



## **The U.S.- Vietnam Bilateral Trade Agreement: A Survey of U.S. Companies on Implementation Issues**

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Interviews and Report by the  
**U.S.- Vietnam Trade Council Education Forum**

The U.S.-Vietnam Trade Council has worked to promote economic and political normalization between the two countries since its founding in 1989. Its affiliate, the U.S.-Vietnam Trade Council Education Forum, provides technical assistance to Vietnam on issues relating to the BTA, WTO, and international economic integration. For additional information, visit our website at <http://www.usvtc.org>.

WASHINGTON, DC  
International Center  
731 Eighth Street, SE  
Washington, DC 20003  
TEL 202.547.3800 FAX 202.546.5248

HANOI  
Press Club, Suite 602  
59A Ly Thai To Street  
Hanoi  
TEL 844.936.1700 FAX 844.936.1701

HO CHI MINH CITY  
New World Business Center, Suite 317  
76 Le Lai Street, District 1  
Ho Chi Minh City  
TEL 848.824.3651 FAX 848.824.3716

EMAIL [usvtc@usvtc.org](mailto:usvtc@usvtc.org) WEB [www.usvtc.org](http://www.usvtc.org)

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## EXECUTIVE SUMMARY

On 13 July 2000, the United States and Vietnam concluded a landmark bilateral trade agreement (BTA) designed to normalize trade relations between the two countries with the granting of reciprocal Most-Favored-Nation (MFN), also known as Normal Trade Relations (NTR) status. The Agreement was signed in July 2000, ratified by the U.S. Congress and Vietnam's National Assembly in October and November 2001 respectively, and entered into force on 10 December 2001. The BTA is an extensive agreement including disciplines, commitments, and obligations in trade in goods, intellectual property rights, trade in services, investment, business facilitation and transparency. It is the most comprehensive agreement Vietnam has signed and contains roadmaps and blueprints for reform affecting all areas of the Vietnamese economy. In exchange, the U.S. agreed to open its market on an NTR basis to Vietnamese goods and services.

As part of ongoing technical assistance provided to assist Vietnam on the implementation of the BTA, and as we mark the second anniversary of its entry into force, the U.S.-Vietnam Trade Council Education Forum conducted extensive interviews with close to eighty U.S. companies over the summer of 2003 on issues related to the BTA, the impact of its reform, and the business environment in general. These companies include U.S. companies currently operating in Vietnam as well as U.S. companies interested in entering the Vietnamese market. To help shape further technical assistance efforts, and to supplement key documents produced by the Trade Council's Education Forum, including our *Summary of the U.S.-Vietnam Bilateral Trade Agreement* (July 2001), *Roadmap for BTA Implementation* (March 2001), and *Catalog of Legal Updates* (produced monthly), we hope that this report could serve to assess the implementation of the BTA while identifying other areas not covered by the BTA but which may be of significance to the business community.

Much of the assessment made in this report is based on BTA commitments effective upon entry into force and those that have phased-in two years upon entry into force of the Agreement. Though it was rare to find perfect consensus across industries, the comments of interviewed companies reveal clear patterns and trends.

In general, companies have acknowledged the positive impact of the BTA. Increased trade volumes have allowed both U.S. and Vietnamese companies to reap benefits from the increase in business activity overall. The United States is now Vietnam's number one export market with bilateral trade more than tripling since 2001. U.S. investment in the Vietnamese economy currently stands at \$1.44 billion in committed capital.<sup>1</sup>

BTA implementation at its early stages has provided a roadmap of a new framework for the trade and investment environment in Vietnam. Overall, companies have noticed genuine efforts to ensure that new legislation is WTO as well as BTA compliant. The Government continues to promulgate an impressive amount of new legislation to address such commitments, and laws are drafted with a view towards international best practices. In addition, companies are now experiencing a lower cost of doing business as utilities, fees and other inputs better reflect market prices. There is however some sense that this new BTA framework, with phase-in periods and guidelines for increased market access, now "lock-in" and "structure" developments in a

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<sup>1</sup> Sources: U.S. Census Bureau and Vietnam's Ministry of Planning & Investment

business environment where licenses were once provided on an ad hoc basis but were heavily dependent on the success of a company's relationships and the number of years established in Vietnam.

At the time of publication of this report, marked improvements have been observed in the quality of legal instruments as they relate to WTO and international trade obligations. Companies have also noted positive development in the processes of investment registration and licensing. Others have noted progress in the elimination of discriminatory pricing, the increasing availability of information, and improvement in the recognition of well-known marks.

Challenges however remain. In the areas of customs and enforcement of intellectual property rights in particular, companies have observed weakness in implementation and enforcement at local and provincial levels, and acknowledged the importance of large scale efforts to provide additional technical assistance, training, and education. They also called for focused attention on developing legislation in Vietnam's services regime to ensure that prudential and other regulatory instruments introduced would not act as barriers to entry, thereby undermining market access concessions that the BTA would otherwise have provided. As U.S. companies look towards Vietnam's WTO accession, many hope that the process will not only accelerate and deepen commitments in the BTA, allowing for quicker and greater market access in the coming years, but also address national treatment issues across key service sectors.

While much effort has been put into improving transparency with regard to laws, regulations, and information, companies hope that efforts in this area could be strengthened further to facilitate trade and investment. They note especially the importance of clarity and specificity in legislation and implementing regulations. In addition, companies have observed particular characteristics and business customs that influence the effectiveness of Vietnam's ability to implement its international trade obligations. Many observed that despite trends towards the development of rule of law, relationships continue to be of primary importance to operating successfully, opening up opportunities for reliance on personal favors and the practice of discretionary decision making.

Despite this, general assessments indicate positive results arising out of the first two years of BTA implementation. While much work remains, companies are encouraged by the efforts made thus far. They continue to be optimistic on their ability to do well in Vietnam, and are enthusiastic about the overall success of the BTA.

## II. TRADE IN GOODS

Chapter I of the BTA establishes important obligations on trade in goods, including most-favored-nation (MFN) and national treatment. It also sets out rules governing technical regulations, customs valuation, non-tariff barriers, import licensing, and state trading. These obligations stem from similar WTO provisions, particularly those in the General Agreement on Trade and Tariffs (GATT).

### Most Favored Nation and National Treatment

The BTA requires Parties to treat goods of U.S. origin *no less favorably* than like goods from other countries (MFN) and *no less favorably* than like domestic products (national treatment). In regard to trade in goods, MFN and national treatment obligations apply to domestic laws, technical regulations & standards including SPS measures, and trading rights. The MFN obligation also applies to tariff rates.

In May 2002, Vietnam issued an *Ordinance on Most Favored Nation and National Treatment* involving trade in goods, codifying these important BTA principles. *Ordinance 41-2002-PL-UBTVQH10* introduced the concept of MFN and national treatment applicable to imports and exports, services and foreign-service providers, investment and foreign investors, and foreign organizations or individuals who are holders of IP rights.<sup>2</sup> The Ordinance lists exceptions for the application of MFN and national treatment for trade in goods.<sup>3</sup>

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<sup>2</sup> *Ordinance 41-2002-PL-UBTVQH10* (25 May 2002). Under this Ordinance, MFN is applicable in the following situations: (1) where Vietnamese law requires that it is applicable; (2) where Vietnam has signed an international treaty requiring that MFN be granted; (3) to countries that Vietnam has reciprocal MFN arrangements; and (4) other cases as determined by the Government. Under the Ordinance, the scope for application of MFN extends to (1) taxes, fees and other charges relating to imports, exports or anything relevant to import/export; (2) payment methods and payment transfers for import/export; (3) regulations and procedures relating to import/export; (4) taxes, direct and indirect charges for imports; (5) quantitative restrictions and import/export licenses; and (6) other legal regulations affecting orders, purchases, transportation, distribution, and warehousing in Vietnam.

<sup>3</sup> Exceptions to MFN include cases where Vietnam: (1) is a signatory to international treaties granting preferential treatment; (2) extends preferential treatment with countries sharing territorial borders; (3) affords preferential treatment to developing or under-developed countries; and (4) is a signatory to an international treaty for transit of goods. Exceptions to the application of national treatment include: (1) procurement conducted by the Government of Vietnam; (2) Government subsidies and supports provided to domestic manufacturers and their use of domestic content; (3) time allotment restrictions on broadcasting and television production; and (4) domestic transportation costs calculated on the basis of commercial activities of transportation.

### MFN Update:

Despite Vietnam's MFN obligations and existence of the *Ordinance on MFN and National Treatment*, MFN does not appear to be automatically extended to goods of U.S. origin. For example, on 12 February 2004, the Ministry of Finance issued *Decision 17-2004-QD-BTC* providing preferential tariff rates on wines & spirits (HS 2204, 2005, 2008) and CKD scooters (HS 8711) of EU origin entering Vietnam. Effective 1 January 2004, these preferential tariff rates were, according to the *Decision*, pursuant to the *Agreement on Revising the Textiles and Clothing Agreement between the EU and Vietnam* of 15 February 2003, and only applied to such goods of EU origin. After consultations such preferential tariffs were extended to similar goods of U.S. and Australian origin, but only on a goodwill basis, and not as a matter of law.

### Tariffs

Under the BTA, Vietnam has agreed to reduce and bind its tariff rates on 261 agricultural and non-agricultural products (representing, at the time of the conclusion of the BTA, approximately 4% of Vietnam's agricultural tariffs and 1% of its non-agricultural tariffs).<sup>4</sup>

In July 2003, the Ministry of Finance issued *Decision 110-2003-QD-BTC on the Promulgation of the Preferential Import Tariffs of Vietnam*.<sup>5</sup> The Decision, published in a mid-August edition of the Official Gazette, includes Vietnam's applied MFN tariff schedule, listing 10,721 goods.<sup>6</sup> The tariff schedule is based on the eight-digit *Harmonized System of Tariffs* and conforms to the *ASEAN Harmonized Tariff Nomenclature* (AHTN). This publication was released to the public and made available in English just after the conclusion of our interviews with U.S. businesses.

Notwithstanding this development, most respondents noted a lack of clear information on tariff rates affecting their imports, or were confused about the existing rates and changes in tariff rates. Many complained that, at any given point in time, they were unable to guarantee applicable rates because of frequent changes in the tariff regime.<sup>7</sup> According to those surveyed, while tariff schedules have been published periodically at Government bookstores, they quickly became invalid due to recurrent tariff changes. The existence of a band within which tariffs could then be applied caused further unpredictability. One company experienced an enormous range ("from 5% to 100%, depending on the Customs official") of tariffs on imports of the same good.<sup>8</sup>

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<sup>4</sup> See Annex E of the BTA for these products and their tariff rates.

<sup>5</sup> *Decision 110-2003-QD-BTC* (22 July 2003), effective 1 September 2003.

<sup>6</sup> Official Gazette No 117-128 (12 August 2003).

<sup>7</sup> See also "Update" in previous section on MFN and National Treatment.

<sup>8</sup> Company 18.



Companies also noted problems associated with the use of Certificates of Origin.<sup>9</sup> Although provision of a Certificate of Origin is optional, importers have reported that they pay lower tariff levels if such certificates accompany their imports. U.S. companies interviewed said Customs officials often contested the accuracy of information in these documents, rejecting the certificate completely, or requesting additional paperwork to ensure its validity. One company noted:

*“.....Aspects of the Certificate of Origin may be questioned or the product label may indicate another country..... [Customs Authorities] may argue that what you are representing isn't that or that your paperwork is wrong....sometimes it's cheaper to pay the higher rate than to go out and get the information they want.”<sup>10</sup>*

Another company remarked:

*“When we experienced problems regarding the origin of an import, Customs officials took a long time to resolve the issue though they were obviously wrong. It costs money to hold these goods at port. [It took] six months before our goods were released when the purpose of the Certificate of Origin is to facilitate the determination of a duty rate.”<sup>11</sup>*

When questioned about administrative review, companies offered differing opinions on what to do when confronted with tariff rate inconsistencies. Some businesses opted to pay the higher taxes or to import their goods into ports that were relatively more reliable. Those importing the same good with regularity were more inclined to maintain receipts of past shipments and used them to dispute higher tariff rates. Few businesses challenged quoted tariff levels but those that did found the review process to be time consuming, costly, burdensome and ineffective.

As expected, the U.S. business community has welcomed *Decision 110* and looks forward to more predictability in their import activities.

### **Customs Valuation**

Under the BTA, Vietnam has committed to conduct customs valuation in accordance with the *WTO Agreement on Customs Valuation (CVA)* by 10 December 2003. The CVA requires customs valuation to be based on the transaction value of an import rather than arbitrary reference or minimum prices. These disciplines are designed to ensure that determinations on the customs value for application of duty rates to imported goods are conducted in a neutral and uniform matter, precluding the use of arbitrary or fictitious customs values.

Vietnam's current valuation procedures are for the most part based on a system of reference pricing but, as of the time of this report, Vietnam was beginning to phase out this system. In 2001, the Government enacted a new *Law on Customs* to introduce WTO based valuation. This was followed by the issuance of implementing *Decree 60-2002-ND-CP Regulating the*

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<sup>9</sup> Companies 7, 11, 45, 57, 66 & 72 all noted the significance of the Certificate of Origin accompanying a shipment.

<sup>10</sup> Company 20.

<sup>11</sup> Company 49.

*Determination of the Dutiable Price for Imported Goods Subject to Import Tax* in June 2002.<sup>12</sup> To meet the BTA deadline of two years upon entry into force (10 December 2003), Vietnam's General Department of Customs has issued a much anticipated *Circular 118-2003-TT-BTC* to implement *Decree 60*.<sup>13</sup> Valuation based on the *WTO Customs Valuation Agreement (CVA)* will, upon effect of the circular, apply to goods originating from ASEAN countries and the United States, and Vietnam is currently considering how such concessions will be extended to other countries.<sup>14</sup> Post entry audit regulations issued recently also supplement these efforts, shifting the burden of proof to importers and allowing for quicker goods clearance.<sup>15</sup>

Notwithstanding these much anticipated developments, U.S. companies interviewed discussed problems associated with the practice of ad hoc valuation and reference pricing. Respondents indicated that depending on what was declared, Customs officials applied duties based on the transaction value or reference pricing.<sup>16</sup> Under current Vietnamese law (i.e. Vietnamese law pre-dating the application of *CVA* principles), Customs officials apply reference pricing if the declared value is 70% less than what is referenced.<sup>17</sup> According to many companies, such

<sup>12</sup> Effective beginning on 1 July 2002, Decree 60 provides for six methods to determine the dutiable price of imported goods: (1) transaction value; (2) transaction value of identical goods; (3) transaction value of equivalent goods; (4) selling price less profit margin; (5) cost calculation; and (6) assumption.

<sup>13</sup> *Circular 118-2003-TT-BTC* (8 December 2003) *Providing Guidelines for Implementation of Decree 60-2002-ND-CP of the Government* (6 June 2002) *on Determination of Imported Goods Value which is Liable to Tax in Conformity with the Principle of the Agreement on Implementation of Article 7 of the GATT*. [Note: To assist with the transition from reference pricing to valuation based on GATT WTO principles, the Ministry of Finance also issued *Official Letter 2959-TCGQ-KTTT* (24 June 2003) *Providing Methods to Calculate Taxable Prices of Imported Items Not on the Regulated Pricing List*. The *Official Letter* also stipulates that taxes should be finalized within eight days and allows businesses to lodge complaints within thirty days if they think assessed import duties are too high. Further, the General Department of Customs issued *Official Letter 4221-TCHQ-KTTT* (27 August 2003) requiring Customs authorities to carry out consistently all guidance documents on preferential import duty rates issued and requiring the use of the *Harmonized System* and descriptions as stipulated by the World Customs Organization. From 1 September 2003, the application of tax codes and import duty rates on imported goods must comply with regulations provided in the preferential import duty list that was issued with *Decision 110-2003-QD-BTC* (25 July 2003)].

<sup>14</sup> *Official Letter 11693-TC-CST on Implementing Decree 60-2002-ND-CP dated 6 June 2002 Providing for the Determination of the Taxable Value of Imports in Accordance with the Principles of an Agreement on Implementing Article 7 of the General Agreement on Tariffs and Trade (GATT)*. [Note: In the *Official Letter*, the Ministry of Finance submitted to the Government for consideration the provisions in which the practice of customs valuation based on transaction prices would be applied immediately to goods originating from the U.S. and the from ASEAN countries. In approximately one year, the Ministry of Finance will issue another decision providing GATT based valuation to the list of countries with which Vietnam has promised MFN].

<sup>15</sup> On 10 October 2003, the Ministry of Finance issued *Circular 96-2003-TT-BTC Providing Guidance for Implementing Decree 102-2001-ND-CP of the Government Making Detailed Provisions on Inspection with Respect to Imports and Exports After Customs Clearance* (31 December 2001). Accordingly, Customs would inspect the accuracy of customs declarations to prevent any customs law infringement, violation in tax and import export management policy. Post entry inspection will be carried out only when customs violations are discovered after customs clearance. For up to five years (60 months) from the date of customs clearance, Customs officials are entitled to conduct a post entry audit if they discover any violations.

<sup>16</sup> Company 18.

<sup>17</sup> Vietnam also maintains a minimum price list on (1) Assorted drinks (alcoholic beverages); (2) Tires, pneumatics inner tubes and fenders of various kinds (used for automobiles, motorcycles & bicycles); (3) Walling and flooring tiles, sanitary ware (toilet sinks, urinals, wash basins, bathtubs); (4) Flat glass, white, colored, light reflecting mirrors and glass, water flasks (non-electric), vacuum inner flasks; (5) Motors, generators (other than used for automobiles, motorbikes and other special-use vehicles such as bulldozers, crane trucks); (6) Electric fans (except industrial fans under sub-heading 84 14 59 00); (7) Motorcycles. *Decision 164-2000-QD-BTC* (10 October 2000).

practices were tolerable if undertaken in a predictable and transparent manner. To them, it was not so much the method or cost, but the ability to estimate consistent costs associated with their business transactions that were key. Such inconsistencies existed not only from transaction to transaction, but also from port to port. Now, with the administration of two systems beginning on 10 December 2003 - with valuation based on transaction prices applicable to goods originating from the U.S. and ASEAN, and valuation based on reference prices applicable to goods originating from all other countries – some companies have expressed apprehension over the added complication and the ability of Customs authorities to further promote predictability and consistency.

In circumstances where duties applied have been challenged by importers, Customs officials have reportedly asked importers to pay the higher price as a deposit on received goods until such a dispute could be formally resolved. Many companies expressed reluctance in making such deposits noting that they were difficult, if not impossible, to recover upon appeal.

*“[Customs officials] could not decide on the [duty] rates and gave us several options: (1) we could put down a deposit... (2) hold our goods in storage... or (3) sign a commitment letter [saying] we will pay an additional assessment after the goods are cleared. Clearly, any of the three options have enormous financial consequences to our operations because of the leverage Customs has once we agree to any of the three options.”*<sup>18</sup>

To discuss problems or address issues relating to customs valuation, the vast majority of businesses headed to their local Customs Office, wrote a letter, or contacted an existing relationship. No specific office or individual was identified as the central enquiry point, and few respondents were acquainted with procedures for submitting an appeal or pursuing administrative review on a ruling. Regardless of the channel through which reviews/appeals were processed, most companies were apprehensive over whether a decision could be overturned. Many businesses concurred with the following sentiment:

*“We try to avoid going to [the authorities] at all costs. Firstly, it takes time. And secondly, there are often easier ways to win the battle without the threat of losing a cooperative relationship that has been built up over time.”*<sup>19</sup>

Overall, U.S. companies have called for the implementation of greater transparency (including procedures for providing advance rulings on tariff classification), more effective use of risk assessment tools, and infrastructure modernization to assist Customs in their efforts to facilitate trade flows. They also recommended increased training and accountability among Customs officials to avoid the misuse of discretionary powers.<sup>20</sup>

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<sup>18</sup> Company 40.

<sup>19</sup> Company 50.

<sup>20</sup> The Prime Minister issued *Decree 106-2003-ND-CP* (23 September 2003) *Providing Guidelines for Dealing with Administrative Offences in Charges and Fees*. Under *Decree 106*, administrative offences committed by responsible authorities in the process of collection of fees and charges may attract fines between VND 20-50 million (about USD\$1,300 to \$3,230).

### Customs Update:

Since entry into force of Vietnam's CVA obligations in December 2003, the U.S.-Vietnam Trade Council Education Forum has been monitoring developments particularly relating to those affecting U.S. companies. Initial reports from importers to which the CVA now applies indicate the introduction of a new form – *HQ-2003-TGTT* - listing questions to ensure that importers meet the prerequisites for utilizing transaction value calculations (e.g. country of origin, relationship between importer/supplier, etc.). In addition, declarations of dutiable value (*Form HQ-2003-PLTG* and *Forms PP2, PP3, PP4 and PP6*) are photocopied and issued once to importers. Although companies have not had much time to gauge consistency in developments, few reported difficulties. One company reported the continued use of reference and minimum pricing on personal goods imported from the U.S., while a couple cited incidents where minimum prices were used when the transaction value was lower. Another company immediately noticed reduced import duties paid, although this was dependent on whether or not FOB (Freight On Board) or CIF (Cargo, Insurance and Freight) values were declared.

Until recently, despite its BTA obligations, Vietnam maintained eight exceptions to the application of transaction pricing. Per *Decision 164-2000-QD-BTC* and *Decision 136-2001-QD-BTC*, minimum prices still applied towards: (1) assorted drinks; (2) tires, pneumatics inner tubes and fenders of various kinds; (3) walling and flooring tiles, sanitary ware; (4) flat glass, white colored, light reflecting mirrors and glass, non-electric water flasks, vacuum inner flasks; (5) motors, specific types of generators; (6) electric fans; (7) motorcycles; and (8) tobacco. To rectify this inconsistency, the Ministry of Finance recently issued *Decision 1291/TCHQ-KTTT* (25 March 2004) clarifying that customs valuation for such products was to be re-determined according to *Circular 118-2003-TT-BTC*. There are now no exceptions to the CVA for goods of U.S. and ASEAN origin.

To date, Vietnam has also extended the application of transaction pricing for valuation purposes to countries that have offered reciprocal treatment of Vietnamese imports. *Official Letter 1644-TM-XNH* (6 April 2004) extends such treatment to imported goods originating from Pakistan, India, South Africa, and Turkey.

### Technical Barriers to Trade (TBT) & Sanitary and Phytosanitary (SPS) Measures

The BTA requires Parties to ensure that their technical regulations and Sanitary and Phytosanitary (SPS) measures (i.e., measures relating to plant and animal health and food safety) do not create obstacles to international trade or protect domestic production. In this regard, Parties must ensure that these regulations and SPS measures are not more trade restrictive than necessary, are applied only to the extent necessary to protect humans, animal or plant life or health, and are based on sufficient scientific evidence.

