



POLICY FRAMEWORK FOR INVESTMENT ASSESSMENT OF VIETNAM

14TH FEBRUARY 2008

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I. Introduction

1. The present Report has been prepared as a joint collaborative effort between the OECD and the Vietnamese authorities, including written responses to a detailed OECD questionnaire and two OECD consultations in Hanoi on 3-5 July, 2007 and 21-23 November 2007. These visits followed the presentation by Vietnam of a preliminary self-evaluation of its investment policies at the High Level Policy Dialogue on the Policy Framework for Investment (PFI) in Melbourne in April 2007. At that meeting the Vietnamese authorities announced their desire to proceed with a more comprehensive PFI assessment and share the results with the international investment policy community and leading investors in Vietnam notably from OECD, APEC and ASEAN economies.

2. The key findings of this report and a roadmap for future reforms are presented in Section II. Section III reviews Vietnam's evolving position in the global economy. Section IV presents an assessment of Vietnam's reform efforts and the current state of the regulatory and legal framework for investment, based upon Chapters 1-4 and part of 9 of the PFI, which addresses questions with respect to investment policy, investment promotion and facilitation, trade policy, competition policy, and financial sector development.

II. Key findings and a roadmap for future reforms

3. The progress Vietnam has achieved in less than two decades in putting in place a legal framework and implementing policies that mobilise private investment, including international direct investment, to support economic growth and the prosperity of Vietnam's citizens has been remarkable. During this period the Vietnamese economy has transformed from a centrally planned economy into a market-based economy in which the important contributions domestic private and international investment can make are recognized. Great entrepreneurial energy was unleashed in this process and the economy has registered an enviable record of strong and sustained economic expansion. Starting from a situation in which the economy was essentially closed to foreign investment, Vietnam is now considered to be one of the most attractive economies in the world for the location of FDI.

4. Nevertheless, Vietnam's economic reform process has not been completed. This PFI assessment has revealed that there are a number of further steps which can be taken if Vietnam is to realize the very considerable investment potential, and in particular in attracting substantially larger flows of beneficial foreign direct investment in the coming years. While Vietnam has enacted most of the main components of a legal framework for a modern market economy, there is considerable work to be done in further improving and effectively implementing this framework, cutting back on unnecessary and burdensome regulations, and transiting from the mindset of a command and control economy to one of market oriented economic management.

5. The main findings and proposed course of action resulting from this comprehensive PFI assessment of Vietnam are as follows.

PFI Chapter 1. "Investment Policy"

6. The new Investment Law of 2006, together with a new Enterprise Law and a new Intellectual Property Law, unified rules relating to investments in Vietnam by foreign and domestic investors, brought Vietnam's investment regime into line with its WTO commitments, improved governance arrangements and gave investors greater autonomy in the conduct of their businesses. The Investment Law establishes non-discrimination as a general principle, but there remain elements of discrimination in various other laws and regulations. The negative list approach has been taken for the remaining sectors or categories in which private investment by either domestic or foreign investors is either prohibited or subject to conditions.

There is also a list of sectors in which conditions are applied only to foreign investors. While this negative list approach is the one followed by OECD countries and is welcome, the lists are very long. It is acknowledged that the system for investors to obtain land use rights (there is no private ownership of land) is time consuming, often non-transparent, and in need of streamlining. The authorities are aware that administrative procedures for establishing investments in Vietnam, while simplified in comparison with the previous system, are still complex, sometimes difficult to understand, and often unnecessarily burdensome. The recent creation of a website, <http://vietnam.investway.info> is a positive further step to improve transparency.

7. Decentralisation of responsibilities to the provincial level together with inadequate timely guidance to the provincial authorities has led to a lack of coherence. There are concerns that the project evaluation requirements and “appraisal” process for large or sensitive projects which require parliamentary approval, remains a cause of uncertainty and unnecessary burdens and delays. Investment guarantee provisions in the Investment Law are generally up to international standards, but have yet to be tested in practice. The Intellectual Property Rights Law of 2005 and related Decrees are based on international standards but evidence suggests that enforcement has not been strong.

8. In light of these findings, priorities for investment policy reform under consideration by the Vietnamese authorities include the following features:

- Phase out the relatively large number of sectors in which foreign investment is treated less favourably than domestic investment, including ensure an early implementation of WTO market access commitments in the service sector, and moving ahead with the equitisation program and allowing greater participation of international investors in that program.
- Make the entry and approval procedures relating to domestic and foreign investors and their investments transparent and readily accessible and make them not more burdensome than necessary to achieve prudential and other similar legitimate public interest objectives: continue to take steps to describe and explain the current procedures in a clear and user-friendly way, and then simplify the procedures for foreign investment registration and certification. Consider moving to requiring only a simple registration system for foreign investments that just aims at verifying conformity with Vietnamese laws. More precisely define all prohibited sectors or restrictions affecting domestic and foreign investments.
- Improve communication and coordination between central and provincial authorities involved in the entry and approval process and provide clear guidance on their respective responsibilities and accountability.
- Clarify the responsibilities of the Parliament, which votes the laws, and the government which execute them, on investment matters, in particular decouple the prior authorisation procedure and granting of investment incentives for major investment projects from the Parliamentary process.
- Improve the transparency of Vietnam’s land markets, and the security and marketability of land use rights, simplify the administrative procedures for finding and acquiring State-owned land for productive use, giving particular attention to improving the ability of SMEs to acquire land use rights directly from government sources.
- Strengthen the enforcement of intellectual property rights, including the setting of remedies at levels that are more likely to be dissuasive, provide increased training to judges, and give stronger powers to intellectual property enforcement agencies.

- Strengthen the capacity and independence of Vietnam's judicial system.
- Make best efforts to ensure that Vietnam's international treaties and commitments that relate to investment meet the standards of the new generation of investment agreements and closely monitor their compliance.

PFI Chapter 2. "Investment promotion and facilitation"

9. Strategies for developing a stable and open business environment are included in Vietnam's socio-economic development plan. Investment promotion and facilitation methods are considered in these strategies to play a catalytic role. The Foreign Investment Agency (FIA) in the Ministry of Planning and Investment (MPI) plays the role of an investment promotion agency for Vietnam. There are also units in charge of foreign direct investment at the provincial level, and short-comings in the coordination between central and provincial authorities in this area are reported. The new Investment Law has led to a significant modification of the investment incentive program, removing subsidies that are contrary to Vietnam's WTO commitments. Nevertheless, the incentive program is very complex, seeking to direct investments towards a long list of public policy objectives. There are questions as to the cost effectiveness of the program.

In light of these findings, priorities for investment promotion reform under consideration by the Vietnamese authorities include the following features.

- Improve coordination between National and provincial authorities responsible for Vietnam's investment promotion activities, provide adequate funding of these activities and needed training for staff.
- Streamline and simplify Vietnam's investment incentive program and avoid seeking to micro-manage private sector investment decisions. Eliminate inconsistent and arbitrary incentive granting practices at the provincial level.
- Regularly evaluate the costs and benefits of incentives and phase out those that are not justified on a cost-benefit basis.
- Building upon the synergies that result from the fact that FIA is under the MIPA, strengthen in coordination efforts to improve regulations and practices and to provide information on business opportunities in Vietnam.

PFI Chapter 3. "Trade policy for investment"

10. Vietnam's accession to the World Trade Organization at the beginning of 2007 marked a major milestone in the nation's transition to a market economy and has involved a great many changes in the trade regime. Investment opportunities have increased as a result. The government is committed to fulfil all of its agreements with the WTO, including those involving a phased opening up of many parts of the services sector, those on transparency, and its obligations under the Agreement on Trade-Related Investment Measures (TRIMS). Steps have been taken to improve customs procedures, simplifying them and increasing transparency. But there is more to be done as Vietnam's customs procedures are still considered to be complicated, relatively slow and, at times, unpredictable.

In light of these findings, priorities for trade reform under consideration by the Vietnamese authorities include the following features:

- Continue efforts to improve Vietnam's customs procedures, extend application of IT and modern techniques, and regularly update the data base used by customs agencies.
- Communicate in understandable terms to all levels of government, to the business community and the Vietnamese people the commitments and obligations of Vietnam as a member of the WTO and the expected benefits from this membership.
- Implement WTO commitments effectively and on time, accelerating implementation when possible, and consider the commitments as a floor, not a ceiling.

PFI Chapter 4. "Competition policy for investment"

11. Vietnam's new Competition Law, enacted in 2004 and just beginning to be implemented, draws upon the experiences and statutes of a number of countries and international model laws, and also incorporates some innovative features. The competition agency, the Vietnam Competition Administration Department, is under the Ministry of Industry and Commerce, which has raised concerns about maintaining the authority's independence from political interference in its enforcement activities. The law is applicable to every business without discrimination towards ownership or size. It can play a key role in realising the investment potential of the country. Implementation will have to be careful to conform to that principle. Some provisions in the law risk being used against efficient foreign firms. Also enforcing the Law with respect to the predominant State-owned sectors may encounter difficulties. One short-coming of the Competition Law is its lack of jurisdiction over anticompetitive practices originating from outside Vietnam though having substantial adverse effects on competition in the domestic market.

In light of these findings, priorities for competition policy reform under consideration by the Vietnamese authorities include the following:

- Implement the Competition Law in an even-handed manner to every business in Vietnam without regard to its ownership. Seek to eliminate instances of discriminatory treatment between SOEs and private enterprises. In efforts to fight predation avoid targeting efficient foreign firms. Accelerate move of ownership of SOEs from line Ministries to the State Capital Investment Corporation.
- Make every effort to assure the independence in practice of the Vietnam Competition Council, including appointing some competition experts who are not public officials to the VCC.
- Amend the Competition Law to widen the scope of regulation to cover anticompetitive practices originating from outside the country, though having substantial adverse effects on the competitive process in its domestic market, and also to cover export and import cartels.

PFI Chapter 9. "Financial sector development for investment"

12. The financial sector of Vietnam has been transformed in recent years, moving from a State-owned mono-banking system to a diversified banking system, including a growing number of joint stock banks, joint venture banks and branches of foreign banks. This development has contributed to channelling funds more effectively to finance promising investment opportunities. But the five State-owned commercial banks still have dominant market share. The equitisation of these banks has begun and is scheduled to continue. However, the ability of foreign banks to participate in that process is limited.

Foreign participation in Vietnam's financial markets is significantly constrained. WTO commitments will require a phased and still partial opening of these markets. Only a small portion of the population use banking services regularly. Commercial lending is severely limited by a lack of credit information. The situation should improve with the establishment of private credit bureaus, the first of which is expected to be launched in 2008. Vietnam's capital market is still underdeveloped, with the bond market being rather inactive. A new Law on Securities and Securities Markets is well designed, drawing on OECD best practices. Market surveillance and enforcement still need to be strengthened.

In light of these findings, priorities for financial sector development under consideration by the Vietnamese authorities include the following features:

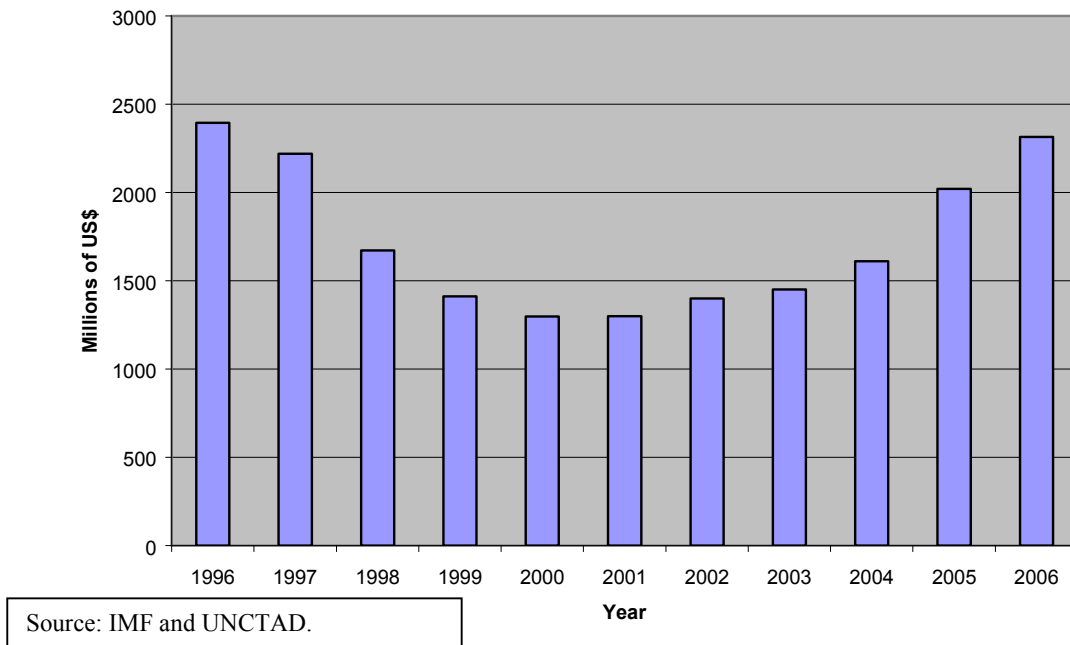
- Move forward with implementation of the May 2006 roadmap for reform of the financial sector, including strengthening and modernizing the State Bank of Vietnam, improving the performance of the State-owned Commercial Banks (SOCBs) and developing the capital markets.
- Continue with the equitisation of the SOCBs and increase opportunities for foreign banks to participate fully in this process.
- Ensure a timely implementation of WTO market access commitments with respect to financial services and otherwise reduce the many regulatory limitations on the ability of foreign financial firms to participate in Vietnam's financial sector.
- Improve the availability of credit information by encouraging the establishment of private credit bureaus and providing the necessary legal framework.

III. Vietnam's evolving position in the global economy

1. Trends in investment patterns

13. In 1987, very early in the process of transition of the Vietnamese economy to a more market-oriented economy, a Law on Foreign Investment was passed. Further steps were taken in the past two decades to encourage, protect and raise the quality of foreign investment (described in Section 4). These efforts were successful in encouraging strong inflows in the mid-1990s (see Figure 1). The Asian financial crisis led to a sharp drop in these inflows. Foreign investment net inflows bottomed out on 2000-2001 and picked up again in 2002, accelerating in 2004 and 2005. In 2006 net FDI inflows reached 2.3 billion US dollars, close to the 2.4 billion US dollar rate reached in 1996. Data thus far available for 2007 suggest a further significant increase will be registered. According to IMF/UNCTAD data, the estimated total stock of foreign direct investment in Vietnam reached 35.45 billion US dollars in 2006, some 72% above the 2000 figure (20.596 billion US dollars) and 20.3 times the 1990 stock which was only 1.65 billion US dollars. Over this 16 year period the foreign direct investment stock as a percentage of gross domestic product has more than doubled, from 25.2% in 1990 to 54.8% in 2006. FDI flows as a percentage of gross fixed capital formation have changed less dramatically, increasing from 10.6% in 1990 to 12.5% in 2006.

Figure 1. Net Foreign FDI Inflows into Vietnam



14. In recent years the strong and stable growth rate - in the range of 7.3% to 8.4% per annum since 2003 – and the improved investment environment have attracted considerable attention from large international companies and the scale of investments has been increasing. Increasingly, international firms see Vietnam as a location for production to supply global markets and a way to diversify their supply chains that have become highly concentrated in China. As of December 2007, there were 8,590 FDI projects still in effect nationwide with the total investment in these projects (foreign and domestic) being 83.1 billion US dollars. Most of this investment is in the industry and construction sectors (68.5% of the total committed capital and 60.2% of the number of projects). The services sector accounts for 34.4% of the capital and 24.5% of the projects.

15. Tables 1.a, 1.b, and 1.c present data on foreign direct investment in Vietnam provided by the Bureau of Foreign Investment under the Ministry of Planning and Investment. These data are not fully compatible with those of the IMF and UNCTAD as Vietnam has not yet adopted the OECD-IMF Benchmark definition for compiling such data. According to the Bureau, for the year 2007 Vietnam attracted over USD 20.3 billion of FDI – registered licenses for new projects plus increased investments in existing projects. Table 1.a shows that the five top source countries in 2007 were South Korea, British Virgin Islands, Singapore, Chinese Taipei, and Japan. Non-Asian OECD members are further down the list. However, the operations of North American and European firms are significantly greater than these data suggest as many of these firms invest through third-party countries, mainly Hong Kong China, Singapore and the British Virgin Islands.

16. As is shown in Table 1.b, over the 1988-2007 period, investors from 25 of OECD's 30 Members made foreign direct investments in Vietnam directly from their home countries and together accounted for over 43% of the total investment over that period. The leading OECD Member source countries according to this data have been South Korea, Japan, the United States, Netherlands, France, the United Kingdom and Australia. Of course, the comments above with respect to the measured flows from Hong Kong China,

Singapore and the British Virgin Islands, along with the Cayman Islands and Barbados also apply here. Firms from Chinese Taipei were early on the scene, investing in apparel and textile manufacturing. Recent investments from Chinese Taipei involve more advanced technologies. South Korea is currently Vietnam's largest investor with 1800 projects worth US\$13.5 billion and in many sectors, including the high-tech industry, construction and real estate.¹ These two countries plus Singapore, Japan and China (including Hong Kong) account for almost 60% of registered FDI. The European Union accounted for only 14% and North America less than 5%.

