



MEMORANDUM

To Clients & Associates

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RE **Structuring M&A Transactions and Private Equity Investments in Vietnam**

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INTRODUCTION

Numerous efforts have been made by the Government of Vietnam over the past 10 years to improve the investment regime and the business climate of the country. Among others, radical changes have been made in the local legislation to make it more compatible with international rules and more business friendly. Vietnam has been admitted as an official member of the World Trade Organization (WTO) since 11 January 2007. It is also praised for its continued economic growth and stable political environment. All of these have positioned Vietnam as an attractive investment destination, including for both foreign direct investment (FDI) and portfolio investment. The development of Vietnam's capital and securities markets in recent years, with the two bourses in Ho Chi Minh City (HoSE) and Hanoi (HaSTC), has also contributed to the growth.

Of note, major laws should be named including the (Unified) Enterprise Law¹ and (Common) Investment Law² both issued in 2005, and the Securities Law³ issued in 2006. The new laws and the increased exposure and further integration of Vietnam into the world economy, have helped to increase mergers & acquisitions (M&A) activities and private equity investments in Vietnam in recent years.

This Memo is designed to provide an overview of the legal framework for M&A transactions and private equity investments in Vietnam, how to structure the deals and to share some practical experience in this area which is anticipated to flourish in the future vs. foreign

¹ Law No. 60/2005/QH11 on Enterprises passed by the National Assembly on 29, effective as of 1 July 2006 ("**Enterprise Law**")

² Law No. 59/2005/QH11 on Investment passed by the National Assembly on 29 November 2005, effective as of 1 July 2006 ("**Investment Law**").

³ Law No. 70/2006/QH11 on Securities passed by the National Assembly on 29 June 2006, effective as of 1 January 2007 ("**Securities Law**")

director investment (FDI) which remains a major channel for attracting foreign capital flow into the country.

FORMS OF INVESTMENT AND TYPES OF ENTERPRISES

Pursuant to the Investment Law, all forms of investment in Vietnam are grouped under two broad categories, “direct investment” and “indirect investment”.

Direct investment is a form of investment whereby the investor invests its capital and participates in the management of the investment activity. It includes the establishment of wholly foreign- or domestic-owned companies, joint venture companies (JVC) between foreign and domestic investors (in one of the business vehicles / types of enterprise as mentioned below); entering into a Business Cooperation Contract (BCC) or a Building - Operation - Transfer (BOT), Building - Transfer - Operation (BTO) or Building - Transfer (BT) contracts with a competent State body for infrastructure projects; purchasing shares or contributing capital to become shareholders and participate in the management of investment activities; and investment in mergers and acquisitions.

Indirect investment is a form of investment by way of the purchase of shares, share certificates, bonds or other valuable papers through a securities investment fund or by way of intermediary financial institutions, and whereby the investor does not participate directly in the management of the investment activity.

While the Investment Law governs direct investment, the Securities Law and the Enterprise Law govern indirect investment. The key difference between “direct investment” and “indirect investment” is whether or not the investor directly participates in the management of the investment activity. The distinction is not however always clear.

The Enterprise Law governs regulations regarding corporate formation and operations. Under Vietnamese law, an “enterprise” is defined as an economic organization having its own name, assets and a stable transaction office, with business registration for the purpose of conducting business operations. There are four (4) main types of enterprises in Vietnam:

- **Limited Liability Companies (LLC):** An enterprise with fifty (50) or less members in which a member may be an organization or an individual. An LLC may consist of a single member LLC (**SM-LLC**)⁴ or multiple members LLC (**MM-LLC**)⁵ all contributing capital.
- **Joint Stock Companies (JSC):** Also known as a shareholding company. It is an enterprise in which the charter capital is divided into equal portions called shares, with a

⁴ A SM-LLC is similar to a 100% foreign owned company established under the old Foreign Investment Law.

⁵ A MM-LLC is similar to a joint venture or a 100% foreign owned company owned by two or more investors under the old Foreign Investment Law.

minimum number of three (3) shareholders and no maximum. Only JSCs may issue shares, offer securities and get listed on the stock exchange if satisfying listing requirements under the securities law.

- **Incorporated Partnerships:** An enterprise with at least two (2) members being co-owners of the company jointly conducting business under one common name (also known as unlimited liability partners). Partnerships may also have partners with limited liability.
- **Private Enterprises** (i.e. sole proprietorships): An enterprise owned by one (1) individual who shall be liable for all activities of the enterprise to the extent of all his or her own assets (unlimited liability). Each individual can establish one private enterprise only.

TYPES OF TRANSACTION

Investors may contribute capital, purchase equity/shares, and merge and acquire an enterprise in order to participate in the management or control of investment activities. Investors who wish to acquire an interest in a JSC or LLC in Vietnam may do so in several ways.

Acquisition of Shares or Equity

- The new investor may acquire shares or capital contribution from an existing investor(s) in the target company, a LLC or a JSC; or
- The new investor may purchase further shares to be newly issued by the target company (in the case of a JSC), or contribute or inject further capital in the target company (in the case of a LLC).

Acquisition of shares or equity is classified as either direct or indirect investment under the Investment Law. The purchase of shares or equity by an investor so that the investor can participate in the management of an enterprise is considered direct investment. Any purchase of shares that does not lead to participation in the management of the target enterprise is considered indirect investment⁶. However, there is not a clear-cut difference between direct and indirect investment for this purpose.

As a result of the acquisition, as the case may be, a SM-LLC may have to be converted into a MM-LLC, or a LLC may have to be converted into a JSC.

Asset Acquisition or Business Acquisition

⁶ Article 21, Investment Law.



An investor may choose to make an asset acquisition in which the investor purchases key assets of the target enterprise. This is a possibility in cases where the investor wants to incorporate new assets into an already licensed entity.

