (1990), 150 (1991), 364 (1992), with the leading foreign investors being Taiwan, Hong Kong, France, Japan, Australia, and Great Britain. In the first five months of 1993, the SCCI approved 110 foreign investment projects worth US$1.648 billion. According to the SCCI, approximately 5,000 businessmen in 1,092 groups visited it in those five months, including 174 groups from Japan, 233 from the United States, and 73 from South Korea. The SCCI reported that during the same time period industrial output increased 10.2%, retail sales 14.7%, exports 17.5%, and imports 32%, while inflation was kept at 0.9%, in line with the government's target of 15% or less for 1993.


4. Further decrees, circulars, and regulations pertain to the establishment and operations of a foreign entity's registered representative office, labor laws, and the use of land. These are: (a) Regulations promulgated on November 5, 1990, issued in conjunction with Decision No. 382-HDBT of the Council of Ministers, on the establishment and operations of resident representative offices of foreign economic organizations (*see infra* note 28); (b) Regulations issued in conjunction with Decision No. 389-HDBT of the Council of Ministers on November 10, 1990, pertaining to local labor hired by foreigners and foreign nations of Vietnamese origin who are temporarily residing in Vietnam; (c) Ministry of Commerce, Circular No. 04-TN-PL (May 6, 1991) (guiding the implementation of the aforesaid Nov. 5, 1990, Regulations); (d) Inter-Ministerial Circular No. 03-TT-LB of the Construction, Labor, War Invalids and Social Welfare, Interior, Finance Ministries dated April 8, 1991, relating to property lease and labor hire; and (e) provincial regulations, e.g., Regulations dated December 21, 1991, of the People's Committee of Ho Chi Minh City concerning the operation of resident representative offices of foreign economic organizations.
Number of Articles of the Law on Foreign Investment in Vietnam. On February 6, 1991, the Council of Ministers issued its Decree Providing Regulations on Foreign Investment in Vietnam. On December 23, 1992, the National Assembly issued further amendments of similar nomenclature, the Law on Amendment of and Addition to a Number of Articles of the Law on Foreign Investment in Vietnam. And most recently, on April 16, 1993, the government issued as Decree No. 18-CP its Regulations in Detail for the Implementation of the Law on Foreign Investment in Vietnam. These legislative enactments have been praised as the boldest and most liberal in Asia.

I. Forms of Investment

All foreign investment in Vietnam comes under the purview of the powerful state agency, the State Committee for Cooperation and Investment (SCCI), which has primary responsibility for licensing of foreign investment in the country. Foreign entities and private persons may invest directly in Vietnam by means of foreign currencies, tangible property, and technology transfers in the four following legal forms approved by the Vietnamese Government.

A. CONTRACTUAL BUSINESS COOPERATION

A contractual business cooperation agreement is formed by a written agreement between foreign and Vietnamese partners to conduct business in a partnership. This agreement is a hybrid of an Anglo-Saxon legal partnership in that a contractual business cooperation agreement in Vietnam does not create a juridical entity. Instead, it creates only a contractual relationship between the parties and is recognized by the government as an authorized form for the conduct of business in the country by a foreign entity. Purely economic, bilateral commercial contracts, such as trading contracts or contracts for the delivery of materials in return for finished goods, are not regarded as investments and do not constitute contractual business cooperation agreements. As a prelude to receiving a license to operate in this mode, the SCCI must review and approve the parties' cooperation agreement, their legal and financial status, and the economic basis for the relationship.

7. Law on Amendment of and Addition to a Number of Articles of the Law on Foreign Investment in Vietnam (Dec. 23, 1992) [hereinafter 1992 Amendments].
9. Law on Foreign Investment in Vietnam arts. 4-5; see also 1993 Regulations arts. 8-18.
B. Joint Venture

Unlike a contractual business cooperation agreement, a joint venture under Vietnamese law is a separate juridical entity that bears a relation to a corporation in that it enjoys limited liability to the extent of the contribution made to the prescribed capital of the enterprise. A joint venture form of business in Vietnam requires that the foreign entity contribute a minimum of 30 percent of the total prescribed capital subscribed by the parties to the joint venture; however, in practice the SCCI generally favors a 50 percent or higher foreign contribution. A board of management governs the joint venture’s operations, and the general director or the first deputy general director of that board must be a Vietnamese citizen. Other members of the board may be foreigners. Participants in a joint venture must share profits and risks in proportion to their respective capital contributions.

Many well-intentioned principles for operating in a market economy are addressed by the panoply of decrees, regulations, and ordinances issued by Vietnam’s National Assembly and the numerous circulars, notices, and decisions issued by other governmental ministries and agencies. Yet, the laws are often roughly hewn and may present legal uncertainties as exemplified by certain provisions of the 1993 Regulations on joint ventures.

Article 32 of the 1993 Regulations requires that a meeting of a joint venture’s board of management be attended by at least two-thirds of its members without specifying whether representatives attending by virtue of proxy of absentee board members are to be counted in determining whether the required quorum exists for the meeting.

Article 33 of the 1993 Regulations requires a unanimous vote for decisions on budget issues, borrowing decisions, amending the joint venture charter, nominating and dismissing the chairman of the board, the general director, first deputy general director, and chief financial officer. Does a vote on such matters require unanimity of all members of the board or only of the quorum two-thirds members attending the meeting?

Article 33 of the 1993 Regulations states that other decisions of the board must be made by two-thirds of members “present” at a meeting without clarifying what might be presumed: that those members who are absent but are represented by proxy are to be deemed “present” for such purpose in view of article 32’s express allowance that members of the board may provide written proxy to their representatives to attend and to vote on their behalf. Is an accepted American practice:

10. Law on Foreign Investment in Vietnam arts. 4, 6-13; see also 1993 Regulations arts. 19-42.
11. The law provides no ceiling as to the proportion of contribution made by a foreign party to the prescribed capital of a joint venture; see 1990 Amendments art. 1.5.
12. Law on Foreign Investment in Vietnam art. 12; see also 1990 Amendments art. 1.6; 1993 Regulations art. 34.
13. Law on Foreign Investment in Vietnam art. 10.
principle of statutory construction to be followed: that plain language must be followed to preclude "present" from meaning "represented" when it may be necessary to count proxies to reach a quorum of two-thirds of the board's members?

