

August 12, 2005

Vietnam Update: Trading Rights & Distribution Services

Overview

Foreign enterprises currently do not have full trading and distribution rights, although licenses have occasionally been granted on a case-by-case basis. Under the 2001 U.S.-Vietnam Bilateral Trade Agreement (BTA), Vietnam committed to open its trading (import-export) sector to non-state and U.S. companies. In particular, the BTA requires Vietnam to extend trading rights to all domestic enterprises upon entry into force and phases-in such rights for U.S. firms over a period of three to seven years. For its accession to the WTO, Vietnam is currently considering the extension of trading and distribution rights to all WTO members.

Vietnam's recently ratified *Commercial Law (Amended)* provides a regulatory framework for foreign participation in the import and distribution sector. The *Commercial Law* was passed by the National Assembly on 14 June 2005 and will enter into force on 1 January 2006. Pursuant to the *Commercial Law*, a key implementing decree currently being drafted by the Ministry of Trade is expected to allow foreign business entities to establish branches in order to conduct commercial activities, expressly comprising "wholesale and retail of goods, import and export of goods, and other related supporting activities". For more information on the draft implementing decree and its contents, please refer to our *Catalog of Legal Updates* available at: <http://www.usvtc.org/updates/legal/2005/july.pdf>

U.S.-Vietnam Bilateral Trade Agreement (BTA) Commitments

Under the BTA, Vietnam has committed to open its trading (import-export) sector to non-state and U.S. companies. In particular, the BTA requires Vietnam to extend trading rights to all domestic enterprises upon entry into force and phases-in such rights for U.S. firms over a period of three to seven years. U.S.-invested joint ventures may engage in trading activities in most products beginning in December 2004 provided that U.S. ownership is limited to 49%. 100% U.S.-invested companies may be established to engage in import/export activities beginning in December 2008. In distribution services, joint ventures with Vietnamese companies may be established beginning in December 2004 provided that U.S. equity in such joint ventures is limited to 49%. Joint ventures with Vietnamese companies without limitations on U.S. equity may be established in December 2007. 100% U.S. owned distribution services companies may be established in December 2008. The above commitments are subject to certain exceptions as listed in Annexes B, C, and D of BTA Chapter 1, and Annex G of BTA Chapter III. See "FAQs: *Trading Rights & Distribution Services*" below for more detail. To view the full text of the U.S.-Vietnam BTA, please refer to this link: <http://www.usvtc.org/trade/bta/text>

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Due to ongoing WTO negotiations and the ongoing development of legislation on trading rights & distribution services, Vietnam's December 2004 BTA commitments have not yet been codified into domestic law. As an interim measure, to implement Vietnam's trading rights obligations as committed to in the BTA and as agreed to during the BTA Joint Committee session on 17 June 2005 in Washington DC, the Ministry of Trade has recently issued a *Diplomatic Note* (dated 28 July 2005) re-asserting its obligation (as stipulated in BTA Chapter I, Article 2, Section 7, Paragraph B, C, D; and Chapter III, Annex G) and providing a point of contact. US companies seeking to import and distribute their products have been instructed to contact the following:

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WTO Accession Commitments

Vietnam is currently considering the extension of trading and distribution rights under the WTO framework to allow the participation of companies from all WTO member countries. At its most recent working party meeting in Geneva on 20 May 2005, Vietnam committed to extend import and export rights to foreign enterprises and individuals, with a very small number of exceptions involving sensitive goods or goods falling within the category of State trading (such as petroleum, pharmaceuticals, sugar, tobacco, salt, fertilizers, rice, cultural products, etc.) and is reportedly seeking a one year transition period for implementation of these commitments. Distribution services including Commission Agents Services, Wholesale Trade Services, Retail Services, and Franchise Services, are currently being negotiated under the WTO GATS framework.

To date, Vietnam has concluded bilateral negotiations with the EU (October 2004), Chile (November 2004), Argentina (November 2004), Brazil (November 2004), Singapore (December 2004), Uruguay (April 2005), Korea (June 2005), Japan (June 2005), Canada (June 2005), China (July 2005), Columbia (July 2005), South Korea (July 2005), and Iceland (August 2005). Negotiations with Cuba, Kyrgyzstan, India, Turkey and El Salvador have also been concluded. Vietnam is now working intensively to close agreements with the U.S., Australia, New Zealand, and others. Its next Working Party Meeting is expected to be held in mid-September 2005.

