ASSESSMENT OF THE DRAFT ENTERPRISE AND INVESTMENT DECREES FOR THE SOCIALIST REPUBLIC OF VIETNAM

Compiled by the ABA-UNDP International Legal Resource Center (ILRC)

April 2006

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DISCLAIMER

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SYNTHESIS OF EXPERT COMMENTS TO THE VIETNAM DRAFT BUSINESS DECREES:

Compilation and Comparison of the Major Points Expressed in the Expert Assessments to the Draft Enterprise and Investment Decrees of Vietnam

ABA/UNDP International Legal Resource Center

Assessment of Business Draft Decrees

DECREE ON INVESTMENT IN THE FORM OF BUILD-OPERATE-TRANSFER (BOT), BUILD-TRANSFER-OPERATE (BTO) AND BUILD-TRANSFER (BT) CONTRACTS

DECREE ON BUSINESS REGISTRATION AND BUSINESS REGISTRIES

DECREE ON BUSINESS LISCENSE MANAGEMENT

VIETNAM

APRIL 2006

BY

KENNETH E. BARDEN

Introduction

The ABA-UNDP International Legal Resource Center (ILRC) has requested volunteers to review a series of proposed decrees to implement enterprise and investment laws in Vietnam. Specifically, the following matters are included in this review:

- the *Decree On Investment In The Form Of Build-Operate-Transfer (BOT), Build-Transfer-Operate (BTO) And Build-Transfer (BT) Contracts,*
- the *Decree On Business Registration And Business Registries,* and
- *the Decree On Business License Management.*

Decree On Investment In The Form Of Build-Operate-Transfer (BOT), Build-Transfer-Operate (BTO) And Build-Transfer (BT) Contracts

Summary

The purpose of this decree is to govern certain investment projects for the development of infrastructure facilities by investors. Three types of projects are contemplated by this Decree, specifically:

1. Build-Operate-Transfer contract (referred to as BOT) – An arrangement whereby, pursuant to an agreement with a Vietnamese public entity, the investor(s) constructs and commercially operates an infrastructure facility for a certain period of time, after which the facility is transferred without additional compensation to the State of Vietnam.
2. Build-Transfer-Operate contract (referred to as BTO) – An arrangement whereby, pursuant to an agreement with a Vietnamese public entity, the investor(s) constructs an infrastructure facility upon the completion of which the investor(s) transfers the facility to the State of Vietnam. Under this type of arrangement, the investor(s) are given the right to commercially operate the facility for a certain period of time in order to recover the invested capital and earn profits.
3. Build-Transfer contract (to be referred to as BT) – An arrangement whereby, pursuant to an agreement with a Vietnamese public entity, investor(s) construct an infrastructure facility upon the completion of which the investor(s) shall transfer the facility to the State of Vietnam. Under this type of arrangement, the investor(s) are compensated either directly by the Government of Vietnam for the project or are indirectly compensated through the facilitation by the Government of other project(s) by the investor(s) in order to recover the invested capital and earn profits.

The decree is designed to encourage investment by domestic or foreign individuals or entities. Investors are to put up capital for the project and are responsible for the undertakings in relation to that project.

The Decree sets forth the conditions and limitations under which public funds may be used for a project. The Decree also provides factors for considering whether a project should be allowed to proceed. Protections are granted to investors to protect their

investment and allow the recovery of capital and profits. The means of resolving disputes are also addressed in the Decree.

Comments on the Decree

Article 4.2 of the Decree requires the equity of an investor to be not less than 30% of the total investment capital of the project. It is unclear whether this requirement applies to each investor individually or as a collective investment group. Article 2.5 encourages households and individuals to be investors. However, if the 30% requirement applies to each investor individually, then only the wealthy will likely be able to invest. The more logical interpretation is that the investor(s), collectively must have 30% equity in the project, with the rest to be financed by other means.