C. 100 PERCENT FOREIGN-OWNED ENTERPRISE

Unlike a number of countries that allow a foreign entity a maximum 49 percent equity ownership position, Vietnam permits a foreign party to own the entirety of the business it wishes to conduct in Vietnam. Nevertheless, a foreign enterprise is unlikely to receive permission to operate as 100 percent foreign-owned if its business is to conduct operations in a field deemed by the government as vital to its strategic security interests, for example the mining of precious metals and gems or the operation of major utility systems. The "legal" capital must be at least 30 percent of the total invested capital of the enterprise unless special approval is obtained from the SCCI for a lower amount. Moreover, the law explicitly prohibits a decrease in the initial legal capital of an enterprise with 100 percent foreign capital. The amount of invested capital, legal capital, and the progress of intended capital contributions must be set forth in the charter of a 100 percent foreign-owned enterprise. The SCCI has the means to withhold or deny the grant of a license if it disapproves the extent of any of those factors. Once the foreign entity is licensed, it is entitled to manage the business and have a foreign national as the chief executive officer.

Unlike under American law, no perpetual existence is possible for a corporate form of enterprise in Vietnam. The duration of "an enterprise with foreign invested capital," which is defined to include both a joint venture and a 100 percent foreign-owned enterprise, shall be determined for each project, but shall not exceed fifty years unless the Standing Committee of the National Assembly recommends to the government that a longer period be allowed. However, the maximum period shall not exceed seventy years.

D. BUILD-OPERATE-TRANSFER (BOT) CONTRACTS

The BOT contract in Vietnam is a form of engagement for the development of an infrastructure project based on a contract concluded between a foreign

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14. Id. arts. 4 & 14; see also 1993 Regulations arts. 43-53.
15. Law on Foreign Investment in Vietnam art. 8; see also 1993 Regulations art. 47.
16. 1993 Regulations art. 47. Article 2 of the 1993 Regulations provides for two distinct components of the investment capital of an enterprise: the "legal" capital and the "loan" capital.
17. 1993 Regulations art. 48.
18. Law on Foreign Investment in Vietnam arts. 36-38; see also 1992 Amendments art. 1.11; 1993 Regulations art. 6.
investor and a governmental agency or governmental entity. Under a BOT contract the foreign investor will complete an infrastructure project and operate it for a determined period of time. Upon the expiry of that time, the foreign investor will transfer the project, without further compensation, to the Vietnamese Government. BOT contracts may be carried out with 100 percent foreign capital, or in combination with capital provided by the Government of Vietnam and/or Vietnamese organizations or individuals. The 1993 Regulations provide that the foreign investor shall be provided a time for operating the project sufficient to recover its invested capital and make reasonable profits before transferring the project without further compensation to the Government of Vietnam.20

II. Approval Procedure for New Investments

The SCCI acts as an interministerial agency to coordinate the review of the various Vietnamese governmental ministries over applications for business licenses from the foreign sector. Large infrastructure projects may also require the ultimate approval of the chairman of the Council of Ministers.21 Another body, the State Planning Committee, processes applications for foreign aid projects. The Vietnamese Ministry of Construction must approve projects with construction works using foreign technology and rules.22 In addition, article 104 of the 1993 Regulations mandates that the directors of a host of government agencies shall issue circulars to guide the implementation of the 1993 Regulations.23

The various ministries in charge of the specific areas to which an investment may relate will also review the proposed investment and evaluate its prospect with special regard to its compatibility with the social and economic matters of their concern. The Ministry of Commerce and Tourism will, for example, review pricing aspects and market considerations of the proposed project's products. The Ministry of Finance will decide upon land, water, and sea surface rents and determine the accounting systems and applicable taxation aspects pertaining to a project.24

Before licensing the parties to engage in business as a joint venture or licensing

20. 1993 Regulations art. 55.
21. Regulations on the appraisal of the Direct Foreign Capital Invested Project art. 4 (promulgated as attached to Council of Ministers, Decision No. 355-HDBT (Nov. 7, 1991)).
22. 1993 Regulations art. 5.3.
23. The agencies cited in article 104 are the SCCI, the State Committee for Planning, Ministries of Commerce, Foreign Affairs, Finance, Labor, War Invalids and Social Affairs, Science, Technology, and Environment, Construction, Transport and Communication, Interior, the State Bank, the General Department of Land Management, the General Department of Customs, and the General Department of Statistics. Further, article 61 of the 1993 Regulations requires the assessment of the Ministry of Science, Technology, and Environment of any transfer of technology made as part of the capital contribution to a foreign investment enterprise.
a foreign entity to operate as a 100 percent foreign-owned enterprise, the SCCI will consider all aspects of the intended business project, including the nature of the industry concerned, the prescribed capital, management requirements, and other social and economic factors. In addition, the SCCI must approve (a) the proposed charter of the joint venture, (b) the economic and technical feasibility studies made by the parties in regards to the contemplated project, and (c) the documentation of the legal, financial, and technical status of the parties. Moreover, the parties must receive approval by the appropriate People’s Committee of the relevant province, city, or special zone and of any other government authority in charge of the Vietnamese parties to the transaction. In the case of a 100 percent foreign-owned enterprise, the SCCI will require guarantees of the company’s long-term commitment to doing business in Vietnam.