With respect to TBT matters, Vietnam is currently working to ensure that all new technical regulations, standards, and conformity assessment procedures comply with international

standards. In March 2002, Vietnam established its enquiry point as required by the *WTO Agreement on Technical Barriers to Trade (TBT)*. Once this is fully operational, this TBT enquiry point will further promote transparency, making it easier for foreign entities to become familiar with Vietnam's technical regulations.

Vietnam's current SPS regime is based on *CODEX* and *FAO/WHO* standards, the standards of regional or developed countries, or international standards. It is at present in the process of reviewing and amending its subsidiary legislation in light of the *WTO SPS Agreement*, the *International Plant Protection Convention (IPPC)* and other international standards to harmonize SPS measures.<sup>21</sup> The Ministry of Agriculture and Rural Development (MARD) currently serves as the general enquiry point and is assessing how to manage questions, notice and comment procedures as required by the *WTO SPS Agreement*.

In general, businesses did not encounter issues relating to SPS that affected the import of plants, animals or foods, and did not observe technical standards to be particularly different from that required in other countries. They did however note that the general lack of transparency in Vietnam rendered most approval processes "unnecessarily burdensome", and that such lack of transparency is also prevalent in the SPS and technical standards regulatory regime. Further, while almost all U.S. businesses said they understood the value and necessity for technical standards, reinforcing the assumption that they guard against substandard products entering the market, most companies felt that Vietnam should adopt universal standards and procedures citing problems that could arise when information requested is unique. These unique requirements raise the costs of doing business and create significant barriers to entry into the Vietnamese market.

*"Certain documents have to be made especially for the Vietnamese Government. They are not required anywhere else and the information is not always readily available. It's hard [for a] factory to put documents like this together. It becomes cumbersome and restrictive... like a non-tariff barrier."*<sup>22</sup>

*"[T]he associated delays are problematic. Testing on one of our mixed shipments took more than one month to complete. It usually takes longer for first time imports. Tests cost about 300,000 Vietnamese Dong [about USD\$20] per sample. For mixed shipments, containing a variety of goods, these costs can really add up."*<sup>23</sup>

### **Trading Rights**

Under the BTA, Vietnam has committed to open its trading (import-export) sector to non-state and U.S. companies.<sup>24</sup> In particular, the BTA requires Vietnam to extend trading rights to all

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<sup>21</sup> The National Assembly recently enacted the amended *Ordinance on Plant Protection and Quarantine*, and a new *Ordinance on Food Safety and Hygiene* regulating the proclamation of food standards and the advertising and labeling of foodstuffs. It is also drafting amendments to the *Veterinary Ordinance* (15 February 1993), and a *Decree on the Safety Management of Labeling for Genetically Modified Organisms (GMOs)* designed to formulate compulsory standards for products using GMO technology.

<sup>22</sup> Company 20.

<sup>23</sup> Company 49.

<sup>24</sup> U.S.-Vietnam BTA, Chapter I, Article 2.7.

domestic enterprises upon entry into force and phases-in such rights for U.S. firms over a period of seven years. For instance, U.S. joint-ventures and U.S. invested enterprises may engage in trading activities in most products beginning in December 2004 provided that the U.S. partner holds less than a 50% share. 100% owned U.S. companies may engage in trading activities beginning in December 2008.<sup>25</sup> For sensitive products, Vietnam maintains trading rights restrictions, and certain products remain subject to state trading.<sup>26</sup> However, the BTA requires that state trading entities make purchases or sales in a non-discriminatory manner and in accordance with commercial considerations.<sup>27</sup>

Through the implementation of Vietnam's *Enterprise Law* (issued in 2000) and related regulations, trading and distribution rights have been extended to all Vietnamese enterprises. Foreign investment in the import and distribution sectors is currently governed by *Decree 27-2000-ND-CP* amending *Decree 24-2000-ND-CP* of the *Foreign Investment Law* and is subject to the condition that it must be implemented in accordance with separate regulations issued by the Prime Minister.<sup>28</sup> Such regulations have not been issued to date. Investment projects have thus far been granted trading and distribution licenses on a case-by-case basis. To address the need for enabling legislation and to reconcile existing discrimination between local and foreign trading companies, Vietnam is currently considering amendments to its 1997 *Commercial Law*. As of the time of this report, the National Assembly had not approved this form of amendment and was not expected to do so in 2003.

Survey respondents noted the absence of trading rights for foreign companies and await full implementation of Vietnam's trading rights commitments, noting in particular the huge efforts and costs (in terms of time) associated with attaining import licenses (see section on *Import Licensing* below). Respondents also expressed the importance of opening up the distribution sector, which together with the right to import, would allow their business operations to develop further (see section on *Distribution Services*). To date, only a select number of foreign companies have received licenses to carry out import (including distribution) activities in Vietnam.

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<sup>25</sup> U.S.-Vietnam BTA, Chapter I, Article 2.7 and Annexes B, C & D.

<sup>26</sup> U.S.-Vietnam BTA, Annexes B, C and D.

<sup>27</sup> U.S.-Vietnam BTA, Chapter I, Article 8 and Annex C.

<sup>28</sup> *Decree 24-2000-ND-CP* (31 July 2000). To date, these regulations have not been issued and, as a result, there is no law stating that investment projects in the import-export sector are prohibited, nor any enabling legislation permitting such investment projects [refer to *Official Letter 3067-TM-DT* (07 August 2002)].

### Trading Rights Update:

Reports indicate that the most recent draft (November 2003) of *Amendments to the Commercial Law*, expected to extend trading rights to foreign enterprises - including U.S. companies, contains a simple provision enabling foreign companies not investing in production to establish a commercial presence in Vietnam for the purpose of conducting activities in the fields of export, import, distribution and other specific commercial services. Further details of the trading and distribution rights of foreign companies are still planned for specification in an implementing decree, but continue to be in the initial draft stage. Another draft of the *Commercial Law* is expected to be released in May 2004.

To assist with their business plans for 2004, U.S. companies hope to be informed of developments with regard to trading rights and more opportunities to comment on draft legislation.

### Import Licensing<sup>29</sup>

The BTA requires Parties to administer automatic and non-automatic import-licensing<sup>30</sup> procedures in a transparent and predictable manner, and in accordance with the *WTO Agreement on Import Licensing Procedures*.<sup>31</sup> Among other things, this provision obliges Parties to ensure that such procedures are no more administratively burdensome than necessary, to publish sufficient information to enable traders to understand how to obtain licenses, and to ensure that the period of license validity is of reasonable duration and not so short as to preclude imports.

Due to legislation restricting trading and distribution rights to domestic enterprises only, Vietnamese enterprises registered under the *Enterprise Law* are entitled to import “according to their business line” as written in their business registration certificate, and are therefore not required to apply for an import license.<sup>32</sup> This is the practice unless such enterprises are importing goods for which the Ministry of Trade requires a non-automatic import license. Import licensing procedures and regulations for foreign invested enterprises are governed separately by the *Law on Foreign Investment* and its implementing regulations, particularly *Circular 22-2000-TT-BTM*.<sup>33</sup> Currently, foreign invested enterprises are only permitted to import the following: (1) goods for the purposes of adding to their fixed assets, including

<sup>29</sup> In the BTA, import licensing is addressed in Chapter VI (Transparency-Related Provisions and Right to Appeal); however, given the direct relevance to trade in goods, this obligation will be discussed in this section.

<sup>30</sup> Automatic import licensing occurs when approval is granted in all cases and where application procedures do not serve to restrict imports. Non-automatic import licensing procedures do not conform with the definition of automatic import licensing and are usually implemented to monitor or limit imports of certain categories of goods. See *WTO Agreement on Import Licensing Procedures*, Article 2 (1) and (2) (a) (iii).

<sup>31</sup> U.S.-Vietnam BTA, Chapter VI, Article 8.

<sup>32</sup> Article 1.6, *Decree 44-ND-CP-2001* (2 August 2001) amending *Decree 57-ND-CP-1998* (31 July 1998).

<sup>33</sup> Article 2, *Circular 22-2000-TT-BTM* (15 December 2000, as amended on 4 December 2001) on *Export on Import Activities and Other Commercial Activities of Enterprises with Foreign Owned Capital*.

equipment, machinery, means of transportation, and materials for their initial investment, to expand their production, or to replace or renew technology,<sup>34</sup> and (2) raw materials for production and business.<sup>35</sup>

Most U.S. businesses complained of difficulties involved in the application of their “import plan.” Applications require a list of all goods to be imported by name, quantity and value and are required for imports even if they were to be used as inputs in production or manufacturing (for domestic distribution and/or exported overseas). Many businesses expressed concern over the required paperwork, requested information and the lack of transparent procedures, recounting various delays associated with the import licensing process. Others felt that the required information was already provided in the investment license, packing lists, or other documents provided to Government authorities prior to import.

One company noted:

*“There are so many different departments involved in the process... A company must visit each department, usually starting with the provincial departments..... A license can take up to fifteen days.”<sup>36</sup>*

Another company said:

*“Obtaining the license was an extreme nuisance. It took six months to apply for just three products. We had to disclose every piece of information, all of which was saleable information. We went back and forth trying to get all the necessary information. It is very unclear what is required. It seems that there are individuals making arbitrary decisions on what is and what is not required.”<sup>37</sup>*

Most companies interviewed said their import licenses were valid for up to one year (responses ranged from 12 to 15 months) or until the company had used up the approved quantities. However, several companies said they were required to obtain a separate license for each individual shipment and were not permitted to apply for a license that was valid for multiple shipments of the same goods.<sup>38</sup> These companies found such import licensing procedures to be unnecessarily burdensome, adding to the administrative costs of running a business.

Vietnam currently maintains a number of non-automatic import licensing requirements and procedures for goods that may be imported and exported depending on certain conditions, set quotas, special permission requirements, and special certifications, etc.<sup>39</sup> However, companies have noted some difficulty in attaining a comprehensive list of goods subject to quantitative quota and published details on how a business might apply for such quotas. Existing legislation

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<sup>34</sup> Article 2.1, *Circular 22-2000-TT-BTM* (15 December 2000, as amended on 4 December 2001) on *Export on Import Activities and Other Commercial Activities of Enterprises with Foreign Owned Capital*.

<sup>35</sup> *Ibid*, Article 2.2. [Note: the import of raw materials for production and business is subject to approval of an import plan].

<sup>36</sup> Company 25.

<sup>37</sup> Company 53.

<sup>38</sup> Companies 4, 14, 17, 39, and 71.

<sup>39</sup> *Decision No. 46-2001-QĐ-TTg* (4 April 2001), pursuant to *Decree No. 57-1998-ND-CP* (31 July 1998).



governing foreign invested enterprises does not appear to distinguish between automatic and non-automatic import licensing procedures.<sup>40</sup>

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<sup>40</sup> *Circular 22-2000-TT-BTM* (15 December 2000, as amended on 4 December 2001) *on Export on Import Activities and Other Commercial Activities of Enterprises with Foreign Owned Capital*.

## II. INTELLECTUAL PROPERTY RIGHTS

Chapter II of the BTA covers intellectual property rights and is modeled on the *WTO Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS). Like the TRIPS Agreement, the BTA requires Parties to protect key forms of intellectual property (such as copyright, trademarks, and patents), enforce such intellectual property rights (IPR), and accord national treatment with respect to the protection and enforcement of IPR. In particular, the BTA sets forth minimum standards for protection of copyrights and related rights, trademarks, industrial designs, patents, integrated circuit layout designs, and confidential information. Minimum standards are also established for the enforcement of intellectual property rights in administrative, civil and criminal actions and measures to prevent copyright piracy, and trademark counterfeiting. The BTA does not incorporate all aspects of the *TRIPS Agreement*. For instance, the BTA does not protect geographic indications. However, the BTA also includes some obligations that go beyond the *TRIPS Agreement*.<sup>41</sup>

The provisions in Chapter II are mostly subject to a gradual phase-in, namely over 30 months upon entry into force of the Agreement, or full implementation by June 2004.<sup>42</sup> In addition, Vietnam has committed to upon entry into force of the BTA, complying with intellectual property requirements codified in Chapter II of the BTA to the extent possible under its existing laws, including the *U.S.-Vietnam Copyright Agreement* and the *Paris Convention for the Protection of Literary and Artistic Works*.<sup>43</sup> Interviews with U.S. businesses focused on provisions that were phased-in at that time, including provisions on copyright and related rights which entered into force in June 2003. Issues relating to encrypted program-carrying satellite signals, layout designs, or industrial designs were not addressed.

In general, while noting improvements in the framework of laws addressing intellectual property protection and responses of relevant authorities to related business concerns, U.S. companies interviewed expressed on-going apprehension and unease that their patents, trademarks and copyrights remain unprotected and highly susceptible to anti-competitive conditions, thereby negating market access opportunities that would otherwise be made available to them through the BTA.

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<sup>41</sup> These include: (1) longer term of copyright protection for works not calculated on life of the author; (2) extension of trademark protection to certification marks and collective marks; (3) obligation to provide a trademark registration system; (4) longer terms for initial trademark registration (ten years as opposed to three years under TRIPS), with the opportunity to renew for subsequent ten year periods); and (5) obligation to protect encrypted program-carrying signals. Under the BTA, Vietnam is also required to apply the terms of the *Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms*; the *Brussels Convention Relating to the Distribution of Programme Carrying Signals Transmitted by Satellite*, and to accede to the *International Convention on Plant Varieties (UPOV)*.

<sup>42</sup> U.S.-Vietnam BTA, Chapter II, Article 18 establishes the following phase-in dates: (1) trademarks – December 2002; (2) patents – December 2002; (3) copyright & related rights – June 2003; (4) trade secrets – June 2003; (5) integrated designs – December 2003; (6) integrated circuits – December 2003; 7) encrypted satellite signals – June 2004.

<sup>43</sup> U.S.-Vietnam BTA, Chapter II, Article 18.4.

## Participation in International Conventions & Overall Legal Framework

Intellectual Property protection and civil violations are currently governed by provisions of Vietnam's *Civil Code* and related implementing regulations.<sup>44</sup> Vietnam's *Criminal Code* covers criminal violations of intellectual property rights. To address its international obligations, the Government is currently assessing its intellectual property regime as it relates to the BTA and its WTO accession.

Vietnam is Party to the *Paris Convention for the Protection of Industrial Property* and the *Madrid Agreement on International Registration of Marks*, became a member of the *Convention Establishing the World Intellectual Property Organization* in 1976, and joined the *Patent Cooperation Treaty* in 1993. The Government is now preparing for its accession to the *Berne Convention for the Protection of Literary and Artistic Works*, the *Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms*, the *Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite*, and the *International Convention for the Protection of Plant Varieties (UPOV)*. Vietnam is also considering accession to the *Rome Convention for the Protection of Artists, Performers, Phonogram Producers and Broadcasting Agencies*.<sup>45</sup>

In addition to action plans for Vietnam's accession to the various intellectual property conventions, the Government is also considering a separate law governing intellectual property, separate from the *Civil Code* that currently governs intellectual property protection, violations and remedies, and the establishment of one authority for the uniform State administration of an intellectual property regulatory regime.<sup>46</sup>

Notwithstanding new legislation and implementing regulations that have been issued, U.S. companies in Vietnam foresee considerable challenges arising out of the vagueness of provisions. One company familiar with the laws governing intellectual property remarked:

*"...Current laws are at such a high level that [they are] incapable of being implemented for two [reasons]... First, [The law] is ambiguous...there are no definitions of terms...[for example,] what is "infringement"? Second, there are no guidelines; there are no decrees or circulars. And those that do exist are far too broad or insufficient."*<sup>47</sup>

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<sup>44</sup> *Decree 76-CP on implementation of Certain Provisions Concerning Copyright of the Civil Code* (29 December 1996), and *Decree 63-CP of the Government* (24 October 1996), as amended by *Decree 06-2001-ND-CP of the Government* (1 February 2001).

<sup>45</sup> As is required under the obligations of an IPR treaty between Switzerland and Vietnam.

<sup>46</sup> *Official Letter 147-VPCP* of the Office of the Government (9 January 2003). [Note: However, as of the date of this report, there appears to be no movement on this front and Vietnam is currently working on amending provisions of the Civil Code].

<sup>47</sup> Company 21.

## MFN and National Treatment

The BTA requires Parties to accord national treatment with respect to the acquisition, protection, enjoyment, and enforcement of intellectual property rights.<sup>48</sup> Unlike the *TRIPS Agreement*, the BTA does not require Parties to accord MFN treatment with respect to intellectual property.

Through *Ordinance 41-2002-PL-UBTVQH10*, Vietnam introduced the concepts of *MFN* and *National Treatment* including that related to the protection of intellectual property rights.<sup>49</sup> The Ordinance mandates the extension of treatment no less favorable than that accorded to domestic organizations and individuals with respect to the acquisition, protection, enjoyment and enforcement of all intellectual property rights and any benefits derived thereof from organizations and individuals of the country.<sup>50</sup>

In general, U.S. businesses could not identify specific instances where they did not receive national treatment. Some, however, mentioned preferential treatment in the way trademarks must be registered, and discrimination on pricing against non-Vietnamese entities for trademark registration.<sup>51</sup>

## Patents

The BTA requires Parties to make patents available for all product or process inventions in all fields of technology, provided that the invention is new, resulted from an inventive step and is capable of industrial application. Patent owners may prevent others from making, using, selling, offering for sale or importing the subject matter of a patent and/or the product obtained directly by the patented process.<sup>52</sup> The BTA permits compulsory licensing of patents on a case-by-case basis and provides exclusions from patentability in isolated circumstances. Finally, the BTA requires Parties to protect patents for 20 years from the date of filing with the possibility of extension.<sup>53</sup> BTA obligations on patents have been in effect since December 2002 – one year upon entry into force of the Agreement.<sup>54</sup>

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<sup>48</sup> U.S.-Vietnam BTA, Chapter II, Article 3.

<sup>49</sup> Article 13, *Ordinance 41-2002-PL-UBTVQH10* (25 May 2002). *Ordinance 41-2002-PL-UBTVQH10* is applicable to foreign organizations or individuals who are holders of intellectual property rights, including: copyright & relevant rights; industrial property rights including patents, utility solutions, industrial designs, trademarks, geographical instructions such as appellations of origin of goods, trade names, trade secrets, layout designs of integrated circuits, and plant species; and the right to oppose competition that is deemed unfair according to the law on industrial property rights and other intellectual property rights.

<sup>50</sup> Article 2.8, *Ordinance 41-2002-PL-UBTVQH10* (25 May 2002).

<sup>51</sup> Refer to the section on “Trademarks” for elaboration of national treatment issues.

<sup>52</sup> U.S.-Vietnam BTA, Chapter II, Article 7.1 & 7.3.

<sup>53</sup> U.S.-Vietnam BTA, Chapter II, Articles 7.2, 7.7 & 7.10 [Note: Article 7.2 states that allowable exclusions include those introduced for the purpose of protecting public order or morality, protecting human, animal or plant life or avoiding serious prejudice to the environment. Parties may exclude inventions related to surgical and therapeutic procedures. Certain plant and animal varieties may be excluded so long as they are protected under the *International Convention for the Protection of New Varieties of Plants (UPOV Convention, 1991)*].

<sup>54</sup> U.S.-Vietnam BTA, Chapter II, Article 18.1(A).

Patents are currently protected under Vietnam's *Civil Code*<sup>55</sup> and related implementing regulations.<sup>56</sup> Patent owners have the exclusive right to use, transfer, and license rights to other persons. They also have the right to demand that other persons stop infringements and seek compensation for damages caused by acts of infringement. The term of protection is 20 years from the official filing date.<sup>57</sup>

Companies interviewed expressed frustration over their inability to protect the molecule or trade dress of a medicine,<sup>58</sup> noting that the current *Civil Code* and its implementing regulations fail to address this area.

*“There is a patent law that protects the product name, but it does not protect the molecule or the dress....this puts a manufacturing company in a vulnerable position, [particularly because proprietary information is often required to be submitted in order to register new products].”*<sup>59</sup>

As a result, pharmaceutical products and packaging mimicking products of U.S. companies are widely available in the Vietnamese market. This lack of brand protection is distressing for pharmaceutical companies that have worked hard to build their reputation in the market.

Some respondents expressed concern over Vietnam's regulations on compulsory licensing, stating that legislation is too broad and that appropriate compensation is not provided.<sup>60</sup> As such, many companies chose not to sell some of their products in Vietnam. U.S. companies recommend that Vietnam provide imported pharmaceuticals the same legal status as manufactured pharmaceuticals to block the grant of compulsory licenses based on reasons of nonuse or improper use.

In addition to longer waiting periods (up to eighteen months) and higher registration fees for foreign applicants, companies also discussed what they describe as a “Catch-22” situation relating to patent registration. Due to the perceived lack of effective patent protection,

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<sup>55</sup> Article 782 of Vietnam's *Civil Code* states that patent applications are subject to examination as to form and substance, and time limits for such procedures range from 3 to 18 months. Subject matter excluded from protection falls within three main categories: (1) those not considered as inventions, including scientific principles, theories and mathematical methods; aesthetic creations; economic management methods and systems; educational, teaching, training methods and systems; computer programs; designs and planning schemes for construction works; projects for regional development and planning; (2) subject matter which should be protected under other forms of protection other than patents, e.g. layout design of integrated circuits, or plant and animal varieties; and (3) those not industrially applicable such as methods for the prevention, diagnosis, and treatment of human or animal diseases, essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.

<sup>56</sup> *Decree 63-CP*, as amended by Decree 06-2001-ND-CP (1 February 2001).

<sup>57</sup> *Ibid.*

<sup>58</sup> The “trade dress” of a medicine refers to the shape and design of the product, i.e. capsule or pill.

<sup>59</sup> Company 3.

<sup>60</sup> According to Article 802 of the *Civil Code* and *Decree 63-CP*, as amended by *Decree 06-2001-ND-CP* (1 February 2001) under which compulsory licensing in Vietnam falls, compulsory licensing can only be applied in these instances: (1) for reasons of non-use or improper use; (2) if the proposed user has failed to reach an agreement with the owner on reasonable commercial terms and conditions within a reasonable period of time; or (3) for reasons of national defense and security, the prevention and treatment of diseases or other urgent needs of the society. [Note: To date, Vietnam has not granted compulsory licensing under these provisions].

companies are reluctant to spend the resources and time necessary to register a patent. One respondent remarked:

*“[I]f you register your patent you have to disclose all the science and if you disclose science without the ability to protect or enforce than you are just giving it away.... people will use the Trade Secret Law rather than patent registration to protect anything they bring to Vietnam or, more commonly, they just won’t bring it to Vietnam.”<sup>61</sup>*

Under Vietnamese law, a patented product can only be protected if a license is granted before the product is introduced into the market. As such, companies have no legal means to prosecute copycat or counterfeit products already present in the market that infringe against their patents. One pharmaceutical company recently discovered copies of a product that had been patented for more than 15 years sold in Vietnam. The company said that the dress of the product looked exactly the same, was sold in the same milligram amount, and had its own visa number (i.e., it had been registered).<sup>62</sup> This company has written to the Ministry of Health’s Drug Administration, questioning the efficacy, strength and potency of the copycat products, but has yet to receive adequate response from the authorities. This company has counted at least 27 counterfeit products modeled after one of its more popular drugs.