It is also unclear at which point in the project development, the investor(s) must have that equity. Are they required to have that amount available prior to start of the project or can the investors continue to raise capital as the project proceeds? This ambiguity is highlighted by the provisions of Article 4.3, which allows the State body to substitute the investor for failure to meet the capital requirement during the "implementation" of the project.

Article 15 requires a performance bond in an amount no greater than 5% of the total investment capital. This seems to be insufficient to protect the interests of the public in that if the original investors fail to complete the project, the costs of finding a substitute investor or to complete the project is likely to far exceed the 5%.

A more pragmatic approach to ensuring completion of the project is to require 100% performance bonding or some similar arrangement whereby the investor has more at risk to assure completion and which would protect the public by providing funding more likely to complete a failed project.

Decree On Business Registration And Business Registries

Summary

This decree addresses registration requirements for businesses wishing to operate in Viet Nam. It is designed to be a comprehensive, yet uniform procedure for registering businesses throughout the country at all governmental levels.

Comment on the Decree

Specific comments on this decree are as follow:

Article 2.2 prohibits certain public agencies from issuing regulations affecting business registrations. It is not clear what this prohibition means. Does that mean that local provincial levels cannot enact regulations unique to their own circumstances?

Article 2.3 seems to prevent business registries from being too restrictive in the consideration and acceptance of applications for registration. What constitutes unacceptable requirements may be somewhat vague.

Article 4.1 discusses lines of business that a business can engage in. However, there are no parameters as to where the lines are considered. For instance, retail and wholesale may be different lines of business, but what about a retail store selling groceries and dry goods? Is that the same line of business (retail)or two lines of business (groceries vs. dry goods)? Some reference to an international standard of classifying business activities may be appropriate here.

Article 4.2 places the burden of a registrant not engaging in a certain line of business within 3 years to notify the registry of such fact. It is unclear whether this article requires the registrant to voluntarily amend its registration to reflect the removal of a line of business or whether the registry is required to make the amendment on its own accord.

It may be useful to establish a central registry of all businesses operating within the country so that cross-checks may be made as to whether a particular business has complied with tax or other legal requirements.

On the issue of similar names, many jurisdictions provide a procedure whereby a prospective registrant can "reserve" a name prior to registration. Such a process may be worthy of consideration here.

Decree on Business License Management

Summary

This decree addresses the procedures for business licensing.

Comments on the Decree

There should be some link between the business license being for activities in which the business being registered has listed as one of its lines of business, especially since the Decree on Business Registration and Business Registries requires a business not engaging in a certain line of business for 3 years to notify the registry of that fact.

It is not clear whether a separate license is required for each location in which a business enterprise wishes to operate. For instance, if a retailer has three stores, is one license sufficient or would separate licenses be required for each location?

It appears that business licenses are to be issued on a national level. What is the role of local governmental units in license control and decisions?

ABA/UNDP International Legal Resource Center

Assessment of Business Draft Decrees

DECREE ON BUSINESS ENTERPRISE LAW

DECREE ON INVESTMENT IN THE FORM OF BUILD-OPERATE-TRANSFER (BOT), BUILD-TRANSFER-OPERATE (BTO) AND BUILD-TRANSFER (BT) CONTRACTS

DECREE ON BUSINESS REGISTRATION AND BUSINESS REGISTRIES

VIETNAM

APRIL 2006

BY

M. DOUGLASS BELLIS

Comments on Vietnamese Decrees relating to Enterprise Law

The Enterprise Law itself seems to have been enacted substantially in the form it was in at the time I reviewed it some time ago. Its prolixity and complicated structure, rife with vague and potentially conflicting provisions, and saddled with seemingly unnecessary and potential detail and variations between otherwise identical entities, made it likely that however enterprise creation is actually governed in Vietnam will either be the result of regulations, such as these decrees, or some more informal process.