The law requires the SCCI to notify the applicant for a license of the SCCI’s decision within three months from its receipt of the application. If the SCCI requires supplementation or amendments to the application, it must so notify the applicant within one month from the date of its receipt of the application. Should the applicant not reply in writing within forty-five days of the SCCI’s request, the application is deemed no longer valid. If the applicant’s reply does not satisfy the SCCI’s request, then the three-month period for the SCCI’s consideration of the application is suspended until an adequate response is made.

Within thirty days of the issuance of a license, the foreign entity must publish certain details of the project in a local or a central daily newspaper in the cases of a business cooperation contract, a joint venture, and a 100 percent foreign-owned enterprise.

In addition to the grant of authority from the central government to establish a foreign investment enterprise, a license must be obtained from the Ministry of Commerce and Tourism for the foreign entity to maintain a representative office. A license fee must be paid according to a tariff schedule issued by the Ministry of Commerce and Tourism and the Ministry of Finance. Once granted, the license for a representative office is valid for up to a three-year period.

Within sixty days after receiving that Ministry’s license, the foreign investor must register with the People’s Committee governing the locality where the repre-
sentative office is established and submit to it the curricula vitae of expatriates who are to work there. The People's Committee must then issue a registration certificate within fifteen days and forward a copy to the Ministry of Commerce and Tourism.\textsuperscript{31} More detailed submissions are required by the Regulations Governing the Operation of Resident Representative Offices of Foreign Economic Organizations in Ho Chi Minh City.\textsuperscript{32}

III. Land Use, Construction Permitting, and Environmental Law

Pursuant to an ordinance issued by the State Council in 1991, foreign persons are entitled to own residential houses during the period of implementation of their investment, period of settlement, or long-term residency in Vietnam, barring any provision to the contrary in any international treaty to which Vietnam is a signatory or that it recognizes.\textsuperscript{33} Other land may not be owned, but must be leased by foreigners.\textsuperscript{34} On the basis of proposals made by the People's Committee of the pertinent province, city, or special zone, the SCCI determines rates of rent to be paid with respect to each specific investment project. The rental rate is based on a maximum term of five years; upon expiration of that rate term, the SCCI will determine a new rate.\textsuperscript{35}

The Council of Ministers is responsible for the allotment of land to foreign investment projects, and the Prime Minister is vested with authority for determin-

\textsuperscript{31} Id. art. 8.

\textsuperscript{32} Regulations Governing the Operation of Resident Representative Offices of Foreign Economic Organizations in Ho Chi Minh City [hereinafter 1991 HCMC Regulations on Representative Offices]. Under article 7 of these regulations, the formalities of documentation include: (a) a copy of the license issued by the Ministry of Commerce and Tourism for the representative office; (b) a completed application made on a prescribed form and identification of the appointment of the representative office head and deputy, if any; (c) a power of attorney signed by the head of the representative office for the purpose of signing contracts with Vietnamese individuals or entities; (d) the filing with a service company assigned by the HCMC People's Committee of copies of the contracts for office rental and hiring Vietnamese employees; (e) resumes with attached photographs as to the personnel who will be working at the representative office; (f) an official letter informing the People's Committee of the seal and authorized signature for use by the representative office; (g) a bank statement confirming that the representative office has opened an account at one of the Vietnamese banks and confirming the account number; and (h) a list of equipment and essential materials imported for the operation of the representative office together with authorization for the same from the customs office. These must be submitted in Vietnamese and in English and must be made in quadruplicate, with one set forwarded to the Ministry of Commerce and Tourism, a second set forwarded to a foreign economic relations service designated by the People's Committee, the third set being retained for business use at the representative office, and the fourth set being retained in the files of the representative office.

\textsuperscript{33} State Council of Ministers, Ordinance on Residential Housing (Mar. 26, 1991).

\textsuperscript{34} Socialistic Republic of Vietnam Const. arts. 17, 18 & 84; see also 1990 Amendments art. 1.9, Ministries of Construction, Labor, War Invalids and Social Affairs, Interior, and Finance, Circular on Leases and Employment by Foreigners, No. 03-TT-LB (Apr. 8, 1991).

ing the duration of their land leases. The law permits long-term land leases of thirty years, and with appropriate approval those leases may be renewed. The foreign investor should bear in mind, however, that the duration of an enterprise with foreign invested capital will be determined as to each specific project and must be negotiated by the investor with the SCCI before undertaking a project. The duration, cannot exceed fifty years unless, on the recommendation of the Standing Committee of the National Assembly, the government extends the duration for a project. Even with such an extension, the maximum period for a project is an aggregate of seventy years.\textsuperscript{36}

While the Council of Ministries determines zoning on the national level, regional and local zoning and building permits are under the jurisdiction of the local People’s Committee. The need for locating and preparing a site and obtaining the necessary permits, and the continued monitoring of a project’s development by various governmental bodies are important reasons for foreign investors to work closely with local partners.