### **Trademarks**

The BTA requires both Parties to protect trademarks, which include: service marks, certification marks and collective marks.<sup>63</sup> The BTA requires Parties to provide the owner of a registered mark the right to prevent anyone from the unauthorized use of identical or similar marks for identical or similar goods or services or where such use would result in a likelihood of confusion.<sup>64</sup> Vietnam agreed to provide a system of registration for trademarks and initial registration must be for a term of at least ten years.<sup>65</sup> In addition, the BTA permits neither compulsory licensing nor encumbering a mark by special requirements.<sup>66</sup> Like patents, BTA obligations on trademarks came into force in December 2002,<sup>67</sup> unless already provided under its existing law.<sup>68</sup>

Trademark protection and registration are governed by Vietnam’s *Civil Code* and implementing regulations *Decree 63-1996-ND-CP* and *Decree 06-2001-ND-CP*. Trademark registration has traditionally been under the jurisdiction of the National Office of Industrial Property (now renamed the Office of Intellectual Property Rights and operating independent of the Ministry of

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<sup>61</sup> According to Company 21, the *Trade Secret Law (Decree 54)* is similar to the *TRIPs* and is quite effective.

<sup>62</sup> Company 3.

<sup>63</sup> U.S.-Vietnam BTA, Chapter II, Article 6.1 [Note: Unlike the *TRIPs*, the BTA explicitly protects certification marks and collective marks as trademarks].

<sup>64</sup> U.S.-Vietnam BTA, Chapter II, Article 6.2.

<sup>65</sup> U.S.-Vietnam BTA, Chapter II, Article 6.2 and 6.8.

<sup>66</sup> U.S.-Vietnam BTA, Chapter II, Article 6.11 and 6.12.

<sup>67</sup> U.S.-Vietnam BTA, Chapter II, Article 18.1(A).

<sup>68</sup> Under the BTA, Vietnam has committed to immediately comply with intellectual property requirements codified in Chapter II of the BTA to the extent possible under its existing laws. U.S.-Vietnam BTA, Chapter II, Article 18.4.

Science & Technology), but allocation of this responsibility has recently been in flux causing a backlog on registrations.<sup>69</sup>

Current legislation on trademark registration in Vietnam is of concern to U.S. trademark holders. As with patents, Vietnam employs a “first to register” policy (as opposed to a “first to use” policy) with regard to trademarks, resulting in a large number of registered copycat trademarks. Although the law now requires publication of pending trademark applications, it still does not provide for opposition procedures. Therefore, individuals and companies that wish to oppose the registration of a mark they consider incompatible with their own have no recourse. In addition, final decisions on trademark registration refusal or cancellation are not subject to judicial review.

As such, a large U.S. company has been unable to register one of its trademarks because a copycat product had already been registered in Vietnam.<sup>70</sup> As of July 2003, the company’s trademark remains unregistered despite numerous requests and the provision of evidence of infringement. Another company found, upon market entry, that its well known trade name and mark had been infringed upon and a similar product was already on the market. After much discussion and examination, authorities were able to finally cancel the latter’s trademark, and the situation has been resolved. Several other companies whose well-known marks have been used by local companies in Vietnam have had their grievances addressed by relevant authorities but enforcement continues to be a challenge.

Further, U.S. companies noted discrimination in the trademark registration process. According to Vietnamese law and practice, only companies with representative offices are allowed to register their trademarks directly. Companies that have not entered the Vietnamese market are required to engage local agents to register their trademarks, which otherwise would not be protected in Vietnam. This requirement contributes to an added cost to market entry. One respondent noted:

*“[T]he State licenses agents to register trademarks, patents and to process all administrative IP filings. Foreign agents are not eligible to be licensed, and foreign entities (except right holders) are not authorized to make such filings and must use a licensed agent. Foreign law firms must use these agents, and cannot file directly. It is also quite expensive to the company that files, as there are two cost layers.”<sup>71</sup>*

### **Copyright and Related Rights**

The BTA requires Parties to protect all “works” and, like the TRIPS Agreement, extends this protection to computer programs and compilations of data.<sup>72</sup> Authors of these works (whether literary, dramatic, musical, computer software) are specifically provided the right to authorize or prohibit the importation of copies of the work, the direct or indirect reproduction of the work,

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<sup>69</sup>At the time of this report and after much back and forth, the National Office of Industrial Property has resumed trademark registration operations after several months of suspension and a backlog of 15,000 applications.

<sup>70</sup> Company 50.

<sup>71</sup> Company 78.

<sup>72</sup> U.S.-Vietnam BTA, Chapter II, Article 4.1.

communication of the work to the public, and the rental of the original or a copy of a computer program for the purposes of commercial advantage.<sup>73</sup> Unless noted otherwise, most BTA provisions on the protection and enforcement of copyright and related rights came into effect on June 2003.<sup>74</sup>

The Copyright Office of Vietnam, under the Ministry of Culture and Information, currently maintains control and supervision over all copyright registration and procedures in Vietnam, although the Government is currently considering separating the jurisdiction over literary and artistic works from “scientifically” related copyrights such as software and integrated circuits between the Ministry of Culture & Information and the Ministry of Science & Technology.<sup>75</sup>

In an effort to come into compliance with its international obligations, Vietnam is currently considering amendments to the *Civil Code*. The amendments were scheduled for commentary in the National Assembly but thus far no plan for its consideration has been scheduled. Those who follow developments in this area stress the importance of getting such legislation through the National Assembly on a timely basis and have expressed concern over the multitude of intellectual property related amendments that will need to be addressed in the coming year.

In general, U.S. copyright holders expressed concern over the clarity of copyright regulations, the lack of effective and sustainable enforcement, while recommending that the Government of Vietnam be the first to set an example on how to honor intellectual property rights.<sup>76</sup> Further, companies in Vietnam have noticed a distinct difference in the ability and effectiveness of the authorities to protect software, music and video recordings, and other forms of copyright – software, music & video recordings being widely available in pirated form with other forms of copyright such as pornography and “cultural items” being more effectively controlled.

Companies interviewed have noted a general lack of clarity on the laws concerning copyright and how right holders may guarantee their ownership and enforce their rights in Vietnam. In particular, companies have noted the lack of clear definitions of terms. One respondent remarked that it was “*like literally copying the lofty provisions of [IP] Conventions into the law*”<sup>77</sup> without putting it in a local and practical context. A company that had recently conducted its own raid on pirated products explained:

*“[When] we conducted our first raids...the economic police only confiscated a portion of the counterfeit products, distinguishing counterfeits from pirated products. The market management bureau, the administrative enforcement side, seized some 15,000 discs... at a shop with some 500,000 discs... so a lot was left behind. Even though [we] spent a lot of time and money explaining this to them,*

<sup>73</sup> U.S.-Vietnam BTA, Chapter II, Article 4.2, 4.6 & 4.7.

<sup>74</sup> U.S.-Vietnam BTA, Chapter II, Article 18.1 (B). [Note: Under the BTA, Vietnam has also committed to immediately comply with intellectual property requirements codified in Chapter II of the BTA to the extent possible under its existing laws. U.S.-Vietnam BTA, Chapter II, Article 18.4].

<sup>75</sup> With increasing digital technology applied to the recording and presentation of artistic works, for example, such a consideration, according to companies, could potentially cause problems associated with jurisdiction of subject matter.

<sup>76</sup> Company 4.

<sup>77</sup> Company 21.



*the market management bureau was confused. ...And when it came time to impose penalties, they did so under the trademark rule. We challenged them on that and they said the reason they did not impose penalties under the copyright rule is because 'it is a penalty for copying and we didn't see them copying'. [This is why] we think definitions are needed."*<sup>78</sup>

Some companies observed the not uncommon use of pirated software in Government agencies and called for the Government to be the first to set an example if it expected to develop effective strategies to deter rising IPR violations. Many companies also noted the inability to sustain enforcement because of insufficient deterrents in the form of penalties. Although penalties have increased markedly over the years, they reportedly are not high enough to deter a company from continuing its lucrative and mobile mini-industry. In many cases, pirated software or video recordings have been confiscated from the infringers but the "bigger investment" – the equipment for burning CDs - has not been taken.

### **Enforcement**

Under the BTA, Parties must provide effective enforcement to prevent IPR infringement, including judicial and administrative procedures, provisional measures, and criminal procedures and penalties for willful trademark counterfeiting or infringement on a commercial scale.<sup>79</sup> Remedies for IPR violations must be expeditious and substantial enough to deter future infringements and include the ability of judicial authorities to order IPR infringers to pay the right holder damages adequate to compensate for the injury sustained, to desist from an infringement, to dispose of infringing and counterfeited goods and to order provisional measures.<sup>80</sup>

Under Vietnamese law, right holders whose intellectual property is infringed may choose to pursue remedies administratively (ruling from agencies and the Administrative Courts), through civil litigation (under Vietnam's *Civil Code* and through the *Ordinance on Procedures for Judgment of Civil Cases* (1989) and the *Ordinance on Administrative Procedures*<sup>81</sup>), or through criminal prosecutions (under Vietnam's *Criminal Code*). Most companies have sought recourse through administrative means considering the underdevelopment of Vietnam's judicial system and the lack of effective civil procedures.

#### *Administrative Sanctions and IPR Enforcement*

Regulations on administrative remedies in the field of industrial property (patents, industrial designs, utility models and trademarks) are provided under *Decree 12-2000-ND-CP* (6 March 1999). The procedures as to how a right holder lodges a complaint with the competent authorities is provided in the *Law on Complaints and Denunciation* (2 December 1998). Fines for importers or manufacturers found to have infringed on trademarks range from VND5-20 million (USD\$330 - \$1300), and include suspension from circulation, confiscation and

<sup>78</sup> Company 4, represented by Company 21.

<sup>79</sup> U.S.-Vietnam BTA, Chapter II, Articles 11 through 15.

<sup>80</sup> U.S.-Vietnam BTA, Chapter II, Article 12 & 13.

<sup>81</sup> *Law on Complaints and Denunciations* (2 December 1998) and the *Ordinance on Administrative Procedures* (as amended on 25 December 1998). See also section on "Administrative Review" under the "Business Facilitation" chapter.

destruction of goods and compulsory compensation. *Ordinance 44-2002-PL-UBTVQH10*, promulgated in July 2002 raised the limit on fines of up to VND100 million for violations of intellectual property.<sup>82</sup> Administrative recourse on copyright violations is governed by *Decree 31-2001-ND-CP on Sanctioning Administrative Violations in the Culture-Information Field* (26 June 2001).

In general, companies voiced two main concerns regarding administrative remedies: (1) while they were glad for the existence of such recourse, many believe that the procedures for dealing with cases of infringement were burdensome and time-consuming and that gaps in the law still exist, which exacerbate the situation by promoting arbitrary interpretation; and (2) fines for violations continue to be too low to deter future infringement.

Although administrative recourse is a more common and somewhat speedier approach in seeking remedies for trademark violations, companies that pursue this avenue continue to be frustrated by the time consuming procedures. According to a legal representative of one company, its trademark issue has not been resolved after three years and is still sitting at the National Office of Industrial Property.<sup>83</sup> The citations below represent additional problems that exist:

*“There’s just not enough information.... What that means when we try to enforce a trademark is that [the authorities] end up taking an arbitrary approach: if two letters in the trademark are different, then they are not confusingly similar. The small difference between Panadol and Parado would be acceptable in Vietnam.”<sup>84</sup>*

*“In dealing with an IPR infringement, a company might deal with a variety of Government agencies, such as the NOIP<sup>85</sup>, the Administrative Courts, the Criminal Courts, a number of police departments (district, ward, market, economic), the Ministry of Trade, the Ministry of Culture and Information, and the Ministry of Science and Technology. Add to that, the problem of dealing with authorities at different levels of Government: provincial, urban, and central.”<sup>86</sup>*

To mitigate the web of regulations and responsible authorities that cause gridlock in enforcement, some companies interviewed have conducted their own investigations. Companies interviewed expressed their satisfaction with the cooperation of the economic police although admittedly, those that have succeeded have been operating in Vietnam long enough to have figured out the system to know who to approach and have established relationships with the relevant authorities. Key to these raids, according to many interviewed, is not only the confiscation but the destruction of pirated and counterfeit goods.

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<sup>82</sup> *Ordinance 44-2002-PL-UBTVQH10 on the Maximum Penalties for Organizations and Individuals Committing any Breach of State Administrative Regulations which does not Constitute a Crime* (1 October 2002).

<sup>83</sup> Company 21. [Note: The National Office for Industrial Property (NOIP) has recently been renamed the Office of Intellectual Property Rights].

<sup>84</sup> Ibid.

<sup>85</sup> The National Office for Industrial Property (NOIP) has recently been renamed the Office of Intellectual Property Rights.

<sup>86</sup> The National Office for Industrial Property (NOIP) has recently been renamed the Office of Intellectual Property Rights.

A legal representative commented on a client's raid:

*"[The authorities] did seize products on their unauthorized raids. The products they seized were then auctioned off. The retailers that bought the goods at auction received papers from the Government. So these counterfeit goods were converted into legitimate goods through the police raid and auction. The same shops bought them back and are selling them, now with the paperwork to legitimize the products!"*<sup>87</sup>

Another company was recently informed by a local Customs authority of incoming counterfeit product at a port. The counterfeit product was confiscated and destroyed and the importer is now reported to be facing charges of up to VND 100 million.<sup>88</sup>

Despite increasing penalties, U.S. companies in general viewed penalties for intellectual property right infringers in Vietnam as inadequate to deter future violations. Adding to this problem, companies cited confusion in the process of identifying appropriate penalties. According to one company, there is a maximum penalty for proven counterfeiters and for infringers, the latter being far more severe (up to life in prison). Legal advisors representing companies whose trademarks or copyright have been infringed upon believe Government officials sometimes confuse the two types of IPR violations. Given that such a determination can make a tremendous difference in the assessment of penalties, these companies reinforced the need to provide clear definitions in all legal documents and Court procedures. Others felt that effective enforcement and adequate compensation for damages could only be achieved by addressing intellectual property violations through other legal means:

*"More than 90% of [all] patent cases go to Administrative Court, which is very effective. However, awards are not equivalent to damages. Almost no damages are paid"<sup>89</sup>.... If you want to request more than VND 100,000, [in penalties] you have to go to [the Criminal] Court."*<sup>90</sup>

#### *Civil Procedures and IPR Enforcement*

At the provincial and higher levels, the People's Court of Vietnam (also referred to as the Civil Court) presides over disputes or infringements relating to industrial property rights. The People's Court adjudicates claims of abuse of industrial property rights, disputes concerning royalty or remuneration, claims on application right and the right of authorship, and disputes relating to contracts concerning transfer of ownership right or licensing contract for the right to use objects of industrial property.

In December 2001, Vietnam's Supreme Court issued specific guidelines for resolving copyright disputes in Civil Courts. These guidelines were issued to ensure uniform application of the *Civil Code* in dealing with copyright disputes and include information on the types of copyright

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<sup>87</sup> Company 21.

<sup>88</sup> Company 1.

<sup>89</sup> Damages can be ordered to be paid to the right holder, but only up to USD\$66 [VND1,000,000].

<sup>90</sup> Company 77.

disputes and jurisdiction, right to initiate legal action, applicable laws involved, and guidelines for the co-ordination between Courts, Inspectorates and Copyright Offices.

No U.S. companies interviewed had ever lodged a case successfully with the Civil Courts, although some have tried. Legal advisors maintain that trial and error is necessary in order to test the system, particularly since the regulations governing procedures continue to be unclear. There have however been a couple of known cases involving copyright disputes between Vietnamese Parties. Reportedly, civil prosecution in this area was found to be ineffective, particularly since damages were inadequate,<sup>91</sup> the provisions did not allow for attorney fees to be recovered, and prompt provisional relief was not provided, allowing infringers to hide and transfer assets.<sup>92</sup>

Vietnam is currently considering a new *Civil Procedure Code*, the draft of which has been debated at the most recent National Assembly Session (October/November 2003). It is currently scheduled for ratification by the National Assembly in May 2004.

#### *Provisional Measures*

Currently, Courts with jurisdiction over IPR related violations and disputes decide on the application of provisional measures. Detailed regulations for this area are provided in the *Ordinance on Procedures for Judgement of Civil Cases* (1989). Under this Ordinance, the competent State bodies may impose temporary administrative measures. Provisional measures include: the search and detention of material evidence, facilities, and equipment used to produce infringing products; ordering the infringing party to stop further activity; confiscation of infringed goods; and temporary seizure of goods for the purpose of ensuring proper compensation. Provisional measures may be lifted once they are no longer considered necessary by the imposing authority. The Court may order provisional measures on its own initiative or at the request of the Supreme People's Procuracy or the concerned Parties. Based on the opinions of the Parties involved, the Court may make an immediate decision, effective thereafter. Either party may appeal this decision, in which case the Supreme People's Procuracy would send a proposal to the Court or to the Chief of Justice directly. The Court or Judge is then required to respond to the appeal within three days.

Vietnam is currently considering further elaboration of provisional measures through a proposed joint circular from the Supreme People's Court, the Supreme People's Procuracy, and the Ministry of Science and Technology.

#### *Border Measures*

The BTA requires Parties to allow right holders to lodge an application with the Customs authorities to suspend release of imported goods suspected to be counterfeit trademark goods or unauthorized copies of works protected by copyrights or neighboring rights.<sup>93</sup>

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<sup>91</sup> In one case where the defendant was found guilty of distributing one million packs of infringing cigarettes a month for 50 months, the Court awarded the equivalent of USD\$33 to the plaintiff.

<sup>92</sup> International Anti-Counterfeiting Coalition 2003 Submission to USTR. Available at <http://www.iacc.org>

<sup>93</sup> U.S.-Vietnam BTA, Chapter II, Article 15.1.

Articles 57 through 59 of the *Customs Law*, effective 1 January 2002, provide procedures for intellectual property right holders to register their rights with Vietnamese Customs authorities and for requesting the provisional suspension of goods suspected of IP infringements. *Decree 101-ND-CP* (31 December 2001) provides more detailed guidelines on border measures for IPR enforcement. The Decree states that goods may be seized when the following three conditions are met: (1) seizure is specifically requested by the trademark owner who provides details as to the nature of the infringing goods; (2) the trademark owner presents a certificate of trademark registration; and (3) upon posting of a security bond by the holder of a trademark. Similar legislation has also recently been issued for copyrighted goods.<sup>94</sup>

One company interviewed explained the process:

*“If a company predicts infringement, they must (1) obtain evidence; (2) figure out the expected shipment date and time; (3) give them a bond – typically 20% of the value of the goods, which is very high. This must be done for each shipment.”*<sup>95</sup>

To help crackdown on counterfeit products in Vietnam, the same company felt that outgoing exports should also merit the same amount of scrutiny:

*“Customs does not have the right to check goods for export at the border, unless there is strong evidence of illegal content. Prior to the new Customs Law, all exporters were required to provide documentation proving that the goods to be shipped were not counterfeit. The new Customs Law removes that requirement, which makes it easier for counterfeit goods to leave the country. It is a good idea for businesses to provide proof of authenticity. I don’t think this would be unnecessarily burdensome.”*<sup>96</sup>

#### *Criminal Penalties and IPR Enforcement*

Vietnam’s *Criminal Code* entered into effect on 1 July 2000 and contains provisions concerning criminal enforcement against violators of intellectual property, including provisions that boost the Government’s ability to combat counterfeiting and copyright violations. In general, counterfeiters or traders of counterfeit goods (foods, fertilizers, veterinary medicines, plant preservations, animals and plant strains, for example) could face punishment of one to five years in prison or up to fifteen years in serious cases. Trademark infringement is punishable with fines and prison terms of six months to three years. An amended *Criminal Procedure Code* was passed by the National Assembly on 18 November 2003. According to the latest draft, these amendments are expected to produce an extensive overhaul of the current *Criminal Procedure Code*.

Although few companies interviewed had ever transferred administrative cases to criminal investigation, those who did attempt this cited difficulties and lack of clarity in the necessary procedures. However, one company stated:

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<sup>94</sup> *Joint Circular 58-2003-TTLT-BVHTT-BTC Providing Guidelines on Protection of Copyright at Customs Offices with Respect to Imports and Exports.* (17 October 2003).

<sup>95</sup> Company 1.

<sup>96</sup> Company 1.

*“The fact is we already go separately to the economic police versus the market management bureau depending on the nature of the case. The economic police can get involved even if it is not necessarily criminal. ...We are not really sure what their threshold is for getting involved but they seem willing to get involved and help. ...The movement now is that people are trying to get criminal remedies, not just civil remedies. What they found is that intellectual property infringement is so profitable that civil remedies will not be enough to stop it. For the price of nothing, you can create something of huge value.”<sup>97</sup>*

Those interviewed on the subject believed that criminal remedies were available provided that proof was presented in advance (typically proof is collected by the infringer but the economic police also get involved).

*“If you come to the police with NOIP confirmation and evidence then you do get action.”<sup>98</sup> Otherwise it is hit or miss. [Intellectual property violations] don’t seem to be a high priority. But if you give them all the information and proof they need, they are more likely to take action... A big issue for the police is to do whatever they can to avoid making mistakes.”<sup>99</sup>*

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<sup>97</sup> Company 21.

<sup>98</sup> The National Office for Industrial Property (NOIP) has recently been renamed the Office of Intellectual Property Rights.

<sup>99</sup> Company 65.

### III. Trade in Services

In Chapter III of the BTA, Vietnam has committed to liberalize a broad array of services sectors, including, among others, telecommunications, accounting, banking, insurance and distribution services. These broad commitments will create valuable opportunities and ensure access to the Vietnamese market by U.S. companies and investors. Like the *General Agreement on Trade in Services* (GATS) under the WTO, Chapter III and its annexes include rules that extend to measures taken by central, regional or local Governments, as well as by non-Governmental entities exercising authority delegated by the Government. The Agreement embodies general disciplines on MFN, market access, national treatment, domestic regulation, monopolies and exclusive service suppliers, while incorporating by reference the *GATS Annex on Financial Services*, *Annex on Movement of Natural Persons* and *Annex on Telecommunications* and the *Telecom Reference Paper*. *Annex G* of the BTA, defines the extent to which Vietnam and the United States will provide market access and national treatment to each other's services and service suppliers (through various modes of delivery).