17. The sector distribution of foreign direct investment over the 1988-2007 period is presented in Table 1.a. as follows: Industry and Construction, 60%, Agriculture, 5.4%, and Services, 34.4%. Within the services sector, finance and banking is only 1.1%, transport and telecommunications, 5.2% and hotel and tourism, 5.9%. Thus it is evident that manufacturing accounts for the largest share of investment. The technology level of these investments has advanced considerably from the low levels in the first years after the economy was opened to FDI. The share of services is considerably lower than has been the experience of most developing countries. The relatively low share of services – particularly in telecommunications, financial services and the media – in FDI flows to date is due largely to government restrictions closing most service sectors to foreign investors. Many of these restrictions are scheduled for removal or reduction under Vietnam's commitments as a new Member of the World Trade Organization (WTO) (see Table 3 below). Telecommunications, for example, will be partially liberalized, but with a cap on foreign ownership of networks of 49% and a requirement that at least 51% must be State-owned. The latter restriction illustrates another factor behind the limited foreign investment in a number of service sectors, the continuing predominant role of State-owned firms. By limiting foreign investment in the services sector, Vietnam is limiting investment flows that account for about two thirds of global FDI flows² and limiting the development and modernisation of service industries that play a central role in the economy and the investment environment.

1. "Korean businesses raise concerns on Vietnamese investment climate", Viet Nam News, 15/12/2007.

2. World Investment Report, UNCTAD, 2004.

Table 1.a. New Investments in 2007 – Top 20 Source Countries

(by 22/12/2007 - including projects still in effect only)

No.	Country & Region	No of projects	Total investment US\$ millions	Share of Total Investment (%)	Legal capital US\$ million
1	South Korea	403	4,992	24.56	1477
2	British Virgin Islands	56	4,329	21.30	1388
3	Singapore	84	2,678	13.18	781
4	Chinese Taipei	209	2,421	11.91	865
5	Japan	154	1,304	6.42	508
6	Malaysia	45	1,170	5.76	177
7	China	113	475	2.34	228
8	Hong Kong, China	68	459	2.26	150
9	The US	61	385	1.89	195
10	Samoa	16	384	1.89	150
11	Thailand	24	288	1.42	168
12	The Netherlands	12	231	1.14	115
13	France	19	224	1.10	114
14	Cayman Islands	5	158	0.78	52
15	Canada	6	146	0.72	44
16	Australia	34	143	0.70	135
17	The United Kingdom	18	81	0.40	29
18	Brunei	16	68	0.33	38
19	Germany	13	51	0.25	23
20	Italy	4	50	0.24	6
	Other	101	286	1.40	166
<i>Total</i>		1445	20,324	100.00	6809

Source: Foreign Investment Agency - Ministry of Planning & Investment.

Table1.b. FDI by Country and Region, 1988-2007

(by 22/12/2007 - including projects still in effect only)

Country & Region	No. of Project	Total Investment Capital US\$ million	Share of total Investment (%)	Legal Capital US\$ million	Disbursement US\$ million
OECD Members					
South Korea	1,837	13,534	16.29	5,122	2,738
Japan	928	9,038	10.88	3,904	4,988
The US	375	2,796	3.36	1,437	752
The Netherlands	84	2,593	3.12	1,479	2,027
France	195	2,419	2.91	1,455	1,137
The United Kingdom	99	1,443	1.74	673	649
Australia	167	870	1.05	458	397
Luxembourg	15	804	0.97	724	12
Switzerland	47	749	0.90	358	531
Germany	98	546	0.66	297	161
Canada	63	490	0.59	198	47
Denmark	50	383	0.46	182	84
Poland	8	100	0.12	42	20
Italy	24	94	0.11	28	28
Belgium	31	84	0.10	40	61
New Zealand	15	70	0.08	50	5
Turkey	7	64	0.08	19	6
Sweden	15	53	0.06	18	14
Czech Republic	13	50	0.06	23	9
Liechtenstein	2	36	0.04	11	36
Norway	14	35	0.04	21	10
Finland	5	33	0.04	11	7
Spain	8	7	0.01	5	0
Ireland	4	4	0.01	2	0
Hungary	4	2	0.00	1	2
Total OECD	4,108	36,297	43.68	16,558	13,721
					0
Non-OECD					
		0	0.00	0	0
Singapore	543	10,739	12.92	3,818	3,804
Chinese Taipei	1,788	10,528	12.67	4,567	3,080
British Virgin Islands	336	7,708	9.27	2,585	1,376
Hong Kong, China	452	5,824	7.01	2,159	2,161
Malaysia	246	2,821	3.39	1,792	1,084
Cayman Islands	29	1,839	2.21	760	595
China	536	1,699	2.04	850	257
Thailand	168	1,667	2.01	703	833
Barbados	2	66	0.08	20	0
Other Non-OECD	382	3,917	4.71	1,723	2,326
Total	8590	83,104	100.00	35,535	29,237

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

Table 1.c. FDI by Sector, 1988-2007

(by 22/12/2007 – including projects still in effect only)

No.	Sector	No of projects	Total investment US\$ million	Share of Total Investment (%)	Legal capital US\$ million	Disbursement US\$ million
I	<i>Industry and construction</i>	<i>5,745</i>	<i>50,030</i>	<i>60.20</i>	<i>20,877</i>	<i>20043</i>
	Crude oil & Gas	38	3,862	4.65	2,305	5148
	Light Industry	2,542	13,269	15.97	5,874	3639
	Heavy Industry	2,404	23,977	28.85	9,256	7049
	Food Processing Industry	310	3,622	4.36	1,611	2058
	Construction	451	5,301	6.38	1,831	2147
II	<i>Agriculture</i>	<i>933</i>	<i>4,465</i>	<i>5.37</i>	<i>2,119</i>	<i>2027</i>
	Agriculture & Forestry	803	4,015	4.83	1,871	1857
	Aquatic	130	450	0.54	248	170
III	Services	<i>1,912</i>	<i>28,609</i>	<i>34.43</i>	<i>12,540</i>	<i>7167</i>
	Transportation & Telecommunication	208	4,287	5.16	2,751	722
	Hotel & Tourism	223	5,884	7.08	2,540	2401
	Finance-Banking	66	897	1.08	827	715
	Export processing zones – industrial zones	28	1,406	1.69	517	576
	Culture, Health Care & Education	271	1,249	1.50	573	367
	New City	9	3,478	4.18	945	111
	Office & House Rental	153	9,263	11.15	3,444	1892
	Other Services	954	2,145	2.58	943	383
Total		<i>8,590</i>	<i>83,104</i>	<i>100.00</i>	<i>35,535</i>	<i>29237</i>

Source: Foreign Investment Agency - Ministry of Planning & Investment.

2. *Investment agreements*

18. Soon after opening the economy to foreign investment, Vietnam entered into negotiations on bilateral and later, multilateral agreements on investment encouragement and protection. As of September 2007, Vietnam has entered into 51 such agreements, of which 21 are with Members of the OECD.

Table 2. Vietnam's Agreements on Investment Encouragement and Protection

Partner	Date of Signature	Date of entry into force
Algeria	21-Oct-96	...
Argentina	3-Jun-96	1-Jun-97
Armenia	1-Feb-93	28-Apr-93
Australia	5-Mar-91	11-Sep-91
Austria	27-Mar-95	1-Oct-96
Bangladesh	1-May-05	...
Belarus	8-Jul-92	24-Nov-94
Belgium and Luxembourg	24-Jan-91	11-Jun-99
Bulgaria	19-Sep-96	15-May-98
Cambodia	1-Sep-01	...
Chile	16-Sep-99	...
China	2-Dec-92	1-Sep-93
Cuba	12-Oct-95	1-Oct-96
Czech Republic	25-Nov-97	9-Jul-98
Denmark	23-Jul-93	7-Aug-94
Egypt	6-Sep-97	4-Mar-02
Finland	13-Sep-93	2-May-96
France	26-May-92	10-Aug-94
Germany	3-Apr-93	19-Sep-98
Hungary	26-Aug-94	16-Jun-95
Iceland	20-Sep-02	10-Jul-03
India	8-Mar-97	1-Dec-99
Indonesia	25-Oct-91	3-Apr-94
Italy	18-May-90	6-May-94
Japan	14-Nov-03	19-Dec-04
Korea, Democratic People's Republic of	2-May-02	...
Korea, Republic of	15-Sep-03	5-Jun-04
Lao People's Democratic Republic	14-Jan-96	23-Jun-96
Latvia	6-Nov-95	20-Feb-96
Lithuania	27-Sep-95	24-Apr-03
Malaysia	21-Jan-92	9-Oct-92
Mongolia	17-Apr-00	13-Dec-01
Myanmar	15-Feb-00	...
Namibia	30-May-03	...
Netherlands	10-Mar-94	1-Feb-95
Philippines	27-Feb-92	29-Jan-93
Poland	31-Aug-94	24-Nov-94
Romania	15-Sep-94	16-Aug-95
Russian Federation	16-Jun-94	3-Jul-96
Singapore	29-Oct-92	25-Dec-92
Spain	20-Feb-06	...
Sweden	8-Sep-93	2-Aug-94
Switzerland	3-Jul-92	3-Dec-92
Chinese Taipei	21-Apr-93	23-Apr-93
Tajikistan	19-Jan-99	...
Thailand	30-Oct-91	7-Feb-92
Ukraine	8-Jun-94	8-Dec-94
United Kingdom	1-Aug-02	...
United States	July 2000	
Uzbekistan	28-Mar-96	6-Mar-98

Source: Vietnam Ministry of Planning and Investment

19. The most recent investment-related agreements with OECD countries include those with Iceland, Japan, Korea, Spain and the United Kingdom. In addition, the US-Vietnam Bilateral Trade Agreement signed in 2001 includes a substantial Chapter IV “Development of Investment Relations”. The main provisions of this Chapter provide a good measure of the high standards of investment liberalisation and protection commitments Vietnam is today able to undertake. They can be summarized as follows:

- A broad, asset-based definition of investment (Article 1)
- The standard National Treatment and Most –Favoured Nation Treatment language “...treatment no less favourable than that it accords, in like situations, to investments in its territory of its own nationals or companies (hereafter “national treatment”) or to investments in its territory of nationals or companies or a third country (hereafter “most-favoured nation treatment”), whichever is the most favourable...” (Article 2.1). A further specific provision requires state enterprises, in their provision of their goods or services, accord national and most-favoured nation treatment to covered investments.
- There is a provision in Article 2.2 for exceptions to the treatment provided by Article 2.1. Annex H specifies these exceptions. For example, paragraph 4.3 of this annex provides in the case of prices and fees of some goods and services under state control, a schedule for eliminating that discrimination over time periods ranging from upon entry into force (for example, water) to 4 years in the case of all goods and services not specified for shorter phase-out periods. The General Standard of Treatment provision is “fair and equitable treatment and full protection and security ... in no case ... less favourable than that required by applicable rules of customary international law.”(Article 3)
- No expropriation or nationalization of investments, either directly or indirectly is permitted “except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article 3.” (Article 10) Thus the standard of compensation is the “Hull formula”.³ The article provides further clarification as to the fair market value to provide the basis for compensation and the meaning of prompt (“freely transferable at the prevailing market rate of exchange on the date of expropriation”). In addition, there are provisions for compensation for losses incurred owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or similar events.
- The issue of free transfer of payments associated with investment (such as contributions to capital, profits, dividends, capital gains, proceeds from the sale of investments, interest, royalty payments, management fees, repayment of loans, etc.) is addressed in Chapter VII of the Agreement. Article 1 of this Chapter provides that such transfers shall be granted “the better of national or most favoured nation treatment.”
- There also are separate chapters on Business Facilitation (Chapter V) and on Transparency-Related Provisions and the Right to Appeal (Chapter VI).
- The dispute settlement provisions (Article 4) first encourages the parties to the dispute to settle their differences through consultation and negotiation. If this does not occur, a number of alternatives are listed, including (after ninety days have elapsed) binding international arbitration. This can be via submission to the International Centre for Settlement of Investment Disputes (ICSID) , to the Additional Facility of ICSID, in accordance with the UNCITRAL Arbitration

3. The so-called “Hull formula” is to provide “*prompt, adequate and effective compensation*”.

Rules, or, if agreed by both parties, to any other arbitral institution or in accordance with any other arbitration rules.

- There is a provision on trade-related investment measures (TRIMs) that calls for conforming to the standards of the WTO Agreement on TRIMS, with Vietnam having a time limit of five years to phase out TRIMs inconsistent with the WTO Agreement (Article 11).
- Both parties agree to endeavour to negotiate a bilateral investment treaty in good faith within a reasonable amount of time (Article 13).
- Both parties have included lists of exceptions to the treatment provisions (Article 14 for the United States and Annex H for Vietnam).

3. *Vietnam and ASEAN*

20. The Association of Southeast Asian Nations (SEAN), founded in 1967, has the objective of accelerating economic growth and promoting peace and stability in the region. An important step towards integrating ASEAN member countries into a regional market was taken in January 1992 with the announcement of the ASEAN Free Trade Area (AFTA) with six original members – Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, and Thailand. Vietnam joined AFTA in 1995. The objective of reducing tariff and nontariff barriers is being addressed through the agreement on the Common Effective Preferential Tariff (CEPT), under which Vietnam committed to reduce its CEPT to no more than 5% by 2006. AFTA also has a wide range of trade facilitation measures. Vietnam is also a signatory of the ASEAN Agreement for Promotion and Protection of Investment (1987), the ASEAN Framework Agreement on Services (1995), the Framework Agreement on the ASEAN Investment Area (1998) and an active participant in the ongoing negotiations for a new ASEAN Comprehensive Investment Agreement (ACIA).

4. *Viet Nam in the WTO*

21. The transition of the Vietnam economy from a centrally planned towards a more market economic system has been based on a series of reforms that began with the announcement of *Doi Moi* at the end of 1986. In what can be considered as the defining moment in this process, Vietnam became the 150th Member of the World Trade Organization on January 11, 2007. This achievement followed some eleven years of preparations, including eight years of negotiations. Anchoring domestic reforms in the framework of its quest for WTO membership has provided a unifying theme for important advances in many areas of the Vietnamese economy. As is discussed at length in this report, the climate for foreign direct investment has benefitted significantly from this still ongoing reform process. In addition to Vietnam's extensive lists of commitments on goods (tariffs, quotas and ceilings on agricultural subsidies) and commitments on services (for a summary of provisions of access to foreign service providers and related conditions see Annex 1 to the Trade Chapter), Vietnam has committed to implement the following WTO agreements: TRIPS (intellectual property), TRIMS (investment measures), CVA (Customs Valuation Agreement), TBT (technical barriers to trade), SPS (sanitary and phytosanitary measures), ILP (import licensing provisions), A/D & C/V (anti-dumping), and ROO (rules of origin). The full texts of Vietnam's commitments and related documents can be found on the WTO website www.wto.org.

IV. Vietnam's policy framework for investment

22. This section evaluates Vietnam's reform efforts and the current state of the regulatory and legal framework for investment. The broad framework for this evaluation is the Policy Framework for Investment (PFI) (see Box 1).⁴ This assessment, as a co-operative endeavour, builds upon Vietnam's own evaluation under the PFI. It focuses on the first four chapters and part of chapter 9 of the PFI, which address questions with respect to investment policy, investment promotion and facilitation, trade policy, competition policy and financial sector development.

Box 1. The Policy Framework for Investment

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

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

Any interested government was welcome to participate in developing the PFI, and some 60 OECD and non-OECD governments took part. Business, labour, civil society, and other international organisations, such as the World Bank, also played an active role, and regional dialogues and public consultations were organised around the world.

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

PFI Chapter 1. Investment Policy

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

4. *Policy Framework for Investment*, OECD, 2006 (www.oecd.org/daf/investment/pfi).

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

a) The new Investment Law

24. On July 1, 2006, a new Vietnam Investment Law came into force, together with a new Enterprise Law and a new Intellectual Property Rights Law. The Investment Law is aimed at mobilizing different sources of capital for development, enabling free entry into the investment market and creating a level playing field between domestic and foreign investors in the majority of economic sectors. It allows investors to make investments in more economic areas than previously was the case. The Investment Law stipulates that only the Government, not ministries and local authorities, has the competence to decide and publicize areas subject to investment prohibition or restriction. Together these three laws improved the governance arrangements and extended the company forms available to investors.

25. Previously, foreign and domestic investments were governed by two separate laws: the Law on Foreign Investment in Vietnam and the Law on Domestic Investments. Pursuant to Vietnam's efforts to meet the criteria for accession to the World Trade Organization and the internationally accepted non-discrimination principle, the new Investment Law seeks to unify rules relating to investments in Vietnam by foreign and domestic investors. Promulgation of the Investment Law was required to make Vietnam's business and investment laws consistent with its commitments to key Agreements of the WTO, including the Agreements on TRIPS (intellectual property), TRIMS (investment measures), GATS (services), SCM (subsidies and countervailing measures), and ITA (information technology). For the implementation of the Investment Law the Government issued Decree No. 108/2006/ND-CP on September 22, 2006 and a number of other decrees. The main provisions of the Investment Law are summarized in Box 2.

Box 2. The Vietnam Investment Law of 2006 – Main Provisions

The Investment Law and its guiding decree identify 5 sectors prohibited for all investors, 9 sectors in which all investors are required to meet certain conditions and 14 sectors for which certain conditions are applied only to foreign investors. The conditions may include certain requirements for the establishment of a company, the scope of operations available for the project, the foreign and domestic ownership structure of the project, and/or the applicable form and type of legal entity. Foreign investors can make investment without any restrictions in areas other than these areas. Under article 4.1, investors are permitted to invest in all sectors and in all industries not prohibited by law. This follows the “Negative List” approach that is strongly recommended by the OECD.