In many cases, the investor acquires not only the assets of the target business but also others associated with the target business such as goodwill, intellectual property rights, client base, employees, etc. This is called business sale or business acquisition. Under the Competition Law⁷, enterprise acquisition is an action whereby an enterprise acquires all or part of the assets of another enterprise at a quantity sufficient to control or influence one or all of the business lines of the acquired enterprise.

The Enterprise Law also provides for sale of an enterprise but it is applied for sale of a private enterprise (sole proprietorship) only⁸. In addition, a State-owned enterprise with 100% State capital may use “business sale” to sell its whole business to another investor⁹.

Merger or Consolidation

Merger and consolidation of an enterprise are defined under the Enterprise Law and the Competition Law¹⁰ as follows:

- Enterprise merger is a process whereby one or a number of enterprises transfers all of its assets, legal rights, liabilities and benefits for the purposes of merging with another enterprise.¹¹
- Enterprise consolidation is a process whereby two or more enterprises combine all their assets, legal rights, liabilities and benefits for the purposes of consolidating among themselves so as to become a new enterprise.¹²

Other Types of Enterprise Restructure

The Enterprise Law also provides for other types of restructuring an enterprise, which may be taken by the investors as a result of M&A activities, namely division or separation of an enterprise.

- Enterprise division is a division of all assets, legal rights, liabilities and benefits of an enterprise for the purpose of establishing two or more new enterprises.¹³

⁷ Article 17, Competition Law

⁸ Article 145, Enterprise law

⁹ Decree No. 109/2008/ND-CP dated 10 October 2008 on the sale and transfer of 100 percent State-owned enterprises.

¹⁰ Law No. 27/2004/QH11 on Competition passed by the National Assembly on 3 December 2004 (“**Competition Law**”).

¹¹ Article 153, Enterprise Law

¹² Article 152, Enterprise Law

¹³ Article 150, Enterprise Law



- Enterprise separation is a transfer of a part of the assets of an enterprise for the purpose of establishing one or more additional enterprises.¹⁴

Onshore vs. Offshore Structure

The new investor may acquire some or all of the shares from the offshore company that holds the interest in a target company in Vietnam. This is called “offshore transaction” and is a quite common structure for acquiring interests in foreign invested enterprises in Vietnam. As this is an offshore transaction, it is not subject to any approval or registration, except for the case where the target company wishes to effect some changes such as corporate name or business lines as a result of the acquisition.

DOMESTIC COMPANIES VS. FOREIGN INVESTED ENTERPRISES

Before the effectiveness of the Investment Law and Enterprise Law, domestic or local companies and foreign invested enterprises (FIEs) were governed by different laws, particularly the 1999 Enterprise Law and 1998 Domestic Investment Promotion Law for domestic companies, and the 1996 Foreign Investment Law (“**FIL**”) for FIEs. As of 01 July 2006, both domestic companies and FIEs are covered by a single system, namely the Investment Law and Enterprise Law. However, there remain certain differences of treatment between domestic companies and FIEs¹⁵ in practice.

The Investment Law defines that “foreign invested enterprises” comprise any enterprise established by a foreign investor (foreign organization/individual) to conduct investment activities in Vietnam or any Vietnamese enterprise (domestic company) in which a foreign investor purchases shares, merges or acquires¹⁶. By this definition, FIEs may include all companies in Vietnam which have any element of foreign ownership, irrespective of the ratio of the foreign ownership or the founders of which companies.

The FIE definition has been made clear (though partly) under Decree 139¹⁷ guiding the Enterprise Law. Accordingly, the Decree provides¹⁸ that if more than 49% of the charter capital (stake) of the enterprise to be established will be owned by a foreign investor, then there must be an investment project and registration of the investment shall be conducted together with establishment of the enterprise, and the investor will be issued an Investment

¹⁴ Article 151, Enterprise Law.

¹⁵ In such areas as land use rights, residential housing ownership, business lines, etc. In general, scope of business / activities of domestic companies are much broader and flexible than FIEs. To establish a FIE in Vietnam, the investors are normally required to present an investment project, while it is not required for Vietnamese investors to set up a domestic company (except for some cases as required under the Investment Law).

¹⁶ Article 3.6, Investment Law.

¹⁷ Decree No. 139/2007/ND-CP dated 05 September 2007 guiding for the implementation of the Enterprise Law (“**Decree 139**”).

¹⁸ Article 9, Decree 139.

Certificate¹⁹ (“**IC**”). In other words, the enterprise to be established in this case will be treated as an FIE. However, if the foreign investor holds just 49% or less stake, then the enterprise to be set up will be treated as a purely domestic enterprise and the investor will be issued a simple Business Registration Certificate²⁰ (“**BRC**”) in the same manner like local investors get when establishing domestic companies.

The threshold of 49% foreign ownership is quite clear for determination of a FIE vs. a domestic company at the licensing stage or for a newly-established enterprise, however it remains ambiguous for the existing companies when it comes to the legal status or other legal rights of a company. In practice, the common approach used by the authorities to differentiate a FIE and a domestic company is that those companies having BRCs are domestic companies and those companies established under ICs are FIEs.

EQUITIZATION OF STATE-OWNED ENTERPRISES

As part of the WTO accession process and in line with domestic policy objectives, Vietnam is transforming many of its State-owned enterprises (“**SOE**”) through an “equitization” (privatization) process that dilutes state ownership and shifts them into JSCs or LLCs operating under the Enterprise Law. In 1998, the government issued its first regulations on the procedures for equitizing SOEs. Additional regulations have since been issued regarding the method of selecting SOEs to be equitized and the way that SOEs should be valued before equitization.