At present, Vietnam does not have specific laws protecting against abuse of the environment other than its 1987 Land Law, which prohibits and imposes fines for the misuse of land or its willful destruction; its Forestry Law, for preservation of forestry; and a decree banning the exports of timber.\textsuperscript{37} References in the Law on Foreign Investment in Vietnam and in the December 5, 1988, Ordinance on Transfer of Foreign Technology to foreign investors’ obligations to protect the environment imply, however, that more specific environmental laws can be expected. The 1987 Land Law is currently in a draft stage of modification, and the draft contains clear expressions that address Vietnam’s environmental concerns.\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{36} 1992 Amendments art. 15.
\item \textsuperscript{37} 1987 Land Law arts. 53-55.
\item \textsuperscript{38} In the present draft modification of the 1987 Land Law, article 60 states: “the use of land for the construction of projects in the areas of industry, science, technology, and services shall have to abide by regulations on the treatment of waste substances, not cause pollution, and harms to the daily life and production of the people living in adjacent areas.”
\item Article 63 in material part states: “The use of the land for the purpose of exploration and exploitation of mineral resources shall have to observe the following regulations . . . (2) to proceed with measures for waste treatment so as not to harm users of adjacent land, (3) upon the termination of its use, the land shall have to be returned with the state specified in the decision of land allocation.”
\item Article 65 provides: “The use of land for making ceramics, bricks and tiles shall have to comply with the following regulations: . . . (2) not to do harm to production and the life; (3) upon the termination of its use, the land must be transformed in order to be used for suitable purposes.”
\item Article 68 provides in material part: “The use of land located within territorial sea waters shall have to observe the following regulations: (1) The state shall only allocate the land located within territorial waters for a fixed-term to organizations and individuals that shall not harm the protection of national security and the protection of natural resources and environment. (2) Subject shall comply with regulations of the state management agency concerned.”
\item Article 72 provides in material part: “The land users assume the following obligations: . . . (3) to comply with regulations on the environment protection and refrain from all acts harmful to the legitimate interest of the users of adjacent lands.”
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IV. Investment Protections

Very conscious of its need to provide assured investment protections to foreign investors, the 1987 Law on Foreign Investment in Vietnam affirmatively mandates that the capital and assets invested by foreign entities in Vietnam will not be expropriated or requisitioned through administrative measures and that enterprises with foreign-owned capital will not be nationalized. That law, as well as the 1993 Regulations, further expressly guarantee that any foreign organization or individual that invests in Vietnam shall be treated fairly and equitably.

Article 23 of the Constitution, however, reserves the right for state expropriation of property conditioned on payment of appropriate compensation made in a freely convertible currency that is allowed to be transferred abroad. That constitutional reservation has not been explicitly repealed by constitutional amendment, and whether article 21 of the Law on Foreign Investment in Vietnam legally supersedes that reservation remains an open issue. Nevertheless, the repeated inclusions of protective language in articles 1, 20, 21, and 39 of the 1987 Law on Foreign Investment in Vietnam, as well as the later enacted regulations thereon, are clearly intended to induce reliance.

V. Patent and Trademark Protection

Vietnam is one of 108 nations that are signatories to the Paris Convention (1883). Vietnam is also a member of the World Intellectual Property Organiza-

40. Id. art. 20. Article 99 of the 1993 Regulations states:
   "The Government of Vietnam guarantees appropriate and equal treatment to all foreign organizations and individuals investing in Vietnam in accordance to the Law on Foreign Investment. Any treaty on investment incentives and protection signed by the Government of Vietnam with the government of another country shall prevail with its agreements.
   In case any amendment or change in the legal system of Vietnam is detrimental to the benefits of the foreign investor as stipulated in his investment and business licences, the State Committee for Cooperation and Investment shall take appropriate measures to guarantee his rights in the following directions:
1. Alter the operational objectives of the project;
2. exempt or reduce taxes within the legal frame;
3. the damages inflicted to the investor shall be considered as losses and shall be treated according to paragraph 2, article 27 of the Foreign Investment Law;
4. the enterprise may continue its operations as stated in the investment licence but with the condition that its continued operations shall not affect the national interest.
   Paragraph 2, article 27 of the Law on Foreign Investment in Vietnam states: "Operating losses incurred by a joint venture enterprise in any year may be carried forward to the following year and set off against the profits of that year. Any loss remaining after such set off may be carried forward on the same basis for up to five successive years."
41. Article 1 of the Law on Foreign Investment in Vietnam states in material part: "The State of Vietnam guarantees the ownership of invested capital and other rights of foreign organizations and individuals and provides favorable conditions and simple procedures for investment in Vietnam."
   Article 39 of the same law states: "In accordance with the principles provided in this Law, the Government of the Socialist Republic of Vietnam shall enact regulations which provide for the creation of favorable conditions for overseas Vietnamese to invest in Vietnam as their contribution to national reconstruction."
42. The Paris Convention requires each contracting state to grant the same protection to nationals of the other contracting states as it grants to its own nationals, provides for the right of priority in the case of patents, utility designs, trademarks and industrial designs, and lays down common rules that all contracting states must follow. Paris Convention for the Protection of Industrial Property, opened for signature Mar. 20, 1883, as amended, 21 U.S.T. 1583, 828 U.N.T.S. 305.
Additionally, Vietnam has enacted several specific laws governing intellectual property rights.\textsuperscript{44}

All applications must be filed with the National Office on Patents, which is under the auspices of the State Commission for Science and Technology. Patents are available in Vietnam as to inventions (fifteen-year duration), utility solutions (six years), industrial designs (five years), and trademarks (ten years).

While the law does not include any listing of unpatentable items, the law defines an invention as a new technical solution that surpasses the level of what could be achieved locally under current economic and technological conditions.

The chairman of the State Commission for Science and Technology has the power to grant involuntary licenses if (a) a patent owner has not used the invention, or the extent of its use is deemed not to have met the development needs of the country; (b) the owner fails to reach agreements with others on the use of its invention; or (c) a determination is made that the invention is vital to national defense and security, public health, or other vital public interests.\textsuperscript{45}

VI. Licensing of Technology Transfers

The 1988 Ordinance on Transfer of Foreign Technology requires that all licensing agreements receive governmental approval. Applications for that approval must be made to the government agency responsible for the particular sector at issue. They must include, in addition to a completed application form, a copy of the proposed technology transfer contract, a written feasibility study of the transfer, and information as to the legal status of both transferor and transferee. An approval is obtained by the issuance of a Technology Transfer Certificate, which is valid for seven years.

Article 6 of the Ordinance on Transfer of Foreign Technology details the provisions to be included in technology transfer contracts: (a) the purpose of the transfer, its specifications, and expected results to be achieved; (b) the price, royalty, terms, and form of payment; (c) the place, time, and schedule of the transfer; (d) specifics regarding industrial property rights; (e) the contract duration and methods of contract amendment and termination; (f) warranties as to quality.