The Investment Law lists the sectors or types of projects in which investments are prohibited and in which investments are conditional.

Under article 30, the five types of projects in which investment is prohibited for all investors (the Prohibited List) include:

- projects detrimental to national defence and security, and the public interest;
- projects detrimental to historical and cultural traditions and ethics;
- projects detrimental to people’s health or destroy natural resources and the environment.
- projects that involve the treatment of toxic waste brought into Vietnam, the manufacture of toxic chemicals or the use of chemical agents prohibited by international treaties; and
- Other projects banned by law.

The Conditional List for all investors (domestic as well as foreign) under Article 29 of the Investment Law includes the following 9 (typically regulated) sectors:

- sectors affecting national defence and security, and social order;
- the banking and finance sector;
- sectors impacting public health;
- culture, information, the press and publishing;
- entertainment services;
- real estate;
- mining and the exploitation of natural resources
- development of education and training; and
- other sectors in accordance with law.

Article 29.2 states that in addition to the sectors stipulated in clause 1 of Article (that is, the so-called “Conditional List”), “the sectors in which investment is subject to conditions shall compromise investment sectors in accordance with the schedule for implementation of international undertakings of which the Socialist republic of Vietnam is a member. Foreign investors thus may be subject to conditions in further sectors according to international commitments. Decree N. 108/2006/ND-CP contains an additional “Conditional List” that is applied only to foreign Investors. It includes the following 14 sectors in which foreign investment will not be licensed or only licensed under special conditions:

- Radio and television broadcasting;
- Production, publishing and distribution of cultural products;
- Mining and processing of minerals;
- Telecommunications and internet services;
- Construction and operation of ports and airports;
- Transport of goods and passengers;
- Fishing;
- Production of tobacco;
- Real estate;

- Import, export and distribution;
- Education and training;
- Hospitals and clinics; and
- Other sectors as per international treaties.

Article 29.4 provides that foreign investors investing in companies in which Vietnamese investors hold more than 51 per cent of the charter capital (that is, the foreign investors are minority investors) will be subject to the same conditions as domestic investors. Capital contributions, share purchase, merger and acquisition of enterprises in Vietnam are restricted in a number of areas consistent with Vietnam's commitments within WTO and other international agreements. Apart from these restrictions, foreign investors can buy any shares from Vietnamese investors without any cap on the amount and areas of shares.

Article 31.1 provides that the government may amend the Prohibited List and the Conditional List from time to time based on "the master plan and strategies for socio-economic development for each period" and international treaty undertakings. Article 29.3 states that in cases where an enterprise with foreign owned capital as invested in a sector in which investment was unconditional but subsequently becomes added to the list of conditional sectors, "the investor shall be permitted to continue its investment activity in that sector."

In addition, the Investment Law provides investors with a great degree of autonomy, such as the right to capital transfer and project transfer, independence in managing their own business, for instance, in hiring labourers or managers and equal access to investment resources, land and credits without discrimination between domestic and foreign investors. Furthermore the Investment Law provides for more diverse investment forms. Foreign investors are now allowed to establish limited liability companies, partnerships, joint-stock or private companies. Also the Investment Law provides a broader range of methods of investment. Article 21 provides that direct investment can be made in the following forms:

- establishment of wholly foreign- or domestic-owned companies;
- establishment of joint venture companies between foreign and domestic investors;
- investment in contractual forms, including business co-operation contracts, build-operate-transfer (BOT) contracts, build-transfer-operate contracts and build transfer contracts;
- investment in business development;
- purchasing shares or contributing capital to participate in the management of investment activities;
- mergers and acquisitions; and
- other (unspecified) forms of direct investment.

The previous requirements on the minimum foreign capital percentage for a joint-venture project and the proportion between legal capital and investment capital have been removed so that investors have more autonomy in mobilizing capital.

26. As is shown in Box 2, Vietnam prohibits private investment in 5 categories. This list, reflecting important public policy concerns (national security, public health, cultural traditions, natural resources and the environment, (toxic chemicals and waste). A second Conditional List consists of nine sectors applies to all investors, domestic as well as foreign. Investment in these sectors is permitted only if certain conditions are met. This list contains a number of important sectors of interest to foreign investors, such as banking and finance, mining and exploitation of natural resources, and real estate. The list largely covers regulated sectors. The conditions that are applied are not specified in the Law on Investment and, therefore, their restrictive effect is not clear. Also, several of the categories in the conditional list are vaguely worded – "sectors impacting public health", "sectors affecting ...social order", and "other sectors in accordance with law".

27. A second "Conditional List" (also given in Text Box 2) just applying to foreign investors, was issued as part of Decree 108/2006/NP-CP providing guidelines for the implementation of the Law on Investment. Article 29.2 provides for this possibility. The list largely reflects Vietnam's international commitments to open markets. The conditions which must be met if a license is to be granted to a foreign

investor “may take the form of certain requirements for the establishment of a company, the scope of operations available for the project, the applicable form and type of legal entity available for the investment project, and certain business conditions”.⁵ There seems to be considerable overlap between this conditional list that applies only to foreign investors and the conditional list in the Law on Investment. The majority of sectors included are services. A summary of Vietnam’s WTO scheduled commitments to open up the services sectors is given in Annex 2 to of this report. This second conditional list includes a final generally worded entry “Other sectors as per international treaties” that adds to investor uncertainty.

28. The clarity and coherence of the laws, regulations and administrative practices concerning investment have been improved under the three new laws. Before the Investment Law came into effect, investment activities were regulated in four key legal documents including Enterprise Law (1999), State Enterprise Law, Law on Domestic Investment Promotion and Law on Foreign Investment. In addition, specialized laws also had particular provisions for foreign investment activities, including the Law on the State Bank, the Law on Credit Organizations, the Law on Insurance Business, the Law on Petroleum, and the Law on telecommunications. Regulations on domestic and foreign investment were issued at different times and had different provisions. As a result, investment policies were inconsistent and unclear, the playing field was not level, and the discrimination between investors constrained economic development. It became apparent that the legal and regulatory framework for investment needed to be improved to reinforce investors’ confidence.

29. The Investment Law of 2006 achieved the unification of the previous Law on Foreign Investment and Law on Domestic Investment Promotion with respect to the issues on investment encouragement and investment policy. The regulations on the organisation and operation of all enterprises, including those with foreign ownership, are stipulated in the new Enterprise Law (2005). Provision related to investment activities that are found in the specialized laws are amended and/or established in accordance with Investment Law in order to ensure consistency and coherence. Provisions of specialized laws in the future concerning investment activities must refer to the Investment Law.

30. As is clear below, however, the objective of integrating both domestic and foreign-invested companies under one common system has not been fully achieved. The basic administrative procedures for undertaking an investment in Vietnam are given in Articles 45 to 73 of the Law on Investment. To guide the implementation of the Law, the Government issued Decree No. 108/2006/ND-CP on 22 September, 2006, Decree No. 95/2006/ND-CP on transforming state enterprises to operate in compliance with the Investment Law and the Enterprise Law, and Decree No. 101/2006/ND-CP on registration and conversion of foreign-invested enterprises.

31. Under the Investment Law (Article 45.1) domestic investment projects with investment capital of less than 15bn dong (approximately US\$0.95m) and not on the Conditional Lists are not required to register their investments under the Investment Law (article 45.1). Nevertheless, such investment projects still have to register under the Enterprise Law and obtain a Business Registration Certificate. Domestic investment projects with investment capital from 15bn dong to 300bn dong (approximately US\$19m) and not included in the Conditional Lists are subject to investment registration procedures. In addition, “where investors request that investment certificates be issues, the Provincial State administrative body for investment shall issue an investment certificate.” (Article 45.2).

32. All foreign-invested projects, including those with investment capital below 300bn dong and not included in the Conditional Lists, are required to be registered. The investors should be issued an Investment Certificate (article 46). The Investment Certificates of foreign investors investing for the first

5. Vietnam: A Guide for Business and Investment, Foreign Investment Agency of the Vietnam Ministry of Planning and Investment, January, 2007, Page 29.

time in Vietnam also serve as Business Registration Certificates for their new enterprise establishments. This helps reduce their paper work. Article 46(3) requires the registration of foreign-invested projects within 15 days after the registration authority receives the proper registration documents.⁶ However, despite these provisions, Vietnam does not have in the same place a full registry of all companies operating in the country.

33. An evaluation or appraisal process applies only to large-scale or conditional investment projects: (i) domestic and foreign-invested projects with investment capital less than 300bn dong (approximately US\$19M) but that are on the Conditional Lists; (ii) domestic and foreign-invested projects with investment capital of 300bn dong or more and that are included on the Conditional Lists; and (iii) domestic and foreign-invested projects with investment capital of 300bn dong or more but that are not included on the Conditional Lists (articles 47-49). The contents of the investment file to be submitted and the criteria for evaluation will differ slightly according to which of the above three criteria applies.

34. The appraisal process has been streamlined substantially. Capital and capital sources are no longer investigated. The Law on Investment still includes a provision (Article 47.3) that in the case of “important national projects” calls for parliamentary approval by the National Assembly of the project and of “regulations on the criteria for these projects”. This contrasts with the approach recommended by the OECD under which approval of individual projects would not be the role of parliament, but of the executive on the basis of a framework established by parliament, and under these procedures, government and parliamentary discretion continues for large investment projects. The Vietnamese authorities stress that the appraisals are conducted mainly for planning aspects such as infrastructure development, land, natural resources and the environment. In all cases the time limit for evaluation must not exceed 30 days or where necessary 45 days, from the date of receipt of a complete and valid investment file (article 47.2). The investor will be granted an Investment Certificate upon completion of a satisfactory evaluation.

b) Implementation

35. In order to support the implementation of the Enterprise Law and Investment Law, on 25 September, 2007, the Prime Minister issued the Decision 1267/QĐ-TTg on the formation of a Task Force headed by the Minister of Planning and Investment. The mandate of the Task Force is to supervise, monitor, and guide the implementation of the two laws by ministries, other central and local authorities and enterprises. More specific duties include formulating guiding regulations under the two laws, particularly regulations on unifying forms and contents of business registration dossiers; revising business registration and investment verification procedures; collecting and analyzing obstacles encountered by investors, enterprises, and executive agencies in order to guide implementation or/and make recommendations to the Prime Minister.

36. The Task Force cooperates with related agencies and with business associations, such as Vietnam Chamber of Commerce and Industry (VCCI), in supervising implementation of regulations on business licensing and other business conditions. It recommends abolishing unsuitable, unnecessary and/or contrary regulations and amending and supplementing inadequate, non-concrete, unclear, and/or inappropriate regulations. It also proposes in some cases the adoption of more efficient and appropriate management forms that do not require a license. The Task Force conducts online discussions on the two laws and has opened training courses to strengthen capacity for those responsible for executing aspects of the two laws.

6. Proper registration documents mean those documents which are prepared in the right way and right form in accordance with requirements stipulated by law.

37. Administrative procedures have been reformed, upon recommendation of the Task Force, to create more favourable conditions for investors through the following policies:

- First, local authorities are permitted to grant licenses to all investment projects regardless of their scale and capital. The objective is the establishment of “one-stop” shops for the registration of new investment projects/enterprises at the provincial level.
- Second, for investment procedures, there are only two steps, namely registration and appraisal. Investment registration is simple and takes less than 15 days.

38. The above mentioned Task Force has received reports submitted by most Provincial and central city authorities on experiences during the first months of implementation (through April 20, 2007), including statistics on the granting of Investment Certificates. According to the incomplete statistics that are available,⁷ some 1,567 projects received Investment Certificates. The total capital of these projects was VND 214,887 billion (equivalent to USD 13.43 billion), which implies an average capitalization per project of VND 137.1 billion (USD 8.6 million). New investment projects account for 72.4% of the total projects that received Investment Certificates.

Table 4. Result of Investment Certificate Granting

Kind of project	Total projects	Total capital (VND million)
A1	687	4,940,517
A2	749	60,554,979
B1	67	98,119,566
B2	31	2,800,686
B3	33	48,471,316
Total	1,567	214,887,064

Note:

A1: Investment projects capitalized under VND 15 billion and not falling in conditional investment domains

A2: Investment projects capitalized between VND 15 billion and under VND 300 billion and not falling in conditional investment domains

B1: Investment projects capitalized more than VND 300 billion and not falling in conditional investment domains

B2: Investment projects capitalized under VND 300 billion and falling in conditional investment domains

B3: Investment projects capitalized more than VND 300 billion and falling in conditional investment domains.

Source: Vietnam Ministry of Planning and Investment

39. Investment incentives that are granted are recorded in the Investment Certificate of all foreign projects and domestic investment projects that require investment certification (article 38). Of 1,567 projects granted Investment Certificates cited above, there are 1,127 projects falling in investment preference areas or domains, accounting for 71.9% of the total. There are 1,010 projects eligible for investment preference domains (accounting for 64.45% of total projects) and 803 projects eligible for investment preference areas (accounting for 51.24 % of total projects).

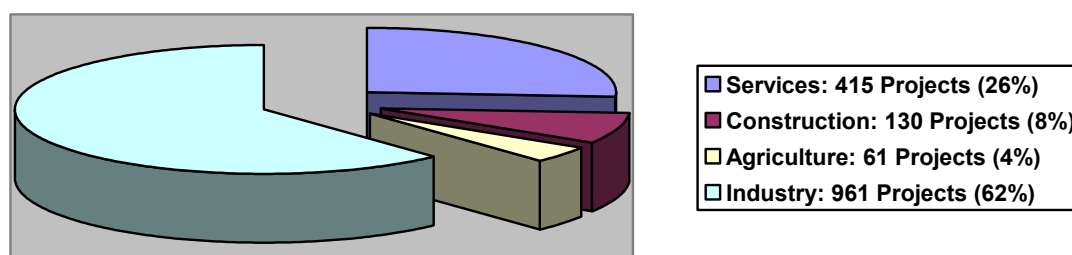
7. At the time this was written, 52 of 64 provinces and central sites had submitted their reports.

Table 5. Number of projects eligible for investment preference

Kind of projects	Projects eligible for investment preference
A1	482
A2	549
B1	59
B2	19
B3	18
Total	1,127

40. Figure 2 below presents the sector breakdown of the investment projects that have received Investment Certificates. The industry sector has the largest number of investment projects, 961 projects accounting for 62% of the total. Next, the services sector has 415 projects accounting for 26%. The construction has 130 projects accounting for 8.0% and the agriculture sector has the smallest per cent of projects with 4.0% (61 projects). Many countries include construction under the heading “industry”. Using that broader definition, 1,091 projects accounting for 69% of total number of projects would be considered to be in the industry sector.

Figure 2. Number of investment projects by industries



41. As noted earlier, under the Investment Law certain projects are subject to an appraisal process. Of 1,567 projects which have been granted ICs under the Investment Law, there are 131 projects that have been subject to investment appraisal with total capital of VND 149,391 billion. The average capitalization of these projects is VND 1,149 billion. In general, the projects subject to investment appraisal invest in infrastructure, such as electricity generation, and entertainment services. Of the 23 projects granted Investment Certificates by provincial agencies, two require submission to the Prime Minister for appraisal. They are capitalized at more than VND 18,187 billion. Provincial People’s Committees granted 1,075 Investment Certificates. Of these, 96 projects with investment capital of VND 86,220 billion required investment appraisal. The Management Boards of Industrial Parks, Export Processing Boards, High-Tech Parks and Economic Zones granted Investment Certificates to 330 projects. Of these, 29 projects with investment capital of over VND 57,702 billion required investment appraisal.

42. In their reports on experience thus far with implementation of the Investment Law and the Decree No.108/2006/ND-CP which guides implementation, provincial authorities have indicated fewer problems than were anticipated in moving to a comprehensive decentralization of Investment Certificate granting. Most provinces are judged to have promptly grasped and undertaken the new processes. Administrative

procedures are said to be handled more rapidly and transparently than was the case under the previous system. However, the implementation experience has revealed certain constraints and impediments, which are confusing domestic and foreign investors as well as the provincial authorities.

c) Outstanding issues reported by the provinces

43. The implementation issues reported by the provincial authorities can be grouped under the following four headings:

- General regulations on investment conditions, investment registration and investment preference
- Procedures for granting Investment Certificates
- Inconsistencies of IC granting orders among provinces
- State Management of investment activities.

General regulation on investors, investment conditions and investment preference

- Many provinces say that conditional investment sectors and conditions for investment projects falling in conditional investment sectors under Article 29 of the Investment Law and Annex III of Decree 108 are stipulated too generally, which makes them difficult to apply. For example, it is difficult to determine “Sectors impacting on public health”. The expected “Report on explaining conditions which must be met by the investment project” has not been issued.
- Presently, there is no unified point of view on the implementation of international commitments – in particular, commitments with the WTO - with respect to investment conditions. Provincial agencies and investors are finding it difficult to determine and understand these commitments. A more accessible presentation of the commitments with respect to the schedule of opening markets is expected to be issued by government decree in the first quarter of 2008.
- The investment preferences for Vietnamese investors established abroad, that is, overseas investors who have certificates of Vietnamese origins, are not clearly stipulated. The Investment Law and guiding decrees do not indicate whether Vietnamese established abroad who invest in Vietnam are to be treated as foreign investors or domestic investors.