SOEs are categorized into three (3) groups: those that remain under 100% State ownership; those in which the State would retain a majority ownership interest (51%); and enterprises in which the State would maintain a minority interest or completely divest ownership.

SOEs with a total asset value of VND30 billion or more or with VND10 billion or more of State-owned capital, or enterprises with an advantageous geographical location, must hire valuation consultants to conduct a valuation of the enterprise.

SECURITIES MARKET

The securities market in Vietnam is regulated under the Securities Law. Vietnam has two listed stock exchanges: Ho Chi Minh Securities Trading Centre (renamed as Ho Chi Minh City Stock Exchange or “**HoSE**” in 2007) and the Hanoi Securities Trading Centre (“**HaSTC**”). The HaSTC was established to focus on the listing of small and medium-sized enterprises. Combining the two markets, the Vietnamese listed market has more than 316 stocks with a combined market capitalization of approximately US\$12.5 billion at the end of October 2008 (dropped from US\$22 billion one year ago).

¹⁹ Which serves both as certificate of incorporation of the enterprise and approval or registration of the investment project.

²⁰ Same as certificate of incorporation in other countries.



Regulation of securities and the securities market is done by the State Securities Commission (“**SSC**”). The SSC was established in November 1996 to organize, develop and supervise the country’s securities markets. In 2004, the SSC became an agency under the Ministry of Finance (“**MOF**”) where its functions and oversight powers were broadened. Under the new model of operation, the main functions of the SSC include:

- Issuing, implementing and enforcing regulations and guidelines related to securities and securities markets;
- Organizing and managing the stock exchange and securities trading centres in Vietnam;
- Licensing of securities companies, securities advisers, securities investment funds, and securities depositories & custodians; and
- Training specialized personnel for the securities industry.

The over-the-counter (OTC) market is an active equity market in Vietnam. It is comprised of only public companies that have not yet been listed on the HoSE or HaSTC. There are approximately 2,500 companies on the OTC market, with a total market capitalization of about three to four times that of the listed market.

The Vietnamese government is currently in the process of re-organizing the OTC market to operate under the supervision of the HaSTC, which will help streamline and standardize the registration and transaction process to make the market more organized. As scheduled by the SSC, the OTC market would be fully regulated and operational by the third quarter of 2008, but it is now postponed due to the recent market turmoil.

LIMITS OF FOREIGN OWNERSHIP IN DOMESTIC COMPANIES

The Vietnamese Government has been hard at work liberalizing its foreign investment regime in order to encourage more foreign investment. As mentioned, prior to 2006, foreign and domestic investors were regulated under two separate regulatory regimes, with stricter limitations placed on foreign investors. But the Enterprise Law and the Investment Law have created a single investment regime for domestic and foreign investors. These new laws actually opened a new era for foreign investment in Vietnam, especially M&A activities.

The Investment Law and the Enterprise Law do not explicitly cap the level of foreign ownership in Vietnamese or domestic companies. It is stated that a foreign investor is entitled to contribute capital to and/or purchase shares of a company in Vietnam, and that the proportion of capital contribution/share purchase with respect to certain sectors, industries and lines of business is prescribed by the government.

In line with the above, Decree 139 affirms a general principle that business entities and individuals, irrespective of nationality, are entitled to make capital contributions and purchase shares without any limitation of level in all enterprises in Vietnam, except for:



- Listed companies;
- Businesses operating under the relevant industry specialized laws;
- Equitized former SOEs; or
- Service companies as set out in Vietnam's commitments to commercial services. The WTO commitments are addressed below in the WTO section of this Memo.

Under Decision 238²¹, foreign investors are able to buy up to 49 percent of listed shares of a company listed on the Vietnam stock exchange, except for some sectors in which foreign ownership may be limited, such as banking (now 30 percent cap).

When foreign investors are to invest in Vietnamese enterprises conducting business in some sectors which are conditional for foreign investors, the percentage of capital contribution and purchasing of shares by foreign investors in such sectors will be in accordance with regulations of the government, specialized laws and commitments of Vietnam in international treaties of which Vietnam is a member. As a member of WTO, Vietnam has committed to remove the caps for foreign ownership in certain sectors over the next few years on a set schedule. The WTO commitments are addressed below in the WTO section of this Memo. In the absence of specific guidelines, foreign participation in companies in Vietnam is vague in many cases especially in unlisted companies in Vietnam, and normally formal opinions from the authorities are required to clarify each specific case.

STATUTORY CONSENTS AND APPROVALS

Licensing Procedures

Foreign Invested Projects

Under the Investment Law and its implementing laws, foreign investors investing in Vietnam for the first time must have an investment project and shall conduct investment procedures in order to be issued with an IC from the Investment Certificate Issuing Authority²² ("ICIA"). In this respect, foreign investors are subject to one of two procedures to obtain an IC, "investment registration" or "investment evaluation". Investment registration is much simpler than investment evaluation.

Investment projects whose investment capital is less than VND300 billion and that do not fall within conditional investment sectors will only be subject to investment registration. For

²¹ Decision No. 238/2005/QĐ-TTg of the Prime Minister dated 29 September 2005 on Foreign Participation in Vietnamese Securities Market ("**Decision 238**").

²² Depending on scale and areas of investment, the ICIA may be the Provincial People's Committee (i.e. local government) or the Management Board of Industrial Zones (for those projects located in industrial zones).

projects with a capital investment of VND300 billion or more, or projects in a conditional sector, the investors are required to undergo investment evaluation for the IC.

Domestic Investment Projects

For domestic investment projects with invested capital below VND15 billion and not falling in conditional sectors, only simple BRC is required from Business Registration Authority²³ (“**BRA**”). For those projects with invested capital from VND15 to VND 300 billion and not falling in conditional sectors, investment registration is required, and the IC will be issued upon request if the investor wants to have the investment incentives recorded (apart from the BRC which must be carried out separately for establishment of the company).