But the decrees are themselves a bit hard to figure out. The draft agreement on Build-Transfer-Operate or Build Operate Transfer or Build Transfer seems to have no precursors in the lengthy law itself, at least on a cursory search for them. Indeed, the topic of this decree does not seem to be fundamentally about business organizations at all, but about something that normally would be a matter of contract between such organizations. No information was given to me as to why such a decree might be desired, or what it was to accomplish. The actual content of the decree itself, though lengthy and again reflective of a drafting style that loves elaboration and multiplicity of detail, is oddly without substance. It seems to say that someone (the government?) of Vietnam would like to think about entering into such agreements, especially in certain areas relating to utilities, but is not very definite as to any details, all of which will be supplied later. No doubt all this has some significance for some internal bureaucratic process in Vietnam, but it is difficult to see any economic or practical reality behind it.

The Decree on business registration and business registries starts with a welter of matters that seem to relate only to the internal workings of various ministries and so do not lend themselves to comment. There is some indication that the Degree tries to deal with various business organization types found in the law along common grounds where possible. Instead of repeating language for each type of registration, the same is used for all. But it is still surprisingly complex and bureaucratic, with vague but potentially troubling provisions like one providing for the withdrawal of the business registration if business does not commence within 60 days. Who decides that, what if there is a dispute and how will anyone know anyway whether a business has started? What is the point of such a requirement?

If this law and these decrees are seriously meant to be a basis for business organization, they seem fundamentally ambiguous and needlessly complex. It is unlikely that a business could feel secure based on these documents alone. Clearly some other informal assurances, obtained by whatever means necessary, must be available, whether in the context of the legal system or otherwise, for a business to predict what it must do to operate in Vietnam. I presume that means the costs of investment are higher, and the return on investment lower, both for domestic and foreign businesses, than they are likely to be in other countries. Without considerably more information and time, further comment on these matters is impossible.

M. Douglass Bellis

ABA/UNDP International Legal Resource Center

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DECREE ON BUSINESS LICENSE MANAGEMENT

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VIETNAM

APRIL 2006

BY

DAVID GORDON

I have a number of specific comments based upon my review of the three decrees. I have relatively few general comments because it seems clear to me that a great deal of time and thought has gone into the drafting. For the most part, I find the decrees relatively ordinary. I use "ordinary" as a compliment, however. Decrees or regulations of any sort should be relatively simple, clear, and contain few surprises. Most of the regulations that I have helped draft for my agency of the United States government have tried to accomplish those same goals. Therefore, those who worked on these drafts are to be commended for mostly achieving that goal.

I will offer my specific comments first and then make a few more general observations at the end. (I should note that there were several instances when I was unsure of the true meaning of the decree because the translation was garbled. That may have resulted in comments from me that appear to make no sense.) Of course, I will be happy to explain my comments in more detail or respond to any questions.

DECREE ON BUSINESS LICENSE MANAGEMENT

3(2) Isn't there a named body either in existence now or to be formed that should be named (instead of making a general reference)?

3(3) Why is this necessary?

4(1) This may be a translation issue, but rather than "will be applied to" I think the decree should state that licenses "will be required" in these sectors.

5(1) I do not understand how business licenses can be issued in more than one "form"; I would also suggest that the word "authorized" be added to modify "Law, Order or Decree of Government."

5(2) This is not the same "format" as announced; it is an exception and should be part of the initial sentence.

5(4) I realize that "common social interest" is a difficult concept to define, particularly in a government decree. However, I am concerned that the people to whom this provision applies have very little guidance. What standards exist to define "common social interest"? Who will decide this extremely important matter, according to what standards, and how will the judgment be made? I am also troubled by the language that refers to "conditions and requirements" that will be "supplemented, revised timely." How will they be "supplemented"; who will review them and how often (and, again, according to what standards)?

5(5) I do not believe that it is necessary or advisable to publish "all" the information. This is an area where transparency is good and necessary, but transparency must serve a valid purpose. There is no value to publishing all information that is available. The drafters must answer the question (for every single item that they propose

to publish) "what is the purpose of publishing this piece of information?" Unless there is a substantive and compelling reason to publish something, I do not believe that it should be published. 5(6) This would appear to be a statement of the obvious with respect to any decrees or legislation whatsoever. Why include it?