Regulations on procedures of investment registration, appraisal and the granting of Investment Certificates

- In accordance with the Investment Law, a project which is capitalized between VND 15 billion and under VND 300 billion and is not in one of the conditional investment lists is to be granted an Investment Certificate. The investors are required to submit very general information about their projects. No verification is required. In these cases the provincial authorities indicate that they have difficulties “monitoring the project”. However, it is not evident that such “monitoring” is necessary.
- The procedures under the Investment Law for granting an Investment Certificate do not require the project (the investor) to submit a feasibility research report. However, the Law on Environment Protection requires the investor to establish an environment impact assessment which is to be enclosed in the feasibility research report. Clause 4 of Article 22 of Law on Environment Protection stipulates that the investment license is only granted after the report on environment impact assessment has been approved. Also, the Construction Law stipulates that

the environment impact assessment is to be included in the proposed investment project. Thus, environment issues are stipulated in three laws with three kinds of procedures. Investors are unsure whether they should make the report on environment impact assessment before or after being granted an Investment Certificate. This can affect the timing of the granting of the Investment Certificate since environmental assessments take time to complete.

- One of the pieces of information to be submitted for the investment appraisal process is the investment project execution schedule. In accordance with the regulations, the project execution schedule is established by the investor. Such a schedule is meant to provide the basis for decisions on the temporary cessation of projects and the withdrawal of an Investment Certificate. More broadly, there is the complication that any subsequent change from the initial information provided to obtain the investment certification may require a new authorisation or amended investment certificate. This seems to be the case for an established foreign-invested company wishing to develop a new product line or even to undertake a significant expansion of an existing product line.
- The Investment Law and Decree 108/2006/ND-CP stipulate procedures for the adjustment of investment projects, but these regulations are not sufficiently clear. Provincial level agencies find it difficult to determine what contents have to be adjusted and what procedures are to be applied.

Inconsistencies of IC granting orders among provinces

- Some provinces have studied, collected and rationalised relevant regulations in a statute on procedures which are applied in the province. The statute is issued by provincial level or central city people's committees, departments of planning and investment or the management boards of economic zones, Industrial Parks and Export Processing Zones. The statute is issued either as a formal legal document (for example Decision No. 08/2007/QĐ-UBND dated 14/3/2007 of Quang Ngai People's Committee on the orders and procedures of IC granting in the province) or in a more informal form which is published on official websites of local authorities.
- An examination of the orders and procedures of Investment Certificate granting by provinces indicates a lack of uniformity, and in some cases they are not consistent with the Investment Law and Decree 108/2006/ND-CP. For example, which provincial agency acts as the main body examining the Investment Certificate is not uniform across the provinces and the coordination among local authorities is not done in a uniform way.

State management of investment activities

- Export Processing Zone and Industrial Park Management Boards have the right to grant the Investment Certificate, which also serves as the Business Registration Certificate. However these Management Boards are not part of the system of business registration agencies in accordance with Decree 88/2006/ND-CP.
- The granting of Investment Certificates has been decentralized to the provinces. However, provincial agencies indicate that uncertainties persist in this area. Moreover, these agencies report that they face difficulties determining which ministries or ministerial level agencies are in charge of which domains for specific cases.

44. The above implementation problems cited by the provincial authorities are consistent with concerns mentioned by various participants in the Mid-term Consultative Group Meeting of the Vietnam

Business Forum in Hanoi on May 30, 2007 and in other business forums. Taken together, the concerns indicate that the approval/registration/licensing process remains still quite complex and difficult to grasp. There is the additional complexity of sector licenses.⁸ (The recent creation of a website, <http://vietnam.investway.info> is a good start at improving transparency in this regard.) In addition, there are significant lacks of knowledge, coordination and experience at various levels, these being due in part to resource constraints.

45. Part of the above problems results from the decentralisation of procedures to provincial authorities apparently without provision of sufficient implementation instructions and training. They also relate to the fact that the authorities have not really let go the control over investment activities. There are rules for practically every type of investment (by size, ownership or sector or types of investment incentives). Under Article 13 of the Law on Investment, investors are granted “the right to autonomy in investment- business” including the right “to select the sector in which to make an investment, the form of investment, the method of raising capital, the geographical location and scale of the investment, an investment partner and the duration of operation of the project”. However, other provisions of the Law, implementing Decrees and the complex incentive program circumscribe these rights significantly and seek to influence these decisions rather than letting them be determined by market considerations. This, along with the uncertainty and administrative burden that comes from the complexity and insufficient clarity and transparency of the system, detracts from the investment climate from the perspective of foreign investors.

46. The project evaluation requirements and process, which appears likely to cause uncertainty and unnecessary burdens and delays, is particularly likely to have an adverse effect on the investment climate as viewed by foreign investors. The granting of Investment Certificates is not concentrated in one place but can be given by local or special zones authorities. Major or sensitive projects must go through a lengthy process involving both the central and the local authorities and in some cases can even require parliamentary approval, a procedure that is likely to politicize the approval process.

47. The World Bank and the International Finance Corporation’s latest report on doing business indicates that there has been an improvement in the ease of doing business in Vietnam, citing shortening the time in dealing with licenses and greater access to credit. Areas needing further improvement include, notably, starting a business, provisions for paying taxes, and investor protection.⁹

d) Consultation mechanisms

48. Moving forward with implementation, it is important that there be effective communication, prior notification and consultation on any regulatory or administrative changes. The Task Force on Implementation is expected to play a valuable central role in this respect. In the formulation of policies and regulations concerning enterprises in general and investment activities and investors in particular, the stated policy of Vietnam’s government is to pay special attention to strengthening the collection of public opinion and opening up the dialogue between the legislative powers and beneficiary groups.

49. This point of view is expressed in the Law on Issuing of Regulations (amended in 2002). Thereafter, the transparency of the process of formulating regulations was improved. The Law stipulates clearly the rights and obligations of the participation of people in recommending the formulation of regulations as well as the duty of the legislative powers to collect public opinion (from agencies, organisations, associations and individuals) when drafting regulations. In 2001 the Prime Minister issued Resolution No. 28 in 2001 that formally nominates the Vietnam Chamber of Commerce and Industry

8. The UNCTAD report also focuses on this problem and invites the authorities as a first step to better explain the procedures, which should be made “as simple and unobtrusive as possible”. Op. Cit, page 41.

9. Doing Business in 2008, World Bank and the IFC, December 2007.

(VCCI) to act as the official representative of enterprise community and requires that all regulations related to the enterprise community need to be commented on by VCCI before promulgation.

50. Presently, the government obtains the opinions of enterprises through the following main channels:

Direct dialogue is undertaken between the state agencies and the business community and groups

One of the notable direct dialogues is the annual meeting between the Prime Minister and the business community. These meetings have become routine and provinces also have learned to hold similar meetings between provincial leaders and local enterprise communities. The ministries and related agencies also hold meetings with the business community. At provincial level, most presidents of the Provincial People's Committees chair such meetings.

Legislative agencies send a official letter to request that representatives of the business community make comments on draft regulation under the official letter

In accordance with Law on the Issuing of Regulations, legislative agencies which draft regulations on enterprises and related issues have to seek the advice of the enterprise community through its representative, such as VCCI .

Draft regulations are published in the media and on the internet; individuals and enterprises are employed to collect opinions

This channel, now commonplace in OECD countries, is quite new in Vietnam, but increasingly is becoming more popular. The OECD has long recommended the use of modern communications technology to improve transparency. As an example of this trend in Vietnam, when the Enterprise Law (2005) and Investment Law (2005) were being formulated, the drafts could be downloaded from the website of the Ministry of Planning and Investment. The drafts were also included in some published articles and on the website "Online Enterprise Forum" of the VCCI. A notable characteristic of the formulation of these laws was the strong participation of the media in the process and published articles providing analysis of the contents of the laws and the collection of public opinion.

Holding two Enterprise Forums each year.

The Vietnam Enterprise Forum has rapidly become an important policy dialogue forum between the public and private sector. Ministries comment on their respective current and planned changes in regulations on economic activities and enterprises and receive the views of the private sector representatives. This dialogue helps to ensure consistency between various laws and regulations and to avoid overlaps and conflicts in the legal environment for enterprises.

e) Concluding remarks

51. To summarize, while recent reforms have resulted in important improvements, Vietnam has not reached the stage whereby the entry and approval procedures relating to domestic and foreign investors and their investments are transparent, readily accessible and avoid imposing unnecessary complications and burdens. There are still persistent elements of a command economy with many of the regulations and information requirements having the apparent objective of obtaining conformity with Vietnam's economic and industrial policies as detailed in its Master Plans. The sharing of responsibilities between the central and local authorities does not seem to be clearly defined or understood, including for regular investments.

52. In view of these concerns, various steps need to be undertaken: First, describe and explain the current procedures in a clear and user-friendly way. Second, find ways to simplify the procedures for foreign investment registration and certification by moving as soon as possible to only a simple registration system for both domestic and foreign investments that just checks conformity with Vietnamese laws, such as those listing prohibited sectors; third, implement the WTO commitments as quickly as possible; and fourth consider additional liberalisation measures, including acceleration of the equitisation process.

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

53. Access to suitable industrial and commercial land for factories, warehouses, offices and retail outlets is essential for a growing economy. Transparent land markets and secure and marketable land rights are as important as the initial access. There is no private ownership of land in Vietnam. The land is owned collectively by the people of Vietnam, with the State acting as the manager. The relevant law and decree are the Land Law of 26 November 2003 (amended) and Decree 181/2004/ND-CP of October 29, 2004 guiding implementation of the new Land Law. This law provides expanded mechanisms for enterprises to obtain the right to use land, including direct allocation or lease by People's Committees, the transfer of land-use right certificates (LUCs) among entities, and granting LUCs via an auction.

54. Land regulations on foreign investors have been changed to delegate powers to local authorities in land delivery and lease to implement investment projects. For enterprises, the regulations stipulate that all enterprise have equal land usage rights and obligations with respect to the accession of land for establishing business sites. Nevertheless, SMEs are reported to have particular difficulties obtaining access to land usage rights and the process is generally very complex and lengthy for all firms.¹⁰ Enterprises with foreign capital are able to sub-lease land in connection with investment projects. People's Committees and Vietnamese partners are mandated to establish clear procedures relating to LUCs and, if necessary, offering compensation.

55. Enterprises with foreign capital are allowed to mortgage assets associated with land and the value of LUCs to secure loans. The real estate collateral mechanism is regulated in the Land Law, the Civil Code, the Law on Credit Organizations and other related regulations. Credit organisations have the power to select and decide to receive assets as collateral, to guarantee loans with the assets created from the loan and to lend with and without the guaranty of assets. Assets that can be used as collateral include land usage rights, houses and other buildings, and other assets associated with land.

56. The above cited Decree 181 stipulates that "Land information including information of land areas, land usage rights, assets associated with land and situation of implementing the rights of land users is provided publicly in accordance with demand". Land prices are supposed to correspond to market prices at the time of land transfer under normal conditions and are published annually. Nevertheless, Vietnam ranks near the bottom of the Real Estate Transparency Index 2006.¹¹

57. The process for acquiring rights for the use of land directly from People's Committees has been simplified. Registration is carried out at the Offices of Land Usage Registration under a "one-stop" procedure designed to be convenient for land users. Under this new process, only three documents are required: an application form for land allocation or lease, an investment decision or certified copy of an investment license, and a certification letter from the local Department of Natural Resources and the

10. "Access to Land: Issues faced by the private sector", Business Issues Bulletin, No. 19 (22). Vietnam Chamber of Commerce and Industry, April, 2007.

11. Ibid.

Environment (DONRE) on the effective record of land use by the applicant. There is a 30-day time limit to process applications on land that is already cleared and a 45-day limit for sites which are not yet cleared. The DONRE is the sole contact for applicants during the whole process.

58. Despite the improvements brought with the new Land Law, the following limitations observed in the present situation could present hurdles to investors in acquiring necessary land use rights:

- The lack of a precise definition of idle State-owned land or an effective mechanism for land surrender causes the process of recovering idle State-owned land to be laborious.
- The methods for calculating land prices are not publically specified and basic market information on available land is difficult to obtain.
- In the absence of detailed and uniform guidance on the application and implementation of the auction process for LUCs, existing outdated and inadequate provincial regulations are being applied.
- Only minimal legal regulations are available to guide the application and organisation of activities involving the use of land for constructing houses for sale and lease, and, more importantly, for constructing production and business facilities (factories, offices).
- The land register system is not kept up to date.
- The security of land tenure is weak.
- The administrative procedures are burdensome; they are complicated and very lengthy.
- There are problems of consistency between the new Land Law and the new Investment Law.

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

59. Vietnam now has a comprehensive and uniform system of regulations on intellectual property that brings together intellectual property-related provisions that formerly were scattered in about 40 legal documents. The key code, law and decree are the 2005 Civil Code, entering into force on 1 January 2006 (specifically, Chapter 34 on author rights and related rights; Chapter 35 on industrial property and varieties of plants; Chapter 36 on technology transfer), the 2005 Intellectual Property Law, effective since 1 July 2006, and the 2004 Civil Procedure Code Decree 89/2006/ND-CP on trademarks and labelling.¹² This system is considered by the Vietnamese authorities to be in compliance with international standards and international treaties of which Vietnam is a member, for example, the Paris Convention on Industrial Property, the Berne Convention on the protection of literary and artistic works, etc. Decree 89 allows enterprises to use technical methods to inform customers about products, origins, trademarks, or warn them of signs of possible infringement.

12. See also Decree 12/1999/ND-CP dated 6/3/1999 that regulates judgment of administrative violation with respect to industrial property; Decree 100/ND-CP that regulates author rights and related rights; and Decree 120/2005/ND-CP that regulates judgment of competitive problems.

60. Several further important Decrees guide the implementation of the Intellectual Property Law. Decree 105/2006/ND-CP dated 22/9/2006 regulates in detail the rights of organisations and individuals (both those who have intellectual property rights and those who do not but are harmed by imitation goods counterfeiting)) to require authorities to judge administrative violations of this law. Decree 106/2006/ND-CP dated 22/9/2006 regulates the judgment of administrative violations of the intellectual property law. It specifies that such a violation is penalized from 1 to 5 times the value of illegal goods or imitative goods which are disclosed; the higher value of the illegal goods, the higher will be the multiplier used to calculate the penalty.

61. The enforcement of intellectual property rights under the system is considered to have been weak thus far. The amount of fines imposed for infringements has been low, and hence such fines are likely to have insignificant deterrent effects. There are no clear guidelines on well-known trademarks; all are under the first-to-file system. There is a lack of clarity about the relevant relationships between central state organs and local authorities, as well as between administrative bodies and enforcement organs, especially with respect to enforcement matters.

62. The Government has undertaken efforts to enhance the awareness of domestic firms, in particular small and medium-sized enterprises (SMEs), so that they can fully use the intellectual property rights system. It conducts a national training program on human resources for small and medium enterprises (under Decision 143/2004/QĐ-TT). The training content covered capacity-building and management skills in science and technology, Intellectual Property Rights (IPRs) and quality standards for SMEs.

63. In addition, the National Office of Intellectual Property (NOPI) has set up an information warehouse covering IPRs in the World and Vietnam. Currently NOPI has updated about 4,000 patents and 200 utility solutions in effect in the world and 50 million descriptions of inventions. In addition NOPI has made available 30 million descriptions of inventions on CD-ROM and electronic versions convenient for searching. NOPI will continue collecting patent information by exchanging information with other foreign counterparts and international organisations for the latest data. Moreover NOPI will also develop an electronic library in both Vietnamese and English and design embedded searching tools (inclusive of translation software from English to Vietnamese and vice versa) so that users can access to needed information in a more convenient, quicker and more accurate manner. Information centres have been established in Ho Chi Minh City and Da Nang to provide intellectual property information to the public.

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

64. Before 01/01/2006, the Vietnam legal system differentiated between business contracts (economic contract) and civil contracts. The Civil Code 2005, replacing the Civil Code 1995 and the Ordinance on Economic Contracts 1989, uniformly regulates all contractual relations. Accordingly since the effective date of the Civil Code 2005 (on 01/01/2006), the term economic contract no longer exists and all contracts are called as civil contracts and are regulated by the Civil Code 2005. This Code uniformly regulates all contractual relations. The principle of equality of rights and obligations in civil procedures of all agencies and organisations, regardless of their form of organisation or ownership is provided for in the 2003 Ordinance on Commercial Arbitration, the 2004 Civil Procedure Code, the 2005 Investment Law, and Decision No. 204/TTg dated 28 April 1993 of the Prime Minister and expanded by Decision No. 114/TTg dated 16 February 1996 of the Prime Minister on the Vietnam International Arbitration Centre.

65. The Civil Code 2005 also regulates foreign civil relations. When establishing products and service transactions with foreign entrepreneurs, Vietnamese and foreign entrepreneurs have the right to select foreign laws to regulate the contractual agreement. In addition, commercial contracts between

businesses are also regulated by the Commercial Law 2005 with detailed provisions for individual transaction categories.

66. In case the Vietnamese laws or international conventions of which Vietnam is a member lead to the application of foreign laws, such foreign law can be applied if the said application or its application consequences do not violate basic principles of the Vietnamese law. In case such foreign law leads to the reciprocal application of Vietnamese law, the Vietnamese law will be used. If the parties do not have a specific agreement on which law to regulate their contractual agreement, the Vietnamese law will prevail in the following cases:

1. The contractual agreement relates to real estate in Vietnam;
2. The contract is signed in Vietnam and is performed entirely in Vietnam;
3. The contract is performed in Vietnam but does not state the place of performance and the related Vietnamese enterprises are the one who initiates the contractual agreement.