For the purposes of this survey and in light of Vietnam's services commitments phasing in over a longer period of time, the report below focuses on key sectors of particular interest to U.S. companies such as telecom, banking, insurance and legal services. Other services such as express-delivery and distribution services will also be addressed.

#### Telecommunications Services

Vietnam undertook a variety of commitments on telecommunications services. First, Vietnam promised to provide market access and national treatment for value-added services (e.g., voice mail, e-mail) and basic telecommunication services (e.g., voice telephony and certain data services). For instance, for value-added services, Vietnam agreed to permit U.S. companies to establish 50% U.S. equity joint-ventures with Vietnamese partners beginning in December 2003 (for Internet services, this commitment phases-in in December 2004). In basic telecom services, Vietnam agreed to permit U.S. companies to establish 49% U.S. equity joint-ventures beginning in December 2005 (for non-voice services such as data) and beginning in December 2007 (for voice telephone services). Second, Vietnam agreed to abide by the GATS Annex on Telecommunications, which requires Parties to ensure that service suppliers have reasonable and non-discriminatory access to and use of the public telecom network and services. And third, Vietnam committed to the WTO Telecommunications Reference Paper, which contains a number of pro-competitive regulatory obligations relating to anti-competitive practices, interconnection, and independent regulation.

A new *Ordinance on Post & Telecom* was issued in May 2002 to address Vietnam's international obligations. *Ordinance 43-2002-PL-UBTVQH10* which came into effect in October 2002 and its implementing *Decree 90-2002-ND-CP*<sup>100</sup> established a separate Ministry of Posts & Telematics to regulate the industry and abolished the Vietnam Post & Telecom's

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<sup>100</sup>*Decree 90-2002-ND-CP on Establishing Functions, Tasks, Mandates and Organization of the Ministry of Post and Telecom* (11 November 2002).

(VNPT) monopoly over the provision of telecom services. Since then, several new Vietnamese service providers have entered the market including the semi-private Saigon Postel, and Electricity Telecommunications and Information Company (ETIC). Further, rules on Internet service provision were also issued in 2001, allowing non-state-owned and controlled enterprises to provide Internet access in Vietnam. At the time of this report, Vietnam's Ministry of Planning & Investment was drafting regulations to permit foreign joint-ventures to provide value-added services (email, voicemail, fax, data and code services). The monopoly on the provision of international basic telecommunication services still remains and is expected to continue.

Notwithstanding market access obligations that phase-in over the next few years, U.S. companies in this sector raised four general issues. First, companies commented on the lack of an independent regulator. The *Telecom Reference Paper* requires the establishment of an independent regulator separate from and not accountable to any telecom supplier. Vietnam's Ministry of Post & Telematics now regulates the sector; however, questions were raised about whether it is truly separate from the primary telecom operator Vietnam Post & Telecom (VNPT):

*"A body within MOPT seems to be regulating the telecommunications sector; however, everyone still has to use VNPT's switch link.....even though there is ostensibly a regulator, most of the personnel come from VNPT, and the two even share the same address! So, even if there is an independent regulator within the Ministry, facts seem to suggest otherwise."*<sup>101</sup>

Second, companies noted that international interconnection rates remain well above cost.<sup>102</sup> The *Telecom Reference Paper* (incorporated into the BTA) requires Vietnam to ensure that Vietnam's major telecom supplier charges U.S. telecom suppliers cost-oriented rates for international interconnection. One company noted:

*"[Vietnam] charges roughly forty cents per minute for the completion of calls from the United States into Vietnam even though the cost for completing such calls is less than ten cents per minute."*<sup>103</sup>

The U.S. Federal Communications Commission sets benchmarks for interconnection rates for Vietnam at just USD\$0.23. Moreover, the cost for completing calls into Vietnam from the United States is much less. Such aberrations make it difficult for U.S. companies to bring service to and from Vietnam, particularly when they have to make up for the extra costs associated with interconnection. One major long distance carrier said it had no choice but to cut the number of circuits it could carry into Vietnam from the U.S., putting a strain on the already thin number of circuits available and making it difficult for customers to readily get connections when calling Vietnam.

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<sup>101</sup> Company 36. The company did however stress that the regulator tries to be impartial and claims to be pro-competitive.

<sup>102</sup> Note: At the time of this publication, *Decision 217-2003-QD-TTg* (27 October 2003) had recently been issued to address cost-based pricing. *Decision 217* provides that post and telecoms fees must be calculated on the basis of input costs and are comparable to telecoms rates in the region and the world. Where it is deemed necessary, "the State will make interventions to stabilize telecoms fees to protect the legitimate rights and interests of users and telecoms businesses."

<sup>103</sup> Company 36.



Third, foreign investors complained about the high cost of leased lines and their inability to use such circuits for Internet connectivity. The *GATS Telecom Annex* (incorporated into the BTA) requires Vietnam to ensure that foreign-service suppliers can access and use leased lines on reasonable and non-discriminatory terms and conditions. Companies noted that the high leased line rates – ranging from USD\$15,000 - \$21,000 a month depending on bandwidth – are not reasonable, particularly in light of lower regional benchmarks. Companies also raised the issue of the prohibition against the use of such leased lines to access the Internet and felt that this was not considered a “reasonable” term and condition.

Fourth, on telecom pricing generally, while most companies interviewed expressed appreciation for the decrease in the price of telecommunication services over the years, all agreed that the prices continue to be too high, and noted Vietnam’s reputation as having the highest telecom rates in the region. High international interconnection rates were cited as a main reason for such high end-user costs.

### **Banking Services**

Under commitments made by Vietnam in the BTA, U.S. financial service providers may establish bank branches, joint-ventures with Vietnamese banks, wholly-owned U.S. financial leasing companies, or joint-venture financial leasing companies with Vietnamese partners. For the first three years (until December 2004), the only legal form apart from banks and leasing companies in which U.S. companies may provide financial services is through joint-ventures with Vietnamese partners. During the first nine years under the Agreement (until December 2010), U.S. equity in joint-venture banks must be between 30% and 49%. After that, U.S. banks may establish 100% U.S. owned subsidiary banks. Over an eight to ten year phase-in period, Vietnam agreed to permit U.S. bank branches to increase the amount of deposits they can accept in dong from certain Vietnamese legal and natural persons relative to the branch’s paid-in capital. After the phase-in period, U.S. bank branches are entitled to full national treatment. Finally, beginning in December 2007 - eight years after the effective date of the Agreement - financial institutions with U.S. equity will be allowed to issue credit cards on a national treatment basis.

As of the date of this publication, the State Bank of Vietnam has accordingly increased the percentage of local currency deposits that U.S. banks may accept.<sup>104</sup> As of 10 December 2003, U.S. banks have been allowed to accept up to 250% of their chartered capital in local deposits. However, because of the underdeveloped market, U.S. banks interviewed including licensed 100% U.S.-owned banks, have not availed themselves of this increase. Most banks have not focused on consumer banking services because of the high up-front investment involved in establishing branches and setting up ATMs, together with a lengthy product approval process.

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<sup>104</sup>The State Bank of Vietnam issued *Official Letter No. 404-NHNN-CNH on the Receipt of VND Deposits by American Bank Branches* (22 April 2003). This *Official Letter* restates the commitment made by Vietnam in the U.S.-Vietnam Bilateral Trade Agreement with regard to the percentage of charter capital and the limit on VND deposits that an American bank branch is allowed to accept from Vietnamese legal entities or natural persons with whom it does not have a credit relationship. [Non-U.S. banks are currently only allowed to accept only up to 50% of their legal capital in local currency deposits].

*“The restriction on deposits from Vietnamese nationals structurally inhibits [our] bank’s ability to offer a number of banking services as this denies [us] of a large deposit base which is required to offer retail banking services”<sup>105</sup>*

Instead, U.S. banks interviewed focused on factors in addition to those addressed by the BTA which affect the scope of their operations. These factors play into whether market access concessions provided through the BTA can be effectively utilized in the future. Specifically, on corporate lending, because of preferential treatment provided to state-owned banks in Vietnam, and lower interest rates they offer, along with the lack of credit among Vietnamese enterprises, foreign banks are often precluded from the provision of loans to the Vietnamese corporate sector. Without greater governance among state-owned banks and equal application of banking regulations between local and foreign banks, foreign banks will, often by choice, not be able to participate in the provision of such services.

One company noted:

*“...local banks sometimes are recommended to make loans to companies or projects which are not economically viable or profitable, but because of considerations other than economic ones, i.e. they employ large number of workers or they are of strategic importance, many projects are funded at subsidized interest rate, even good ones which should be able to produce good return at normal market rates.”<sup>106</sup>*

Additionally, companies interviewed expressed concern over their inability to compete on an equal footing with local banks because prudential measures that applied to them did not necessarily apply strictly to local banks. To illustrate this point, one company brought up an example of a situation where foreign exchange rates were not uniformly applied:

*“The foreign exchange rate in Vietnam is set by the central bank which does not take into consideration the demand/supply of the market. Currently the “official rate”, does not always resemble the market rate, but local banks seem to be giving out these market rates...”<sup>107</sup>*

Companies were also asked if they thought Vietnam’s prudential regulations and capital requirements exceeded international norms. For instance, Vietnam requires minimum legal capital requirements for establishment of a foreign credit institution. For foreign bank branches, the requirement is USD\$15 million; for joint-venture banks, it is USD\$10 million; and for foreign non-banking credit institutions, it is USD\$5 million.<sup>108</sup> While not necessarily inconsistent with international norms, or with what Vietnam has notified as a national treatment exception under the BTA, companies noted that levels set were high by international

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<sup>105</sup> Company 35.

<sup>106</sup> Company 35. This company said it only lent against cash-flow projections and would only use security as a last resort.

<sup>107</sup> Company 35.

<sup>108</sup> Vietnam took national treatment exceptions for these prudential measures under Annex G of the BTA.

standards.<sup>109</sup> Such distinctions can deter banks from entering the market and expanding their scope of operation in spite of market access opportunities provided through the BTA.

One company noted:

*“Foreign banks should be able to set up a branch in Vietnam with capital requirements at the same level as a local bank. Besides the capital contribution, foreign banks also bring know-how, expertise, new technology, new products into the market which makes it different from the newly set up local banks.”*<sup>110</sup>

Other prudential measures affect lending. For example, credit institutions are also not permitted to exceed 15% of its equity in total loans, and foreign currency lending is highly restrictive.<sup>111</sup>

One company observed:

*“Banks and companies should be allowed to decide on the currency of their borrowing depending on the purpose and availability of financing.”*<sup>112</sup>

Another company said:

*“... [What] hinders our business is lending in hard currency can only be for imports and pre-export finance. This prudential measure limits the foreign debt that companies can take out. Nevertheless, the central bank has relaxed this regulation and we anticipate further loosening in the near future.”*<sup>113</sup>

In interviews, companies were also asked about mortgaging services. For the first three years under the BTA or until December 2004, financial institutions with 100% U.S. equity ownership may not take an initial mortgage interest in land use rights (LURs). After this time, these institutions will be able to take an initial mortgage interest in land-use rights held by foreign-invested enterprises, and may use mortgages or land-use rights for the purposes of liquidation in case of default. Although Vietnam already allows foreign investors to mortgage the value of land with on-shore foreign bank branches,<sup>114</sup> and has recently even issued legislation enabling LURs to be mortgaged with offshore banks on a trial basis,<sup>115</sup> the conditions under which LURs

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<sup>109</sup> By way of comparison, China’s requirements for establishment is USD\$12 million for a highly restricted license increasing with expansion in business scope to USD\$72 million per branch for a full license to conduct banking business with foreign and local corporate and retail customers denominated in both foreign and local currency. (American Chamber of Commerce PRC, *Report on WTO Implementation, 2002*).

<sup>110</sup> Company 35.

<sup>111</sup> Article 18 of *Decision 1627 of the State Bank of Vietnam Promulgating Lending Regulations* (31 December 2001) as amended by *Decision 28 of the State Bank of Vietnam* (11 January 2002) and *Decision 688 of the State Bank of Vietnam* (1 July 2002).

<sup>112</sup> Company 35.

<sup>113</sup> Company 75.

<sup>114</sup> *Decision 79-2001-ND-CP* (1 November 2001) of the Government on the Amendment of and Supplementation to *Decree 17-1999-ND-CP* (29 March 1999) on Procedures for Exchange, Transfer, Lease and Sub-lease of a Land Use Right and Mortgage of the Value of Land Use Rights, and *Decree 81-2001-ND-CP* (5 November 2001) allowing Overseas Vietnamese to Buy a House in Vietnam provides guidance on these changes.

<sup>115</sup> *Decree 85-2002-ND-CP* of the Government (25 October 2002) amending *Decree 178-1999-ND-CP* of the Government (29 October 1999) on Security for Loans Obtained from Credit Institutions. In practice, this is not

may be mortgaged are restrictive and no U.S. banks currently licensed seem to be interested thus far.

One company interviewed said:

*“Although foreign bank branches have recently been allowed to take LURs as mortgage, we feel that practical enforceability of mortgaged LURs remain a concern which would hinder the operation of consumer banking as well as offshore loans.”*<sup>116</sup>

In general, U.S. banks felt that the current environment made it difficult for them to be able to compete with local banks and all expect to enjoy full national treatment in the near future. They hoped that the creation of a level playing field among local, state-owned and foreign banks would be addressed in Vietnam’s WTO accession process.

### **Insurance Services**

Under the BTA, Vietnam agreed to allow market access for the cross-border supply of insurance services provided to enterprises with foreign-invested capital or foreigners working in Vietnam.<sup>117</sup> Three years after the entry into force of the Agreement (December 2004), U.S. companies will be permitted to form joint-ventures with a Vietnamese partner, as long as U.S. equity participation does not exceed 50%. Five years after entry into force (December 2006), percentage limitations on U.S. equity will be eliminated. For a period of three years (between December 2001 and December 2004) after the effective date of the Agreement, companies with U.S. equity participation are prohibited from providing motor vehicle, construction and other types of “mandatory” insurance. After this period, joint-ventures with some U.S. equity participation will be permitted to provide this type of insurance, and after six years (December 2007), companies with 100% U.S. equity participation will be able to do so. Until five years after the effective date of the Agreement (December 2006), reinsurance must be conducted through the Reinsurance Company of Vietnam and must be in a minimum proportion of 20%.

There is currently only one licensed U.S. insurance service provider in Vietnam – a 100% foreign-owned company offering life insurance.<sup>118</sup> Several other American insurance providers are currently seeking 100% foreign-owned licenses to provide life or non-life insurance services in Vietnam. Under the BTA, Vietnam is required to permit the establishment of 100% foreign-owned insurance service providers within five years of entry into force of the Agreement, or by December 2006.

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expected to be implemented until all parallel laws (*Law on Credit Institutions, Law on Foreign Investment, and Law on Land*) relevant to this policy are amended. The *Amendments to the Law on Land* has recently been passed by the National Assembly but this issue has not been addressed. For now, the State Bank of Vietnam is allowing mortgaging with off-shore banks on a trial basis.

<sup>116</sup> Company 35.

<sup>117</sup> U.S.-Vietnam BTA, Annex G, p. 14. Vietnam also made cross-border market access commitments in reinsurance services; insurance services in international transportation; insurance brokering and reinsurance brokering services; and advisory, claim settlement and risk assessment services.

<sup>118</sup> In addition, there is one [U.S.-Vietnam] joint-venture company licensed to provide insurance brokerage services.

While recognizing that BTA obligations concerning the licensing of 100% foreign-owned insurance service providers do not enter into force for a few more years, U.S. companies seeking such licenses expressed concern over the current level of transparency in licensing procedures, noting that existing guesswork made planning difficult. While expressing support for the BTA, some companies noted that the BTA framework with phase-in periods and guidelines for increased market access “locked-in” and “structured” developments in this sector where licenses were once provided more randomly but heavily dependent on the success of a company’s relationships and the number of years established in Vietnam.

*“While BTA provides market access to U.S. insurers of up to 50% and 100% ownership after December 2004 and December 2006 respectively, it seems to restrict access to the insurance market for the time being. It is important to note that regardless of these phase-in provisions, there are none preventing Vietnam from opening its insurance sector sooner than what it has committed to in the BTA..... Vietnam has since 1996 been granting licenses to foreign companies from countries that do not have such phase in provisions or a “BTA” with Vietnam. But we [U.S. companies] are currently placed in the context of the BTA, [whereas our foreign counterparts are not restricted by the BTA].”<sup>119</sup>*

Despite this, unlicensed companies interviewed have chosen to pursue 100% foreign-owned licenses because they feel there is room in the market for life insurance (less than 1% of the population is currently being served by five insurance companies including state-owned companies and currently). However, companies noted that the long process of applying for<sup>120</sup> and figuring out the criteria for a license is characterized with uncertainty. For them, the criteria appear to be difficult to define and some felt that in the end it was still a political process.

Under Vietnam’s *Insurance Business Law* which applies to both domestic and foreign companies, all insurance companies must: (1) have at least USD\$10 million in capital;<sup>121</sup> (2) have experienced and effective management; and (3) they must provide economic proof that there is a need for such services. For foreign-invested companies to be licensed, however, there seems to be additional criteria. According to *Decision 175-2003-QD-TTg*, to receive a license, a foreign-invested insurance company should: (1) be a large company with experience in the insurance business with an international network; (2) be a company of a country that is a big investor or have a large trade and investment volume with Vietnam; (3) be a company with long term investment, and contribute to market development through training cooperation programs, technology transfer, and technical assistance to Vietnam.<sup>122</sup>

Companies interviewed also expressed concern over the lack of an independent regulator for insurance in Vietnam, noting in particular the possible conflict of interest that the Ministry of

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<sup>119</sup> Company 32.

<sup>120</sup> Under Vietnamese insurance licensing procedures, the waiting period for notification of insurance licenses is 60 days. Several companies have been waiting way beyond this period, without notification.

<sup>121</sup> Companies interviewed did not view this capital requirement as inconsistent with international norms, or higher than that imposed by other countries. In China for example, the legal capital requirement for the establishment of an insurance company is USD\$24.2 million (reduced from USD\$60.5 million in August 2003) for a nationwide license. (American Chamber of Commerce PRC, *Report on WTO Implementation*, 2002).

<sup>122</sup> *Decision 175-2003-QD-TTg* (August 2003).

Finance faces as financier of Vietnam's state-owned insurance companies and regulator for the insurance sector at large.<sup>123</sup> For example, noting that a board member of Vietnam's state-owned insurance company sat on the committee that approved products, one company said:

*"It's not exactly clear but all foreign companies see this. It is not possible to compete with [the State-Owned-Enterprise (SOE)]. We realize this but still want to offer what we can [in terms of insurance products]. The product approval process is another issue. The process is run out of the Ministry of Finance and [the SOE] is on the product approval committee. The committee is assigned the task of approving all insurance products that a foreign company wishes to provide. One key prerequisite for approval of an insurance product is that [the SOE] must already provide it...[and] if they don't understand it, they reject our application. We don't need more branches [and therefore will not invest more] unless we can expand our services."<sup>124</sup>*

In addition, some companies have experienced difficulties relating to delays in product approval. Article 64 of the *Law on Insurance Business* requires companies to submit specific product information in connection with their license application, but does not regulate product approvals after licensing. Although a time line has been set by the authorities to approve or to decline with specific reasons given (i.e., within 30 days to respond to any product submission), insurance companies often experience delays greater than that to receive final approval. This can significantly affect development of new business opportunities. According to survey respondents, other countries in the region do not require specific approval or have approval granted within a shorter timeframe for traditional products.

Finally, some companies have expressed interest in additional options for re-investing premium in Vietnam, including the ability to invest some premium outside the country in more stable and mature financial markets. Under current Vietnamese Law, foreign-invested insurance companies are required to reinvest their profits in Vietnamese projects. To encourage this further, *Decision 175* issued recently entitles such foreign-invested insurance companies to investment mechanisms and policies as provided for domestic insurance companies.<sup>125</sup>

### **Legal Services**

The BTA requires Vietnam to permit 100% U.S. equity ownership in law firms, joint-ventures, and branches. U.S. lawyers, however, may not appear before Vietnamese Courts. U.S. firms may advise on Vietnamese law if they hire persons with Vietnamese law degrees who satisfy the requirements applied to like Vietnamese practitioners. Branches of U.S. law firms may receive a five year renewable license.

Vietnam has recently issued new regulations addressing legal services. Specifically, *Decree 87-2003-ND-CP* (effective 1 September 2003) substantially reforms the regulatory framework for

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<sup>123</sup> The Insurance Supervision Department under the Ministry of Finance acts as the regulator in all aspects of the insurance business in Vietnam.

<sup>124</sup> Company 38.

<sup>125</sup> *Decision 175-2003-QD-TTg* (August 2003).

the operation of foreign law practices and foreign lawyers in Vietnam and aims to expand the scope of operation for foreign law firms to meet requirements of the BTA. Under this Decree, the scope of practice of foreign law firms in Vietnam has been substantially broadened allowing foreign law practices to advise on foreign and international law in the fields of business, investment and commerce. Foreign law firms are also now permitted to “provide legal consultancy services and other legal services”, including consultancy on Vietnamese law where a foreign law practice employs a Vietnamese lawyer or employs a foreign lawyer with a Vietnamese law degree and satisfying all requirements as applied to a Vietnamese lawyer.<sup>126</sup> However, participation by foreign lawyers in Vietnamese Court proceedings are prohibited including Vietnamese lawyers and trainee Vietnamese lawyers employed by foreign law practices.

Law firms interviewed, while generally pleased with the expanded scope of operation permitted to them, expressed reservations in whether they were accorded national treatment as provided in the BTA.<sup>127</sup>

One respondent noted the following issues:

*“.....(1) while [onshore] foreign law firms will be able to hire licensed Vietnamese lawyers, there is no provision allowing Vietnamese licensed lawyers individually to become equity holders in foreign law firms;<sup>128</sup> (2) it is unclear whether, when licensed Vietnamese lawyers give advice on Vietnamese law, they are giving advice on behalf of themselves only, or on behalf also of their foreign law firm employer.”<sup>129</sup>*

The above respondent noted that without incentives involving equity and partnership, it was difficult to keep Vietnamese lawyers after investing many resources into training. Further, the lack of clarity in the regulations is not only a problem for practical reasons relating to liability, but also for the reason that it results in uncertainty as to the scope of permitted activities of onshore foreign law firms. This is significant because any onshore foreign law organization operating beyond the scope of its permitted activities may be subject to a fine from VND 10 to 20 million and in aggravating circumstances, revocation of its license.<sup>130</sup>

Foreign law firms all look forward to additional progress in this sector.