\textsuperscript{43} The World Intellectual Property Organization (WIPO) was established by a Convention signed at Stockholm, July 14, 1967. WIPO has 135 members and is one of the 16 specialized agencies of the United Nations system of organizations. Among other matters, WIPO carries out programs of legal-technical assistance for developing countries to help them deal with their patent, trademark, industrial design, and copyright matters.

\textsuperscript{44} Ordinance on Innovations to Effect Technical Improvement and Rationalization in Production and on Inventions (promulgated by Decree No. 31-CP, Jan. 23, 1981 and amended by Council of Ministers, Decree No. 84-HDBT (Mar. 20, 1990); Ordinance on Utility Solutions (promulgated by Decree No. 200-HDBT (Dec. 28, 1988) and amended by Decree No. 84-HDBT); Ordinance on Industrial Designs (promulgated by Decree No. 85-HDBT (May 13, 1988), and amended by Decree No. 84-HDBT); Ordinance on Trademark (promulgated by Decree No. 197-HDBT (Dec. 14, 1982) and amended by Decree No. 84-HDBT); Decree on the Protection of Industrial Property (Jan. 28, 1989); and the Ordinance on Transfer of Foreign Technology to Vietnam (Dec. 5, 1988).

\textsuperscript{45} Decree on the Protection of Industrial Property Right art. 14.
and confidentiality; (g) personnel training systems for the transferred technology; and (h) methods for settlement of disputes.

The technology transferred into Vietnam must meet at least one of the requirements set forth in article 4 of the Ordinance on Transfer of Foreign Technology of increasing the technological level of production or efficiently exploiting local resources. Export restrictions on transferred technology are prohibited. The Ordinance on Transfer of Foreign Technology does not express specific guidelines for the licensing of technology transfer. The pragmatic standard used by the government is its favorable agreement that (a) the license enhances the licensee's level of technology, efficiency, product range, and quality; (b) the technology will not harm the environment; (c) the technology will appropriately use local manpower, energy, and natural resources; and (d) the technology will not endanger occupational safety.

A foreign party to a joint venture may contribute all or a portion of its prescribed capital through the transfer of technology. Contracts for the transfer of technology in the form of capital contributions must be made independent from, but must accompany, the investment application documents. After obtaining the State Committee for Science's approval, the SCCI will then examine and evaluate all the papers. If the SCCI grants an investment license, it will, with the approval of the State Committee for Science, at the same time grant permission for the contract for technology transfer as a capital contribution to the licensed entity.

VII. Repatriation of Profits, Royalties, Interest, and Capital

The edifice that Vietnam has been building over the past five years to create an open selection of investment forms and to establish a responsible relationship between the foreign entities and the Government of Vietnam has been accompanied by corollary developments in its finance law concerning foreign exchange control and the repatriation of money and profits. Further, the government has created a tax structure with liberal tax holiday and exemption entitlements. Articles 80 through 85 of the 1993 Regulations comprise the foreign exchange control rules pertaining to foreign investment operations. All capital funds and revenues of an enterprise with foreign invested capital are to be deposited in its accounts at the branch of a foreign bank in Vietnam or with a Vietnamese bank or a joint Vietnamese and foreign bank. All revenues and expenditures of the foreign enterprise are to be transacted through those accounts, and all currency conversions are to be at the official rate promulgated by the State Bank of Vietnam.

To militate against foreign trade imbalances and any adverse neocolonialist

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46. Law on Foreign Investment in Vietnam art. 7.
47. 1993 Regulations art. 80.
48. Id. art. 85.
influences that could occur from a large presence of foreign enterprises in Vietnam, the 1993 Regulations provide that, apart from special cases such as the manufacture of import-substitutes or the construction of infrastructure, the revenues received in foreign currencies from export and from other legal sources shall at least be sufficient to meet the foreign enterprise’s expenditures in foreign currencies, including overseas remittances of the foreign investor. However, in recognition that special cases will need accommodation, the law vests the SCCI with authority to decide in such cases upon the ratable balance of payment to be made in foreign currencies in converting Vietnamese currency into foreign currencies and in realizing payment by receiving goods in a determined corresponding value.49

Foreign investors in transitional economies are prone to have difficulty converting profits earned in domestic currency into foreign exchange and, therefore, are prone to want to retain export earnings in foreign exchange whenever possible. Alleviation from tight foreign exchange conditions, however, should occur as Vietnam demonstrates its ability to maintain a stabilized currency, create trade surpluses, and curtail inflation.50

Foreign investors may repatriate their share of profits received upon (a) payment of taxes due on any applicable profits and sums to be repatriated, (b) certification of such payment by Vietnamese financial authorities, and (c) approval of the SCCI if the repatriated sum is greater than the initial and reinvested capital of the foreign enterprise.51 Transfers are allowed only after the end of each financial year.52 Export-oriented enterprises are given preference over import-substitution ones for remittance of profits.

Repatriated profits are subject to a 10 percent withholding tax, which is scaled to a 7 percent rate in the case of investments greater than US$5 million. The tax is further reduced to 5 percent in the case of investments greater than US$10 million.53 The extent of a withholding tax may be a subject of negotiation with the SCCI on investment projects deemed vital to the state’s interest.54 Royalties received in exchange for services or technology transfers may be

49. Id. art. 82.

50. Although its economy was ravaged in 1990, 1991, and 1992 by the sudden stop of financial subsidization from the Soviet Union, and being virtually destitute of other foreign economic assistance, Vietnam has through its own endeavors remarkably reduced its rate of inflation from 67% in 1991 to 17.2% in 1992. By the end of the first half of 1993, the Vietnamese dong increased to 10,000 per U.S. dollar in comparison to a 14,500 per U.S. dollar level in late 1991. Vietnam’s goal is to contain inflation to less than 15% per annum in 1993.