FAQs: Trading Rights & Distribution Services

★ What are trading rights?

When a company is granted trading rights, it is given the right to directly import and export goods, without having to go through a state-owned or local trading company. Restrictions on trading rights are typically inconsistent with:

- GATT Article III (National Treatment) as such restrictions usually limit the ability of foreign entities or individuals to import/export a like product
- GATT Article XI (Quotas) as such restrictions prevent the import/export of products from another WTO member.

Trading rights permit the import and export of goods only and do not cover the ability to distribute goods once they are imported. The distribution of goods is subject to GATS distribution services commitments, or in the case of the BTA, Annex G.

★ What has Vietnam committed to in the area of trading rights under the BTA?

Under the BTA, Vietnam has committed to grant trading rights to U.S. entities according to the following schedule, subject to Annexes B, C, and D:

Upon entry into force (December 2001): Vietnamese enterprises may trade in all products, subject to exceptions under Annexes B and C. U.S. invested enterprises may import and export products used in, or in connection with, their production or export activities.

Three years upon entry into force (December 2004): U.S. invested enterprises in the production and manufacturing sectors only may import and export all products, subject to exceptions listed in Annexes B, C, and D. U.S. joint ventures with Vietnamese enterprises may engage in import and export activities in all products, subject to exceptions listed in Annexes B, C and D. U.S. equity in such joint ventures is limited to 49%.

Six years upon entry into force (December 2007): U.S. joint ventures with Vietnamese enterprises may engage in import and export activities in all products, subject to exceptions as listed in Annexes B, C and D. U.S. equity in such joint ventures is limited to 51%.

Seven years upon entry into force (December 2008): U.S. companies will be permitted to establish 100% owned enterprises to engage in import and export activities in all products, subject to exceptions as listed in Annexes B, C, and D.

Annex B: Annex B sets out the quantitative restrictions that Vietnam is permitted to maintain and their phase out period. These range from 3-10 years on import quantitative restrictions for some agricultural products; 2-7 years on import quantitative restrictions for some industrial products; and “unbound” (i.e. no commitment made) for export quantitative restrictions for semi-milled and broken rice. Annex B also lists prohibitions on certain imports (e.g., cigarettes) and exports (e.g., certain timber products).

Annex C: Annex C lists those imports and exports restricted to state trading companies and, where applicable, their phase out schedule. These range from 5 years to “unbound” on the import of some products; and “unbound” on the export of products including rice, petroleum, natural gas, diamonds, precious stones, silver & gold.

Annex D: Annex D lists phase out periods for restrictions on trading and distribution rights for specific industrial and agricultural products, ranging from 0 years to “unbound” on import trading rights for some agricultural products; and 0 to 6 years on import trading rights for some industrial products. No commitments have been made for some products (marked “unbound”) while others are restricted to state trading companies only (marked “C”). Annex D also lists restrictions on export trading rights, with phase-out periods ranging from 3 years to “unbound” for key agricultural and industrial products. For the purposes of Annex D, all phase-out periods begin on the date on which U.S. joint ventures in companies engaging in import and export activities are first permitted (3 years upon entry into force, or December 2004). For example, a phase-out period 5 years means that trading rights are permitted for this product only 8 (5+3) years from entry into force of the BTA, or December 2009.

★ **What are distribution rights?**

The distribution of goods (sale within a country) is addressed in a country's commitments on distribution services and governs the ability of companies to engage in the distribution of goods once they have been imported.

Distribution services include the following:

- Commission Agents' Services - Commission Agents' Services consist of sales on a fee or contract basis by an agent, broker or auctioneer or other wholesalers of goods/merchandise and related subordinated services.
- Wholesale Trade Services – Wholesaling consist of the sale of goods/merchandise to retailers to industrial, commercial, institutional, or other professional business users, or to other wholesalers and related subordinated services. Wholesale services can either be supplied from a fixed location or away from a fixed location.
- Retail Services – Retailing services consist of the sale of goods/merchandise for personal or household consumption either from a fixed location (e.g., store, kiosk, etc.) or away from a fixed location (e.g. direct selling) and related subordinated services.
- Franchise Services Franchising services consist of the sale of the use of a product, trade name or particular business format system in exchange for fees or royalties. Product and trade name franchising involves the use of a trade name in exchange for fees or royalties and may include an obligation for exclusive sale of trade name products. Business format franchising involves the use of an entire

business concept in exchange for fees and royalties, and may include the use of a trade name, business plan, and training materials and related subordinated services.