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<sup>126</sup> The scope of legal consultancy and legal services by Vietnamese lawyers is unrestricted and may extend to foreign and international law as well as Vietnamese law.

<sup>127</sup> Under the BTA, Vietnam took no National Treatment exceptions (see Annex G).

<sup>128</sup> Vietnamese lawyers are permitted equity only in their capacity as partners in a *Vietnamese law partnership* that Vietnamese licensed lawyers may become equity holders in a *foreign and Vietnamese law partnership*.

<sup>129</sup> Company 78. [Note: The standard international practice is that although individual lawyers sign documents containing advice, the document is issued in the name of the law firm, and it is the law firm that is liable for the advice].

<sup>130</sup> *Decree 87-2003-ND-CP*. As of the time of this publication, the Government had just issued *Circular 06-2003-TT-BTP* (29 October 2003) providing guidance on *Decree 87* and the *Ordinance on Lawyers*. However, the issue has still to be clarified.

## Distribution Services

Vietnam's BTA commitments for distribution encompass wholesale, retail, agency and franchise services. These commitments do not apply on a cross-border basis (i.e. from the U.S. into Vietnam) and therefore apply to the establishment of a U.S. distributor within Vietnam. In this respect, beginning in December 2004, or three years upon entry into force of the BTA, joint-ventures with Vietnamese partners may be established with up to 49% U.S. equity. Beginning in December 2008, or seven years upon entry into force of the BTA, companies with 100% U.S. equity will be permitted. One retail outlet may be established as a right, while additional outlets will be considered on a case-by-case basis. For some industrial products, Vietnam's market access limitations in the distribution services sector are subject to the additional limitations contained in a separate Annex to the Agreement, which provides phase-out periods for such restrictions.<sup>131</sup>

Although these commitments do not phase in for a few more years, companies have in general called for quicker liberalization of distribution services. Currently, only a handful of companies in Vietnam have licenses to distribute directly. Although many believe firmly in the benefits of local distribution networks to facilitate reaching further into the local population, they also note that the lack of resources and capacity local distributors currently possess that can keep companies from attaining their full potential.

One company remarked:

*"...the costs of promotion through our distributor are very high. If we could do our own distribution, we could improve our profit margins and our investment would be more proportionate."*<sup>132</sup>

Another said that being able to invest in its own distributors would make a big difference.

*"Although we are happy with the current distributor, a joint-venture or 100% foreign-owned distributor would be preferred to improve efficiency. The current distributors don't have the financial capacity to handle some of our plans."*<sup>133</sup>

Some companies also noted that being able to invest in their own distribution would give them more control over inventory. Direct distribution would also allow such companies to have greater control over their intellectual property.

Vietnam is currently considering different ways to extend trading and distribution rights to foreign entities over time. It has been reported that the current draft *Amendments to the Commercial Law* will address such issues. This law is currently scheduled for commentary in the National Assembly in 2004 but there are currently no plans for its ratification.

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<sup>131</sup> U.S.-Vietnam BTA, Annex D.

<sup>132</sup> Company 58.

<sup>133</sup> Company 2.



#### Distribution Services – Multilevel Selling Update:

Pursuant to a *Competition Law* currently in its 9<sup>th</sup> draft, Vietnam’s Ministry of Trade recently released for commentary a draft *Decree on Multilevel Selling*. U.S. companies, hoping to provide distribution services in such form, are closely watching these developments and look forward to opportunities to provide input and commentary.

#### **Express-Delivery Services**

There are no commitments relating to market access or national treatment in the BTA addressing this sector. Nevertheless, U.S. express-delivery service providers hope for further liberalization particularly as part of Vietnam’s WTO accession process. While making comparisons with China’s market and the potential of U.S. express-delivery services in Vietnam, U.S. companies noted the importance of integrated air express services in light of globalization, changing business international practices, increasing supply chain pressures, and demands by manufacturers for maximum efficiency and speed. Currently, all express-delivery companies in Vietnam are required to work under the auspices of “Agency Agreements” with the Ministry of Post and Telecom (MOPT). At this point, joint-ventures are not permitted in this sector.

#### IV. DEVELOPMENT OF INVESTMENT RELATIONS

Chapter IV of the Bilateral Trade Agreement establishes rules to facilitate cross border investment between the U.S. and Vietnam. In addition to most favored nation (MFN) and national treatment obligations, it requires Parties to accord “fair and equitable” treatment to covered investments and prohibits Parties from using unreasonable or discriminatory measures to impair covered investments. The chapter sets forth obligations in the areas of expropriation, repatriation of capital, prohibitions on technology transfer requirements, and trade related investment measures (TRIMS). Chapter IV establishes detailed obligations regarding investor-state dispute settlement and provides the consent of both Parties to resolve such disputes through arbitration. Chapter IV applies to a state enterprise to the extent that the enterprise exercises any regulatory, administrative or other Governmental authority delegated to it by the Government.

##### Trade Related Investment Measures (TRIMS)

Under the BTA, Vietnam has committed to eliminate certain trade-related investment measures, including trade-balancing measures and foreign exchange controls on imports upon entry into force (10 December 2001), and all other prohibited TRIMs such as local content requirements by the earlier of December 2006 (five years upon entry into force of the Agreement) or the date of its WTO accession.

Under *Decree 24-2000-ND-CP* and its amending *Decree 27-2003-ND-CP*, Vietnam has sought to eliminate trade-balancing requirements previously implemented through restrictions on the importation of goods used for production. *Decision 718-2001-QD-BKH* also eliminated export performance requirements (previously held at 80% of output) for most goods, with 14 items remaining on the compulsory export list.<sup>134</sup> With the lifting of such restrictions, the Ministry of Planning & Investment (MPI) has sought to amend the licenses of foreign investors still containing such requirements. While most companies interviewed to date continue to have such provisions in their investment contracts, all have said that the governing authorities do not in practice seek to enforce them, and have in general not experienced problems in this area.

Vietnam has also eased foreign exchange controls for foreign investors. *Decree 27-2003-ND-CP amending Decree 24-2000-ND-CP* provides for foreign-invested enterprises and foreign business cooperation contract Parties to purchase foreign currency to satisfy their current transaction requirements and for other permitted transactions from any bank licensed to trade in foreign currencies in Vietnam.<sup>135</sup>

However, Vietnam continues to require some foreign investors to use local content. This is particularly so for the electronics, motorcycle manufacturing and automobile sector.<sup>136</sup> U.S.

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<sup>134</sup> Items exempted from the elimination of export requirements as notified in the BTA [Annex H, (3)] appear to be different from those listed in *Decision 718*. *Decision 718* includes eleven other items not listed in Annex H, (3) of the BTA. Vietnam has committed to the elimination of items listed in Annex H (3) seven years upon entry into force of the BTA.

<sup>135</sup> This was previously only permitted from authorized commercial banks.

<sup>136</sup> *Decision 648-1999-QD-BKH* of the Ministry of Science, Technology and Environment Promulgating Regulations of Types of Motorcycles Assembly and Manufacture (17 April 1999) stipulates mandatory local content percentages for automobile manufacturers.

automobile manufacturers face high tariffs on imported components and have to satisfy requirements as high as 30 to 60% of the total value of an engine in local content.<sup>137</sup> Other sectors requiring the use of local raw material that Vietnam has notified in Annex H of the BTA<sup>138</sup> include cane sugar, paper processing, vegetable oil, wood processing, and milk.

Apart from companies operating in the sectors mentioned above, few companies experienced problems associated with mandatory local content requirements. Most companies sourced their inputs locally anyway for comparative advantage reasons. A few companies, however, felt that some individual import plans were not approved because of discrimination against imported materials that were available locally.

### Investment Licensing

Under the BTA, Vietnam has committed to transition from a licensing to a registration regime over a period of two to nine years upon entry into force of the agreement.<sup>139</sup> The *Side Letter* of the BTA also obligates Vietnam to provide national treatment and MFN to investment licensing while ensuring that the criteria required in such procedures are administered in a transparent manner.<sup>140</sup>

Regulations governing investment registration are government by that of *Decree 27-2003-ND-CP amending Decree 24-2000-ND-CP*.<sup>141</sup> Accordingly, projects eligible for investment registration must satisfy all of the following mandatory conditions: (1) not being Group A projects;<sup>142</sup> (2) they must conform with approved plans for development of the relevant industry or products;<sup>143</sup> and (3) they must not require an environmental impact statement. In addition, *Decree 27* requires that projects satisfy one of the following alternative conditions to qualify for investment

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<sup>137</sup> *Circular 215-HTDT-LXT*. [Note: Implementation of the automobile components production program is a necessary condition for granting an investment license. The value of components and spare parts manufactured in Vietnam must account for at least 5% of the value of the finished automobile no later than the fifth year from the date of commencing production and must annually increase to reach at least 30% of the automobile value at the tenth year of production.]

<sup>138</sup> Vietnam has sought to maintain these local content requirements for up to five years upon entry into force of the Agreement.

<sup>139</sup> Vietnam may maintain an evaluation regime for investment licensing in the following sectors: broadcasting, transportation services, installation & and operation of sea, river and airports, certain financial services, construction, maintenance of telecommunication facilities, real estate and certain infrastructure development projects.

<sup>140</sup> U.S.-Vietnam BTA, Chapter IV, Side Letter.

<sup>141</sup> *Decree 27-2003-ND-CP* (19 March 2003) on the Amendments to *Decree 24-2000-ND-CP* (31 July 2000) *Guiding the Implementation of the Foreign Investment Law*.

<sup>142</sup> Group A Projects are defined as: infrastructure construction of industrial zones, export processing zones, high-tech zones, urban areas, BOT, BTO and BT projects; construction and operation of sea ports and airports; operation of sea and air transportation; oil and gas; post and telecommunication services; publishing, printing services (except projects for printing of technical materials, printing of packaging, printing of labels of goods, and printing of normal patterns on textiles and garments, leather and footwear), press; radio and television broadcasting; advertising services together with publication of advertisements; cinematic activities; artistic performance; conducting games with prizes; medical examination and treatment establishments; general education, tertiary, undergraduate and postgraduate training or equivalent levels; scientific research and production of medicine for human diseases; insurance, finance, auditing and inspection; exploration and exploitation of rare and precious natural resources; construction of residential houses for sale; national defense and security projects.

<sup>143</sup> In the absence of which the consent of the ministry in charge of the industry is required.

registration: (1) they must be exporting 80% of products (relaxed from 100%); (2) they must be investing in an encouraged or specially encouraged project located in an industrial zone, but not a Group A project; or (3) they must belong to the manufacturing sector with up to USD\$5 million invested capital. Further, *Decree 27* states that, where a project satisfies the conditions for registration, the investment licensing body must issue the investment license without obtaining recommendations from any other body.

Companies interviewed have noted that registration and licensing processes particularly under the jurisdiction of the Ho Chi Minh City Department of Planning and Investment (where most apply for their licenses) have been streamlined and accelerated. Licensing for projects in the largest category for example, has been reduced to a maximum of 15 days. In the city of Danang, the Government is piloting the licensing of foreign-invested projects in 20 hours and hopes to see this reduced to 15 hours soon.

Despite this, numerous companies believe that licensing procedures are still “unnecessarily burdensome.” One company remarked:

*“[A lot of time is spent on] the issues of notarization, legalization, consularization, translation, and notarization again - a five step process that you have to go through for every document that comes from abroad. People should be able to sign an affidavit that says 'under penalty of law this is true and complete' and that should be enough. ...And it takes a lot of extra trouble, maybe weeks or even months to get it done....and it is just totally unnecessary....A lot of this investment licensing procedure involves feasibility studies. Some feasibility studies are complete shots in the dark. They ask you to project some things that you really cannot project....and to require people to do that as part of their formal procedure process can be a waste of everyone's time.”<sup>144</sup>*

Companies also still observe a lack of transparency in licensing procedures in certain sectors, particularly those representing service sectors requiring significant regulation and supervision and which normally require high-level approval.

### **Technology Transfer**

The BTA forbids Parties from mandating or enforcing requirements to transfer technology, a production process, or other proprietary knowledge.<sup>145</sup> Exceptions are permitted when applying generally applicable environmental laws that are consistent with the provisions of the Agreement or when the measures are taken pursuant to an order, commitment or undertaking that is enforced by a Court, administrative tribunal or competition authority to remedy an alleged or adjudicated violation of competition laws.<sup>146</sup>

Vietnam's *Law on Foreign Investment* and its implementing regulations (*Decree 27 amending Decree 24*) appear to “encourage” technology transfer. These regulations do not explicitly

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<sup>144</sup> Company 23.

<sup>145</sup> U.S.-Vietnam BTA, Chapter IV, Article 7.

<sup>146</sup> U.S.-Vietnam BTA, Chapter IV, Article 7.1 & 7.2.

mandate technology transfer for the approval of an investment project; however, U.S. companies remain concerned about the high degree of discretion in the investment approval process, stating that such “encouragement” could amount to requirements. Businesses from most sectors have experienced different levels of pressure for technology transfer. In the pharmaceutical industry, for example, the occasional practice of compulsory licensing requires the transfer of technology, without which companies say they will be unable to manufacture, market or distribute affected products. In other sectors, local content requirements appear to determine whether or not investment projects or loans from local banks will be approved, indirectly affecting the outcome of an investment project.

However, some U.S. companies have found utility in technology transfer requirements. Most companies interviewed did not regard such requirements as obstacles. Those that discussed this felt that in numerous ways technology transfer often made good business sense. Many companies voluntarily transfer their know-how to build local suppliers into their value chains as the developing distribution infrastructure in Vietnam makes it highly desirable to have suppliers nearby. Other companies that are already being driven up-market by aggressive, low-end competition find that in a highly evolving market like Vietnam, technology transfer is the least of their concerns, and that sometimes more than just technology transfer is essential if they are to move quickly in response to new pressures and opportunities.

### **Land Issues**

Under Annex H of the BTA, Vietnam has committed to creating favorable conditions for exercising the mortgage and transfer of land use rights. U.S. investors may lease land for investment purposes but may not own land and residences. For up to three years upon entry into force or up to December 2004, U.S. investors are not allowed either to mortgage land use rights at foreign credit institutions operating in Vietnam or to transfer land use rights except for the case of transfers of invested assets associated with the land within the lease period.

Vietnam currently extends land use rights (LURs) to Overseas Vietnamese and already allows foreign investors to mortgage the value of land with Vietnamese joint stock or foreign bank branches in Vietnam.<sup>147</sup> In a bid to attract more foreign investment, Vietnam has also recently been considering legislation enabling LURs to be mortgaged with offshore banks.<sup>148</sup> This however is not expected to be fully implemented until all parallel laws such as the *Law on Credit Institutions*, *Law on Foreign Investment*, and *Law on Land* relevant to this policy are amended. As of the date of this report, the State Bank of Vietnam is allowing this on a trial basis.<sup>149</sup>

Companies interviewed greatly anticipate developments on this front. Many are leasing land from designated industrial zones which are very expensive and look forward to having the option

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<sup>147</sup> *Decision 79-2001-ND-CP* (1 November 2001) of the Government on the amendment of and supplementation to *Decree 17-1999-ND-CP* (29 March 1999) on Procedures for Exchange, Transfer, Lease and Sub-lease of a Land Use Right and Mortgage of the Value of Land Use Rights, and *Decree 81-2001-ND-CP* (November 2001) Allowing Overseas Vietnamese to Buy a House in Vietnam provides guidance on these changes.

<sup>148</sup> *Decree 85-2002-ND-CP* of the Government (25 October 2002) amending *Decree 178-1999-ND-CP* of the Government (29 October 1999) on Security for Loans Obtained from Credit Institutions.

<sup>149</sup> The *Amendments to the Law on Land* passed the National Assembly in November 2003. However, this aspect of mortgaging LURs with off-shore banks was not addressed.

of mortgaging their LURs to raise capital. Some however, have expressed concern about overall implementation of such a policy. One respondent remarked:

*“A lot of banks are interested in mortgage lending [although U.S. banks have not indicated interest] and a lot of companies would like to use their LURs to raise capital. ...You can now mortgage, but the foreign banks can't, thus precluding the participation of foreign investment companies. Registration at the local cadastral bureau is required and sometimes local authorities will or will not approve...it's all over the place... The biggest outstanding issue is to create a central registry for the mortgages of LURs...to check to see whether or not land use rights have been mortgaged or not ..... They've already done this for non-land security (equipment, etc.) but not yet for land...”<sup>150</sup>*

Other investors have expressed interest in purchasing mortgages but are having a difficult time coming up with the true market value of land. Many have also expressed interest in access to longer land lease periods and more consistent land policies among the provinces.

### **National Treatment Issues**

Article 2 of the Investment Chapter requires Parties to provide the better of national treatment or MFN with respect to covered investments. State enterprises are also to accord national treatment or MFN on investments, subject to specific limitations regarding prices and fees for goods and services under the control of the Vietnamese Government.<sup>151</sup> Sector-specific exceptions to national treatment are identified in Annex H.<sup>152</sup>

The *Ordinance 41-2002-PL-UBTVQH10 on MFN and National Treatment* issued in May 2002 introduced and defined the concept of national treatment, applicable to imports and exports, services and foreign-service providers, investment and foreign investors, and foreign organizations or individuals that hold intellectual property rights. It defines national treatment in investment as treatment *no less favorable* than that provided to domestic investments.<sup>153</sup> The provision of national treatment is currently subject to certain exceptions.<sup>154</sup>

Although foreign investors currently operate under Vietnam's *Foreign Investment Law*, with domestic investors operating under the *Domestic Investment Law*, the Government is continuing

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<sup>150</sup> Company 21. According to this company, land is currently administered by local authorities and the establishment of a central registry for secure transactions involving land would be challenging.

<sup>151</sup> U.S.-Vietnam BTA, Chapter IV, Article 2.1.

<sup>152</sup> These include sectors such as broadcasting, television; production, publication and distribution of cultural products; investment in insurance; banking; brokerage, dealing with securities and currency values, and other related services; mineral exploration and exploitation; construction, installation, operation and maintenance of telecom facilities; construction and operation of in-land, water, sea and air ports; cargo and passenger transportation by railway, airway, road, sea, and inland water way transportation; fishing and fish catching; and real estate business.

<sup>153</sup> *Ordinance 41-2002-PL-UBTVQH10* (May 2002) [Article 3.1].

<sup>154</sup> *Ordinance 41-2002-PL-UBTVQH10* (Article 17). Exceptions to National Treatment include the following: (1) procurement conducted by the Government of Vietnam; (2) government subsidies and supports provided to domestic manufacturers and their use of domestic content products; (3) time allotment restrictions on broadcasting and television production and (4) domestic transportation costs calculated on the basis of commercial activities of transportation.

to eliminate disparities between the two policy regimes to ensure equal treatment of foreign and domestic investors. Recent decisions allowing joint-stock foreign-invested companies and test running partnership investments are examples of this trend.

With regard to prices and fees, which may affect covered investments, Vietnam is gradually eliminating its dual pricing system in areas such as tourism, air, rail transportation, seaport charges, charges for TV advertising and utilities such as telephone charges, electricity and water.<sup>155</sup> Vietnam is also considering legislation that proposes the elimination of dual pricing on land.

Almost all companies interviewed did not find severe issues with dual pricing noting in general the efforts made by the Vietnamese Government over the last few years to close the gap. A few companies mentioned higher electricity and telecommunication charges for foreign investors. Many were looking forward to the complete elimination of dual pricing for air travel charges.<sup>156</sup>

While some U.S. companies identified discriminatory practices against foreign investors in Vietnam, others also pointed to policies that discriminated in favor of foreign investors such as lower corporate income taxes and lower import duties, although these policies in these areas have now become more equalized.<sup>157</sup>

In general, companies noted a lack of national treatment in land ownership and usage (as noted previously), state procurement, and investment in service sectors such as distribution, telecommunications, advertising, banking and other financial services. While these sectors are subject to certain exemptions under the BTA, companies hope for greater national treatment to help level the playing field.

### **Investment Disputes**

Through Article 4 of BTA Chapter IV, Vietnam has consented to allow investors to submit disputes to local courts or tribunals, to previously agreed to dispute settlement procedures, or to international arbitration. As contemplated by this article, Vietnam is currently preparing to join the 1965 Washington Convention, also known as the Convention of the International Center for the Settlement of Investment Disputes (ICSID). Accession to this Convention was included in the law making plan for 2003 but was not taken up by the National Assembly last year. Vietnam's membership in ICSID will provide investors with an alternative forum to address investor-state disputes.

### **Expropriation and Compensation**

The BTA establishes disciplines with regard to expropriation and compensation for investors.

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<sup>155</sup> Under the BTA, Vietnam committed to eliminate dual pricing and develop a uniform set of fees and prices with phase in periods ranging from upon entry into force up until 4 years upon entry into force [Annex H, Paragraph 4.3].

<sup>156</sup> This is expected to be implemented in January 2004 – one year ahead of what Vietnam has committed to in the BTA [See Annex H, Paragraph 4.3].

<sup>157</sup> Effective as of 1 January 2004, corporate income taxes will be 28% for both foreign and domestic enterprises (*Law on Corporate Income Tax*). Import duties for inputs are also now equivalent for both foreign and domestic enterprises.

For instance, Parties cannot expropriate an investment except when done for a public purpose, in a non-discriminatory manner, in accordance with a general standard of treatment, and upon payment of prompt, adequate and effective compensation.<sup>158</sup> The BTA also requires Parties to accord MFN and national treatment to a covered investment when a Party adopts measures relating to losses as a result of war, armed conflict or similar events, and, in certain enumerated instances, to pay compensation.<sup>159</sup>

Vietnam's *Foreign Investment Law* protects foreign investments from expropriation, by ensuring that the capital and other lawful assets of foreign investors are not requisitioned or confiscated through administrative measures, while guaranteeing that Foreign Invested Enterprises (FIEs) will not be nationalized.<sup>160</sup> Although there is no specific mention of compensation in the event of expropriation, the *Foreign Investment Law* and *Decree 24* stipulate that a foreign investor may be considered for compensation, in certain necessary requirements, in the event a change in Vietnamese law causes damage to the interest of the investor.<sup>161</sup>

No companies interviewed had experienced alleged expropriation thus far, although as of the time of this report, several investors had pending disputes involving land transfers.<sup>162</sup>

### Currency Transfers

Chapter VII, Article 1 of the BTA permits currency transfers as agreed upon in an investment authorization or investment agreement and requires Parties to grant nationals and companies of the other Party the better of MFN or national treatment regarding certain payment and currency issues. A Party may prevent transfers through the equitable, non-discriminatory and good faith application of its laws relating to: bankruptcy, insolvency, or protection of the rights of creditors, issuing, trading or dealing in securities, futures, options, or derivatives, reports or records of transfers, criminal or penal offenses, or ensuring compliance with orders or judgments in judicial or administrative proceedings.<sup>163</sup>

Vietnam's *Foreign Investment Law* guarantees foreign investors the ability to repatriate profits and invested capital.<sup>164</sup> The law also permits foreign investors to remit payments abroad for the provision of technology or services, on the principal and interest on offshore loans incurred over the course of their operations, and on other monies and assets in their lawful ownership. Moreover, the provisions allow for covered investments to enjoy the better of national treatment or most favored nation treatment with respect to transfers of capital contributions, profits,

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<sup>158</sup> U.S.-Vietnam BTA, Chapter IV, Article 10.