Projects with a capital investment of VND300 billion or more, or projects in a conditional sector, the investment evaluation is required and the IC will be issued while the BRC must be obtained separately from the BRA.

Conditional Investment Sectors

The Investment Law lists conditional investment sectors for both Vietnamese and foreign investors. These sectors include:

- Fields that have an impact on national defense or security, or social order or safety;
- Financial and banking fields;
- Fields that have an impact on public health;
- Culture, information, the press and publications;
- Entertainment services;
- Real estate business;
- Survey, search, exploration or exploitation of natural resources, and the protection of the ecological environment;
- Development of educational and training work; and
- A number of other fields under the provisions of law.

Particularly, Decree 108²⁴ provides a list of investment sectors which are conditional to foreign investors.

²³ An agency attached to the Provincial Department of Planning and Investment (DPI).

²⁴ Appendix III, Decree No. 108/2006/ND-CP providing guidelines for the implementation of a number of articles of the Investment Law dated 22 September 2006 (“**Decree 108**”).

Registration for Transfer of Interests in LLCs

For LLCs, it is required under the Enterprise Law that any transfer of interests must be registered with the BRA which has issued the BRC (for domestic companies) or the ICIA which has issued the IC (for FIEs) so as to reflect the changes of the investors or members of the company.

Restrictions on Transfer of Shares in JSCs

For a JSC, within three years of the date the company receives a BRC or an IC, a founding shareholder has the right to freely transfer his/her common shares to another founding shareholder of the same company and may only transfer his/her common shares to a third party if so approved in a general meeting of shareholders (“**GMS**”). In this case, the shareholder that intends to transfer his/her shares would not have the right to vote on such transfer of shares and the approved transferee automatically becomes a founding shareholder of the company²⁵.

In case of change of a founding shareholder in a JSC as a result of share transfer or acquisition, the Enterprise Law mandates that the change must be registered with the BRA or the ICIA for an amended BRC or IC.

Statutory Notice for a Shareholder Holding 5% of Shares or More

The Enterprise Law also requires that if an investor acquires 5% of the total shares or more of a company, this must be reported and registered with the BRA²⁶. According to the recent guidelines from the Ministry of Planning and Investment (“**MPI**”), the legal representative of the company will be responsible to register shareholders owning 5% or more of the total number of shares with the BRA within seven working days from the date of acquisition of such percentage of ownership.

Statutory Requirements for Listed Companies

For public companies and those companies listed on the stock exchange, they are also subject to the disclosure and reporting requirements under the Securities Law for M&A transactions.

Registration Required for FIEs not Re-registered under the New Laws

For those FIEs which have not been re-registered under the new laws (see below), it is required that any transfer of legal capital or interests shall be subject to the approval by the investment licensing authority which has issued the investment license. And all of these FIEs remain LLCs which was the single legal form for FIEs under the old law.

RESTRUCTURING FOREIGN INVESTED ENTERPRISES

²⁵ Article 84.5, Enterprise Law.

²⁶ Article 86.4, Enterprise Law.



With the liberalization of Vietnam's investment regime and the implementation of the Investment Law and Enterprise Law, FIEs that were established under the old FIL may consider re-registration under the new laws by 1 July 2008²⁷. Otherwise, they will operate under the investment licenses issued under the old law, and the terms of the issued investment licenses will apply until expiry of the term of the project.

Conversion of the legal form of an FIE may be carried out at the same time as the re-registration process. FIEs established under the old FIL can be converted and re-registered as an SM-LLC, MM-LLC or JSC operating under the new laws. Through conversion and/or re-registration, the investment license under the old FIL will be replaced by an IC that will also serve as the BRC. The laws make it clear that re-registered FIEs will take over all rights and liabilities of the former enterprises, including investment or tax incentives granted under the previous investment licenses.

Though re-registration for FIEs is not mandatory under the law, choosing not to re-register restricts an enterprise from extending the duration of the business or amending the scope of their activities.

DOCUMENTATION AND DUE DILIGENCE

Foreign investors looking towards Vietnam to expand their operations via M&A transactions and private equity investments should be aware of the challenges that earlier investors encountered when first entering the Vietnamese marketplace. Many older enterprises, established under a developing legal regime without the assistance of international-standard professional services, suffer from poor documentation and record keeping. This lack of proper documentation has made it difficult for new investors to properly value the enterprise and analyze the potential risks of investing.

Also in practice, many Vietnamese companies are not familiar with due diligence and may be hesitant to provide full disclosure. Therefore, the investor and its advisers should be particularly cautious of any unwillingness to make full disclosure. Professional advisers should know how to work with the target companies to get the maximized disclosure, and in some cases, cross-check must be conducted to verify the information disclosed.

Thus, the importance of comprehensive legal and financial due diligence before acquiring an enterprise cannot be understated. Though a "Representations and Warranties" clause in a contract may seem sufficient, the participating parties may differ as to the definitions they apply to the terms of such a clause. This makes it essential that an acquiring company conduct their due diligence to find out for themselves the legal and financial condition of the target enterprise.

²⁷ Two (2) years from the effective date of the Investment Law and Enterprise Law. At the time of writing this Memo, the deadline passed. However, quite a lot of FIEs have not yet conducted re-registration under the new laws, and it remains unclear how it will be resolved if such companies wish to extend the term or expand its scope of activities.



It is also a good practice to draft a preliminary agreement, such as a memorandum of understanding or a letter of intent, in order to arrive at a “meeting of the minds” for the essential terms and conditions of a transaction. Though such an agreement is not required by law, it gives both parties a chance to identify the other side’s assumptions and expectations before drafting a final agreement.