5(7) This provision refers to the legal "right" to receive the license but says nothing about a remedy for the government's failure to issue a license that should be issued. Article 23(5)(d) appears to address this situation, but it, too, is badly flawed.

5(8) Are there any "related parties" that are not included in this list? If yes, perhaps "related parties" should be defined in Article 3. If not, eliminate the phrase.

6(2)(b) I would think that this prohibition should already be part of a general criminal statute. It should not be necessary to include such a prohibition in every statute or decree.

6(2)(c) Same comment as above.

7(1)(d) How will this be monitored? by whom? What if the owner of the license disagrees? What procedures will address disputes?

Chapter II I have no specific comments on this chapter except to observe that this creates what I believe is an unnecessary layer of bureaucracy. The number of applicants for business licenses will be significant enough on a regular basis that the process of applying for and obtaining the license should be easy to follow and quick. The more layers of bureaucracy that are added, the slower and more complicated the process becomes. More bureaucracy also means more jurisdictional "turf" battles between different agencies or bureaus or divisions and a simple process becomes unreasonably complex.

15(1) I do not understand the purpose of listing the contents. Indeed, I am not certain that I understand the need for this Article at all.

16(2)(a) This reference to 5(1) is incorrect.

16(2)(b) I do not understand why this is required. The vast majority of applications for business licenses will involve common businesses. The requirement for an "impact assessment" for every application is (unless I fundamentally misunderstand it), an enormous waste of time. Virtually all assessments will reach the same conclusions; I do not understand what purpose is served by adding this step; it appears to do no more than add another layer of bureaucrats and add an unnecessary delay to the process of getting a license. In that regard, 16(2)(g) seems to be particularly unhelpful.

17(1)(a) This provision is an invitation to disaster: it grants a right to "update" a draft to at least six different entities. I do not understand what it means to "update" a draft; but no matter what it means, the fact that six or more different parties have the right

to modify a draft means that there is a significant risk that several parties will argue over what goes into the draft. Moreover, I do not understand why any of these parties should have the right to "update" a draft. (Perhaps this all results from my basic misunderstanding of the process, but I find this provision to be highly problematic.)

17(1)(c) In order to provide certainty to the party applying for a license, I believe that a "reasonable period" should be replaced by a specific period of time.

17(1)(d) As I have commented earlier, there is every reason to believe that this process will be repeated thousands, if not tens of thousands, of times. I do not believe that any step should be included in the process that adds delay unless there is a substantial policy reason for doing so. I think this provision should be eliminated.

17(2)/17(3) As with the previous provision, I think these should be eliminated. They represent an enormous investment of time and effort and the most positive contribution that they are likely to make is to employ large numbers of people to carry them out. I do not see how these provisions will add very much except in unusual cases, which should be a small minority of cases. Perhaps the procedure set forth here can be kept and applied exclusively in unusual cases, at the discretion of a senior official.

18(1) The phrase "significant contradictory effects" is vague. This language is an invitation to "related parties" to obstruct and delay applications from competitors. Because there is no standard or guidelines for the meaning of "significant contradictory effects," any party can object to anything whatsoever. There is no penalty for doing so.

19(2) It is unclear whether 15 days are 15 calendar days or 15 business days.

20(3) Again, as I have said with regard to other provisions, this is an invitation to obstruct and delay. The phrase "if necessary" sets no standard whatsoever.

21(3) The text of this provision is missing.

22 Please see my comments for Article 5(5)

23(2) This is the first provision where I would have expected to find a fee specified. I cannot find a fee mentioned here or anywhere else.

23(2)(c) There is no procedure set forth here or even a time limit.

23(3)(b) This provision invites battles between different government departments.

23(5)(a) Although this provision directed that a license "shall be issued," I cannot find any provision, here or elsewhere, about a remedy when the licensing office fails or refuses to issue the license.