<sup>159</sup> U.S.-Vietnam BTA, Chapter IV, Article 10.1 and 10.3.

<sup>160</sup> *Foreign Investment Law* (Article 21).

<sup>161</sup> Article 21.a. of the *Foreign Investment Law* and Article 121 of *Decree No. 24-ND-CP* (31 July 2000).

<sup>162</sup> Interviews were limited to companies currently operating in Vietnam; however, existing disputes mentioned relate to foreign-investors with local land-contributing partners who are now withholding the land due to rapidly increasing land prices [Company 21].

<sup>163</sup> U.S.-Vietnam BTA, Chapter VII, Article 1.6.

<sup>164</sup> *Foreign Investment Law* (Article 22). [Note: Profit repatriation was previously taxed at 2-7%, but the Government has recently issued legislation to eliminate such taxes under the new *Law on Corporate Income Tax* and implementing regulations *Decree 164-2003-ND-CP* (22 December 2003) and *Circular 128-2003-TT-BTC* (22 December 2003). These regulations allow for foreign investors to be exempt from taxes when remitting profits and exempt from Corporate Income Tax if they are reinvesting].



dividends, royalty payments, management fees, loan repayments and awards from dispute settlement.

In addition, Vietnam has gradually reduced the mandatory conversion of foreign currency income once applied as high as 80% in 1998. *Decision 46-2003-QD-TTg*<sup>165</sup> reduced the compulsory conversion ratio for current income in foreign currency for Vietnamese and foreign entities.<sup>166</sup> As of 7 May 2003, the percentage has been reduced to zero.

With regard to equity investment, the State Bank of Vietnam has recently issued *Decision 998-2002-QD-NHNN (13 September 2002) on Foreign Exchange Control Applicable to Purchase and Sale of Securities by Foreign Organizations and Individuals at Securities Centers*.<sup>167</sup> According to the *Decision*, foreign securities investors are only permitted to remit abroad investment capital after one year from the date that such funds are transferred into an investor's securities trading account (mandatory for investors to set-up in order to participate in trading) unless otherwise permitted by law. There are no time restrictions that apply to the remittance abroad of investment profits, dividends and bond interest. Although central bank approval is no longer required for foreign securities investors to remit profits abroad, prescribed documentation is still required to be presented to the transacting bank for transactions into and out of an investor's securities trading account.

No company mentioned profit repatriation and currency transfers as an obstacle to investing in Vietnam, but some expressed concern about the lack of foreign currency conversion guarantees. *Decision 998* for example, states that transfers are contingent upon the ability of the converting bank to have sufficient foreign currency. Some service providers have also mentioned strict rules requiring the reinvesting of profits in projects in-country and the inability to reinvest in offshore projects.<sup>168</sup>

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<sup>165</sup> *Decision 46-2003-QD-TTg (2 April 2003) of the Government on the Compulsory Selling Rate of Foreign Currency with respect to Current Sources of Income of Residents being Economic or Social Organizations.*

<sup>166</sup> Including Vietnamese economic organizations, foreign invested enterprises, foreign business co-operation Parties, foreign company branches, foreign contracts, contracts in partnership with foreign entities.

<sup>167</sup> Effective as of 28 September 2002, the *Decision* outlines regulations on foreign exchange control applicable to the purchase and sale of securities by foreign investors with respect to (1) the remittance of funds into Vietnam; (2) conversion of foreign currency into Vietnamese dong; (3) opening and use of VND bank accounts; (4) conversion of VND into foreign currency; and (5) remittance abroad of foreign currency.

<sup>168</sup> Company 5.

## V. BUSINESS FACILITATION

Chapter V of the BTA establishes obligations designed to facilitate business activity. In this Chapter, both countries agreed to permit advertising, marketing studies, and the sale of products directly to consumers. The Parties also agreed to allow businesses to import office equipment, stock samples and replacement parts, and secure access to office and living spaces and public utilities. Moreover, both Parties committed to provide at least the better of national treatment or MFN with respect to government-provided products and services at fair and equitable prices.

U.S. companies noted significant improvement in Vietnam's efforts to facilitate business activities since entry into force of the BTA. Few companies raised any major issues with government policies affecting routine business activities although companies felt Vietnam could do more to facilitate business activity and identified areas where further improvements are needed. For example, U.S. businesses reported price discrimination in the provision of advertising services. Businesses also noted difficulties when importing office equipment and discussed limitations relating to market studies, working with local agents, and advertising.

### Importing Office Equipment

The BTA requires Parties to permit businesses and nationals to import any equipment used in the operation of their business, such as typewriters, computers, photocopiers, and fax machines.<sup>169</sup>

Under the *Law on Foreign Investment*, as amended in June 2000, foreign-invested enterprises, foreign individuals, and foreign companies are permitted to import equipment, machinery, materials and means of transport designated for their investment projects.<sup>170</sup> Foreign-invested enterprises are exempt from import duties on office equipment, while foreign individuals and foreign companies receive exemption when such equipment cannot be locally produced or the quality of locally produced equipment fails to meet demand.<sup>171</sup> Under Vietnam's *Commercial Law* and *Decree 13-1999-ND-CP*, representative offices, branches of foreign merchants, and foreign credit institutions are permitted to import items that are necessary for their business activities, subject to full import duties.<sup>172</sup>

Most companies interviewed did not experience any difficulties importing equipment necessary for local business operations. According to U.S. businesses, a company is required to submit an import plan to the Ministry of Planning and Investment (MPI) indicating the equipment and the value of equipment to be imported. A few U.S. companies preferred to buy locally rather than import office equipment saying that buying locally saves them money, reduces import hassles and guarantees after-sales-service. Those few businesses that did encounter problems importing equipment cited what they considered to be unnecessary procedures and delays or mishandling at Customs.

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<sup>169</sup> U.S.-Vietnam BTA, Chapter V, Article 1(A).

<sup>170</sup> The *Law on Foreign Investment* (Article 31) [12 November 1996, as amended on 9 June 2000] and *Decree 51-1999-ND-CP* (8 July 1999).

<sup>171</sup> *Ibid.*

<sup>172</sup> Articles 41 & 43 of the *Commercial Law* and Article 19 of *Decree 13-1999-ND-CP* (17 March 1999).

One company noted:

*“We had a lot of problems when we imported some equipment last year. Our equipment was held at port because we did not agree on the need to pay duties. This affected our entire business operation and the import of our raw materials was delayed until our equipment was cleared. Four months later, Customs told us that we were exempt from duty but we were stuck with a huge holding fee from the airport storage company. The charge was significantly more than we would have had to pay in import taxes.”*<sup>173</sup>

### **Access to Office and Living Space**

The BTA requires Parties to permit access and use of office space and living accommodations in a non-discriminatory manner and at market prices.<sup>174</sup>

*Decree 30-2000-ND-CP*, promulgated in August 2000, permits foreign companies and individuals to lease office space and living accommodations from Vietnamese organizations and citizens, provided that the space is not located in areas, which are prohibited to foreigners.<sup>175</sup> However, *Decree 30-2000-ND-CP* on access to office and living space poses certain problems with respect to: (1) legal minimum rental rates and (2) lease contract procedures. First, the People’s Committee establishes a minimum rental rate to facilitate the calculation of taxes on lease incomes. This however is only applied to foreign companies and individuals. Second, to certify a lease contract, the notary office requires a six-month temporary residence permit but in order for one to receive a temporary residence permit in Vietnam, evidence of a lease contract is required.<sup>176</sup>

Still, U.S. businesses in general did not report any difficulties. While they acknowledge that the rents they pay are high relative to what locals pay, they also realize that their minimum standards for office space and living conditions are much higher than that of local companies. However, they did note that rental fees in Vietnam were considerably higher than that of neighboring countries. Respondents suggested that high costs, relative to neighboring countries, and the inability to purchase land could make Vietnam less attractive to foreign investors and can prevent companies from increasing their investments.

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<sup>173</sup> Company 66.

<sup>174</sup> U.S.-Vietnam BTA, Chapter V, Article 1(B). This commitment is subject to laws and procedures governing immigration and foreign missions.

<sup>175</sup> *Decree 30-2000-ND-CP* (11 August 2000) *Abolishing 27 Permits and Converting 34 Permits into Business Conditions*.

<sup>176</sup> *Ibid.* [Note: When certifying a lease contract, the notary office requires the foreign lessee to submit his/her six-month temporary residence permit. In order to obtain the temporary residence permit, the immigration authority requests the foreigner produce an accommodation lease contract. This is a “Catch-22” situation that makes the process difficult for foreigners].

## Engaging Agents, Consultants and Distributors

Chapter V of the BTA requires Parties to allow companies and nationals to engage agents, consultants, and distributors at mutually agreed terms and conditions.<sup>177</sup>

Foreign companies are currently allowed to engage Vietnamese agents for activities such as distribution services but not foreign agents.<sup>178</sup> With regard to hiring consultants, *Decree 24-2000-ND-CP* states that a foreigner may freely engage Vietnamese and foreign-invested firms offering investment, auditing, and accounting services.<sup>179</sup> With regard to hiring legal consultants, U.S. companies may only engage law firms in Vietnam (whether Vietnamese or foreign) to provide advice on Vietnamese law although only Vietnamese law firms are allowed to practice in courts.<sup>180</sup>

Survey respondents said they did not encounter significant problems when they hired consultants, agents and/or distributors for their businesses. However, a number of U.S. companies said they felt limited by the current capacity of local distributors and would prefer to hire a higher quality distributor whether local or foreign-owned.

## Advertising and Direct Sales

Under the BTA, the Parties agreed to permit various forms of advertising for goods and services, such as television, radio, print and billboard, and the use of preaddressed cards and envelopes.<sup>181</sup> In addition, both Parties committed to encourage direct contact and permit sales between U.S. businesses and Vietnamese consumers (and between Vietnamese businesses and U.S. consumers) as well as organizations whose decisions affect potential sales.<sup>182</sup>

Under the 1997 *Commercial Law* and the *Law on Foreign Investment*, U.S. businesses may have direct contact and sales with Vietnamese consumers. However, customer contact and distribution rights are subject to restrictions that only apply to foreign companies. For example, in order to bring in goods for trade fairs and exhibitions a foreign business must obtain approval for each import. Moreover, only a select number of goods may be imported for direct sale.<sup>183</sup>

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<sup>177</sup> U.S.-Vietnam BTA, Chapter V, Article 1.1(C).

<sup>178</sup> *Commercial Law* (10 May 1997), Article 120; and *Law on Foreign Investment* (12 November 1996, as amended on 2000), Article 77.

<sup>179</sup> *Decree 24-2000-ND-CP* (31 July 2000).

<sup>180</sup> *Ordinance of Lawyers* (25 July 2001) and *Decree 87-2003-ND-CP of the Government on Practice by Foreign Lawyer Organizations and Foreign Lawyers in Vietnam* (effective 1 September 2003).

<sup>181</sup> U.S.-Vietnam BTA, Chapter V, Article 1.1(D).

<sup>182</sup> U.S.-Vietnam BTA, Chapter V, Article 1.1(E).

<sup>183</sup> *Commercial Law* (10 May 1997), Article 201; and *Law on Foreign Investment* (12 November 1996, as amended on 9 June 2000); *Decree 45-2000-ND-CP* (6 September 2000) *Setting Forth the Regulations on Representative Offices and Branches in Vietnam of Foreign Merchants and Foreign Tourism Enterprises; and List of Goods and Services in Which Foreign Merchants are Permitted to Do Business in Vietnam Promulgated in conjunction with Decree 45-2000-ND-CP*.

With regard to advertising, foreign-invested enterprises may hire licensed foreign advertising agencies in Vietnam to advertise its products and services. Less than half of the U.S. businesses surveyed engaged in any form of direct advertising in Vietnam. The majority of businesses who do advertise said they often encountered barriers, such as discriminatory rates for advertising services, bureaucratic and unclear approval process, censorship and limits to the amount of money a company can spend on advertising.

Currently, foreign firms are limited to spending no more than 7% of annual revenue on advertising.<sup>184</sup> Companies said they felt restricted by this limit and the inability to receive tax deductions on advertising expenses. Other companies discussed perceived discrimination against foreign businesses in terms of advertising prices.

*“There are three levels of advertising rates. The cheapest is for local trademarks. The second level is for foreign trademarks that are produced locally. The highest rates are for foreign trademarks that are imported into Vietnam.”*<sup>185</sup>

A number of companies cited problems with the approval process for a proposed advertising campaign. Companies complained of delays and inconsistent practices and a few said they did not know which authority has jurisdiction over the final decision. One company, commenting on the lack of transparency in the approval process, said the status of its marketing campaign only became known after local magazines and newspapers contacted the firm, with news that the Government instructed them not to print the ads.<sup>186</sup>

### **Market Studies**

The BTA requires Parties to allow businesses to conduct market studies, either directly or by contracting for the service.<sup>187</sup> Under Vietnam’s *Foreign Investment Law*, all businesses and representative offices are permitted to conduct market studies without restrictions and a foreign company may provide such services to other businesses both in Vietnam and overseas.<sup>188</sup>

While the lack of available data was noted, for the most part companies were satisfied with the rules and regulations governing the conducting of market research activities.

### **Government Provided Products and Services**

In the BTA, both Parties agreed to provide access to Government provided products and services, including public utilities, in a non-discriminatory manner and at prices not greater than those charged to third-country nationals or companies, where the Government controls or sets such prices.

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<sup>184</sup> *Ordinance on Advertising* (16 November 2001) and *Decree 24-2003-ND-CP* (13 March 2003) *Providing Detailed Regulations for Implementation of the Advertising Ordinance*.

<sup>185</sup> Company 50.

<sup>186</sup> Company 68.

<sup>187</sup> U.S.-Vietnam BTA, Chapter V, Article 1.1(F).

<sup>188</sup> *Foreign Investment Law* (12 November 1996, as amended in 9 June 2000) and *Decree 45-2000-ND-CP* (6 September 2000).

In March 1999, Vietnam lowered fees assessed to foreign investors on electricity and overseas telephone calls and guaranteed the same rate for telephone installation, domestic calls, water prices and admission fees to historical, revolutionary and cultural sites.<sup>189</sup> In February 2002, Vietnam issued *Official Letter 951-VPCP-KTTH* providing guidelines on the gradual adjustment to a single price system for advertising rates, airline passenger charges, electricity, post and telecommunications.<sup>190</sup>

Although these laws seem to indicate the trend towards a one-price regime, the majority of U.S. businesses said they continued to experience some discrimination in the provision of Government provided products and services. Businesses said they paid higher fees for some products and services including electricity, water, telecommunication services, gas, air<sup>191</sup> and land transportation, postal services and medical services.

One company interviewed said:

*“We know that the post office has different rates for foreigners. We have a post office box and [a sign in the post office] clearly states different rates for foreign companies and local companies.”*<sup>192</sup>

Most businesses have however observed a narrowing of the gap between foreign and local rates on Government provided products and services compared with rates that were assessed, even prior to the entry into force of the BTA. Others were optimistic that these price differences would soon be eliminated. Many U.S. businesses felt they paid market prices for products and services supplied by the Government and noted few differences between the prices they pay and prices paid by local and other foreign companies.

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<sup>189</sup> *Decision 53-1999-QD-TTg* (26 March 1999) and *Circular 71-2003-TT-BTC* (15 August 2003) ended discrimination between nationals and foreigners on admission to tourist attractions, museums, and other cultural sites.

<sup>190</sup> *Official Letter 951-VPCP-KTTH* (25 February 2002).

<sup>191</sup> As of January 2004, dual pricing in air transport has been eliminated.

<sup>192</sup> Company 75.

## VI. TRANSPARENCY AND RIGHT TO APPEAL

Chapter VI of the U.S.-Vietnam Bilateral Trade Agreement (BTA) establishes obligations designed to improve transparency of laws, regulations, and administrative procedures, thereby fostering predictability and encouraging commercial activity. Key obligations outlined in this chapter include the publication of laws, regulations and administrative procedures; access to economic, trade and other data; opportunity for public comment on draft laws and regulations; availability of channels for administrative review of decisions, including the right of appeal to a judicial body; and the uniform application of laws. These obligations have been in effect since the entry into force of the BTA in December 2001.

Overall, the majority of U.S. businesses recognized the improvements Vietnam has made to increase transparency for foreign businesses operating in Vietnam. Indeed, before the bilateral trade agreement was signed, Vietnam began making changes to its legal framework to comply with many of the provisions covered in the BTA.

In general, companies noted that new laws and regulations have become more accessible and noted a trend towards more transparent policymaking. U.S. businesses also indicated getting greater advance notice of draft laws and regulations. Nevertheless, U.S. companies noted that even greater transparency is necessary to create a stable environment for their business operations.

### Publication of Laws, Regulations and Administrative Procedures

The BTA requires Parties to publish, on a regular basis, all laws, regulations, and administrative procedures in an official journal that is made readily available to the public.<sup>193</sup> The publication must include such essentials as the effective date of the measure, the product or service affected, and any authority that must be approved or consulted when implementing the measure.<sup>194</sup> The Parties also agreed not to enforce laws until they have been published.<sup>195</sup>

Vietnam's *Law on Promulgation of Legal Instruments*, as amended in the last months of 2000 and again in 2002, and *Decision 909-2003-QD-TTg to Reform the Formulation and Promulgation of Legal Instruments and to Raise the Quality of Legal Instruments*, together introduced a number of important reforms covering most of the commitments in Chapter VI of the BTA.<sup>196</sup> Accordingly, all legal documents (national and local) and agreements to international conventions are now to be published in an official Government gazette. In March 2003, the Government issued *Official Letter 309-CP-PC* requiring all Government bodies to forward a copy of all legal instruments to the Office of Government within two days of promulgation and consequently mandating the publication of such information in the Official Gazette (Cong Bao) within fifteen days of promulgation.<sup>197</sup> As of the first of July 2003, the Official Gazette has been published on a daily basis.

<sup>193</sup> U.S.-Vietnam BTA, Chapter VI, Articles 1 & 5.

<sup>194</sup> U.S.-Vietnam BTA, Chapter VI, Article 1.

<sup>195</sup> U.S.-Vietnam BTA, Chapter VI, Articles 4.

<sup>196</sup> *Amendments of and Additions to the Law on Issuance of Legal Instruments* (16 December 2002); and *Decision 909-2003-QD-TTg* (14 August 2003).

<sup>197</sup> *Official Letter 309-CP-PC* (20 March 2003).

At the time of interviews, many U.S. businesses, recognized considerable improvements in access to information; however, they continued to express concern over the lack of clarity in information where available. Those surveyed stated that legal instruments were not easy to interpret, at many times contained vague provisions, and often led to more questions. In addition, despite efforts to provide advanced notice of applicable legal instruments, several respondents cited instances where laws had come into effect without prior notice, including retroactive laws. For example, the *Amendments to the Law on Social Insurance* and subsequent implementing regulations came into effect eight days prior to its actual issuance.<sup>198</sup> With no regulations or implementing guidelines issued at that time, and the old *Law on Social Insurance* still in place, businesses expressed concern and confusion in terms of how to ensure compliance. It should be noted though that members of the legal community have noticed fewer instances of applicable retroactive laws in recent months.

### **Access to Economic, Trade and Other Data**

The BTA requires Parties to provide access to data on the national economy and individual sectors.<sup>199</sup> In November 2001, Vietnam issued a Decision to require the mandatory publication of all statistics relating to its state budget.<sup>200</sup> Over the years, statistical information on trade and investment, employment, production and economic projections have become more readily available.

Companies interviewed understand and recognize the challenges of information gathering in Vietnam and cite the importance of technical assistance to assist in the collection of input data, and the building and maintenance of national databases for economic statistics. In particular, respondents underscored a lack of information for the information technology, health, and the financial sectors in Vietnam, the last being crucial to credit ratings, loans and investment growth for their area of business. For some companies, government officials were the only source of information on the national economy and individual sectors.

### **Public Comment on Draft Laws and Regulations**

The BTA requires Parties to afford the public an opportunity to comment on any measure that may affect the conduct of business activities, including drafts of laws and regulations.<sup>201</sup> Since implementation of the BTA, opportunities for comment on draft laws are becoming a more common practice among ministries, which seek feedback from their constituents such as trade associations, domestic and foreign companies, law firms, international donor organizations, and technical assistance providers. Still, there remains no formal system for notice and comment on draft laws in Vietnam.

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<sup>198</sup> *Decree 01-2003-ND-CP* (9 January 2003), effective 1 January 2003.

<sup>199</sup> U.S.-Vietnam BTA, Chapter VI, Article 2.

<sup>200</sup> *Decision 182-2001-QD-TTg* (22 November 2001).

<sup>201</sup> U.S.-Vietnam BTA, Chapter VI, Article 3.



*“The Government does request feedback...But the Trade Agreement requires more than that... It requires that they allow everybody who will be affected by a decision to have a chance to comment on it.”*<sup>202</sup>

However, legal and policy developments in this area continue. In mid-2003, the Vietnamese Government approved an action plan to reform the formulation and promulgation of legal instruments in an effort to raise the quality of these instruments,<sup>203</sup> and the amended *Law on Promulgation of Legal Instruments* now requires all drafting bodies to obtain and investigate opinions from all relevant bodies, organizations and individuals, in particular, those directly affected by the legal instrument.<sup>204</sup>

Significantly, the above action plan contemplates attracting experts, scientists, concerned parties and citizens in the process of formulating and promulgating legal instruments. Further, from the fourth quarter of 2003 to the fourth quarter of 2005, the Ministry of Justice is charged with preparing a plan to achieve an effective regime for the wider participation in formulation of legal instruments.