FOREIGN EXCHANGE CONTROL

Since the purchase and sale of securities in Vietnam by foreign investors must be implemented in Vietnamese Dong (“**VND**”), foreign investors are permitted to open VND accounts and foreign currency accounts with credit institutions in Vietnam, or to open accounts with banks in foreign countries with the approval of the State Bank of Vietnam (“**SBV**”).

Investors transferring foreign currency into an authorized bank in Vietnam in order to invest in securities must transfer the capital into a “specialized on-call foreign currency deposit account” of a securities company opened at an authorized bank in Vietnam. The foreign currency must then be sold to an authorized bank, as needed, to obtain Vietnamese dong in order to purchase securities.

Assuming it has fully discharged its financial obligations (i.e. taxes) to the State, a foreign investor is permitted to remit abroad the following:

- Its profits derived from business activities;
- Payments received from the provision of technology and services and from intellectual property;
- The principal of 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.

TAXATION

Corporate Income Tax

The Law on Corporate Income Tax came into effect on 1 January 2004 and is currently the primary tax on corporate income and capital gains²⁸. The law was enacted with the goal of harmonizing the tax regimes for both domestic and foreign enterprises by applying a standard CIT rate and incentive policy. The current CIT rate is 28%.

²⁸ Law No. 09/2003/QH11 dated 31 July 2003 on Corporate Income tax (“**CIT Law**”).



Taxes are imposed on foreign institutional investors in different ways, depending on whether they conduct direct or indirect investments. For straight purchases of the charter capital of a foreign party in a joint venture, a CIT of 28% is payable on any premium over the original investor's actual contribution to capital. When investing in shares of JSCs, the investor is typically classified as a foreign investor investing in Vietnamese securities through a bank account. Such a classification is important because it is more favorable than classification under the other categories, which would generally impose a CIT at the rate of 28% on profits earned. For these investors investing through a bank account (with no permanent establishment in Vietnam), a deemed CIT of 0.1% is imposed on the gross value of securities sold on each transaction. This applies to the sale of shares/securities, bonds (except tax-free bonds), and investment fund certificates.

For foreign investors that do not fall under this classification, the sale of an interest or the transfer of ownership of capital contributed in a company to another investor in Vietnam (capital assignee) is treated as a capital assignment and the vendor (capital assignor) is subject to Capital Assignment Tax ("**CAT**") at a rate of 28% on any gains derived from the capital assignment. Portfolio funds, both onshore and offshore, are not subject to an additional value-added tax ("**VAT**")²⁹.

As of 1 January 2009, a new CIT Law³⁰ will take effect. This new CIT applies to economic institutions and enterprises (individuals and business households that currently pay CIT will shift to paying taxes in line with the new PIT Law from 1 January 2009 as mentioned below). Vietnam's rules on taxing foreign institutions operating in Vietnam or having derivative incomes in Vietnam, which are recorded in under-law documents such as ordinances and resolutions, are now put into the Law on CIT to upgrade the tax framework.

Differences in the new law include a reduction in the CIT rate from 28% down to 25% along with comprehensive reforms on tax preferences in order to encourage economic growth and create conditions for businesses to increase their capital accumulation for further business expansion and to improve their competitive strength.

Tax Incentives

As mentioned, the standard CIT rate is 28%. However, the State encourages new investment projects in certain industries, sectors or regions with an incentive rate of 20%, 15%, or 10% for a certain period of time³¹. Investors that contribute capital in the form of

²⁹ Other tax regulations regarding portfolio funds can be found in Circular No. 100/2004/TT-BTC dated 20 October 2004.

³⁰ Law No. 14/2008/QH12 dated 3 June 2008 on Corporate Income Tax, effective as of 1 January 2009 ("**new CIT Law**").

³¹ A list of sectors entitled to special investment incentives can be found in Sections A and B of Appendix I of Decree 108.



patents, technical know-how, technological processes, or technical services shall be exempt from CIT³².

There are also tax holidays from two (2) to nine (9) years depending on where the project is located, the types of activities and the number of employees. Tax holidays can take the form of complete tax exemption for a certain period from the date from which the company makes profit followed by a period in which tax is charged at half rate.

Personal Income Tax

A new Personal Income Tax (PIT) Law was passed on 21 November 2007 and will be effective as of 1 January 2009.³³ The new law now unifies locals and foreigners into a single progressive tax scale, where previously, both types were subject to different tax regimes.

The income tax scale under the new PIT Law is as follows:

Level of Tax	Level of Average Annual Income (Million VND)	Level of Average Monthly Income (Million VND)	Tax Rate (%)
1	Up to 60	Up to 5	5
2	Over 60 up to 120	Over 5 up to 10	10
3	Over 120 up to 216	Over 10 up to 18	15
4	Over 216 up to 384	Over 18 up to 32	20
5	Over 384 up to 624	Over 32 up to 52	25
6	Over 624 up to 960	Over 52 up to 80	30
7	Over 960	Over 80	35

Under the new PIT, an individual's income from capital investment, capital assignment (inclusive of income derived from stocks/securities transactions), and real estate transfers shall be taxed at the following flat tax rates:

Taxable Income	Resident Tax Rate	Non-resident Tax Rate
Capital investment income (including dividends and interests)	5%	5%
Capital assignment income (e.g. holding a direct interest in a LLC)	20% on net	0.1% on gross sale proceeds
Capital assignment income (securities where taxable gain can be determined)	20% on net gains	0.1% on gross sale proceeds
Capital assignment income	0.1% on gross sale	0.1% on gross sale

³² Article 40 of Decree 24/2007/ND-CP dated 14 February 2007 providing guidelines for the implementation of the CIT Law ("**Decree 24**").