67. The Vietnamese law does not stipulate that dispute settlement is a key content of a contractual agreement. However, the resolution of disputes due to breach of contract has been clearly stipulated by Vietnamese laws. This provision has been commonly used in various types of contracts, including international trade contracts. Accordingly, related parties may apply international conventions or laws of a neutral/third country and request a hearing of arbitrators or courts of a neutral/third country, but such decisions must be compatible with the laws and procedures of Vietnam as well as be stated clearly in the contract.

68. The 2005 Investment Law has one article (Article 12) on dispute settlement. Accordingly, disputes related to investment activities in Vietnam must firstly be resolved by negotiation and mediation. In the case of unsuccessful mediation, the dispute will be heard by the arbitrator or court, inclusive of foreign arbitrator and court, in accordance with legal regulations. Procedures for the settlement of economic disputes by arbitration have been introduced. The establishment of the International Arbitration Centre in Ho Chi Minh City is a welcome development. If the parties to a commercial dispute do not want to file a petition to the People's Court, they can choose, by consensus, to resolve the dispute through an economic arbitration centre. The concept of commercial activities has been expanded to be consistent with international practice. Arbitration decisions are final and binding, unless nullified by a court.

69. According to Vietnamese laws, Vietnamese courts will not re-hear a dispute case previously heard by a foreign court or arbitrator. They will check and verify the civil verdict or decision made by the foreign court or the decision made by the foreign arbitrator in line with the Vietnamese laws and international conventions that Vietnam has endorsed or joined for decision. The acknowledgement of and permission for enforcing a civil verdict or decision of a foreign court or a decision of foreign arbitrator in Vietnam should not violate basic principles of Vietnamese laws.

70. Articles 356 and 370 of the Civil Procedural Law of Vietnam in 2004 clearly state the types of civil verdicts and decisions of foreign courts or decisions of foreign arbitrators which are not acknowledged and permitted for enforcement in Vietnam. These include civil verdicts or decisions which are deemed ineffective by the law of the country where the court made such verdicts or decisions; cases that fall under the specific trial authority of Vietnamese courts; cases in which related parties choose the arbitrators who do not have competency to make such decision in accordance with the applicable laws of each party; cases in which the dispute is not resolved by an arbitrary method in accordance with the Vietnamese law.

71. A well functioning and independent judicial system is vital for building a favourable business climate for foreign and domestic investors alike. The capacity and independence of Vietnam's judicial system is still an area of concern for investors. A more specific concern is the short time limit for appeal (only 15 days) as compared with the norm commonly used in OECD countries of a 30-45-day period. Also, there is no provision for the mandatory publication of arbitration decisions.

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

72. The Government of Vietnam has maintained a compensation policy in case of nationalizing assets of foreign and Vietnamese enterprises operating within Vietnam territory. This compensation policy is considered to provide for a timely, sufficient and efficient basis and in line with obligations stated in international laws. Article 6 of the new Investment Law guarantees that the "lawful assets and invested capital of investors shall not be nationalized or confiscated by administrative measures." The only exceptions to this guarantee are cases of "real necessity for the purpose of national defence and security and in the public interest." In such cases, compensation shall be "at market prices at the time of such compulsory acquisition or requisition" and is required to be fair and non-discriminatory. It will be paid at the time of announcement of such compulsory purchase or requisition. Compensation to foreign investors is to be made in a freely convertible currency and shall be permitted to be remitted abroad.

73. The Investment Law provides equal, non-discriminatory treatment for all investors from different countries and Vietnam. The payment or compensation should ensure the legal interests of the investor. Item 2 Article 6 of the Investment Law stipulates "no discrimination among investors". The non-discrimination feature is also demonstrated in Items 2 and 3 of Article 4, Chapter I. Item 2 Article 4 stipulates that: the State will perform equal treatment under laws over investors of all economic sectors, between domestic and foreign investment; encouraging and creating favourable conditions for investment activities. Item 3 Article 4 stipulates that: the State acknowledges and protects the ownership of assets, investment capital, income and other legal interests of investors.

74. There are possible avenues, untested thus far, for reviewing the exercise of the government's expropriation power or contesting it, independent of the provisions of the Investment Law. Articles 23 and 25 of the Constitution of the Socialist Republic of Vietnam 1992 and Items 2 and 3, Article 5, Chapter I of the Enterprise Law 2005 also are relevant. They can be considered as legal independent channels to challenge the use of this power in the courts.¹³

13. Article 23, the Constitution of the Socialist Republic of Vietnam stipulates that legal assets of individuals and organizations will not be nationalized. In exceptional necessary cases due to military, security and national interest reasons, the State will compulsorily purchase or requisition assets with compensation for individuals and organizations at market prices. Article 25 of the Constitution of the Socialist Republic of Vietnam in 1992 stipulates that the State encourages foreign individuals and organizations to invest capital and technology in Vietnam in accordance with Vietnamese laws and international laws and practices; ensuring the legal ownership of capital, assets and other interests of foreign organizations and individuals. Foreign-invested enterprises will not be nationalized. Item 2 Article 5 of the Enterprise Law stipulates that the State acknowledges and protects the ownership of assets, investment capital, income and other legal interests of enterprises and enterprises' owners.

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

75. Through Amendments in 2001 of the Constitution of 1992 (Art. 15 & 16), there is constitutional recognition of the foreign direct investment and the domestic private sectors as components within the Vietnamese economy in addition to the already recognized State-owned enterprise sector. The new Investment Law applies as a general rule uniformly to domestic and foreign investors and removes all discrimination in terms of prices and charges applied to foreign investors. Also relevant is the Ordinance on Most-Favoured-Nation and National Treatment in International Trade of 7 June, 2002. The Investment Law also firmly establishes non-discrimination as a general principle toward all kinds of investors. As a Member of the World Trade Organization (WTO), Vietnam has committed to comply with WTO's non-discrimination principles including Most-Favoured Nation and National Treatment, as discussed under Chapter 3 of the PFI below.

76. There remain, however, elements of discrimination scattered in various laws and regulations that have yet to be made consistent with the Investment Law and commitments to the WTO. No clear mechanism is in place to ensure the transparency of remaining discriminatory restrictions on international investment and to periodically review their costs against their intended public purpose. The lengthy list of sectors in which conditions or restrictions only apply to foreign investors is given in Box 2 and discussed under the PFI Question 1.1 above. An Annex to the section on PFI Chapter 3 on Trade presents a summary of FDI restrictions in the services sector. Those in the financial, distribution and telecoms and communications sectors are the most problematic as these are sectors that play a central role in the development of an economy and ones in which foreign investment has played an important positive role in many other economies. The level of these restrictions together with the restrictions and conditions applying to all private investors is still quite high in comparison to most other countries, particularly when one considers that 40 per cent of the economy is run by State-owned enterprises. Achieving in practice the non-discrimination provided in Vietnamese laws is difficult under these circumstances.

77. With respect to the transfer of capital and profits, the new Investment Law (Article 9) provides the foreign investor, after having discharged fully its financial obligation to the State of Vietnam, the right remit abroad or back to their home countries, in convertible currency part or the whole of their profits, payments received from the provision of technology and service and from intellectual property, the principal and any interest on foreign loans, invested capital and proceeds from the liquidation of investments and other sums of money and assets lawfully owned by the investor. Vietnam has maintained restrictions on only (i) capital transfers abroad for investment by resident organisations – these are subject to approval by the competent agencies and must be within the amount of foreign currency owned by these organisations; and (ii) payment and repayment of foreign loans by resident organisations – these have to be registered with the State Bank of Vietnam.

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

78. Vietnam has signed and acceded to a large number of bilateral and multilateral arrangements on investment, including bilateral agreements on the encouragement and protection of investment with 51 countries and territories, agreements on the avoidance of double taxation with 45 countries and territories, the Framework Agreement on ASEAN Investment (AIA), the MIGA and the New York Convention, etc. As noted earlier, Vietnam has entered WTO and signed numerous multilateral agreements such as the agreement on Trade Related Investment Methods (TRIMS), the agreement on Trade Related Intellectual Properties (TRIPs); and the General Agreement on Trade in Service (GATS). The relevant legal document for this process is Law No. 41/2005/QH11 "On Conclusion, Accession and Implementation of Treaties" of June 2005. The Ministry of Planning and Investment is the one key agency identified by the government to work on the implementation of international agreements relating to investment. However, there is no established periodic review process by the government with respect to existing international treaties and commitments to determine whether their provisions create a more attractive environment for investment. Nor are there concrete measures to ensure effective compliance with the country's commitments under its international investment agreements.

79. In order to meet international commitments as a Member of the WTO and other investment agreements, the Vietnamese business environment has been improved considerably through extensive and intensive reforms. In 2005, Vietnam first issued the general legal framework for all investment forms by promulgating the two new laws mentioned earlier, the Law on Investment (in 2005) and the Law on Enterprise (in 2005). These laws, as explained earlier, have the objective of creating a level playing field for foreign investors and domestic private and State investors. The Ministry of Planning and Investment is preparing to issue a Decree on guiding the implementation of some of Vietnam's investment commitments in the WTO. Investors are said to be anticipating this document, hoping that it will help clarify the intentions of the authorities, resolve some outstanding issues with respect to the implementation of WTO commitments and thereby open doors further to investment flows to Vietnam.

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

80. Vietnam acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1995. Vietnam has not acceded to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID). Vietnam allows foreign investors to use foreign arbitration or judges and applied foreign law if these disputes are not specified in Vietnamese law. The Association of Southeast Asian Nations has established a corresponding mechanism to solve trade and investment related matters. This mechanism permits investors to direct complaints to State bodies via the internet when they meet difficulties relating to the implementation of the ASEAN agreement. Foreign arbitral awards rendered by a recognized international arbitration institution must be respected by Vietnamese courts without a review of the case's merit. As noted earlier, foreign arbitral awards are recognized and enforced in accordance with the Civil Procedure Code and other related legal normative documents for implementation in Vietnam.

81. However, there remains some ambiguity which affects the award enforcement efficiency. For instance, it is not obvious what is meant by "a third country". If one of the parties is a multinational

enterprise, it is not clear whether such countries related to its operation are all excluded as non-third countries or only the country where its head office is located is excluded. Also, there are no authoritative definitions for the terms "international economic relations" and "domestic business transactions". The difference between "economic relations" and "business transactions" is unclear.

PFI Chapter 2. Investment Promotion & Facilitation

82. The second chapter of the PFI addresses the measures taken to promote and facilitate investment within an overarching strategy for improving the investment environment. Establishing a sound investment environment is of primary importance, but once this is achieved, active promotional efforts can help investors perceive profitable opportunities and develop linkages with local firms. The creation of an Investment Promotion Agency (IPA) or similar institutional facility is an approach that can help simplify administrative procedures, improve transparency, and focus promotion efforts.

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

83. Developing the private sector is one of the most important priorities in the recent economic policies of Vietnam. Aside from the specific investment policy reforms in the 2005 Investment Law and the business environment reforms in the Enterprise Laws of 1999 and 2005, a number of Prime Minister's Directives have addressed the improvement of the business environment and promotion of foreign investment into Vietnam. In particular, Prime Minister's Directive 109/2007/QĐ-TTg on the Investment Promotion National Program for 2007-2010 is considered an important measure to attract more FDI inflow into Vietnam. In addition, the Government has organised Annual Conferences on Planning and State Budget (latest in January 2007), during which focus is given to continued regulatory reforms. Investment promotion and facilitation measures constitute one of the 7 main action plans submitted by the Ministry of Planning and Investment.

84. The Ministry of Planning and Investment is making the development plan for the period of 2006-2010, which is a component part of the socio-economic development plan for this period. Strategies to develop a stable and open business environment are implemented in the form of promulgating regulations, instructions, decisions of the government and State Bodies. In these strategies, investment promotion and development methods are considered to play a "catalytic" role in attracting investment for the economy's growth and development.

85. The Ministry has identified three roles for investment promotion:

- Provide information for investors to encourage them to invest in Vietnam.
- Provide assistance to investors to establish enterprises in Vietnam.
- Provide assistance to existing investors when they face difficulties in Vietnam.

86. The program for the reorganisation, restructuring and equitisation of state owned enterprises (SOEs) has important implications for foreign investment in Viet Nam. The equitisation process consists in transforming SOEs into shareholding companies and selling a portion or all of the shares to private investors and/or to the employees of the company. (Vietnam does not employ the more commonly used term "privatisation" for this process.) By the end of 2006 about 3233 enterprises were equitised and 326

were transferred or sold. The plan for 2007 was for the equitisation of another 550.¹⁴ This program should be promoted strongly. Most of the asset sales have been limited to SMEs and to minority stakes in larger SOEs. The Government indicated in 2007 that there are 19 sectors in which existing SOEs will remain under 100 per cent Government ownership (such as radio, television, publishing and the press) and another 27 sectors in which the Government will maintain more than 50 per cent of the capital (such as insurance, and the mining of minerals, petroleum and natural gas). SOEs still account for some 40% of GDP and most are involved in commercial activity in competition with private firms. The equitisation program is including large as well as smaller firms across a wide range of industries, including power, telecom, maritime, oil and gas, and finance and insurance.

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

87. At the central level of government, the Foreign Investment Agency (FIA) in the Ministry of Planning and Investment plays the role of the Investment Promotion Agency for Vietnam. The structures, powers and duties of the FIA are regulated in Decision No.523/2003/QĐ-BKH. The FIA is the main body to help the Minister to manage foreign direct investment into Vietnam and direct investment of Vietnam to foreign countries and to draft the plans and projects to attract foreign investment. It also has the functions of reviewing foreign investment plans, evaluating the economic and social effects of foreign investment activities, and providing information on foreign investment. With respect to receiving, processing and licensing the investment projects, the FIA is mandated to inform domestic and foreign investors about the investment procedures and to receive the project files that are within the competence of the Prime Minister and of Ministry of Planning and Investment (that is the files of major or sensitive projects). Currently, there are three investment promotion centres under this agency: Northern Investment Promotion Centre, Central Investment Promotion Centre, and Southern Investment Promotion Centre.

88. Similarly, there is also a unit in charge of foreign direct investment in each provincial Department of Planning and Investment. Many regions have established IPAs.¹⁵ There is no consistent structure of IPA for each province. Some provinces establish an investment promotion centre under their department of planning and investment. Some provinces combine the functions of investment promotion with trade and tourism promotion and establish trade, investment and tourism promotion centres. Others assign this function to the Department of Planning and Investment with no independent body being established. At present, in Vietnam there are 120 state agencies managing investment, including provincial people committees, management boards managing Industrial zones and Export-processing zones at provincial level, management boards of economic zones and management board of high technology zones. These agencies launch various, largely uncoordinated actions on investment promotion in order to attract capitals into specific projects every year. The provincial IPAs have organised trade and investment promotion fairs, seminars, workshops, and overseas investment promotion tours aimed at enhancing information channels for investors both within and outside the country.

14. Vietnam, A guide for Business and Investment, Foreign Investment Agency of the Vietnamese Ministry of Planning and Investment of Vietnam, January 2007, Page 24.

15. Some examples are Ho Chi Minh City investment promotion centre, Da Nang investment promotion centre, Nghean investment promotion centre, Langson investment promotion centre, Binh Dinh investment promotion centre, Angiang trade-tourism-investment promotion centre, Hue investment-trade-tourism promotion centre, Kiengiang trade promotion centre, Thainguyen investment promotion centre, and Bacgiang investment promotion centre.

89. A positive aspect of this decentralization has been the competition between various provincial IPAs in terms of performance. This has led to increased effectiveness of some of the provincial investment promotion activities, as well as further reforms at the provincial level. The negative feature, however, is the lack of real effective coordination between the provincial IPAs and local Departments of Planning and Investment, the Ministry of Planning and Investment and other government agencies. Reportedly, there is an overlap in organising investment promotion conferences. Investors can become confused with the uncoordinated information and signals they receive.

90. This situation is intended to be corrected by the Decision issued in July 2007 on founding and implementing a National Investment Promotion Program for the period 2007-2010.¹⁶ This Decision stipulates that the investment promotion programs of ministries, agencies, as well as provinces have to conform to the socio-economic development plan of the respective province/city and the socio-economic development plan approved by the Prime Minister. The program must also be consistent with investment attraction orientations that are to be unified for the whole country. It is unclear how these plans at the provincial and national level are to be reconciled to achieve the desired consistency.

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

91. Generally speaking, the IPA functions at both the central and provincial levels appear not to be adequately funded. At the central level, there is about 2-5 VND billion (about US\$130,000-300,000) from the central budget (excluding other funds) for investment promotion every year. This finance is provided to the Ministry of Planning and Investment. This budget is only enough for necessary administration activity and is not sufficient for advertising. At present, almost funding of investment at the local level is from local budgets. Therefore, the provincial fund allocation for investment promotion depends on the awareness of provincial level people's committees of the importance of investment promotion.

92. Inadequate human resources, both in terms of numbers and skill levels, is a difficulty facing all the planning and investment Departments and management Boards. All face inadequate funding for positions. With respect to skills, many provincial level staff lack the needed professional, language and marketing training. In the largest cities like Hanoi and Ho Chi Minh City staffs do tend to have good qualifications, often obtained through education abroad. Almost the Planning and Investment Departments and Management Boards thus have a need to provide training to their staff, but the budgets for this are very limited.