ON BUSINESS REGISTRATION…

11(5) Here, as elsewhere, there appears to be an extraordinary number of decisions left to the Prime Minister. I can think of virtually nothing that involves the registering (or licensing) of a business that is important enough to require involvement of anyone in the Prime Minister's office, including this provision.

20(2) The requirement that a response must be made within 7 days after a complaint is filed is, in theory, a good idea. I am very concerned, however, that in order to avoid further problems a pro forma or unhelpful response will be issued, simply for the sake of technical compliance with this requirement.

21(2) This provision states that the registry shall notify the founders of the business in certain instances requiring their action. It does not specify how long the founders have to correct the problem (or a procedure in the event of a dispute).

22(1) Enterprises are directed to send notices to the registry "within 10 working days as of the decision to establish" branches, etc. Why must there be a time period and, more significantly, how can anyone determine when the decision was made in order to start counting the 10 –day period?

40 I am not at all certain that I understand this provision. But if I do, Article 40 requires businesses to re-register on an annual basis. I hope that this means that they must register once after the decree goes into effect. If it means that a business must re-register on an annual basis, I would find that provision extremely burdensome and question the basis for it.

ON INVESTMENT IN THE FORM OF BOT/BTO/BT CONTRACTS

3(1) The inclusion of water supply and electricity projects concerns me. A number of countries have made projects in these sectors off-limits to foreign investors on the grounds of national security. While I recognize the critical position such projects play in developing a national infrastructure, I am nevertheless concerned that the government of Vietnam should be extremely careful in permitting foreign entities to undertake these projects. Although this may reflect an overly cautious (or overly suspicious) concern, anyone providing commodities that are so basic to the country inevitably poses some risk to national security.

3(2) This provision is important in reassuring investors that would be likely to take advantage of the decree; however, unless it is "fleshed out" in more detail and in a manner that makes the protections and favorable conditions "real," the provision will be of no use at all.

6(1) This section says that "sectoral management ministries" and "people's committees" will draw up a list of projects; but 6(3) says that the list will be sent not only to the Ministry of Planning and Investment but also to the "relevant sectoral management

ministry and the people's committee" for comments. But if these groups drafted the list in the first place, I don't understand the point of asking for their comments on a list they already helped draft.

7(1) Again, a provision involves a required approval from the Prime Minister's office, a decision that need not reach that level of government. Moreover, the language says "shall approve" and offers no procedure to its rejection.

11 and 12 Needless to say, the text of these provisions is critical; without any text in my version, all commentators will be handicapped in offering complete impressions.

13. This provision refers to a "feasibility study report" but I could not find a description anywhere of what is contained in such a report, what timelines are involved, or any other details. Given its almost-certain key role, this is a significant omission.

14(1) As I will comment later, I do not recommend the exceptional degree of specificity found in any provision like this. Few, if any, parties are likely to omit the most critical topics and, to the extent that the government retains the ultimate authority to approve or disapprove a contract, the great amount of required detail is likely to prove counterproductive. At the very least, it runs the risk of omitting something and, by its omission, suggesting to the parties that such an omission is acceptable.

14(3) I applaud the decision to include a choice to apply foreign law; this is an important provision and will—and should—be favorably received.

15 Although I have commented that too much detail is problematic, this section demonstrates the opposite risk: too little detail. For a procedure as potentially complicated as bonding a significant and expensive infrastructure project, there is remarkably little detail here. Even more surprising, 15(2) proceeds on the assumption that an investor will either complete the project or fail to perform. This is a false dichotomy; most projects of this type are completed in some degree and it is unfair to the investor to require forfeiture of the entire bond. The situation is more complex than 15(2) acknowledges and should be rewritten with a more realistic view of partial performance in mind.

16(1)(c) This provision suggests that all foreign investors will be required to operate as a joint venture. While this may be desirable in some—or even in many—cases, there may be circumstances in which a joint venture is less desirable; is another business form available to investors?