³³ Law No. 04/2007/QH12 on Personal Income Tax dated 21 November 2007, effective as of 1 January 2009 ("**PIT Law**").



(securities where taxable gain cannot be determined)	proceeds	proceeds
Real estate transfer income (where taxable gain can be determined)	25% on net gains	2% on gross sale proceeds
Real estate transfer income (where taxable gain cannot be determined)	2% on gross sale proceeds	2% on gross sale proceeds

Double Taxation Agreements

Vietnam has entered into agreements on the avoidance of double taxation with numerous countries around the world. There are currently forty-three (43) of these agreements in effect, based on the OECD model. The purpose of double tax avoidance agreements is to eliminate double taxation by:

- Exempting and reducing the tax amount payable in Vietnam for residents of the participating countries; or
- Deducting the tax amount already paid in participating countries by the residents in Vietnam from the amount payable in Vietnam.

In addition, these agreements form a statutory framework for the mutual cooperation and support in international tax management among the tax agencies of Vietnam and of the contractual nations with a view to prevent the evasion of taxes imposed on income and assets. The MOF has issued a number of circulars that provide detailed guidelines on the application of double taxation agreements in Vietnam³⁴.

PROPERTY ISSUES

Investment Guarantees

One of the biggest concerns investors had in investing in Vietnam in the past was the possibility that the State could seize assets at any time without just compensation. The Vietnamese government has made it a priority to relieve these concerns, reflected by the inclusion of a whole chapter on “Investment Guarantees” in the Investment Law.

Among the many guarantees given are assurances that lawful assets and invested capital shall not be nationalized or confiscated by administrative measures, and if they are taken, that it is done only in the case of “real necessity” by which the investor shall be compensated or paid damages at the market price at the time of announcement of the taking. The guarantees also state that the State may not discriminate between investors and that any compensation to foreign investors must be made in a freely convertible currency to

³⁴ Circular No. 133/2004/TT-BTC dated 21 December 2004 providing guidelines to implement some articles of the Agreements on Avoidance of Double Taxation between Vietnam and other countries (“Circular 133”).

which the investor may remit abroad. Other guarantees given include: protection for intellectual property rights; the opening of the investment market in compliance with committed schedules; the right to remit profits abroad, etc³⁵.

Land Use Rights

Like China, land in Vietnam belongs to the people and the right to use the land is administered by the State for the people. Ownership is referred to as a “right to use land” and requires a “Land Use Right Certificate” (“**LURC**”) which details the duration and purpose of the land use. The use of land beyond the scope of the LURC can lead to withdrawal of the Land Use Right. In general, the State may reclaim land if it provides compensation, but exceptions exist where no compensation is required.

The duration of Land Use Rights is usually fifty (50) years, but may be as long as seventy (70) years in the case of residential land and other special circumstances, and not in perpetuity. Under the new rules issued in 2007³⁶, foreign investors may acquire land in Vietnam via an assignment of a project using land from a domestic enterprise.

There are two ways for foreign investors to acquire land, namely: (a) via a land lease from the State directly for empty land, or payment of compensation for a current land user to give up the land and enter into land lease; or (b) via a capital contribution of land use rights from a Vietnamese party to a JVC or BCC.

LABOUR ISSUES

Employers are required to sign labour contracts with their employees. The type of contract signed varies upon the duration of the contract. Employers wishing to employ ten (10) or more employees are required to sign collective labour agreements with the employees, containing basic terms such as working hours, salaries and bonuses, insurance, work safety provisions, and guarantee of employment.

Under the Labor Code, where an enterprise divides, separates, merges or transfers the ownership, management or right to use the assets of the enterprise, the new employer shall continue to be bound by the labor contract with the employee. This serves to bind enterprises to their labour contracts regardless of any change in ownership of the enterprise. This is common among joint ventures where the foreign investor sells its charter capital in a LLC. But in practice, some authorities view a change in the ownership of a SM-LLC as an effective termination of that enterprise, requiring severance payments and re-employment by the new owner of the SM-LLC.

³⁵ Chapter 2, Investment Law.

³⁶ Decree No. 84/2007/ND-CP dated 25 May 2007, additionally stipulating the grant of land use right certificates, recovery of land, exercise of land use rights, order and procedures for compensation, support and resettlement upon land recovery by the State, and settlement of land-related complaints.

The employment of an expatriate is generally limited to a managerial position or to a position requiring a high level of expertise for which Vietnamese employees are not yet qualified. A work permit is required for expatriate employees and overseas Vietnamese planning to work in Vietnam for three (3) months or more. The work permit is valid for the duration of the labour contract, but for no longer than 36 months including any renewals. Further, the work permit allows the expatriate employee to work only for the employer mentioned in the labour contract. If an enterprise employing expatriates with work permits is sold and a new enterprise is formed as a result (as is common in M&A transactions), the new enterprise/employer is required to renew the current work permits under the new employer's name. But a mere transfer of charter capital would not normally constitute a change in employer would require the renewal of work permits.

The minimum wage in Vietnam is a monthly wage that must be paid to an employee hired to perform a basic job that does not require training. The minimum wage is two-tiered, depending upon whether the employee works for a foreign-invested enterprise or foreign/international organization, or a state-owned or local enterprise. The minimum wage also varies upon the geographic area of employment and is set by the State.

INTELLECTUAL PROPERTY RIGHTS

The Civil Code³⁷ and the IP Law are the main regulations on intellectual property³⁸. Vietnam is also a signatory to the Paris Convention, the Madrid Agreement, the Madrid Protocol, the Stockholm Convention of 1967, the Berne Convention, and the Geneva Conventions.