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

93. Under the Enterprise Law (2005) and the Investment Law (2005) the former licensing system was replaced by a business registration certificate or an investment certificate. This initially abolished about 150 business licenses/permits and thousands of sublicenses and conditions issued at local level. Investment registration has become simpler. Many provincial authorities have made great efforts to set up a "one-stop shop" procedure. However, every provincial investment promotion agency has tried to implement the procedure in a different way, and, accordingly, the success achieved also varies. As noted earlier, all projects, whatever their capital amounts and ownership structure, need to obtain an investment

16. No. 109/2007/QĐ-TTg.

registration certificate. Enterprises can do business in all sectors/areas that are not prohibited by laws (a negative list). The before-mentioned Task Force on the Implementation of the Unified Enterprise Law and Common Investment Law has a continued mandate to develop proposals to reduce remaining sublicenses and conditions for enterprise establishment issued by line Ministries and at the local levels.

94. The Ministry of Planning and Investment as well as the Departments of Planning and Investment in most provinces have developed websites to provide information to investors. Many investment promotion agencies have established (or made plans to set up) a website for promotion. However, the quality of these websites is generally lower than required in spite of a lot of improvements.

95. The weakest point with respect to the services provided by Vietnam's investment promotion agencies is dealing with problems that arise after the granting of Investment Certificates. This service is provided both within and outside industrial parks and export-processing zones. However, investors inside industrial parks and export-processing zones appear to face fewer problems than investors outside them. The management boards of industrial parks and export-processing zones can undertake the majority of procedures after granting certificates. The zone developer has to take care a number matters important to investment projects, such as land clearance and the development of infrastructure. Investors outside industrial parks and export-processing zones must make direct contact with relevant agencies and handle many matters themselves.

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

96. The Prime Minister has annual meetings with investors to listen to their comments and complaints about the investment climate in Vietnam and to provide responses to investors on their outstanding issues. Relevant Ministries also have meetings with investors on the issues under their authority, especially when such issues are known to be of current concern to the investor community, particularly in the areas of tax, customs, and land. For example, the Ministry of Finance and the Vietnam Chamber of Commerce and Industry organised a meeting with business representatives to discuss tax and custom issues. Provincial Peoples Committees organise annual meetings to discuss with enterprises issues of concern. Representatives of functional departments and state agencies participate in the dialogue. In such meetings, enterprises present their desires, their obstacles and difficulties that hinder their business and investment in areas such as business sites, investment incentives, credit availability, tax incentives, and the granting of business licenses. The government team implementing the Enterprise Law and the Investment Law organises meetings with relevant agencies to solve and/or submit to the government proposed actions to overcome any difficulties arising in the process of implementing the two laws. Also, the Ministry of Planning and Investment and its Foreign Investment Agency consult for the government in promulgating instructions and in identifying and solving problems that may arise for investors.

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

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

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

99. The government at the central level proposes objectives and criteria for the incentive program on the basis of the overall strategy of social and economic development. Ministries and provincial peoples committees are responsible for the implementation process. In addition provincial governments also provide various local incentives. However, for reasons of consistency and transparency, provincial incentive programs are required to be in line with the policy framework of the central government.

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

101. With respect to taxation, Vietnam has introduced a number of different measures of investment preference such as enterprise income tax reduction and exemption, import tax reduction and exemption, credit subsidies and investment subsidies. Vietnam has no specific statistical data on the extent to which investments in Vietnam have been due to tax incentives. The results of a survey of domestic investors based on in-depth interviews and a questionnaire were informative on this issue. The competitive capacity initiative project for encouraging domestic investment revealed that among the companies receiving enterprise income tax preferences, about 85% (of 140 domestic companies) said that they would still invest in their businesses when there is no the enterprise income tax preference. This suggests that the availability of the preference, while it may be a necessary condition in some cases, it is not a sufficient reason for investors to make an investment. Some investment projects will still be implemented without tax preference since the investors recognize that the tax preference is provided at a certain point in time. The preference is only "the facilitator". The survey mentioned above indicated that when making an investment decision, the factors of infrastructure and human resources are the most important to the enterprises, rather than any enterprise income tax preference. Additional factors to which investors pay more attention than to tax preferences are the ability to access the source of raw materials and the market, as well as the legal framework of the localities and the behaviour of local management.

102. An additional factor in Vietnam is the tax complexity of the incentive program with its multiple objectives and levels of incentives that creates a significant administrative burden on the government in addition to the tax revenue costs and, at the same time is confusing to potential investors. In the final analysis, tax reduction and exemption for foreign investors is likely to attract only a small number of investors. The most necessary thing to attract investment is the creation of a favourable environment in which the government plays the role of a supporter for investors, rather than a controller, seeking to fine tune investment flows.

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

103. While there are no explicit and legal measures to facilitate linkages between foreign invested enterprises and local enterprises, such linkages are promoted by the government of Vietnam through granting foreign invested enterprises incentives that lean toward this direction, such as assistance for commercial development in mountainous, island and ethnic minority areas; incentives for investment projects in science and technology, corporate income tax reductions for employing a large number of female employees.

104. Pursuant to its policy to support the development of SMEs, the government has established the Vietnam Agency of Small and Medium-sized Enterprises Development (ASMED) within the Ministry of Planning and Investment and also the SME Credit Assurance Fund. The Centre for Assisting SMEs has been established within the Vietnam Chamber of Commerce and Industry. The authorities report that there has been a perceptible decrease in the number of complaints about uncertain government policies in this area. Similarly, they indicate there has been an increase in the number of SMEs reporting that they see no substantial constraints to growth and suggest that this points to improved business conditions. There remain concerns about access by SMEs to credit on reasonable terms, an unsuitable and exceedingly complex tax system and confusing regulations. Also there is a reported disconnect between the established central government policies and SME policies at the local level.

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

105. The government has participated in and benefited from a number of international programs. An Investment Climate Assessment was undertaken in Vietnam by the World Bank's Foreign Investment Advisory Service (FIAS). An extensive review of Vietnam's business licensing system was carried out by FIAS, in collaboration with the Mekong Private Sector Development Facility (MPDF). The World Bank's Multilateral Investment Guarantee Agency (MIGA) has supported Vietnam on issues related to the involvement and potential role of the private sector in the power generation and transmission sectors, and on the development of investment. Vietnam has yet to participate in the World Association of Investment Promotion Agencies (WAIPA), or to use UNCTAD's Advisory Service on Investment and Training aimed at building investment promotion expertise.

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

106. Vietnam has not participated to date in such information exchange networks.

PFI Chapter 3. Trade Policy

107. Chapter 3 of the PFI considers a country's trade policies, laws and practices for the perspective of how trade policy can encourage investment – both domestic as well as foreign – and can help maximize the contribution of investment to development growth. Vietnam's accession to the WTO marked a major milestone in the nation's transition to a market economy and has involved a great many changes in Vietnam's trade regime.

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

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

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

110. Despite recent improvements, Vietnam's customs procedures are still considered to be complicated, relatively slow and at times unpredictable. There are work overloads in the processing of declaration forms at some key border gates where huge volumes of imported and exported commodities transit. The application of IT and modern techniques is still limited in scope and in the number of enterprises involved. Another concern is ineffective follow-up of complaints, leading to delays in complaint settlements (some cases took more than one year). Also the database of the customs agencies is not updated regularly. This limits the tax calculations of customs agencies under GATT principles, and the declarations by enterprises.

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

111. The Vietnam government has committed to fulfil all WTO's agreements signed since Vietnam's accession to the WTO on 11 January 2007. Immediately after Vietnam's accession to the WTO, the Office of the Government is required by law to publish draft Government Resolutions and Decrees, and Decisions and Instructions of the Prime Minister, on the Internet or in mass media for comments by government agencies, organisations and individuals. Ministries and drafting agencies are also required to seek comments from the business community through the Vietnam Chamber of Commerce and Industry (VCCI) in the drafting of any policies or rules affecting business operations. Draft legal documents affecting the business community have been published on the VCCI's website (www.vibonline.com.vn). The duration of the time period for collecting comments on draft measures is 60 days. Vietnam also made a commitment to publish these drafts in magazines and/or websites of state agencies.

112. The Government Action Plan issued to implement Resolution No. 16/2007/NQ-CP dated 27/02/2007 confirms the importance of the propagation and dissemination of information about the WTO to state agencies, investors, businessmen, and associations. The government intends to use diversified information channels, the media, and training courses to increase awareness and understanding of the opportunities and challenges following Vietnam's accession to the WTO as well as the specific contents of commitments and their implementation. The implications of WTO rules for Vietnam's policies on socio-

economic development also are to be promulgated. The main information channels to be utilized are training courses in all local areas, television and radio programs, the print media, and published documents.

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

113. Vietnam has established trade relations with 160 countries and territories worldwide, and signed 90 bi-lateral trade agreements. Moreover, the country is a signatory to 350 development co-operation agreements and another 37 bilateral agreements on economic and cultural cooperation with foreign countries and international organisations. Most significant is Vietnam's participation in the US-VN Bi-lateral Trade Agreement, the ASEAN Free Trade Agreement (AFTA-1996), and other regional economic cooperation schemes such as Asia Pacific Economic Cooperation (APEC-1998), ASEAN Economic Community, and the Greater Mekong Sub-region (GMS) Those agreements have proven to help in attracting more investments into Vietnam, since they help to supplement the country's small domestic markets. Many of these agreements have the purpose of promoting both trade and investment and entail measures to protect intellectual property rights, harmonise customs valuation, procedures and nomenclature, develop common product certification standards and eliminate quantitative restrictions and barriers.

114. Currently, Vietnam, through its participation in ASEAN, is negotiating simultaneously 6 FTAs with partners. These are ASEAN-China, ASEAN-Korea, ASEAN-Australia, New Zealand, ASEAN-India, ASEAN-Japan, and ASEAN-EU. (Annex 1 to this section gives a summary of these negotiations.) In addition, ASEAN has signed the ASEAN-US Trade and Investment Framework Arrangement (TIFA) and in the near future will sign the ASEAN-Canada Trade and Investment Cooperation Arrangement (TICA). However, these are only general agreements that are not legally binding. Their purpose is to create a foundation on which to continue studying the necessary future steps. In addition, ASEAN is exploring the possibility of establishing FTAs with Pakistan and Turkey: but, the prospects for these are not clear. (See Annex 1 to the present document.)

115. As for bilateral agreements, the Vietnam-Japan Economic Co-operation Agreement is currently under negotiation.

116. Pursuant to implementation of WTO commitments, the Government issued the Action Plan to implement Resolution No.16/2007/NQ-CP dated 27/02/2007 regulating the main policies to strengthen the rapid and sustained growth of the economy in context of Vietnam being a member of the WTO. This action plan determines the duties of state agencies at central and local level and of enterprises in all economic sectors to carry out the Resolution. The objective is to take full advantage of opportunities and overcoming challenges, driving Vietnam to a new stage of rapid and sustained growth. The National Assembly has programs for drafting laws and regulations that extend until year of 2012 to complete the legal framework under Vietnam's commitments with the WTO.¹⁷

117. Under the WTO Vietnam has entered into commitments on investment policies related to trade (discussed below), on transparency, and on opening up the service market. The commitments on transparency contribute to update information and to strengthen the confidence of investors in Vietnam's legal framework. Regarding commitments on opening up the service markets, Vietnam is opening up 11 sectors; this involves opening up 110 of the total 155 service sub-sectors under WTO's classification

17. The full listing of Vietnam's commitments taken when becoming a member of the WTO on 11th January, 2007, can be found on the WTO website at http://www.wto.org/english/thewto_e/acc_e/a1_vietnam_e.htm.

scheme. (Annex 2 to the present report presents a summary of Vietnam's WTO commitments to open up markets in the services sector.) Foreign investors are able to invest in Vietnam through the establishment of joint-venture enterprises, 100% foreign invested enterprises (in accordance with a concrete schedule for each of the sub-sectors) and cooperation with Vietnam enterprises through business cooperation contracts (BCC). In several sectors, foreign investors are permitted to establish branches. These commitments contribute to expand investment opportunities for foreign investors in Vietnam. More generally, the authorities consider that Vietnam's accession to the WTO gives a strong positive signal to foreign investors about the determination of Vietnam to provide a positive environment for investment and continued economic growth.

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

118. Vietnam has a unified tariff table for all imported and exported commodities. It has to eliminate all subsidies prohibited by WTO rules and has to provide investment incentives on equal terms to both foreign and domestic investors. They were thus terminated for motorbikes in 2003 and the plan for the auto industry is discussed below. Prior to Vietnam's accession to the WTO, the Government planned to spend VND 5,000 billion on the Development Strategy of Textile until year of 2010; but after Vietnam's accession, the Government is committed to cut this expenditure. When implementing the reform of trade policy, the Government conducts the analysis, research, impact assessment of its policies to minimize negative impacts. Presently, draft regulations are published on the Government website for reference and to collect public opinion (particularly from the enterprise community and related sides).

119. The specific situation and plans for four key industrial sectors, autos, steel, paper, and pharmaceuticals is given in Annex 3 to the present report.

120. Regarding the WTO Agreement on Trade-Related Investment Measures (TRIMs), Vietnam commits to fully carry out its obligations under this instrument. The TRIMS Agreement does not stipulate specifically how to design trade-related investment measures but rather presents a list to illustrate several investment measures which are not consistent with the national treatment obligations stated in Article III and with obligations which remove restrictions on quantification as stated in Article XI of GATT. All measures stated in the illustrative list, whether they are applied as conditions for enterprise establishment and/or expansion or for being granted investment preference, are prohibited. The main measures stated in the List include local content requirements, investment in association with expansion of access to domestic materials, foreign currency balance or import-export balance conditions or export restrictions. Vietnam is committed to eliminate any such conditions and to not re-introduce any measure that is inconsistent with the TRIMS Agreement.

121. For Vietnam, its obligations under TRIMS are not new issues. Under the US-Vietnam Bilateral Trade Agreement (BTA), Vietnam basically commits to fully implement the regulations of TRIMS. The 2005 Investment Law places into legislation Vietnam's full commitments with respect to this BTA. The measures which are considered as violations of TRIMS are thereby removed. These commitments contribute to improving the investment environment and should attract investment in some sectors. However, in order to sustain socio-economic development, namely, strengthening exports, raising the added-value in the economy and expanding domestic sourcing of materials, Vietnam is seeking to identify new measures and policies for development that would be consistent with WTO obligations. The Government is studying possible measures, such as replacing export criteria by other criteria like creation of jobs or investment areas, encouraging investment projects that supporting industry development, encouraging the establishment of infrastructure and of raw material development, particularly in areas with difficult socio-economic conditions, and encouraging projects for the planting and processing of forestry and agricultural products.

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

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

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

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

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

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

Vietnam agrees to bind the cap level for all tariffs (VND 10,600). The average rate of all tariffs is to be reduced from current level of 17.4% to 13.4%, with the regular cuts within 5-7 years. The average rate for agricultural products is to be reduced from 23.5% to 20.9% with the regular cuts within 5 years. For industrial products, the average reduction rate is from 16.8% to 12.6%, with the regular cut within 5-7 years. Approximately one third of the tariff lines have to be reduced. These are mainly concentrated in the lines with tariff rates of more than 20%. Some sensitive and important commodities for the economy, including agricultural products, cement, steel and iron, constructive materials, and autos, will still maintain certain levels of protection.

The sectors with the strongest tariff reductions are textile and garment, fish and fish products, wood and paper, other manufactures, machines and electronic and electric equipment. Like other WTO members, Vietnam also commits under some free trade agreements to cut and reduce tariffs for particular industries, such as information technology products (ITA), textile and garment, and health care equipment, with the implementation duration within 3-5 years. For tariff quotas, Vietnam maintains application rights on sugar, poultry egg, tobacco leaf and salt.

127. As a result of the above actions, import tariffs are not now considered to be the decisive factors determining the input costs of Vietnam's commodities. Rather, other factors, in particular, customs clearance procedures and logistics (transport, warehouse...) are believed to have stronger impacts on commodity prices. The important infrastructure serving Vietnam's international trade such as sea ports, airport, land transport, warehouse facilities, still are inadequate in capacity and inefficient. Furthermore, basic services, including electricity, water supply, and telecommunications, are monopolies and/or are of low competitiveness and quality. This leads to increased costs and thereby to decreased competitiveness of Vietnamese enterprises and their exports.

PFI Chapter 4. Competition Policy

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

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

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

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

- a. Rationalizing organisational structures, business models, improving business efficiency;
- b. Speeding up technical and technological advances, improving the quality of goods and services;
- c. Promoting uniform application of quality standards and technical norms of products categories;
- d. Harmonising business, goods delivery, and payment conditions, which have no connection with prices and price factors;
- e. Enhancing the competitiveness of small and medium-sized enterprises;
- f. Enhancing the competitiveness of Vietnamese enterprises in the international market.