16(1)(e) Here, as in a number of other places, opinions or comments are invited. I disagree with such an approach. It gives too much potential power to too many other parties. It runs a great risk of obstruction, of delay, of political infighting, of jurisdictional battles, of corruption and, ultimately, of convincing potential investors to leave. Project contracts, though potentially complex, should be subject to as few formal approvals as possible. Little real purpose is served by inviting opinions.

16(1) This is another place where my earlier comments relating to the Prime Minister's office are relevant. Too many decisions are passed to that office. Few projects are likely to be so significant nationally as to require approval at that level. These approvals should be delegated to others (whether individuals or offices).

21 I am not sure I understand the difference between the requirement in announced in 6(2)(d) and the one described in 21(1)

22(2) This provision is so vague as to be both meaningless and dangerous. What does "shall supervise" mean in real life? How closely? How often? With what powers? This language is so ambiguous that it offers a enormous opportunity for corruption, at the very least.

24(2) Although it is reasonable (and expected) that a contract will address conditions justifying price increases, it is unreasonable to decide exact increases in advance because the potential for different kinds of changes is so large that it would be foolish to make such decisions in advance. Requiring a potential investor to do so will be a significant deterrent to investment.

24(3) The provision addresses notice to the government but says nothing about a time limit for responding to the investor (or a remedy in the case of a serious disagreement).

25 This Article is as laudable ; it is also unhelpful. The idea behind the Article is wonderful. But the manner in which the idea has been turned into regulatory language is not good. The drafters have chosen very vague language that tells a potential investor little. "Shall be given all favorable conditions," "in case of necessity," "may request from the State support"—none of these are specific enough to provide any guidance at all and none are specific enough to reassure investors that they can rely upon support from the State. This provision has the potential to be enormously important—but as it is written, it is only nice words that accomplish little.

26(2) How often is "periodical care" necessary? Who makes certain that it is done? Are there any circumstances in which an obligation will extend beyond turnover?

26(3) What terms are there for enforcement? What about penalties?

28 and 29 As noted above regarding Articles 11 and 12, these are critical provisions and their absence makes all of these comments less helpful.

30(4) Given the significance of the timing, manner, liability, etc. involved in every handover, these documents should be drafted by Vietnam and not left to the parties. They should be available for review by potential inspectors, but only by having them drafted by Vietnam will Vietnam itself be fully protected.

If I have any general concern, it is that these decrees strike me as, perhaps, tending a bit toward over-regulation and too much detail. I should emphasize the word "tend"—but my even greater concern is that a relatively significant volume of decisions are passed along what appears to me to be too many layers of bureaucracy. Unless, for example, licensing involves a particularly technical business or involves the public health or safety, the procedure should be reasonably quick and easy. Over-regulation and too much detail often makes it difficult for businesses to operate, causing them to spend extra time and money deciding how to comply with the law. More to the point, it runs the risk of creating disincentives. The greater the disincentive to register, the greater number of businesses will ignore the law.

In addition, over-regulation and overly detailed laws–especially when conflicting political/legal jurisdictions are involved—increase the likelihood of conflicting legal standards and create opportunities for corruption. Although these decrees are essential to the statutory framework, they stand the best chance of effectiveness when they are not overly detailed, complex, or unnecessarily time-consuming. I do not believe that any of these three decrees are unnecessarily complex, although I have tried to note a few places where I believe the decrees contain or require too much detail and demand too much of those subject to them.

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Assessment of Business Draft Decrees

DECREE ON INVESTMENT IN THE FORM OF BUILD-OPERATE-TRANSFER (BOT), BUILD-TRANSFER-OPERATE (BTO) AND BUILD-TRANSFER (BT) CONTRACTS

DECREE ON BUSINESS LICENSE MANAGEMENT

DECREE ON REGISTRATION AND BUSINESS REGISTRIES

VIETNAM

APRIL 2006

BY

CHUDI OJUKWU

Comments on Draft Decrees of the Government of Viet Nam.