### **Channels for Administrative Review**

Article 7 of the BTA’s Transparency Chapter requires Parties to maintain administrative and judicial tribunals and procedures for the prompt review and correction of administrative action relating to matters covered by the Agreement. These procedures shall include the opportunity for appeal, without penalty, by persons affected by a decision. Notice of the decision on appeal shall be given to the appellant accompanied by a written explanation and information on the right to any further appeal. Further, all final judgments must be in writing and include the reasons for such decision.

Survey respondents noted that implementation of this provision remains in flux. Currently governed partly by the *Law on Complaints and Denunciations* and the *Ordinance on Administrative Procedures*,<sup>205</sup> among others, administrative reviews of decisions are conducted, in practice, on an ad hoc basis. While not planned for ratification until May 2004, amendments to the *Civil Procedure Code* and the *Law on Complaints and Denunciations* are expected to reconcile many of the requirements outlined in the BTA.

Procedures for appeals to judicial tribunals are currently available, but U.S. businesses also believe these procedures are conducted on an ad hoc basis. While businesses recognized the existence of an appeal process, they felt that resulting outcomes were incomplete and found the decision-making process to be cumbersome and ineffective. Some companies noted that as long as there were conflicts of interest in the appeal process (e.g., a Government agency serving as the regulator and the decision maker at the same time), the appeal process could not be fair. Overall

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<sup>202</sup> Company 21.

<sup>203</sup> *Decision 909-2003-QD-TTg* (14 August 2003).

<sup>204</sup> *Amendments and Additions to the Law on the Issuance of Legal Instruments* (16 December 2002).

<sup>205</sup> *Law on Complaints and Denunciations* (2 December 1998) and the *Ordinance on Administrative Procedures* (as amended on 25 December 1998).

reform in Vietnam's judicial system and the development of an independent judicial system will be important to addressing this concern.

### **Uniform, Impartial & Reasonable Application of Laws**

The BTA requires Parties to administer all laws, regulations, and administrative procedures of general application in a uniform, impartial and reasonable manner.<sup>206</sup>

U.S. businesses reported significant problems with uniformity in the application of legal instruments saying that inconsistency in the application of laws reduced predictability, and created a more cumbersome business environment in Vietnam. Businesses cited the lack of implementing guidelines and the lack new training for Government authorities as the primary reasons for such problems.

Many respondents noted differences between application of general laws in the North and South, as well as differences between major cities and provinces. All agreed that doing businesses outside the major cities was less transparent. A significant proportion of respondents suggested differences between the main urban centers, stating a preference for doing business in one city over the other.

Some companies felt that the lack of uniformity can be attributed to ambiguity in the provisions written into laws and legal instruments. These respondents felt that the laws were written too generally, leaving much room for interpretation.

One respondent remarked:

*“The interpretation of the law can be very different from place to place and a lot of laws seem to be written so as to allow for interpretation. For example, one company received three different interpretations of the VAT law in each of the provinces in which it has business activities...”<sup>207</sup>*

Another company described its experience in trying to open an office in Vietnam. Following instructions from a Government Circular, the company sought approval from the local People's Committee. The People's Committee instructed the company to first get permission from the State Bank. When the company visited the State Bank, they were told they must first go to the People's Committee. Despite having the Government Circular in hand during both meetings, the company was unable to move to the next step in the process.

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<sup>206</sup> U.S.-Vietnam BTA, Chapter VI, Article 6.

<sup>207</sup> Company 65.

## VII. CONCLUSIONS, SUMMARY OF FINDINGS, AND RECOMMENDATIONS

Ten years after the lifting of the post-war embargo by the U.S., and as we mark 10 December 2003 - the second anniversary of the U.S.-Vietnam Bilateral Trade Agreement's entry into force, we note the growing significance of U.S. participation in Vietnam's economy. As of September 2003, total year-to-date bilateral trade stands at USD\$4,784,322,102. Comparisons made on pre-BTA statistics (Year 2001 and YTD 2003) indicate that U.S. exports to Vietnam and Vietnamese exports to the U.S. for 2003 will have close to tripled.<sup>208</sup> U.S. investment in the Vietnamese economy stands at approximately USD\$1.44 billion in committed capital.<sup>209</sup> With such increases in trade and investment activity, U.S. companies all look forward to continuing implementation of the BTA and to Vietnam's accession to the WTO.

### Conclusion

In assessing the information provided through interviews and feedback from U.S. companies, the following conclusions can be made:

- In general, companies have observed genuine efforts by Vietnam to ensure that new legal instruments comply with the BTA. They have also noted efforts to ensure that laws are promulgated in a way that is conducive to a more transparent legal regime, but also hoped that a more formal mechanism for public commentary on draft laws could eventually be established. Many felt that key to effective implementation is greater specificity in the legal provisions in order to eliminate opportunities for arbitrary interpretation of such laws, discretionary decision making, and opportunities for corrupt practices.
- While recognizing the enormity of tasks ahead, particularly in areas where mass education, systemic overhauls, and new infrastructure are needed, U.S. companies hope for further progress in areas that directly affect their day to day business operations. In particular, companies hope for greater efficiency in customs operations, and more effective risk-management strategies to improve trade facilitation.
- Again, while recognizing the challenges of effective enforcement, U.S. companies hope for stricter measures to enforce violations of copyright and trademarks, including clearer and more specific legal provisions, the establishment of higher penalties, and less burdensome procedures and lower thresholds for pursuing civil and criminal remedies.
- While recognizing that the area of "trade in services" is fairly new to Vietnam, U.S. service providers hope that legislation developed to tackle this important aspect of the economy addresses key issues such as national treatment, and fair and transparent

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<sup>208</sup> 2001: U.S. Exports to Vietnam = USD\$460,892,072; Vietnam Exports to U.S. = USD\$1,052,626,287  
2002: U.S. Exports to Vietnam = USD\$580,154,302; Vietnam Exports to U.S. = USD\$2,394,745,628.  
2003 YTD: U.S. Exports to Vietnam = USD\$1,162,584,666; Vietnam total exports to U.S. = USD\$3,621,737,436.  
(Source: U.S. International Trade Commission)

<sup>209</sup> Source: U.S. Census Bureau, Vietnam's Ministry of Planning and Investment.

licensing. They also noted that while prudential measures issued to regulate the services sectors were tremendously important, they hoped that these would not serve as barriers to entry that would negate any market access that they would otherwise receive under the BTA.

- There continues to be much progress in the foreign investment regime. The Government is currently considering several policy options such as those affecting land use rights for collateral that, if implemented effectively, will greatly benefit the overall investment environment.
- Overall, while companies interviewed find Vietnam to be a challenging place to do business, they did not view Vietnam as more difficult than other developing markets. These companies tend to represent long-timers who know the system well enough and have developed a network of relationships that help them successfully navigate their day-to-day operations in Vietnam. However, newcomers continue to face challenges from limited transparency and cumbersome procedures necessary to start up operations. Companies note the importance of continuing to attract new foreign direct investment in Vietnam and stress the need for transparency and predictability in order for Vietnam to compete with its neighbors in the region.

## Summary of Findings

Provided below is a table outlining and summarizing findings based on U.S. company feedback in specific areas of implementation:

| BTA Chapter                         | Issue Area                  | Noted Improvements (✓)  | Problem Areas (✗)  |
|-------------------------------------|-----------------------------|---|--|
| <u>Trade in Goods</u>               | Tariffs                     | <ul style="list-style-type: none"> <li>✓ Classification based on HS System.</li> <li>✓ Tariff Schedule now available.</li> </ul>  | <ul style="list-style-type: none"> <li>✗ Sliding tariff scales.</li> <li>✗ Inconsistent application.</li> <li>✗ Discretionary rulings.</li> </ul>  |
|                                     | Customs Valuation           | <ul style="list-style-type: none"> <li>✓ Anticipation of Customs Valuation based on transaction pricing.</li> <li>✓ Post entry audit being established for more efficient customs clearance.</li> </ul> | <ul style="list-style-type: none"> <li>✗ Inconsistent valuation practices.</li> <li>✗ Burdensome procedures for administrative review and appeals.</li> <li>✗ Complaints to Customs preclude appeals in a court of law.</li> </ul> |
|                                     | Technical Regulations & SPS | <ul style="list-style-type: none"> <li>✓ TBT enquiry point established.</li> <li>✓ SPS enquiry point soon to be established.</li> </ul>   | <ul style="list-style-type: none"> <li>✗ Unique and burdensome requirements imposed on businesses.</li> </ul>  |
|                                     | Trading Rights              | <ul style="list-style-type: none"> <li>✓ Trading rights extended to Vietnamese non-state companies.</li> </ul>  | <ul style="list-style-type: none"> <li>✗ No trading rights for U.S. companies thus far (to be phased-in starting December 2004).</li> </ul>  |
|                                     | Import Licensing            |   | <ul style="list-style-type: none"> <li>✗ Burdensome procedures.</li> <li>✗ Lack of transparency on procedures.</li> </ul>  |
|                                     | Non Tariff Barriers         |   | <ul style="list-style-type: none"> <li>✗ Tariff Rate Quotas remain for agricultural products.</li> </ul>   |
| <u>Intellectual Property Rights</u> | Patents                     |   | <ul style="list-style-type: none"> <li>✗ Laws continue to be vague.</li> <li>✗ Compulsory licensing lacks adequate compensation.</li> <li>✗ Lack of control over parallel imports and copycat products entering market.</li> </ul> |

|  |   |   |   |
|--|---|---|---|
|  | <p>Trademarks</p>                                       | <p>✓ Improved Recognition of Well-known Marks</p>   | <ul style="list-style-type: none"> <li>✗ No legal provisions for preventing the use of unregistered well-known marks.</li> <li>✗ No national treatment for registration.</li> <li>✗ First to register policy resulting in registered copycat products.</li> </ul> |
|  | <p>Copyright &amp; Related Rights</p>                   |   | <ul style="list-style-type: none"> <li>✗ Legislation is still vague and lacks clear definitions.</li> <li>✗ No administrative recourse for copyright violations.</li> <li>✗ Pirated software, music, videos are readily available.</li> </ul>                     |
|  | <p>Enforcement:<br/><i>Administrative Sanctions</i></p> | <p>✓ Some cases of successful crackdowns and raids.</p>                                   | <ul style="list-style-type: none"> <li>✗ Burdensome procedures.</li> <li>✗ Penalties insufficiently high to deter future violations.</li> <li>✗ Laws are unclear, therefore rulings are arbitrary.</li> </ul>   |
|  | <p><i>Civil Procedures</i></p>                          | <p>✓ Cases of successful raids by Economic Police.</p>                                    | <ul style="list-style-type: none"> <li>✗ Burdensome procedures.</li> <li>✗ Penalties insufficiently high to deter future violations.</li> <li>✗ Damages paid to right-holder are low (USD\$66).</li> </ul>  |
|  | <p><i>Provisional Measures</i></p>                      | <p>✓ Some cases where counterfeit and pirated goods have been seized and confiscated.</p> | <ul style="list-style-type: none"> <li>✗ Companies have to post bond ahead of time.</li> </ul>  |
|  | <p><i>Border Measures</i></p>                           | <p>✓ Customs enforcement mechanisms available.</p>  | <ul style="list-style-type: none"> <li>✗ No seize &amp; destroy measures or confiscation of equipment.</li> <li>✗ Injunctive relief not addressed.</li> <li>✗ Up to the infringer to provide burden of proof.</li> </ul>  |
|  | <p><i>Criminal Penalties</i></p>                        | <p>✓ More effective in preventing future violations.</p>                                  | <ul style="list-style-type: none"> <li>✗ Not easy to initiate criminal cases.</li> </ul>  |



|                                     |   |  |  |
|-------------------------------------|---|--|--|
|                                     | Technology Transfer                         |  | <ul style="list-style-type: none"> <li>× “Encouragement” of technology transfer.</li> </ul>  |
|                                     | Land Issues                                 | <ul style="list-style-type: none"> <li>✓ LURs can be mortgaged with onshore foreign banks.</li> </ul>              | <ul style="list-style-type: none"> <li>× Absence of registry to realize secured transactions</li> <li>× Discrimination on land pricing.</li> <li>× Land lease periods are short (30 years).</li> <li>× Determination of market value of land difficult.</li> </ul> |
|                                     | National Treatment Issues                   | <ul style="list-style-type: none"> <li>✓ Gradual elimination of dual pricing.</li> </ul>                           |  |
|                                     | Investment Disputes                         | <ul style="list-style-type: none"> <li>✓ Expected accession to ICSID.</li> </ul>                                   | <ul style="list-style-type: none"> <li>× Underdeveloped judicial and court system.</li> </ul>  |
|                                     | Expropriation and Compensation              | <ul style="list-style-type: none"> <li>✓ Provided in Foreign Investment Law.</li> </ul>                            |  |
|                                     | Currency Transfers                          | <ul style="list-style-type: none"> <li>✓ Elimination of mandatory foreign exchange conversion measures.</li> </ul> | <ul style="list-style-type: none"> <li>× Lack of foreign currency conversion guarantees.</li> </ul>  |
| <b><u>Business Facilitation</u></b> | Importing Office Equipment                  |  | <ul style="list-style-type: none"> <li>× Burdensome import licensing procedures.</li> <li>× Imports are not consistently duty free.</li> <li>× Some delays at Customs.</li> </ul>  |
|                                     | Access to Office & Living Space             |  | <ul style="list-style-type: none"> <li>× High rental fees (when compared regionally).</li> </ul>   |
|                                     | Engaging Agents, Consultants & Distributors |  |  |
|                                     | Advertising & Direct Sales                  |  | <ul style="list-style-type: none"> <li>× Restrictions remain for foreign companies conducting direct sales.</li> <li>× Discriminatory pricing in advertising.</li> </ul>   |



|                            |  |   |   |
|----------------------------|--|---|---|
|                            | <p>Market Studies</p> <p>Government Provided Products and Services</p>   | <p>✓ No restrictions.</p>   | <p>× Lack of reliable data.</p> <p>× Some discriminatory pricing remains.</p>   |
| <p><u>Transparency</u></p> | <p>Publication of Laws, Regulations &amp; Administrative Procedures</p> <p>Access to Economic, Trade and Other Data</p> <p>Public Comment on Draft Laws &amp; Regulations</p> <p>Channels for Administrative Review</p> <p>Uniform, Impartial &amp; Reasonable Application of Laws</p> | <p>✓ Establishment of <i>Official Gazette</i>, now published daily.</p> <p>✓ Laws published within 15 days of promulgation and do not come into effect until they are published.</p> <p>✓ Greater availability of information.</p> <p>✓ Increased opportunities for commentary of draft laws.</p> | <p>× Raw input and statistical data still difficult to obtain.</p> <p>× No formal mechanism for commentary of draft laws.</p> <p>× No formal channels for administrative review in some areas.</p> <p>× Burdensome procedures.</p> <p>× Interpretation of vague laws causes inconsistencies in application.</p> |

## Recommendations

It is in light of these conclusions that we respectfully submit the following recommendations:

- **Technical Assistance** – We note that while Vietnam is currently receiving bilateral and multilateral technical assistance in various issue areas, including areas addressed by the WTO Agreements, a more coordinated effort could be made to highlight and provide the following assistance: (1) international best practices and related policy issues that should be made to implement the BTA; (2) technical issues aimed at legislators and regulatory agencies; and (3) the provision of broader awareness and educational efforts aimed at local authorities and the business community. Further, we note the importance of soliciting and incorporating feedback from foreign and local enterprises operating in Vietnam on the effectiveness of laws and the efficacy of regulations and procedures. We also highlight the tremendous wealth of expertise in the U.S. private sector particularly on regulatory issues.
- **Autonomous Liberalization** – We note the potential for increased foreign direct investment that autonomous liberalization in various sectors would attract, including that of the trading rights and distribution services sectors. Further liberalization in the banking, insurance, and telecommunication sectors could also provide greater capital mobilization and other “multiplier effects” for Vietnam’s economic development.
- **WTO Accession** – As Vietnam looks towards WTO accession, we note the importance of demonstrating effective implementation of BTA commitments on trade liberalization. These commitments, if multilateralized, could act as a spring board for WTO accession (See U.S.-Vietnam Trade Council analysis, “*The BTA and Vietnam’s WTO Accession*”, 4 August 2003, available at <http://www.usvtc.org>).

Finally, on behalf of the corporate membership of the U.S.-Vietnam Trade Council and companies that participated in this exercise, we thank the Government of Vietnam for this opportunity to comment and look forward to continuing our fruitful partnership with Vietnam.

## APPENDIX

### **Methodology**

Close to 80 U.S. companies were interviewed during the summer of 2003.<sup>210</sup> In general, U.S.-Vietnam Trade Council representatives conducted hour-long personal interviews with the primary representatives of U.S. companies with significant operations in Vietnam. A few companies responded in writing or via a phone interview. To encourage candid discussion and evaluation, the names of individual companies have not been used.

The goal of this survey was to assist in the shaping and focus of future technical assistance and implementation efforts. It was also our hope that this report could serve to assess the implementation of the BTA and Vietnam's accession to the WTO by also identifying areas not covered by the BTA but which may be of significance to the business community.

To facilitate such interviews, an *interview questionnaire* was customized to facilitate an in-person interview and to take advantage of the flexibility and pragmatic nature of qualitative research. Organized according to the various chapters of the BTA and in accordance with issue areas, this guide was crafted based not only on common problems faced by U.S. companies in other countries but also issues that have arisen out of dispute settlement cases in the WTO.

Beginning in May 2003, U.S.-Vietnam Trade Council Education Forum staff conducted extensive face-to-face interviews with U.S. companies on issues related to the BTA and the business environment in general. Interviews took place over an eight week period from the end of May through the first week of July 2003.

Companies targeted for this research included U.S. companies currently operating in Vietnam as well as U.S. companies interested in entering the Vietnamese market. Under certain circumstances, businesses that represent U.S. companies, such as law firms and accounting firms, were also included in the interview sample.

Among the U.S. companies with operations in or interested in Vietnam, interviewees were selected and sorted according to industry and its level of current participation in Vietnam's economy. The following industries were targeted:

- Insurance
- Manufacturers and exporters of apparel, footwear, bags, toys, etc.
- Pharmaceuticals
- Legal consultants
- Transportation services (e.g., logistics, express-delivery)
- Financial services
- Telecommunication services
- Distributors of consumer goods

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<sup>210</sup> While an effort was made to canvass as broad a selection as possible, not all sectors were examined.

- Consultants (e.g., accounting, market research, brokers)
- Information technology
- Retail sales (e.g., restaurants and clothing stores)

## Interview Questionnaire

### TRADE IN GOODS

#### **Tariff Reductions and Classification**

Through the BTA, Vietnam has agreed to increase market access for U.S. goods by reducing and binding its tariff rates on 261 categories. The agreed reductions are set forth as tariff “bindings” meaning that while Vietnam cannot exceed the bound tariff rates, it can decide to lower them. Vietnam has also committed to and is currently applying the Harmonized Commodity Description and Coding System (HS Nomenclature) for imports and exports.

1. Are any of these bound tariff items relevant to your business’s operations? If so, has your company been able to import these goods at the tariff level as identified in the BTA?
2. Is information on the tariffs imposed on your imports, whether or not they are included in the BTA, readily available to you? Is there a public source for such information?
3. Do you ever encounter “sliding tariff scales” on the importation of products? How often does the tariff level change on particular products and do you get taxed at the higher or lower end of the scale?
4. Are tariff levels on goods imported by your company identified in your individual business contracts? If you choose to import additional items, does this contract need to be revised before you can benefit from the application of specific tariff levels?
5. Are you aware of any entity (whether local or foreign) receiving preferential tariff rates on goods entering Vietnam? Are such goods items originating from ASEAN countries? Are such goods originating from EU countries?
6. Do you in the importing of goods encounter confusion in tariff classification? If so, how are these usually resolved? Which Authority in Vietnam resolves such confusion? If you are aware, please elaborate how the appropriate tariff classification is determined. Is there a known point of enquiry for such matters?
7. Do you in the importing of goods encounter confusion in determining the origin of goods? If so, how are these usually resolved? Which Authority in Vietnam determines the origin of goods? If you are aware, please elaborate on the method used. Is there a known point of enquiry for such matters?
8. Please provide any other relevant information concerning tariffs that affect your business operations, including what could be done to facilitate information availability in this area.

#### **Customs Valuation**

Under the BTA, Vietnam has committed to use the *transaction value* (rather than reference prices) for determining the value of a good for Customs. The obligations undertaken are designed to ensure that determinations of the customs value for the application of duty rates to imported goods are based on transaction value of the imported merchandise and conducted in a neutral and uniform manner, precluding the use of arbitrary or fictitious values. Accordingly, the dutiable price for imported goods is to be determined using the following six methods in this particular order: (1) transaction value; (2) transaction value of identical goods; (3) transaction value of similar Goods; (4) deductive method; (5) computed value; and (6) fall-back method.

1. Vietnam's new Customs Law (effective 1 January 2002) and *Decree 60-2002-ND-CP* (effective 1 July 2002), regulates the determination of dutiable prices for imported goods. These new regulations based on WTO Customs Valuation principles are currently applied to goods originating from some countries and as identified in individual companies' commercial contracts. Are imports made on behalf of your business operation subject to this system of valuating goods at the border?
2. When clearing Customs, what documents do you present to facilitate such methods of calculation?
3. Is this system of valuating goods applied uniformly at port of entries throughout Vietnam? Which ports of entry have not applied such methods?
4. What process does Vietnam use to determine the Customs value of a good? Is there an established point of enquiry for matters relating to Customs valuation? Which Authority in Vietnam determines and makes rulings on such matters? Are there channels for administrative review or for presenting disputes on rulings? Are trading companies allowed to apply for a ruling on such matters before goods are imported or exported?
5. In your experience, do the methods used continue to discriminate against targeted imported products? For example, do the calculation methods shift imported components into higher tariff classifications with higher duty rates? In what industry is this a prevalent occurrence?

### **Import Licensing**

Vietnam has committed to administering import licensing procedures in accordance with the *WTO Agreement on Import Licensing*. The *WTO Agreement on Import Licensing* establishes rules for countries using import licensing to regulate their trade and aims to ensure that procedures used do not, in themselves, form barriers to trade. The Agreement aims to increase transparency and predictability to protect the importer against unreasonable requirements or delays associated with import licensing. Both automatic and non-automatic (quotas) licenses are covered by the Agreement.