Vietnam separates intellectual property rights (“**IPR**”) into two categories, copyrights and industrial property rights. Industrial property rights cover the following:

- Inventions;
- Industrial designs;
- Layout designs;
- Trademarks;
- Geographical indications; and
- Business secrets.

Registration is generally required except for copyrights; however, registration of a copyright creates prima facie evidence for protection. For industrial property, rights are protected upon

³⁷ Civil Code passed by the National Assembly on 14 June 2005 (“**Civil Code**”).

³⁸ Law No. 50/2005/QH11 dated 29 November 2005 on Intellectual Property, effective from 01 July 2006 (“**IP Law**”).

registration on a first-to-file basis. There are exceptions to the first-to-file rule for trade secrets, geographic indications and trade names, which are all entitled to legal protection upon the fulfillment of conditions for their formation and usage³⁹.

The duration for protection of IPRs is in line with international conventions. Patents are protected for 20 years from the date of application, copyrights are generally protected for the author's life plus 50 years (with a few exceptions), and trademarks are protected for ten (10) years from the date of application, indefinitely renewable for successive ten (10) year periods.

The Vietnamese IP laws accord the IPR owners with wider enforcement options. Accordingly, they can select administrative actions, civil proceedings or even criminal proceedings under the Criminal Code for certain serious IPR violations. While IP laws of Vietnam are considered as compatible with international standards, enforcement of IPRs remain weak.

The buyers in M&A transactions should be aware that, in many cases, recordal of changes (e.g. change of owner or address, etc.) in titles or certificates of protection for IP assets, including licensing agreements, should be made with the Patent & Trademark Office⁴⁰, as required by the Vietnamese laws.

COMPETITION LAW

Vietnam's Competition Law was adopted by the National Assembly on 9 November 2004 and is the first of its kind in Vietnam. The purpose of the law is to support Vietnam's developing market-based economy and to satisfy demands from international organizations such as the WTO. The Ministry of Industry and Trade ("**MOIT**")⁴¹ is the major government body responsible for administration of the competition law and policies.

The State has established two agencies to oversee competitive practices and enforcement of the Competition Law. The Vietnam Competition Administration Department ("**VCAD**") is responsible for accepting and conducting investigations of competition cases concerning practices in restraint of competition, and conducting investigations into and dealing with competition cases concerning unfair competitive practices and other practices in breach of the Competition Law. The Vietnam Competition Council ("**VCC**") was established to handle competitions cases and unfair competitive practices. The VCC is responsible for organizing the handling of competition cases concerning practices in restraint of competition after investigation by the VCAD, and establishing case-specific panels to hold investigative hearings into competition cases.

Mergers, consolidations, acquisitions, joint ventures and other (undefined) forms of economic concentration are regulated under the Competition Law. When participating

³⁹ Articles 49, 50 and 100 – 107, IP Law.

⁴⁰ National Office of Intellectual Property (NOIP) headquartered in Hanoi.

⁴¹ Established as a result of merger between the Ministry of Trade and the Ministry of Industry.

parties in an M&A transaction have a combined market share of 30-50%, they must notify the VCAD in order to determine whether the proposed economic concentration can proceed. Exemptions are permitted for definite periods of time if a prohibited agreement/activity satisfies certain criteria aimed at reducing prime costs and benefiting consumers. Exemptions are decided by the Minister of the MOIT upon the recommendation of the VCAD.

TECHNOLOGY TRANSFERS

Pursuant to the Technology Transfer Law⁴², a technology transfer must be implemented on the basis of a written contract, which must include specific terms required by law, and the contract generally must be registered with the competent State body⁴³. Registration of a technology transfer must take place within ninety (90) days of executing the technology transfer contract. The parties to the contract may agree on the price where the transferee does not use State funds. If State funds are utilized, then the contract must be submitted to the State for approval.

Owners of technology may transfer the following: technical know-how; technical knowledge about technology in the form of technological plans, technical solutions, formulae, technical parameters, design drawings, technical plans, computer programs, and data information about the transferred technology; solutions for rationalization of production and renovation of technology, licenses for special business rights and other objects as provided in the law on technology transfer.

Under the current rules, the term of a technology transfer contract may not exceed seven years, while for a licensing agreement (e.g. trademark license), the term of the contract would depend on the term of protection of the respective IP object to be licensed for use in Vietnam. The licensing of IPRs (like trademarks) may be included as part of a technology transfer contract, or made in a separate licensing agreement which is required to be registered with the NOIP.

DISPUTE RESOLUTION

Any dispute involving at least one foreign party, except disputes between a foreign investor and a State administrative body, shall be resolved by one of the following tribunals and organizations:

- A Vietnamese court;

⁴² Law on Technology Transfer No. 80/2006/QH11 dated 29 November 2006, effective from 01 July 2007 (“**TT Law**”).

⁴³ Depending on the types of technology transfer, the contract for technology transfer must be registered with the Ministry of Science and Technology (MOST) in Hanoi or Provincial Department of Science and Technology (DOST).



- A Vietnamese arbitration body;
- A foreign arbitration body;
- An international arbitration body; or
- An arbitration tribunal established in accordance with the agreement of the disputing parties.

Disputes between a foreign investor and a State administrative body relating to investment activities in Vietnam shall be resolved by a Vietnamese court or arbitration body, unless otherwise provided in a signed contract between the parties or in an international treaty of which Vietnam is a member.

System of Courts

Vietnam has three (3) tiers of courts: the Supreme Court, Provincial Courts and District Courts. The Supreme Court is composed of one Council of Supreme Court Judges and separate special courts consisting mainly of the Central Military Court, Criminal Court, Civil Court, Economic Court, Labour Court, Administrative Court and respective appellate courts. The Supreme Court is empowered to hold supervisory trials and/or review cases with judgments that have already taken legal effect but have been protested to. In limited cases, the Supreme Court has appellate jurisdiction and may review judgments of first impression from the immediate lower courts that have not yet taken legal effect but have been appealed.