Introduction:
The decrees under review are intended to be some form of subsidiary legislation to give effect to certain aspects of the investment and enterprises law. This approach is not unique to the Viet Nam and is used world wide as it is clear that a primary legislation cannot provide for every conceivable circumstance. The power to make regulations should be flexible and reflect a basic understanding of the constancy of changing circumstances.

In review decrees one was sometimes constrained by the fact that translation may have muddled up some of the contents of the decrees. It is also important to observe that whilst there is a need to provide a legal framework for most commercial activities and the decrees seek to provide a framework for public private partnerships, the are in many respects over legislation as many of the items should be covered by contract inter parties. This is however explainable by the political and economic history of the jurisdiction.

Decree on Investment in the Form of Build-Operate-Transfer (BOT) and Build-Transfer-Operate (BTO) and Build-Transfer (BT) Contract.

Article 1 – should include the phrase "and other matters connected/incidental thereto". This is in order to accommodate incidental actions arising from the various contracts.

General Provisions

Article 3 – Given that the government seeks to encourage investment in the areas specified in the article it may be important for the regulation to from time to time specify what incentives, tax breaks, etc that will be available to an investor. The regulation in article 34 appears rigid and should be crafted to allow the government offer other incentives.

Article 38 allows the operator company to mortgage the undertaking it is operate although with the consent of thee authorized state body. This may not be a very prudent provision as it appears not to be in the interest of the Viet Nam people and may be liable to abuse.

Article 39 on right to buy foreign currencies may not give enough comfort to a foreign investor as it appears not to provide for repatriation of profits.

Decree on Business License Management

Chapter 1- General Provisions.

Article 1 – Scope of Application

(2) (a) Urgent Solutions. The phrase – "urgent solution" listed in the exclusion case is vague. It should be more elaborate to elicit at least instances that can be construed to mean urgent solutions.

Article 4 (2) does not convey a clear meaning. (grammatically)

Article 23 (7) on validity and duration of licence
The Business license evidenced by the registration certificate should not be restricted to a period of validity. Once a company is registered, it should only loose its legal validity upon winding-up or any other legal position requiring the revocation of the registration of business license.

It is difficult to comment on these regulations as the translation is poor and the intendment of the regulations is not clear.

Decree on Registration and Business Registries

Article 34 (2). The provision here requiring individual household in item 1of this Article to register only one household business nationwide is somewhat an unreasonable restriction. Such restrictions should be loosened at least to allow Household Enterprises to have multiple business objects in their licenses or just have prohibited business areas for Household enterprises.

Article 39- is an unnecessary restriction on the name given to individual Business households as it must be Vietnamese. It should allow choice of language.

Article 40- provides for the re-registration of individual business name after one year. This is rather too cumbersome. In the alternative such businesses may be required to file an annual return.

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Assessment of Business Draft Decrees

DECREE ON BUSINESS LICENSE MANAGEMENT

DECREE ON BUSINESS REGISTRATION AND BUSINESS REGISTRIES

VIETNAM

APRIL 2006

BY

ROBERT D. STRAHOTA

Comments of UNDP/ABA Vietnam Volunteer Robert D. Strahota
On Draft Decree on Business License Management
April 24, 2006

Thank you for the opportunity to provide these comments.

General Comments

Generally, this draft Decree is well-prepared and I agree that is much needed to help eliminate corruption an unnecessary procedures that impede business licensing and the capital formation process. I am, however repeating several of the comments that I have made separately on the Decree on Business Registration and Business Registries.

At the opening of the 10th Party Congress of the Vietnamese Communist Party, General Secretary Nong Duc Manh warned party members that the issue or corruption was threatening "the survival of our regime". Mr. Manh told the Congress that "intensifying the fight" against corruption and wastefulness was "the pressing requirement by the society and the political determination of our party". He stressed the Party aimed to "build a clean and strong leadership and management, to overcome a huge risk that threatens the survival of our regime".

The opportunities for corruption in any society are always present whenever persons are subject to government laws and regulations. Of course, it would be impossible for a society to exist without necessary laws and regulations, and regulations concerning business licenses certainly fall within the necessary category.