51. 1993 Regulations art. 83.


53. 1993 Regulations art. 70.

54. Article 71 of the 1993 Regulations provides that the SCCI shall decide specific tax rates and the time of their levy on the profits repatriation tax and shall also decide upon the applicable rate of the corporate income tax and upon applicable tax exemptions.
repatriated subject to payment of a turnover tax of 4 percent. This tax is a deductible expense in determining an enterprise's taxable profit.55

No restrictions exist against the remittance abroad of interest on principal or interest of any loan obtained from foreign sources. To date, however, Vietnam enterprises have received few such loans. The singular impediment to repayment will remain a scarcity of foreign exchange while Vietnam builds momentum in economic strength or until international financial institutions provide the funding for infrastructure projects that can help create foreign exchange liquidity.

The Government of Vietnam expects foreign investors to contribute in full the capital they indicate in their application for an investment license and to honor the formula and schedule under which they commit to fund those capital sums. If those sums are not fully paid and the foreign enterprise withdraws from its project, then remittance of amortization of fixed assets from the invested capital is disallowed.56 Upon the termination and dissolution of an enterprise otherwise, foreign investors are entitled to remit abroad their respective invested and reinvested capital after payment of all debts. Repatriation must correspond with a time frame designated by the Ministry of Finance,57 which presently is allowing withdrawals in three equal annual installments unless a case is deemed deserving of special treatment to allow a more rapid repatriation. Repatriation of capital beyond the amount of all initial and reinvested capital requires the prior approval of the SCCI.58

Foreign persons working in Vietnam under a contractual business cooperation agreement or in enterprises with foreign-owned capital are authorized to transfer abroad in foreign currencies their salaries, wages, and other legal receipts after deducting the amount of receipts tax to be paid and their living expenses in Vietnam.59 All currency conversions are by law to be made according to official foreign exchange rates published by the State Bank of Vietnam.60

VIII. Taxation on Sales, Dividends, Repatriated Profits, and Corporate Profits

The 1993 Regulations broadly include as taxable all revenue derived from the sale of products or services supplied as well as other revenue accruing from any business activity of the foreign enterprise. Deductible expenditures include (a) the costs of raw materials and energy for production activities; (b) wages, salaries,
and fringe benefits paid to both Vietnamese and foreign workers; (c) depreciation of fixed assets; (d) acquisition expenses incurred in connection with a license of technology or technical services; (e) overhead; (f) marketing costs; (g) other paid taxes; (h) social insurance fund contributions; (i) carryforward losses from prior years; and (j) other expenditures that in the aggregate do not exceed 5 percent of the total amount of expenditures.61

Nondeductible expenditures include (a) costs of materials or energy deemed not to have been incurred in the formation of taxable income; (b) amortization of fixed assets beyond limits prescribed by the Ministry of Finance; (c) losses incurred by virtue of cessation of production; (d) fines due to violations of economic contracts or breaches of the law; (e) interest paid on principal sums contributed to the legal capital of an enterprise; and (f) interest paid on loans of an enterprise exceeding 2.34 percent of the total legal capital.62

Taxes must be paid in the same currencies that are received from sales. This provision can operate to create certain degrees of imbalance between the value of hard currency sales receipts and related expenditures thereto that are paid in Vietnamese dong since the relative value of the dong has fluctuated greatly to the dollar in recent years. What may be paid in the early part of a tax year in Vietnamese dong may, for example, have a far different hard currency value at tax time, and virtually no market facility exists to provide means of hedging against the Vietnamese dong. The goal stated by governmental authorities of Vietnam for the State Bank is to stabilize the dong close to 10,500 to the dollar in order to encourage exports. Once a sustainable conversion level can be recognized, this problem should be considerably alleviated.

Taxes are payable on a quarterly basis, and accounts must be submitted not more than three months after the end of the enterprise’s fiscal year, which is a calendar year unless authorized otherwise by the Ministry of Finance. Returns for taxes due on sales to the domestic market are due within five days after the end of each month.63

Although foreign investors may import all capital assets necessary for infrastructure projects free of duty, these will be subject to import duties and sales taxes to the extent such imported assets are later sold in Vietnam.64 The 1990 Law on Turnover Tax65 applies to domestic sales only and covers all goods and services except agricultural products and commodities. The applicable range of

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61. Id. art. 74; see also Ministry of Finance, Circular on Taxation of Foreign Investment in Vietnam, No. 55-TC-TCT-TT (Oct. 1, 1991).
63. Id.
64. 1993 Regulations art. 76.
tax varies widely from 1 percent to 10 percent depending upon the respective product.\textsuperscript{66}

Vietnam thus provides a variety of liberal financial incentives to foreign investors for reducing withholding taxes, in connection with the repatriation of profits made on substantial investments. It also exempts capital goods and materials to be used in manufacturing products for export from import duties. Further, an enterprise with foreign-owned capital is not required to pay more than 50 percent of the stipulated land rent during the exploration, survey and construction stages of a project.

IX. Tax Rates and Exemptions

Vietnam seeks to encourage investment in those economic sectors having vital national or provincial interests by carving its tax rate and exemption structure into seven main sectors of projects having foreign capital.

Five tax rates are generally applicable to foreign investments in the following six sectors, unless the "priority" nature of the investment provides other financial incentives of a lower rate or an exemption:\textsuperscript{67}

(1) Investors in an Export Processing Zone (EPZ) are provided financial incentives of a corporate income tax of 10 percent of profits of production enterprises and 15 percent on profits of service companies. In addition, enterprises in an EPZ may be granted a tax exemption for four years commencing with the first profit-making year in the case of production enterprises and a tax exemption for two years commencing with the first profit-making year for service enterprises.