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

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

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

134. Article 56 of the Competition Law stipulates that the settlement of competition cases involving competition-restricting acts shall comply with the provisions of this Law and the settlement of competition cases involving unfair competition acts shall comply with the provisions of this Law and legislation on handling of administrative violations. In the process of carrying out competition procedures, investigators, the head of the Competition Administration Department and Competition Council members must, within

the scope of their respective tasks and powers, keep confidential business secrets of enterprises and respect the legitimate rights and interests of related organisations and individuals. The Competition Law clearly stipulates the proceedings of investigation and settlement of competition cases without discriminating among enterprises of different types of ownership. Every business is treated equally by the Law. Vietnam authorities confirm that the principles of non-discrimination and consistency are important principles in the process of making verdicts in competition cases. Yet it must be added that there is no explicit mention of the principles of non-discrimination between relevant parties and consistency in case analysis and judgement in the Law. The principles, moreover, have not been tested in practice due to the absence of case records so far in Vietnam.

135. The Competition Law recognizes all enterprises' lawful right to business competition. However, competition must be implemented on the principles of honesty, non-infringement upon the interests of the State, public interests, legitimate rights and interests of enterprises, consumers and compliance with the provisions of this Law. The incorporation of the concepts of "national interests" and "public interests" into competition legislation has been done in a number of countries. The justification is that this allows "flexible" application of competition rules, keeping in view industrial policy objectives of governments or their political preference. However, experience in other countries has shown that this ambiguity might provide room for undue intervention by the government into the enforcement process in the future. In particular, reference to industrial policies and/or political interests risks favouritism to domestic incumbents in the application of the Law.

136. The adoption of the Competition Law is a significant landmark in terms of economic reforms and regulatory framework development in Vietnam. There were a lot of public/media-based debates surrounding the content of the Law before its official promulgation. There were also quite a number of public consultation rounds organised to improve the quality of draft laws. All these activities have greatly promoted the public's awareness of the Law, and subsequently of its implementation.

137. Businesses and other interested parties can get access to all necessary information related to the Law and its implementation from a multitude of sources. Foremost is the Vietnam Competition Administration Department (VCAD), which has the responsibility to undertake advocacy and public education programs on policies regarding competition in Vietnam, and build up databases, collect information and provide relevant State agencies as well as organisations and individuals in Vietnam with the same. Accordingly, the VCAD has been arranging to provide such information either directly from their offices (in Hanoi, Da Nang, and Ho Chi Minh City), via their websites (www.qlct.gov.vn and www.vcad.gov.vn, in Vietnamese and English respectively), or web-based forums, printed publications and telephone hotline (04 936635; extension numbers: 102 and 106). Resource constraints are a limitation, however.

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

139. The Government and the Ministry of Trade have promulgated a number of documents to guide implementation of the Competition Law.¹⁸ Also, Art 35(2) of the Competition Law states that the

18. Decree 116-2005-ND-CP of the Government dated 15 September 2005 on Detailed Provisions for Implementation of the Law on Competition; Decree 120-2005-ND-CP of the Government dated 30 September 2005 on Dealing with Breaches in the Competition Sector; Decree 110-2005-ND-CP of the

competition authorities have the mandate to “publicise the decisions on grant of exemption according to the Government's regulations”. The obligation to convey procedural documents and decisions on competition cases is stipulated specifically in Decree 116-2005-ND-CP. VCAD has indicated that it will convey its decisions through providing procedural documents of competition, conveying or notifying procedural documents of direct competition, and publishing notifications in the mass media. Since decisions on settling cases of competition include an analysis of proof and reasons for decisions, publicizing these decisions implies publicizing the reasons behind the judgments. Another relevant provision in this regard is Art 104 of the Competition Law, which states that “*hearings shall be held in public*”, unless when the contents of a hearing are related to national secrets or business secrets.

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

140. The Vietnam Competition Administration Department (VCAD) is under the Ministry of Industry and Commerce (Former Trade Ministry) which is established and stipulated in terms of functions, duties, powers and organisational structure by the Government. While there was considerable debate as to whether placing the competition authority within an existing Ministry would compromise its independence, this Ministry was the only place where knowledge and expertise on competition was available. VCAD performs the regulation of economic concentration and investigations into competition cases, as well as resolves cases involving only unfair competition acts. The Vietnam Competition Council (VCC) is an agency which also is established and stipulated in terms of functions, duties, powers and organisational structure by the Government.

141. Political support will be crucial to the success of the Competition Law. This would enable the passage of any further needed legislation and would provide more independence and resources for the authority that will implement the policy. Wide publicity about the competition authority and its support from key politicians would make it more difficult for the politicians to backtrack on their commitment under pressure from special interest groups. Political backing would raise the profile of competition issues and create public awareness through the media. In the case of Vietnam, where the competition regime is still young, having the backing of the Ministry of Industry and Commerce, as well as the Prime Minister (due to the institutional standings of the competition authorities within the government system, as well as the staff appointment procedures, as mentioned below) should be a considerable advantage towards becoming stronger and being able to enforce the law effectively.

142. In order for the competition authorities to function effectively, they clearly need adequate resources. The level of financial support available and the way it is used is important, but equally important are human resources. The operating budgets of VCAD and VCC are provided by the State budget and accounted for independently, not depending on other agencies. The Ministry of Finance is the agency which has authority to make decisions on the annual level of budget for these two agencies based on the operating estimate proposed by the two agencies. Yet, as Art 1 of Decree 05 states that “*the fund for the operation of the Vietnam Competition Council shall be allocated from the state budget and prepared in the annual estimated budget of the Ministry of Trade*”, there are questions as to the extent to which the operational budget of the competition authorities will depend upon the mercy of the Ministry.

Government dated 24 August 2005 on Supervision of Multi-Level Selling; Decree 05-2006-ND-CP of the Government dated 9 January 2006 on Functions, Duties, Powers and Organizational Structure of Competition Council; Decree 06-2006-ND-CP of the Government dated 9 January 2006 on Functions, Duties, Powers and Organizational Structure of Competition Administration Department; The Circular No 19/2005/TT-BTM dated 8/11/2005 by the Government on implementation of some regulations in the Decree No 110/2005/ND-CP dated 24/08/2005 on management over multi-level selling.

143. The VCAD, however, may have an additional source of finance for their operations, which is the collection of case-handling charges. Art 62 of the Competition Law states that, “*competition case-handling charges shall be used for the handling of competition case. The Government shall prescribe the levels, collection, payment, management and use of such charge in accordance with legislation on charges and fees.*” Liability to competition case-handling charges is provided for in the Law. The party that is concluded to have violated the provisions of the Law must pay competition case-handling charges. Where the investigated party is found not guilty, the complainant shall have to pay competition case-handling charges. Where a competition case is initiated by the VCAD, if the investigated party does not violate the provisions of the Law, the VCAD shall have to pay competition case-handling charges. Vietnam is the first country in the world to have such provisions. This approach might curb abuse of the Law, but it might also lead to under-enforcement. On the other hand there is a risk it could encourage enforcement efforts driven by budget needs. It is difficult to determine what the balance between these incentives will be.

144. The best law cannot be applied effectively without adequate human resources, *i.e.* a staff of sufficient size with adequate technical competence. The last condition is especially important in the area of competition law, which often involves a high-level economic analysis that complements a legal one in order to detect and to analyse the effects of business conduct. Competition authorities thus need to employ lawyers, economists and investigators familiar with competition issues. In addition, several attorneys with litigation experience and a sound knowledge of administrative law and civil procedure should be hired. The Competition Law provides that a VCAD investigator and a VCC member should hold at least a Master degree in law, economics or finance, and have 5 and 9 years of experiences in these fields respectively. However, in the case of Vietnam, this provision might prove difficult to realise. Most of the VCAD staff are quite young and do not possess necessary qualifications and skills, even though they are dynamic and highly dedicated. The process of recruitment is carried out in compliance with the general regulation on recruitment of State civil servants under the legal regulation on civil servants.

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

146. An important factor that ought to be taken into account in measuring the level of independence of the competition authority in carrying out its mandate, or that can be called as an institutional arrangement for insulating enforcement decision-makers from political direction or influence, is the mechanism for *judicial review of competition decisions/judgements*. Decisions for competition cases are based on the voting of the majority or the decision of the Chairperson of the report session if a majority vote is not reached. A decision by the VCC on a competition case is similar to an appeal verdict and is enforced by authorised state agencies. If the relevant parties disagree with the decision of the tribunal and the VCAD head, they may lodge a complaint with the VCC and the Industry and Commerce Minister respectively.

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

148. Finally, the Competition Law does not require a decision by the competition authorities as a prerequisite to bring private civil suits before the court. Private suits can be initiated totally independent of administrative proceedings regulated at the Civil Code. In granting a cause of action, Vietnamese legislations hardly ever require intent, although intents might be considered by the judges in deciding cases. Having no requirement of wilfulness or negligence, as in tort actions, undoubtedly makes it easier for the private parties to recover loss. The provisions seem to readily allow damage actions, and thus appear more similar to the US system. The law allows interested parties to initiate a lawsuit against a decision granting exemption by the Industry and Commerce Minister and the Prime Minister in accordance with the Law on Complaints and Denunciations.

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

149. The term ‘abuse of dominant position’ refers to anticompetitive business practices in which a dominant firm may engage in order to maintain or increase its position in the market. These business practices by the firm may be considered as "abusive or improper exploitation" of monopolistic control of a market, aimed at restricting competition. The Competition Law provides clear market share thresholds that establish market dominant positions by a single enterprise or a group of companies, as well as a monopoly position. Abuse of dominance or monopoly position is prohibited by the Law in its Art 13-14, which provide a long list (though not necessarily exhaustive) of various practices by dominant firms, deemed as violations of the law. The important point is that this group of prohibitions does not have an exemption section as in the case of anticompetitive agreements. Presumably, since the dominant firms or group of firms or the monopolists, as defined by the Law, possess at least 30 per cent of the relevant market, they have passed the ‘safe harbour’ threshold provided by the Law, and thus might be able to restrain competition significantly.¹⁹ The standard for finding predation, based on “aggregate” instead of variable cost, appears to be unusually tough. This could risk the Law being targeted towards efficient foreign firms.

150. As noted above and according to the Article 2, the Competition Law is applicable to business organisations, individuals (defined as "enterprises" in the Competition Law) including enterprises which

19. Art 13 of the Law provides for prohibited acts of abusing the dominant position on the market:
“Enterprises, groups of enterprises holding the dominant position on the market are prohibited from performing the following acts:
 1. *Selling goods, providing services at prices lower than the aggregate costs in order to eliminate competitors*
 2. *Fixing an unreasonable selling or purchasing price of goods or services or fixing a minimum reselling price causing loss to customers;*
 3. *Restricting production or distribution of goods and services, limiting the market, or impeding technical or technological development causing loss to customers;*
 4. *Imposing dissimilar commercial conditions to the same transactions in order to create inequality in competition;*
 5. *Imposing conditions on other enterprises signing contracts for the purchase and sale of goods and services, or forcing other enterprises to accept obligations which have no direct connection with the subject of such contracts;*
 6. *Preventing new competitors from entering the market.”*
 Whereas, Art 14 of the Law lists out prohibited acts of abusing the monopoly position on the market:
“Enterprise holding the monopoly position shall be prohibited from performing the following acts:
 1. *Acts defined in Article 13 of this Law;*
 2. *Imposing unfavourable conditions on customers;*
Abuse of monopoly position to unilaterally modify or cancel the contracts already signed without legitimate reason.”

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

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

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

153. Art 117 of the Competition Law provides for a wide range of remedies, which would be applied in the case of finding of abuse of dominant positions, including monetary fines, public corrections, restructuring of enterprises having abused its dominant position in the market, revocation of the business registration certificates, and deprivation of licenses and practicing certificates, etc.²⁰ In addition, the head

20. Art 117 of the Law lists out various forms of penalties to be imposed for breaches of laws on competition and measures for remedying consequences:
"1. For each practice in breach of the laws on competition, the individual or organization in breach must be subject to one of the following main forms of penalty:
a) A warning;
b) A fine.
2. Depending on the nature and seriousness of the breach, one or more of the following additional forms of penalty may also be applied to an individual or organization in breach of the laws on competition:
a) Withdrawal of business registration certificate; revocation of the right to use a license or practicing certificate;
b) Confiscation of exhibits and facilities used to commit the breach of the laws on competition.
3. In addition to the forms of penalty stipulated in clauses 1 and 2 of this article, one or more of the following measures for remedying consequences may also be applied to an individual or organization in breach of the laws on competition:
a) Restructure of an enterprise which abuses its dominant market position;
b) Division or separation of enterprises which merged or consolidated; compulsory re-sale of that part of an enterprise which was acquired;
c) Public rectification;
d) Removal of illegal terms and conditions from a contract or business transaction;
e) Other measures necessary to remedy the effects of the restraint on competition caused by the practice in breach.

of the Competition Administration Department and the Competition Council Chairman have the authority to apply some administrative preventive measures prescribed by legislation on handling of administrative violations (Article 61 of the Competition Law). The contents of these measures are specified in Article 88 of the Decree 116/2005/ND-CP. Moreover, the Decree 120/2005/ND-CP in Article 55 also stipulates forcible measures for executing decisions dealing with competition cases, to be applied cases where organisations or individuals who have not acted within the time limit as required by a competition case decision. The mechanisms of forcible implementation of the competition case-handling decisions are regulated in Article 121 of the Law of Competition and legal documents on implementation.

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

154. Assessment of the impacts of any barriers on the competition in the market is one of the functions of Vietnam's competition agency. In implementing the Competition Law, this agency will supervise and assess the possible effects of policies, legal regulations or specific administrative decisions and make proposals for suitable amendments and supplements to the issuing bodies. Accordingly, the competition agency has been undertaking research on certain economic sectors to identify policies not complying with competition policies. The results of these reviews up to now have indicated that the policies examined do not put forward barriers to the free market entry of enterprises. Article 6 of the Competition Law prohibits the State management agencies from performing certain acts that would prevent competition in the market such as enacting administrative decisions in order to force enterprises to buy goods of enterprises which are designated by these agencies, etc. Nor does the Government of Vietnam create barriers to the market entry by way of offering monopoly positions to foreign investors in its investment incentive policies.

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

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

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

4. Where a practice in breach causes loss to the interests of the State or to the lawful rights and interests of other individuals or organizations, compensation must be paid for such loss in accordance with law."

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

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

159. No, the Vietnamese competition agency does not undertake such cost-benefit evaluations. The Competition Law does not give any exception to “national leading companies”. The law applies equally to all enterprises of every economic sector and scale.

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

160. Vietnam had around 12,300 State-owned enterprises (SOEs) at the beginning of *Doi Moi*. Economic performance of SOEs lagged as they lacked incentives to be more efficient and profitable. Accumulated bad debts of unprofitable SOEs, resulting in a mounting fiscal burden and budget deficits, have always caused headaches for the government. By the end of the 1980s, a comprehensive SOE reform programme was no longer an option but a necessity. The first round of SOE reform started in 1986. Initial reform measures sought to dissolve unprofitable SOEs and rearrange the others by means of merger and consolidation. Profit-based accounting was introduced and output targets were replaced with profit targets. In 1992 the government decided to experiment with equitisation as part of SOE reform. Major waves of equitisation, however, were not undertaken until mid 1998.

161. Although the equitisation programme has been successful in transforming a large number of SOEs into more efficient enterprises, there are still many shortcomings. The pace of equitisation has been slow. By early 2005, only 80% of the government target has been met; total capital of equitised SOEs accounts for only 8.2% of total State-owned capital in the economy. SOEs contribute approximately 40% of Vietnam’s GDP and 50% of the State budget revenue.²¹

162. Vietnam’s Competition agency has the function of assisting the Government in its management functions in order to establish and maintain a healthy competitive environment in Vietnam’s markets. With its functions, powers and missions, this agency will contribute its ideas and proposals to the Government and related agencies on activities during the privatization process that may lead to disadvantageous consequences in forming and maintaining the above mentioned competition environment.

163. The Competition Law and its implementation regulations recognise the possibility of an enterprise gaining control over other enterprises by way of taking over their assets or a sufficient bloc of shares – which might happen in Vietnam given the ‘equitisation as privatization’ approach of the country. A guiding principle in the equitisation process in Vietnam has been that the government has always tried to ensure that the State remains the biggest, and controlling, shareholders of all equitised firms. However, after the enterprises have been converted into the shareholding or limited liability companies, M&As might

21. Vietnam A Guide for Business and Investment, Ministry of Planning and Investment of Vietnam, Foreign Investment agency, January 2007.

be eventually possible since the companies will be expanding further once listed. In any case, the Competition Law's provisions regarding mergers and acquisitions (M&As) will have overriding power over all other legislation on the same issues.

164. The government of Vietnam has also tried to ensure consistency between the Competition Law and competition-related provisions of other laws and regulations. The Unified Enterprise Law 2005 of Vietnam, for example, states that, “*for merger cases where merging parties have a combined market share of 30 per cent up to 50 per cent in the relevant markets, the legal representatives of the merging parties have to notify the competition-managing agency before the merger is affected, unless the laws and regulations on competition stipulate otherwise. Merger cases, in which merging parties have a combined market share of beyond 50 per cent in the relevant markets, are prohibited, unless the laws and regulations on competition stipulate otherwise*”.²² The same regulation and prohibition applies in the case of acquisition.²³

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

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

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

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

22. Unified Enterprise Law 2005 of Vietnam, Art. 152.

23. *Ibid.*, Art. 153.

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

169. In the future, cooperation will be extended by VCAD towards jointly settling transnational competition cases. Vietnam’s Competition Law is applicable to all foreign enterprises operating in Vietnam in every form. Hence, for example, the regulations on M&A of Vietnam’s Competition Law can be applied. Information can be exchanged via current cooperation mechanisms based on signed documents. The provisions of cooperation in signed cooperative documents have clearly stated the necessity of maintaining the security of exchanged information. The exchange of particularly sensitive information can be carried out via diplomatic means through Ambassadors. The Competition Law has regulations on securing such information (See Article 36 the Competition Law).