1. Do most transactions relating to the importation of goods into Vietnam for your company involve automatic import licensing procedures? Are imported goods for your company used as inputs for production, as inputs for manufactured goods which are then exported, or for distribution within Vietnam?
2. Prior to importation of goods, what procedures does one have to undergo? Does your company continue to feel that automatic import licensing procedures are still unnecessarily burdensome?
3. When importing goods into Vietnam, does your company need to apply for one license for each different shipment? Apart from your import license, are other documents often requested by from Vietnam's Customs authorities?
4. Is applying for a non-automatic import license unnecessarily burdensome? Is the allocation of non-automatic licenses a transparent process? Are foreign companies discriminated against during this process? (For example, are fees for applying for such a license higher for foreign companies?)
5. Are non-automatic licenses only applicable to a single port of entry?
6. Is obtaining an import licensing ever dependent on export performance, local content, transfer of technology or other requirements? Are there any additional procedures that are Unnecessarily burdensome or you view as having trade-distorting effects?

7. Are there points of inquiry established for matters relating to import licensing? Are any of the decisions made on licensing subject to administrative review?

#### **Elimination of Non-Tariff Barriers**

Vietnam has committed to the general elimination of all non-tariff barriers (NTBs) three to seven years upon entry into force of the BTA. Non-tariff barriers include import and export restrictions, quotas, licensing requirements which serve as trade-distorting measures.

On 4 April 2001, Vietnam's Ministry of Trade issued *Decision 46-2001-QĐ-TTg on Import Export Management for the period of 2001-2005* effectively eliminating non-tariff barriers and quantitative restrictions. Under this Decision, only seven items - petrol, glass, iron, vegetable oil, sugar, motorbike and nine-seat motorized vehicles - require a trading license from the trade ministry.

1. Are products imported or exported by your company subject to licensing requirements? Are any of these products you import/export not listed on the list of seven items (petrol, glass, iron, vegetable oil, sugar, motorbike, nine-seat motorized vehicles) mentioned above as exempted from licensing? Are there points of inquiry and mechanisms for administrative review for inconsistencies such as this? Have attempts to rectify such situations been successful?

#### **Standards and Sanitary & Phytosanitary Measures**

The BTA forbids Parties from using technical regulations and standards to discriminate against foreign products or otherwise create "unnecessary" obstacles to international trade. Likewise, the BTA requires Parties to ensure that health measures affecting food safety and animal and plant health (known as "SPS" measures) are non-discriminatory, based on scientific principles and sufficient evidence, and do not otherwise act as an obstacle to trade. The purpose of these measures is to distinguish legitimate technical and health standards from protectionist measures.

1. Are any of your products or inputs required to meet certain technical standards prior to import or distribution?
  - a. If so, what kind of testing or certification must you receive? Who administers these tests and authorizes certification/approval?
  - b. Do these standards treat imported products differently from domestic products? If so, how?
  - c. Are the tests/certifications unnecessarily burdensome?
  - d. What is the stated justification (policy objective) for this standard? Are there less trade-restrictive ways to accomplish this objective?
2. Are your products subject to SPS measures (i.e., measures designed to protect human, animal, or plant health)?
  - a. If so, what is the purported scientific basis for these SPS measures?
  - b. If so, do these SPS measures discriminate between local products and imported products?
3. Are standards, technical regulations and conformity assessment procedures developed and applied transparently and on a non-discriminatory basis?
4. Are standards and SPS measures applied consistently at different points of entry to Vietnam? Which points of entry have not applied such standards and/or SPS measures?
5. Are you aware of any entity (whether foreign or domestic) receiving more lenient standards or assessments?

6. Is information on standards and SPS measures affecting your business readily available to you?
  - a. Where do you find this information?
  - b. Is there a known point of enquiry for related questions?

### **Trading Rights**

Under the BTA, Vietnam is required to extend trading rights (i.e., the right to import/export) to all domestic enterprises upon entry into force of the Agreement, while extending trading rights to foreign joint-ventures by December 2004. Wholly-owned U.S. trading companies are to be permitted by December 2008. In preparation for opening up the import/export sector, Vietnam is currently drafting the Amendments to the 1997 Commercial Law to regulate this sector. The Amendments to this Law are not expected to be considered by the National Assembly until the end of 2003/early 2004 for implementation end of 2004. Until then, trading rights have been granted on a case by case basis to foreign ventures.

1. In your day to day business operation, do you encounter instances where the import of products for use in production is not permitted, regardless of whether such permission is granted in your investment license?
2. Is your business centered on import & export activities? Are you aware of foreign joint-venture or wholly owned companies in your business sector involved in direct trading (import/export) activities? Are they ASEAN entities?
3. Do foreign joint-ventures or foreign-owned companies with licenses to engage in direct import & export activities encounter discriminatory treatment in any way?

### **INTELLECTUAL PROPERTY RIGHTS**

Under the BTA, Vietnam has taken on obligations to adhere to internationally accepted norms to protect and enforce intellectual property rights. In particular, the BTA sets minimum standards of protection for copyrights & related rights, trademarks, industrial designs, patents, integrated circuit layout designs and confidential information. Minimum standards are also established for the enforcement of intellectual property rights in administrative and civil actions and, criminal actions and actions at the border for copyright piracy and trademark counterfeiting. The BTA also requires that Vietnam accord National treatment to U.S. right holders. The IPR obligations phase in gradually: trademarks and patents (December 2002), copyright and related rights (June 2003), encrypted programs (June 2004), all others (December 2003).

### **Patents**

1. Under current legislation and policies/practices, is compulsory licensing of patents an issue of contention? What is the scope of this contention? In instances of compulsory licensing, are efforts made at obtaining authorization from the right-holder taken? Is the use non-exclusive and non-assignable, and limited to the supply of the domestic market? In cases of compulsory licensing, is the right holder paid adequate remuneration?
2. Does Vietnamese law provide for exclusions from patentability? If so, what are they?
3. Under current legislation and policies/practices governing patent protection, is there the option for judicial review in instances of patent infringement where administrative procedures offer no recourse? Are there opportunities for the suspension of potentially infringing acts before a legal determination is made?



4. If civil procedures are resorted to in cases of patent infringement, are procedures undertaken unnecessarily burdensome and lengthy?
5. Under current legislation and policies/practices governing patent protection, would enforcement agents have the authority to conduct confiscation of income from patent-infringing products and fine violators? In the case of a finding of infringement, are awards issued at least equivalent to damages?

#### **Trademarks**

1. Has your company had problem registering a trademark? If so, please describe.
2. Has your company been unable to register a trademark? If so, what was the reason given for the refusal to register the trademark?
3. Under current legislation and policy, is the recognition of well-known marks practiced? Is national treatment extended to holders of well-known marks? For example, is recognition of local well-known marks more commonly extended and granted, as opposed to internationally well-known marks?
4. Under current legislation and policy, is national treatment afforded to right-holders for the registration of trademarks? Can registration be done directly without having to go through an authorized Vietnamese agent?
5. In instances where civil proceedings are currently being undertaken, is there the option for preliminary injunction?
6. In instances of infringement where administrative proceedings are ineffective, are there opportunities for the transfer of cases to enforcement authorities for criminal investigation without having to show proof of a crime? Are there opportunities for private Parties to file complaints with criminal prosecutors if administrative authorities fail to transfer cases to criminal enforcement authorities?

#### **Copyright**

1. Under current legislation and policy, are there opportunities for preliminary injunction in instances of copyright infringement under civil procedures?
2. Under current judicial procedures governing intellectual property, is the burden of proof placed on the infringer to show that its operations are properly licensed?
3. What has been your company's experience with copyright infringement?
4. What steps has your company taken to enforce your copyright? What has been the response from Vietnamese Government officials? Please describe.

#### **Enforcement**

1. In general, what other issues hinder or impede the effective enforcement of intellectual property rights protection? Is effective coordination among Government agencies, or local protection/ corruption an issue?
2. Under current legislation, policy and procedures, are there options for criminal remedies for commercial scale infringement? Is this route unnecessarily burdensome? Are thresholds set for criminal prosecution unnecessarily high so much that few opportunities for criminal action exist?

## **TRADE IN SERVICES**

### **Distribution Services**

Under the BTA, Vietnam will allow U.S. companies to establish *local* joint-ventures (of up to 49% U.S. equity) to engage in all forms of distribution services by December 2004. [This obligation only applies to US providers who establish in Vietnam. U.S. companies based in the U.S. cannot engage in cross-border distribution services.] This equity limitation will be eliminated by December 2007. In preparation for opening up the import/export and distribution services to foreign participation, Vietnam is currently drafting the Amendments to the 1997 Commercial Law and its implementing Decrees to regulate this sector. The Amendments to this Law are not expected to be considered by the National Assembly until the end of 2003/early 2004 for implementation end of 2004. Until then, trading and distribution rights have been granted on a case by case basis to foreign ventures.

1. What restrictions and challenges do you face in distributing your products on a wholesale, retail or franchising basis?
2. Do you know of any non-U.S. foreign companies that are licensed to distribute in Vietnam? If so, what are these companies and what do they distribute? Are they joint-ventures or 100% foreign-owned?
3. Would quicker opening up of the distribution sector affect decisions in your company to expand operations in Vietnam? What kind of problems do you foresee in this regard? For example, do you anticipate anti-competitive behavior and/or collusion in distribution of your product? What advantages do you anticipate if the ability to distribute products directly is extended in your sector? Would direct distribution assist in reducing the presence of counterfeit products in the market?

### **Banking Services**

Under the BTA, Vietnam allows U.S. financial service suppliers to, inter alia, provide financial services such as lending, acceptance of deposits, payment and money transmission services, etc. (beginning in 2004), establish 100% subsidiary banks (beginning in 2010), receive VND deposits from Vietnamese legal persons (beginning 2009) and Vietnamese natural persons (beginning 2011) with which they don't have client relations, and issue credit cards (beginning 2009) on a national treatment basis. Have these commitments affected your decision to locate or expand business and investment in Vietnam?

1. Vietnam made no commitments on cross border banking services e.g. lending of all types or acceptance of deposits. What types of cross border banking services do your company provide? Does your company have to comply with any restrictions e.g. registration or licensing requirements to supply such services?
2. Has the restriction on the opening of transactional points affected your business? How? Does your branch have any offshore business e.g. purchase of shares of offshore companies or offshore bank accounts? Do you have to obtain any permit/registration with the SBV in order to do so?
3. Do you think the various prudential requirements imposed by the SBV are in line with international norms? Do they pose any unnecessary obstacles to your business even if they are applied on a non-discriminatory basis? If yes, why?

4. Do you have any difficulties (e.g. registration or notification requirements, etc.) in the creation, perfection and enforcement of security interest, especially, mortgages over land use rights in Vietnam? Do you have the absolute right to dispose of the secured property upon default of the debtors? As an offshore lender, do you have the right to take security for your loans by way of mortgage of land use right? How could you enforce such mortgage before Vietnamese Courts?

#### **Insurance Services**

Vietnam will allow the establishment of 100% U.S. owned insurance companies beginning 2006, and provision of statutory insurance business beginning 2004 for U.S. Vietnam insurance joint-ventures and 2006 for 100% U.S. owned insurance companies. Have these commitments affected your decision on your potential investment or expansion of your business in Vietnam?

1. Under the BTA, Vietnam gave commitment in respect of a number of cross border insurance services, including, *inter alia*, insurance services provided to FIEs, reinsurance services, insurance and reinsurance brokering services, etc. Do you think your company is treated non-discriminatory to State-owned insurance companies? If so, in what manner?
2. Vietnamese law prohibits a life insurance company from providing non-life insurance services and vice versa. As a life/non-life insurance company, do you have any plan to set up a non-life/life insurance company? If yes, have you ever applied to the MOF for a license? Do you think the current regulations continue to permit considerable bureaucratic discretion for the MOF and offer limited certainty to foreign insurers seeking to operate in Vietnam's market?
3. Can you open your branches as many as you want and in any provinces where you want or is there any quantitative restriction? If yes, how has this restriction affected your business? Do you have to obtain approval from the provincial authority to open a branch? How provincial authority and the MOF cooperate in considering your application for a branch?
4. Do you think the various prudential measures imposed by the MOF are in line with the international norms and applied on an impartial basis?

#### **Non-Banking Financial Services**

Under the BTA, Vietnam made no cross border commitments on non-banking financial services. In commercial presence financial leasing services, it will allow U.S. service suppliers to establish joint-ventures or 100% U.S. owned financial leasing companies. Has this commitment affected your decision to invest or expand your investment in Vietnam?

1. Vietnam made no commitments on certain cross border financial services such as asset management, participation in issue of all kinds of securities, etc. Some of them are very new to both Vietnamese regulators and customers, e.g. asset management, settlement and clearing services for financial assets, including derivative and securities products. Does your company have any intention to provide these new kinds of financial services in the Vietnamese market?
2. Do you think U.S. owned financial leasing companies are in the same playing field with Vietnamese financial leasing companies, especially State-owned financial leasing companies?
3. The BTA allows a non-bank U.S. securities service supplier to set up representative office in Vietnam. Does it make sense to your company to have a representative office in Vietnam given the current laws of Vietnam prohibit a foreign representative office from engaging in any business activities?

4. Do you think the various prudential measures imposed by the SBV are in line with the international norms and applied on an impartial basis? How have they affected your business?

#### **Telecommunication Services**

The BTA will allow U.S. firms to offer telecom services in Vietnam over a phase-in period: value added services, such as e-mail, voice mail, and other computer based telecom services (beginning in December 2003), Internet services (beginning in December 2004), basic voice telephony (beginning in December 2008). Has this staged introduction of competition affected your company's decisions about the extent to which it should locate or expand its operations and investments in Vietnam? How else has Vietnam's telecom regime affected your business decisions?

1. The BTA obliges Vietnam to establish a regulator that is separate from and not accountable to any supplier of basic telecom services (e.g., VNPT). What has been your company's experience with Vietnam's telecommunications regulatory regime? Is there an independent regulator? Does it issue impartial decisions?
2. In the BTA, Vietnam agreed to permit, upon entry into force, U.S. telecom suppliers to provide *all* "cross-border" telecom services (i.e., from the United States into Vietnam) through a Vietnamese gateway operator. What kinds of cross-border telecom services does your company offer (e.g., e-mail, voice mail, on-line data retrieval, basic voice, data, Internet)? What has been your company's experience with offering such services?
3. For cross-border basic telecom services (e.g., voice telephony), Vietnam has committed to ensure that its major supplier provides U.S. suppliers interconnection at non-discriminatory terms and conditions, (including quality), at cost-oriented and reasonable rates, and in a timely fashion. Does VTI or other gateway operators provide interconnection in this manner?
4. Beginning in December 2004, Vietnam committed to allow U.S. companies to establish a 50% joint-venture with a Vietnamese company to supply "value added" telecom services (i.e., email, voicemail, and other computer-based telecom services). Is your company preparing to offer such services through a joint-venture in Vietnam? If not, why not?
5. Vietnam will also allow U.S. companies to establish joint-ventures in Vietnam to offer other types of telecom services: Internet services (beginning in December 2005), basic non voice service (beginning in December 2006), and basic voice telephony (beginning in December 2008). Is your company planning to offer such services through a joint-venture in Vietnam? Does this phase-in schedule affect your company's decisions about whether to locate in Vietnam?

#### **INVESTMENT RELATIONS**

##### **Trade Related Investment Measures (TRIMs)**

Under the BTA, Vietnam has committed to the general elimination of trade-related investment measures including the elimination of trade-balancing measures, foreign exchange controls on imports by December 2001. It has committed to eliminate all other TRIMs including local content requirements by December 2006 (or the date of its WTO accession, whichever is earlier).

1. Do you continue to have trade balancing or foreign exchange limitations in your investment license? Do you experience instances where trade-balancing measures or foreign exchange controls are imposed, whether or not they are listed in your investment licensing? Please elaborate.

2. Do regulations concerning your investment involve mandatory local content or export performance requirements? Is your company accorded investment preferences provided that you use local Vietnamese content in the production of your goods? If so, please elaborate on which sector you belong to and what specifically these requirements are. If local content and performance requirements are not stipulated in order to attain a license in your sector, do you continue to feel like they still factor into licensing decisions?

#### **Investment Licensing**

1. In your sector, has licensing for investment projects transitioned to a registration system? If so, does this registration system continue to be unnecessarily burdensome? Are regulations relating to investment registration transparently administered? If investment in your sector is still based on a licensing regime, are regulations relating to the application and notification of licenses transparently administered?

#### **Technology Transfer**

1. Since the entry into force of the BTA, have you experienced any mandatory provisions on the transfer of technology as a condition on the establishment, acquisition, expansion, management, conduct or operation of a covered investment?

#### **Land Issues**

1. How important are issues relating to land ownership, leasing and transfer to your current investment or its future? Is your company allowed to mortgage land use rights at foreign credit institutions operating in Vietnam or to transfer land use rights?

#### **BUSINESS FACILITATION**

The BTA ensures U.S. business people a non-discriminatory environment for conducting routine business practices, such as setting-up an office, importing products designated for office use, advertising, and conducting market studies.

1. Does your company encounter any difficulties gaining access to available office space and/or living accommodations for foreign employees? Did another entity (whether local or foreign) receive better rates or benefits?
2. The Vietnamese Government supplies some products and services that are essential to most businesses, public utilities for example. Does your company receive market prices for products and services supplied by the Government?
  - a. Do you receive the same rates as local businesses?
  - b. Do you receive the same rates as other foreign-owned businesses?
3. Has your business imported equipment necessary for local business operations?
  - a. If yes, did you encounter any unnecessary procedures or delays?
  - b. If no, was your reason for sourcing this equipment in Vietnam related to legal issues or procedural burdens? Please explain.
4. Does your company advertise its goods/services in Vietnam? Have you encountered any barriers to advertising? Please explain. If applicable, did you find the approval process to be unnecessarily burdensome?

5. Has your business conducted any market studies or employed a consultant to do so on behalf of your company? If so, did you encounter any difficulties obtaining the necessary information? Please explain.
6. Please provide any other relevant information concerning the ability of your business to engage in Vietnam. (E.g., direct contact and sales, market studies, stocks, advertising, hiring agents, etc...)

#### TRANSPARENCY

The BTA stipulates extensive provisions designed to increase transparency in matters relating to international trade. Vietnam agreed to publish all laws, regulations and general administrative procedures and provide a reasonable period for public comment on new or modified laws and regulations before implementation.

1. Are new laws and regulations affecting your business easily accessible to you?
  - a. Are these laws and regulations published regularly and in advance of their effective dates?
  - b. Where do you find this information?
2. Does your business have an opportunity to comment on the formulation of laws, regulations or administrative procedures in your sector?
3. Has your business ever appealed or requested administrative review on decisions affecting your business?
  - a. If yes, were you satisfied with the process? Please describe.
  - b. If not, are you aware of the procedure for making such an appeal?
4. Have laws affecting your business operations been uniformly implemented throughout Vietnam? Please explain.
5. How does your business meet its information needs? To the extent that it is available, is information and data on the national economy and various sectors accessible?

### **List of Interviewed Sources**

1. Executive and legal advisor for liaison office of a U.S. apparel and footwear company.
2. Representative and financial executive of 100% foreign-owned consumer goods manufacturer.
3. Representative of a U.S. pharmaceuticals firm.
4. Representative and executive for a U.S. information technology company.
5. Representative and executive of a U.S. insurance service provider.
6. Representative of a U.S. information technology company.
7. Representative of a high-technology development company.
8. Executive for a U.S. manufacturer of household appliances.
9. Representative for a U.S. express-delivery service provider.
10. Representative of a start-up high technology firm.
11. Executive of a major importer of apparel to the United States.
12. Representative of a U.S. logistics company.
13. Representative of a U.S. logistics company.
14. Representative for a U.S. express-delivery service provider.
15. Executive of a start-up high-technology firm.
16. Representative for U.S. manufacturer of high-end footwear and apparel.
17. Representative of a U.S. relocation service provider.
18. Representative of headwear and apparel manufacturer.
19. Executive for representative office of a major U.S. medical equipment and pharmaceutical manufacturer.
20. Representative of a diversified, 100% foreign-owned enterprise.
21. International attorneys of an international law firm.
22. Representative of a U.S. company providing diversified services to insurance companies and government agencies.
23. Representative and executive for a market entry consultancy and advisory firm.
24. Representative of a U.S. chemical and agro-science company.
25. Representative of a U.S. agribusiness company.
26. Representative and executive for a U.S. provider of banking services.
27. Representative of a U.S. express-delivery service provider.

28. Representative and financial executive of a U.S. manufacturer of household consumer products.
29. Representative of a U.S. manufacturer of biotech products and medical equipment.
30. Representative of a U.S. insurance conglomerate.
31. Executive for the representative office of a U.S. conglomerate involved in multiple business sectors.
32. Representative for a U.S. insurance company.
33. Executive of a trade consultancy and private equity firm based in the U.S.
34. Representative of a regional investment and advisory firm.
35. Representative for a U.S. financial services provider.
36. Executive for a high-technology telecommunication consultancy.
37. Representative of a joint-venture insurance company.
38. Legal advisor for a U.S. insurance company.
39. Executives for a regional relocation company.
40. Representative of a retail shop selling imported products.
41. Finance executive of a U.S. financial services provider.
42. Finance executive of a U.S. financial services provider.
43. Executives from a U.S. beverage conglomerate.
44. Representative and executive for a U.S. consumer goods manufacturer.
45. Executive and Representative for a U.S. agribusiness conglomerate.
46. Representative of a manufacturer and distributor of food and beverages.
47. Representative for a career services consultancy.
48. Representative of a company providing distribution services.
49. Representative of logistics consulting company.
50. Representative of a U.S. food and beverage conglomerate.
51. Representative and legal advisor for a pharmaceutical company.
52. Legal advisor of a U.S. oil and gas company.
53. Representative of a U.S. consumer and industrial product manufacturer.
54. Company did not respond
55. Representative of a regional market research service provider.
56. Representative of a global advertising service provider.
57. Representative of a U.S. food and agribusiness.



58. Representative for a U.S. food and agribusiness.
59. Executive for a multinational corporate services consulting firm and representative of a small consulting firm.
60. Attorney at an international law firm.
61. Company did not respond.
62. Finance executive of a U.S. oil and gas company.
63. Representative and Executive of a joint-venture high-technology company.
64. Executive for a major oil and gas company.
65. Representative of a small consulting firm and representative of a pharmaceutical market research service provider.
66. Representative of a manufacturing company.
67. Company did not respond.
68. Executive of a joint-venture partnership with a U.S. automotive manufacturer.
69. Representative and executive of a large diversified company.
70. Representative of a construction services provider.
71. Executive of a U.S. telecommunications service provider.
72. Executive at a U.S. legal advisory and consulting firm.
73. Representative of an equipment supplier.
74. Executive for an engineering and architectural service provider.
75. Representative of a global banking and financial services provider.
76. Representative of a U.S. software manufacturer.
77. Representative of a U.S. software manufacturer.
78. Attorney at an international law firm

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