The Council of Supreme Court Judges is the highest body for trials that apply supervisory and review procedures, and is the supreme authority on guiding courts on the uniform application of laws. Under the procedural laws of Vietnam, a supervisory trial is a hearing that reviews judgments that have been rendered but have been protested for a possible violation of the law.

A Provincial Court is composed of one Committee of Provincial Court Judges and separate special courts, namely the Criminal Court, the Civil Court, the Economic Court, Labour Court, and the Administrative Court. The Committee of Provincial Court Judges has the power to hold supervisory trials and review cases that have already taken legal effect but have been protested to. A District Court has the power to hold first-instance trials in civil, commercial, and labour cases except for when the Provincial Courts deem it necessary to exert jurisdiction over a matter.

Generally, foreign judgments are not enforceable in Vietnam. Under the current Code of Civil Procedure⁴⁴, Vietnamese courts will only consider the recognition of judgments issued

⁴⁴ Code of Civil Procedures passed by the National Assembly on 1 January 2006 (“**Code of Civil Procedure**”).

by courts in countries that have entered into an agreement with Vietnam to do so. To date, most of the countries that have entered into a judicial agreement with Vietnam are socialist. With regard to countries that have not signed a judicial agreement with Vietnam, the verdicts issued by the courts in those countries would be considered for recognition on a reciprocal basis. However, in practice, few verdicts issued by courts in foreign countries have been recognized by the Courts of Vietnam.

Arbitration

Arbitration is becoming a more common practice in Vietnam since the passage of the Ordinance on Commercial Arbitration in 2003. The ordinance gives a broader definition of commercial activities covered by arbitration, outlines court support of domestic arbitration proceedings and provides for enforcement of domestic arbitration awards. For disputes and arbitral awards that arise under the ordinance, the party seeking to enforce the award may go directly to an enforcement agency for enforcement unless a Vietnamese court voids the award.

Since 1995, Vietnam has acceded to the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention), whereby foreign arbitral awards may be recognized and enforced in Vietnam. The Code of Civil Procedure sets guidelines on the recognition and enforcement of foreign arbitral awards in Vietnam. Under the Investment Law, parties may choose offshore arbitration in their contract.

BANKRUPTCY ISSUES

Guidelines on bankruptcy are promulgated in the Bankruptcy Law⁴⁵. There is no separate bankruptcy court in Vietnam. The District People's Court or the People's Court in a province or a city under central authority may have jurisdiction depending upon where the business is registered. The Court of Appeal under the People's Supreme Court has jurisdiction to review any appeals from a lower court. Judges are responsible for setting up a team to perform the tasks of managing and liquidating the properties of bankrupt enterprises and cooperatives.

Creditors, laborers, shareholders in a joint stock company, partners in a partnership, and the owners or legal representatives of the owners of an enterprise or cooperative may all file an application to open bankruptcy procedures⁴⁶. The Bankruptcy Law in Vietnam recognizes liquidation and re-organization of enterprises, co-operative and alliances of cooperatives. There is no bankruptcy for individuals. Real estate is not treated differently than other assets in insolvency proceedings. Moreover, certain enterprises are subject to special treatment under the bankruptcy law.

COMMITMENTS TO THE WTO

⁴⁵ Law No. 21/2004/QH11 on Bankruptcy dated 15 June 2004 ("**Bankruptcy Law**").

⁴⁶ Chapter II, Bankruptcy Law.

As a member of WTO, Vietnam is committed to liberalizing the service and financial markets in addition to reducing and cutting down the tariff for imported goods. Accordingly, the financial service market will be opened to attract overseas investment capital. However, Vietnam still holds the right to limit the access in the case of the securities industry.

The roadmap to open the market for securities under WTO commitments is as follows:

- Upon accession, foreign securities service suppliers will be permitted to establish representative offices and joint ventures with Vietnamese partners. The foreign capital contribution must not exceed 49%.
- Five (5) years from the date of accession, securities service suppliers with 100% foreign-invested capital will be permitted.
- Five (5) years from the date of accession, the following services and branches of foreign securities services suppliers will be permitted:
 - a. Asset management, such as portfolio management, all forms of collective investment management, pension fund management, custodial depository and trust services;
 - b. Settlement and clearing services for securities, derivative products, and other securities-related instruments;
 - c. Provision and transfer of financial information, and related software by suppliers of securities services; and
 - d. Advisory, intermediation and other auxiliary securities-related including investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

CONCLUSION

As a member of WTO, Vietnam has to adhere to WTO commitments and adopt international rules. It is no doubt that further reforms will continue to take place, especially in the legal framework, to make the country more integrated to the world economy. It is therefore anticipated that M&A activities will growth rapidly in the years ahead. M&A transactions will be also a good choice for foreign investors as Vietnam has started to open such service sectors as telecoms, banking and finance to foreign investments. Continued high economic performance, especially for the private sector, and the growth of the financial and capital markets, would be the driving force for M&A growth in Vietnam, for both in-bound and on-shore transactions among local enterprises.

To keep pace with this, the regulatory framework for M&A activities in Vietnam needs to be further improved, especially with regard to clear rules on foreign ownership in Vietnamese companies. In this respect, the National Assembly has recently circulated a Draft Resolution



on Implementation of Vietnam's WTO Commitments for public comments. It is expected that if the Resolution is approved by the National Assembly, various issues will be made clear, particularly for foreign investors to invest in and acquire interests in companies in Vietnam in different sectors and industries.

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