(2) A special priority tax rate of 10 percent applies to enterprises with foreign invested capital carrying out (i) building of infrastructure in regions of mountains or other harsh natural and socio-economic conditions;\textsuperscript{68} (ii) afforestation projects; and (iii) other projects deemed of special importance to the government. Projects enjoying this 10 percent tax rate may also be afforded an exemption from income tax in the four years commencing with the first profitable year and enjoy a reduction of 50 percent in each of the four subsequent years.

(3) Decree 87-CP promulgated in 1983 by the National Assembly also entitles companies and contractors under the BOT investment form to a corporate

\begin{footnotesize}
\begin{enumerate}
\item However, for EPZ produced products, see Regulations on Special EPZ in Vietnam art. 51 issued in conjunction with Decree No. 322-HDBT (Oct. 18, 1991).
\item 1993 Regulations arts. 66 and 67; see also Joint Circular of the Ministry of Finance and the State Committee for Investment and Cooperation No. 66-TTLB (Oct. 30, 1992).
\item The provinces recognized as having mountainous or other harsh natural and socio-economic conditions are: Bac Thai, Cao Bang, Lang Son, Lao Cai, Yen Bai, Ha Giang, Tuyen Quang, Son La, Lai Chau, Than Hoa, Nghe An, Ha Tinh, Quang Tri, Quang Binh, Quang Ngai, Binh Dinh, Phy Yen, Binh Thuan, Ninh Thuan, Gia Lai, Kon Tum, Dac Lac, Lam Dong, and Hoa Binh.
\end{enumerate}
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tax of 10 percent, an exemption from that tax in the first four years of operation, and a 50 percent reduction in the next four years.

(4) A 15 percent rate applies to projects of other infrastructure construction; exploitation of natural resources other than oil, gas, and rare, precious resources; heavy industry such as metallurgy, basic chemical, mechanical manufacture, and cement; development of perennial industrial plants; investments in mountainous regions and other regions of harsh natural and socioeconomic conditions (other than the exploitation of rare, precious resources). These projects may receive a tax exemption for each of the two years commencing with the first profitable year and enjoy a 50 percent reduction in tax in each of the four subsequent years.

(5) A 20 percent rate applies to projects that do not qualify for a lower rate and that have two of the following requirements: employment of 500 or more workers; use of advanced technology; the export of at least 80 percent of the project's products; existence of legal capital, or contributed capital in the case of a business cooperation contract, of US$10 million. These projects may receive an income tax exemption of two years since commencing with the first profitable year and a reduction in tax by 50 percent in each of the three subsequent years.

(6) A 25 percent rate applies to income from all other sources.

(7) On July 6, 1993, the National Assembly approved Vietnam's first comprehensive oil and gas tax laws to include a resource tax of 6 percent to 25 percent for crude oil, 0 percent to 10 percent for natural gas, and a profits tax of 50 percent, with the proviso that a reduction in or exemption from the profit tax could be granted on a case-by-case basis by the government.

If one investment project covers operations in several localities, then the criteria applicable to the situs of the main invested capital or principal business activity will apply. After receiving the written opinion of the Ministry of Finance as to the applicability of a special preferential exemption to a specific project, the SCCI will determine the effective tax rate and efficacy of an exemption.

A preferential tax treatment may be applied in favor of a 100 percent foreign-owned enterprise in cases necessitating investment encouragement. To further encourage reinvestment of profits, foreign enterprises that reinvest profits in their local operations for a duration of at least three years are entitled to a refund of taxes paid on the amount of profits reinvested for that period of time. 69

69. 1993 Regulations art. 72. The amount of profit tax to be refunded is calculated under the formula

\[ R = \frac{P}{100\% - S} \times S \]

where: 
R is the amount of profit tax to be refunded
P is the share of profit (after payment of profit tax to be refunded) that is reinvested
S is the profit tax rate stipulated in the investment license
Article 70 of the 1993 Regulations imposes a withholding tax on profits earned by foreign enterprises on profits to be transferred out of Vietnam. This tax is calculated by multiplying the quantity of products to be sent out of Vietnam by the tax rate stated in the enterprise’s investment license granted by the SCCI and the FOB price of those products as evidenced by the contracts for exporting those products. If such contracts do not exist or they do not stipulate that price, then the Vietnamese tax authorities are to determine the average export FOB price.

X. Labor Laws

One of Vietnam’s greatest attractions for foreign investment is its inexpensive labor, in addition to the well-known reputation of its people for their industry and high literacy rate. The central government has set its official minimum wage at US$35 per month, and salaries are determined by job description.70 Article 16 of the 1987 Law on Foreign Investment in Vietnam requires foreign enterprises to give Vietnamese citizens priority in recruiting personnel, but permits the employment of foreign workers when Vietnamese are not available with the advanced technical qualifications for the job. Labor relations are otherwise governed by the Ordinance on Labor Contract of September 10, 1990, and the Statute on Labor Employment Applied to Enterprises with Foreign Invested Capital promulgated with Decree No. 233-HDBT June 22, 1990, by the Council of Ministers.71

While 100 percent foreign-owned enterprises must proceed through a Vietnamese labor administration office or one of six licensed service companies in negotiating their labor contracts, a joint venture can negotiate through its own Vietnamese partners, and thus may effectively lower employee wages. Foreign enterprises operating in an EPZ are allowed to fix their own wages on a contract-by-contract basis without distinguishing between a joint venture and a 100 percent foreign-owned enterprise.