★ **What has Vietnam committed to in the area of distribution services under the BTA?**

Under Annex G of the BTA, Vietnam has made commitments for Wholesale & Retail Services, Agent Services, and Franchising Services, subject to the following limitations:

Cross Border Distribution (from the United States into Vietnam): Vietnam has not undertaken any commitments to permit cross-border services. In other words, Vietnam has provided no legally binding guarantee that a U.S. company can provide distribution services from abroad.

Local Distribution (within Vietnam):

Three years upon entry into force (December 2004): Joint ventures with Vietnamese companies in the distribution services sector may be established. U.S. equity in such joint ventures is limited to 49%.

Six years upon entry into force (December 2007): Joint ventures with Vietnamese companies in the distribution service sector may be established, at which time there will be no limitations on U.S. equity.

Seven years upon entry into force (December 2008): 100% U.S. owned distribution services companies may be established.

In all cases, the distribution of some industrial products is subject to additional limitations contained in Annex D (see above). Moreover, Vietnam has excluded certain products from its distribution commitments (e.g., oil, gas, fertilizer, alcoholic drinks, cigarettes, medicine). The establishment of retail services (beyond the first one) shall be considered on a case by case basis.

★ **Under the BTA, what rights do U.S. companies get beginning in December 2004?**

➤ U.S. companies with investment activities in the production and manufacturing sectors only will be able to import and export directly, subject to exceptions as listed in Annexes B, C, and D. For example, beginning in December 2004, a U.S. invested enterprise in the manufacturing sector in Vietnam will be able to import and export any product, provided this product is not listed as an exception in Annexes B, C, and D.

➤ U.S. companies will be able to establish joint ventures with Vietnamese companies to engage in import/export activities, subject to exceptions under Annexes B, C and D. U.S. equity in such joint ventures is limited to no more than 49%.

➤ U.S. companies will be able to establish joint ventures with Vietnamese enterprises to distribute products, subject to exceptions under Annexes B, C and D. U.S. equity in such joint ventures is limited to no more than 49%.

★ **What is the status of legislation governing trading rights and distribution services?**

Vietnam's recently ratified *Commercial Law (Amended)* provides a regulatory framework for foreign participation in the import and distribution sector. The *Commercial Law* was passed by the National Assembly on 14 June 2005 and will enter into force on 1 January 2006. Pursuant to the *Commercial Law*, a key implementing decree currently being drafted by the Ministry of Trade is expected to allow foreign business entities to establish branches in order to conduct commercial activities, expressly comprising "wholesale and retail of goods, import and export of goods, and other related supporting activities", and is supplemented with an annex for the establishment of Foreign Invested Enterprises (FIEs) in this area of commercial activity according to a certain schedule. The draft decree also provides for existing, licensed FIEs to conduct commercial activities (including importing and distributing goods) subject to the amendment of their investment license. The draft decree is not expected to be issued until negotiations in this area for Vietnam's WTO accession are settled. For more information on the draft implementing decree and its contents, please refer to our *Catalog of Legal Updates* available at: <http://www.usvtc.org/updates/legal/2005/july.pdf> As an interim measure, to implement Vietnam's trading rights obligations as committed to in the BTA and as agreed to during the BTA Joint Committee session on 17 June 2005 in Washington DC, the Ministry of Trade has recently issued a *Diplomatic Note* (dated 28 July 2005) re-asserting its obligation (as stipulated in BTA Chapter I, Article 2, Section 7, Paragraph B, C, D; and Chapter III, Annex G) and providing a point of contact.

★ **What is the status of regulations governing multi-level selling?**

Multi-level selling (also known as pyramid selling) is regulated under the *Law on Competition*, promulgated by the National Assembly on 3 December 2004 and effective as of 1 July 2005. To implement the *Law on Competition*, the Ministry of Trade is drafting four decrees, including a *Decree on Supervision of Multi-level Selling*. The draft decree prohibits certain types of person from engaging in multi-level selling and prohibits the following goods from this form of distribution: goods for which circulation is prohibited or for which trading is restricted; human medicines; all types of vaccines; biological products; medical equipment and apparatus; veterinary drugs; plant protection agents; toxic chemicals and products containing toxic chemicals. This draft decree is still being finalized and expected to be issued in August at the earliest. For more information on the draft decree, please refer to our *Catalog of Legal Updates* available at: <http://www.usvtc.org/updates/legal/2005/july.pdf>