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

PFI Chapter 9. Financial Sector Development

171. A well-functioning financial sector and system is critical for an attractive investment climate. Payment services, mobilizing savings and allocating financing to firms wishing to invest are essential services. Well functioning financial systems also impose discipline on firms to perform and drive efficiency.

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

172. Every year, the State Bank of Vietnam (SBV) submits a regular report on progress and quality of the legal documents of the banking sector to the Government. The SBV regulates and supervises the banking system, which has undergone a major transformation since 1988. Before 1988, Vietnam had a State-owned mono-banking system. Vietnam now has a more diversified banking system, including, in addition to the five State-owned commercial banks (SOCBs) and the so-called State-owned banks for social policies and for development, 37 joint-stock banks, 9 finance companies (of which two are wholly foreign-invested), 12 leasing companies (of which 3 are wholly foreign-invested), 960 public credit unions, 5 joint venture banks and 39 branches of 28 foreign banks. Nevertheless, the SOCBs still account for the majority of loans and deposits. The International Finance Corporation (IFC), working with the Mekong Private Sector Development Facility (MPDF), carried out a “Financial Sector Diagnostic” of Vietnam in

2006.²⁴ They reported that, despite the recent growth of the banking sector, less than 5% of the population use bank services regularly and less than 20% hold bank accounts. Risk management is generally considered to be poor and reporting is highly unsatisfactory.

173. Recent reform efforts have focused on strengthening and modernizing the State Bank of Vietnam, improving the performance of the SOCBs and developing capital markets. A roadmap for reform was signed by the Prime Minister in May 2006, including strengthening banking supervision, and restructuring the SOCBs. The SOCBs historically carried out policy lending and continue to be the main source of finance for State-owned enterprises. The government has indicated its plan for the equitisation of the SOCBs, with a target completion date of end 2008. The process began in December 2007 with the US\$652 million realized in the auction of shares in Vietcombank. A second SOCB, the Industrial and Commercial Bank (Incombank) plans its partial privatization in March 2008 with an auction of 25% of its shares. Foreign private institutions wishing to invest in Vietnamese banks, including SOCBs in the process of equitisation, need to be among the top 500 banks in the world. This requirement presumably is a proxy for an assessment of qualifications for a banking licence based on prudential and other non-discriminatory criteria, the approach used in all OECD countries. Generally shareholding is limited to 10%; but if the investor is a strategic partner and with the approval of the Prime Minister, this limit can be raised to 20 per cent. Investors are then limited in their ability to transfer these shares for a number of years thereafter.

174. Vietnam's capital market regulator is the State Security Commission. There are trading centers in Hanoi and Ho Chi Minh City. The 2006 Law on Securities and Securities Markets is well designed, drawing on OECD best practices. Market surveillance and enforcement still need to be strengthened however. The IFC-MPDF have recommended the introduction of a centralized registry system, an integrated securities depository system, and an individual securities broker/dealer registration system as important next steps to strengthening Vietnam's capital markets.²⁵ The IMF, in its conclusions to the 2007 Article IV consultations, "welcomed the authorities plan to introduce greater exchange rate flexibility as the institutional and operational infrastructure for it is set into place".²⁶ This would contribute to the development of the financial system.

175. Vietnam's domestic bond markets have been rather inactive. Treasury bonds account for 64% of the market, bonds issued by the Bank for Investment and Development account for 18% and corporate bonds account for only 11%. The government bond market is highly fragmented with more than 400 bond instruments. The government has announced plans to issue a much needed benchmark bond. Liquidity in this market is low. Only SOCBs are said to be participating in the bond auctions.²⁷

24. Vietnam Financial Sector Diagnostic, International Finance Corporation-MPDF, August 6, 2006.

25. Ibid, page 9.

26. "IMF Executive Board Concludes 2007 Article IV Consultation with Vietnam, PIN No. 07/136, 21 November, 2007.

27. "A Smarter Bond Market", Vietnam Financial Review, Pages 18-19, November, 2007.

176. According to the existing regulations,²⁸ foreign financial service providers are allowed to take part in the financial sector. However, the scope of their participation and operation are restricted, depending on the type of the organisation, its business lines, and the domain of operation. For the most part foreign banks have concentrated on serving foreign invested companies, large state-owned corporations and foreign individuals in Vietnam. Several have entered into the retail markets for automobile loans, housing loans and international credit card services. Implementation of the commitments to the WTO, will result in the removal of most obstacles against foreign financial firms by 2010. Under market opening moves taken to date, foreign financial firms have expanded their commercial presence in Vietnam under many forms in Vietnam, such as:

- a. For the foreign commercial banks: Representative offices, branches, foreign commercial banks, joint-venture commercial banks, in which the financial contribution of the foreign partner does not exceed 50% of the charter capital of that joint-venture commercial bank, joint-venture financial leasing companies, 100% foreign invested capital financial leasing companies. And, since 1/4/2007, 100% foreign invested capital banks are allowed to be established;
- b. For foreign financial companies: Representative offices, joint-venture financial companies, 100% foreign invested capital financial leasing companies;
- c. For foreign financial leasing companies: Representative offices, joint-venture financial leasing companies and 100% foreign invested capital financial leasing companies.

177. Foreign credit institutions face restrictions on their activities, but these will be reduced significantly in the coming years.²⁹ These include: restrictions on VND deposit mobilization from individuals, and organisations, restrictions on credit card issuance; restrictions on the foreign individuals and organisations' establishment of sub-banks, branches or transaction offices and other restrictions on the financial service supply such as currency intermediation, financial information supply, and consultancy service supply.

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

- a. Vietnam can limit the participation of foreign credit institutions in the equitisation of Vietnam's State commercial banks to the same participation level as that of Vietnam's banks.
- b. In terms of the financial contribution under the form of stock purchasing, the total amount of stock that foreign individuals and foreign legal entities are allowed to hold in each of Vietnam's State joint stock commercial banks can be limited to 30% of the bank's charter capital, unless the Vietnam's regulations and law provide for higher limits or unless they are allowed by Vietnam's authorized agencies.

179. The limitations on foreign participation in Vietnam's financial sector are quite severe in comparison with OECD countries. Experience has shown that opening financial markets to foreign

28. Law on Credit organizations, Decree No 22/2006/ND-CP, Decree No 16/2001/ND-CP, Decree No. 65/2005/ND-CP, adjustment and addition of the Decree No 16/2001/ND-CP, Decree No. 79/2002/ND-CP.

29. Decree No 22/2006/ND-CP dated 28/2/2006 by the Government on the operation of branches of foreign bank, joint-venture banks, 100% foreign invested capital banks, foreign credit organization's representative offices in Vietnam, Circular No 03/2007/TT-NHNN dated 5/6/2007 by the State Bank on regulation, guidelines on the implementation of several articles of Decree No 22/2006/ND-CP.

institutions can accelerate the development of a modern, competitive and efficient financial system, which in turn, is an essential component of a robust economy and the investment environment. WTO commitments in this area should be considered a floor and opportunities for acceleration of the timetable should be seized.

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

180. The legal basis to protect the rights of borrowers and creditors in Vietnam is provided by a number of legal documents, including the Law on State Bank of Vietnam and subsequent adjustments and revisions, the Law on Credit Organisations Institutions (?) and the Decree on deposit insurance, State Bank's decisions on the loan regulations, and other legal documents on the regulation, guidelines on currency, credit, banking activities. The rights of shareholders of joint stock commercial banks must follow the regulation of Enterprise Law, Stock Law, and charter of that joint stock commercial bank. The Civil Law has regulations on the rights and responsibilities of lenders and borrowers in order to ensure the legal rights of both.

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

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

183. There is, therefore, a need for the establishment of private credit bureaus that will cover low value loans. The first private credit bureau for Vietnam is expected to be launched in 2008. The absence of such institutions to date has meant that lenders have been unable to obtain information on the indebtedness and credit histories of most applicants for loans, particularly SMEs. This has resulted in the excessive reliance on collateral. The IFC-MPDF is advising the SBV and the banking industry on developing the necessary legal framework.

184. Regarding deposit insurance, Vietnam has currently a Decree on deposit insurance. A law on the deposit insurance is now in the process of being drafted by relevant agencies. Under the current system, credit organisations have a responsibility to take part in the insurance or consolidation of deposits. Credit organisations and non-credit organisations that are allowed to implement several banking activities involving the deposit of individuals, must take part in the compulsory deposit insurance. Organisations that

take part in the compulsory deposit insurance must publicly announce information on the deposit insurance at their head offices and transaction offices.

ANNEX 1

VIETNAM'S CURRENT FREE TRADE AGREEMENT NEGOTIATIONS

ASEAN-China

The negotiation was initiated in late 2002. In 2003, ASEAN and China signed a Framework Agreement on comprehensive economic cooperation ASEAN-China. After that, two important agreements were concluded, including an Agreement on Trade in Commodities (2004) – which came into effect on 1/7/2004 – and an Agreement on Trade in Services (2006) – which came into effect on 1/7/2007. The ultimate objective is to form a Free Trade Agreement (FTA) in the year of 2010, with a phase-in period for new members of ASEAN until 2015. Presently, ASEAN and China are negotiating an Agreement on Investment and are initiating the second round for the negotiations on an Agreement on Trade in Services.

ASEAN-Korea

ASEAN and Korea signed a Framework Agreement on comprehensive economic cooperation in 12/2005. In May 2006 ASEAN and Korea signed the Agreement on Trade in Commodities. This Agreement came into effect on 1/6/2007. Now the two sides are trying to conclude negotiations on an Agreement on Trade in Services before the end of 2007. The negotiations on investment is ongoing but without a specified time-frame for conclusion.

ASEAN-Australia, New Zealand

In contrast to the step-by-step process under way in the ASEAN-China and ASEAN-Korea negotiations, ASEAN-Australia and New Zealand in 2005 commenced to negotiate simultaneously all the points of a FTA (single undertaking), including commodities, services, investment, intellectual property, competition, original principles, dispute settlement. With respect to the model to be used for commodities in the FTA, ASEAN-CER, ASEAN-6 and Australia-New Zealand have reached certain achievements. On the other hand, the models for tariff reduction, services, investment and hygienic and technical standards still have big gaps. It is anticipated that by the end of 2007, ASEAN and Australia, New Zealand will have finished the negotiations and in early 2008 will sign a comprehensive agreement.

ASEAN-India

ASEAN and India signed a Framework Agreement on ASEAN-India comprehensive economic cooperation on 8/10/2003 in Bali, Indonesia. Currently, the two sides are negotiating the model of tariff reduction for creating the ASEAN-India FTA. The next step was the signing of an Agreement on Trade in Services under this Framework Agreement on occasion of the Ministerial Consultant Meeting ASEAN-India held in August of this year.

ASEAN-Japan

In 2003, ASEAN-Japan reached the General Agreement on Comprehensive Economic Partnership in Phnom Penh, Cambodia. Thereafter, the two sides held many sessions but progress has been slow. Japan wanted firstly to bilaterally negotiate with each of ASEAN countries before negotiating at the regional level. Up to now, Japan has finished negotiating with 6 ASEAN countries. Since the beginning of 2007,

negotiations have progressed more rapidly. Presently, there are still divergences between ASEAN and Japan on the model for tariff reduction, C/O, and epidemic hygiene.

ASEAN-EU

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

ANNEX 2
SUMMARY OF RESTRICTIONS TO FDI ENTRY IN SERVICES
UNDER WTO ACCESSION AGREEMENT

Sector	Current restrictions	Commitments to liberalization
<i>1. Business services</i>	For most types of business services, foreign firms are temporarily restricted to providing services to other FIEs.	After 2-3 years from accession, most restrictions will be lifted.
<i>2. Communication</i>	Postal services closed to FDI. Temporary restriction for courier services. Significant restrictions in telecommunication sector (see section 12.b) Significant restrictions in audiovisual services and no opening of radio and television.	Opening of courier services 5 years after accession. Only partial opening of telecommunications services. Long-term restrictions to remain, including JV requirement for facilities-based operators, with 49 per cent maximum foreign ownership.
<i>3. Construction and engineering</i>	For most types of construction and engineering services, foreign firms are temporarily restricted to providing services to other FIEs.	After 2-3 years from accession, most restrictions will be lifted.
<i>4. Distribution</i>	Joint-venture requirement with foreign participation cap until 2009 in wholesale and retail. Restrictions on certain goods.	Removal of joint-venture requirement by 2009. Establishment of foreign-owned retail outlets beyond the first one subject to economic needs test.
<i>5. Education</i>	FDI permitted only in higher education and in technical fields, sciences and technology, business studies, economics, international law and languages. Joint venture requirement with cap until 2009.	100 per cent foreign-owned investments allowed from 2009. Restrictions on fields of study to remain.
<i>6. Environmental services</i>	Some services will remain public or private (concession) monopolies. Joint venture requirement with cap for 4 years after accession.	Removal of joint-venture requirement by 2011.
<i>7. Financial services</i>	Significant restrictions in insurance, banking and other financial services.	Most restrictions will be lifted by 2011, with some opening to FDI immediately upon accession.
<i>8. Health</i>	Few restrictions for hospitals, but social services closed to FDI.	

9. <i>Tourism and travel</i>	FDI not permitted in guide services. FDI in travel agencies and tour operators requires joint-venture, without cap on foreign share.	None.
10. <i>Recreation, cultural, sporting</i>	FDI not permitted in news agencies, libraries and museums.	FDI in entertainment services will be permitted from 2012, but only through joint venture with maximum foreign participation of 49 per cent.
11. <i>Transport</i>	Important restrictions apply, many in the form of requiring joint ventures with cap on foreign participation.	Increase in cap on foreign participation in joint ventures or lifting of joint venture requirement in certain cases.

¹ *This table provides a brief summary of the restrictions and commitments to liberalization, most of which are more detailed and complex than presented here.*

Source: WTO, Schedule CLX – Viet Nam, Schedule of Specific Commitments in Services.

ANNEX 3

SITUATION AND SUPPORT PLANS FOR FOUR INDUSTRIES

Auto industry

Vietnam's auto production industry has had a high level of protection for a long time. Domestic enterprises which produce auto are small in scale and inefficient. Currently, just few producers have production rates of 5,000 products or more per year. The others are small scale assembly units. In spite of these limitations but under the high level of protection, the auto industry still exists and develops smoothly. However, Vietnam's accession to the WTO is expected to change this situation. Vietnam must abolish its trade-related investment measures in this sector and foreign auto enterprises cannot be compelled to have joint ventures with domestic enterprises to produce autos in Vietnam. The regulations on local content are removed and the tariff barrier also must be reduced. Significant changes are anticipated in the manners of production, the investment domains and market shares. Foreign enterprises will set up manufacture and assembly lines for many types of products instead of one specialized line for a model. More importantly, there are many new fields likely to attract investment such as sale, distribution auto insurance and purchase finance. Such changes would have strong impacts on the Vietnam's auto production industry. Maybe a few joint venture enterprises can exist and develop, but most domestic enterprises in the sector are likely to go out of business or shift to producing auto parts.

Steel Industry

Generally, the competitiveness of Vietnam's steel industry is low. Domestic enterprises producing steel have small scale and are inefficient. Many producers have a low or at best a medium level of technology. They do not reach the economies of scale achieved by modern international producers. Vietnam's steel products are not diversified; they concentrate on the construction steel. Many steel products, such as steel bars, steel foil, steel bands, steel rolls, as well as cold and hot steel lamination, require high technology and high quality standards that Vietnam's producers cannot meet. With the strong reduction of the tariff rate for the steel industry after WTO accession and the tariff reduction schedule within CEPT/AFTA to 0-5%, Vietnam's steel industry will have significant problems. It will have to make adjustments in its investment structure and improve its level of technology if it is to survive.

Paper Industry

Generally, Vietnam's paper industry is restricted in its development. While large domestic producers are able to expand raw material areas serving their production, most domestic producers, smaller in scale, do not have their own raw material areas and depend on imported paper powder. Currently, domestic paper powder output meets only 37% of the domestic demand. Thus, with the opening up of the domestic market and WTO accession, small scale domestic paper producers, with their limited technology and dependence on paper powder importation, will face great challenges. However, if they prepare well in advance, expanding raw material areas, innovating technology and diversifying products, Vietnam's paper industry could still compete with imported products.

Pharmaceutical Industry

Generally, the competitiveness of Vietnam's pharmaceutical industry is limited. The firms in this sector concentrate essentially on pharmacy preparation and original medicine production and do not seek to expand drug resources. The focus is on producing normal medicines and not on specialized medicines. Most domestic pharmacy producers do not meet international standards. Only 18 of 174 Vietnam's pharmacy produces reach the standards of medicine production under WHO's recommendations (GMP-WTO) and only 42 of all producers reach ASEAN standards (GMP-ASEAN). Under the commitments with the WTO with respect to the pharmacy industry, the general tariff has been reduced to about 0-5% in comparison with 0-10% in the past. The average tariff rate is to be 2.5% by 5 years after Vietnam's accession to the WTO. The average tariff rate for cosmetics is to be reduced from 44% to 17.9% when Vietnam has fully implemented its commitments. This means that Vietnam's accession to the WTO will lead to a sharp fall in medicine and cosmetic prices and difficulties for domestic firms in this sector.