Management is afforded wide latitude in imposing sanctions on employees who violate internal rules or labor discipline: verbal reprimand, partial or total elimination of bonus, transfer to other work for a duration of up to three months, or dismissal. Management is entitled to dismiss an employee due to his misconduct, such as a failure to fulfill his duty or continuously stopping work without legitimate reason; financial problems of the company; an upgrade in technology that makes a job obsolete; the employee’s loss of labor capability due to illness or employment injury without a prospective recovery in sight after six months

70. Regulations on Labor for Enterprises with Foreign Invested Capital art. 39 issued in conjunction with Council of Ministers Decree No. 233-HDBT (June 22, 1990); see also Decision on Minimum Wage of Labor in Enterprises With Foreign Invested Capital, No. 242-LDTBXH-QD (May 5, 1992). However, Decision No. 860-QD-UB-NC issued June 11, 1993, by the Ho Chi Minh City People’s Committee sets a minimum wage of US$80 per month for labor hired for work at the representative offices of foreign-owned enterprises.
71. 1993 Regulations art. 65.
of treatment; natural disasters or fire that compel management to diminish production and reduce the work force; termination of the labor employment contract; or dissolution and liquidation of the company. An advance dismissal notice of thirty days is required, and a dismissed employee may seek job reinstatement by appeal to the local labor agency.

XI. Bankruptcy

The Vietnamese Government has announced its intention to privatize approximately half of its more than 12,000 state-run enterprises. The remainder will be separated into a group that the government wishes to retain nationalized and a group to be disposed of via liquidation or bankruptcy. With that prospect in the offing, the Government of Vietnam has proposed a rudimentary bankruptcy law, scheduled to become effective July 1, 1994, which divides creditors into secured, partially secured, and unsecured groups nomenclatured as guaranteed, semiguaranteed, and unguaranteed creditors. The law creates procedures for adjudicating bankruptcies through the Central Government Economic Court belonging to the province or city where a bankrupt company’s main office is located, and entitles a company up to two years to reorganize its business from the time a creditors’ conference reaches a decision on the feasibility and a plan of reorganization. The creditors’ conference is to be chaired by a judge appointed by the chief judge of the Economic Court. All creditors are able to participate in that conference if they submit their claims to the court within sixty days from the publication in local and government papers of the Economic Court’s decision to accept a bankruptcy declaration and to open proceedings.

The decision to create bankruptcy laws results from the desire of the government to create a means within the context of a market economy, rather than a fiat one, for creditors to help transform companies out of insolvency and unprofitability. Well-intentioned that may be, but without laws and procedures for securitizing assets, prioritizing claims, and other further protections and financial incentives for attracting the foreign parties whose capital contributions may be needed to modernize the plant and equipment of those companies to make them profitable local partners in joint venture or business cooperation contract relationships, the extent to which foreign capital can help raise up that vast segment of Vietnam’s economy must remain in question.

XII. Dispute Resolution

Article 5 of the 1993 Regulations mandates that foreign organizations and individuals investing in Vietnam must observe the procedures set forth in those regulations. The 1993 Regulations restrict the allowed modes for resolving disputes that arise other than as between the partners of a joint venture or a business cooperation contract.

If a dispute arises between either foreign-invested enterprises or the foreign
partners to a contractual business cooperation agreement vis-à-vis Vietnamese government agencies, the disputing parties must first seek settlement through conciliation; should the conciliation fail, the case must be brought before "a competent authority" of the government. No alternative forum for resolution is allowed. The regulations do not define "a competent authority," but clearly the foreign investor must be prepared to deal with whatever authoritative body or individual the government may select. It is therefore of vital importance that all aspects of a project's development and operation be at the outset in written form with the relevant government agencies and that, whenever possible, the authority to be designated for resolving any unsettled dispute be set forth in those documents.

If a dispute arises between either foreign-invested enterprises or the foreign partners to a contractual business cooperation agreement vis-à-vis Vietnamese economic organizations, those disputes must be settled "in accordance with Vietnamese laws and by a Vietnamese arbitration body." If, however, a dispute arises between the partners of a joint venture or a contractual business cooperation agreement, then wider latitude is allowed: the parties must first try to resolve their dispute through negotiation and conciliation; should that fail, then they may bring the matter before either a Vietnamese arbitrator, or an arbitrator of a third country, or an international arbitrator or an arbitration panel chosen by all parties concerned.

However, article 33 of the 1993 Regulations specifically empowers the SCCI to arbitrate when disputes among members of a joint venture's board of management arise on issues of business objectives, business planning, and key personnel that require unanimity of the board of management. The laws of Vietnam do not define or otherwise delimit the spectrum of issues that may be considered as involving "business objectives" or "business planning." Such issues are at the very heart of business operations and may be deemed to have extensive scope. Potential investors might consider opting for a different form of conducting business than in a joint venture if they wish better freedom to arbitrate those matters before a different arbitration body should Vietnam not modify article 33 to enable broader arbitration possibilities to disputes on core matters.

XIII. Conclusion

It is astonishing not only how quickly the Government of Vietnam is transforming itself into a market-centered economy, but also how extensively it has created new laws in so many fields to catalyze and facilitate its economic metamorphosis.

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72. Id. art. 102.
73. Id. art. 101.
74. Id. art. 100.
The government has expressed its desire to develop a public stock market to foster equity financings for realizing an expansion of its economic growth at an accelerated pace. It has also announced its desire to obtain observer status with the GATT as the first step for gaining full membership. These developments are continued reflections of the strong desire of Vietnam to emulate the successes of its Singapore, Taiwan, and mainland China neighbors. These new laws in Vietnam are adolescent. Many need refining, and as with other countries experiencing economies in transition from communist socioeconomic to free market natures, laws regarding many facets of commercial enterprise, for example, securitization, commercial paper, and banking, are yet to be developed.

But with respect to the laws that have been promulgated to date, Vietnam's new leadership is succeeding in creating laws that are workable and favorable to foreign investors. It has coupled those laws with financial incentives that are attracting foreign investments at an accelerating pace. It welcomes the presence of the Western community within it and is reaching out for membership in world trading organizations to integrate with the community of nations. President Clinton has stimulated the prospects for its potential growth by lifting the U.S. trade embargo. Vietnam is today no longer an unborn tiger.