Much can be done to eliminate corruption by ensuring that the civil servants responsible for business licenses are fairly compensated and they understand that corruption will not be tolerated and will be punished severely. However, there is another important dimension to discouraging corruption. It requires focus on the laws and regulations that provide an opportunity to engage in corrupt behavior, such as the solicitation of bribes. The greater the number of approvals that are required, the greater the number of persons who must give approvals, the greater the amount of details required to be provided to comply, the greater the subjectivity of legal requirements and the correspondingly greater discretion given to persons administering laws and regulations are all factors that increase the opportunities of corruption.

It is important, therefore, to draft regulations for all business licenses with an understanding of these problems and to seek to minimize the problems by minimizing each of the above factors that exacerbate opportunities for corrupt behavior. Several of the comments below are made with a view to achieving this objective, recognizing that, in the past, business licensing and registration have been a chronic source of opportunity for governmental corruption.

A. It is recommended that there be a specific prohibition in the Decree against officials responsible for a business license registry making false entries in, altering

or deleting information included in a business registration certificate or file. This has proven to be a chronic problem in other countries, such as Russia, where, e.g. corrupt officials have altered or erased lawful evidence of enterprise ownership from business registration records.

B. It is recommended that the collection of filing fees for all business licenses be centralized to the maximum extent possible and that the Decree require two copies of a written receipt to be maintained for each fee paid, indicating the amount of the fee received and the signature and printed name of the Business Registration official who accepted the fee on behalf of the Business Registry. One copy of the receipt should be given to the applicant for business registration and one should be part of the mandatory records of the Business Registry.

C. Insofar as the Business Registry information will be publicly available, including, in some cases, personal identification numbers and other personal data of individuals, what consideration has been given to protection of this information against identity theft? It is suggested that it should not be necessary to publish personal identification numbers. Indeed, were it not for the fact that a law such as the Enterprise Law requires personal identification numbers, there really would be no reason to collect such information in connection with business licensing activity. Only the tax authorities have a valid business need for this information.

D. Business Registry or other prosecutorial officials should be required to bring a legal proceeding in a court of law or provide for an administrative hearing to revoke or otherwise challenge the validity of a Business License or Registration once it has been issued. Once a business license has been issued, there should be a strong presumption in favor of its validity and freedom from challenge. Government officials (possibly acting corruptly) should not be permitted to challenge an individual's or entity's Constitutional right to pursue economic well-being without affording the individual or entity any fair process under the rule of law. Once the Business License has been issued, the burden should shift to the government to prove in court that it is invalid or that there are grounds for revocation.

Specific Comments

Article 13. Care must be exercised so that this Article is not drafted or interpreted to exacerbate licensing problems by requiring new licenses of businesses simply because incompetent governmental officials did not comply with this Decree.

Article 17. It is a good idea to involve the persons referred to in Article 171.b in the process of establishing licensing requirements. However, such persons should not be involved in the process of commenting on individual licensing applications, except in circumstances where, e.g. a license is exclusive, such as public utility or stock exchange or central securities depository. Involving persons in commenting on routine licensing applications is only likely to further delay licensing processes.

Article 23.7. Limiting licenses to five years duration makes matters worse rather than better because it increases the chances for unnecessary governmental involvement and potential corruption. There is no reason some licenses, such as securities broker-dealers, may not be valid indefinitely until the licensee withdraws from business or there are grounds for revocation. Government can monitor licensees through inspection and requiring annual reports rather than requiring new licenses.

Comments of UNDP/ABA Vietnam Volunteer Robert D. Strahota
On Draft Decree on Business Registration and Business Registries
April 23, 2006

Thank you for the opportunity to provide these comments.

General Comments

At the opening of the 10th Party Congress of the Vietnamese Communist Party, General Secretary Nong Duc Manh warned party members that the issue or corruption was threatening "the survival of our regime". Mr. Manh told the Congress that "intensifying the fight" against corruption and wastefulness was "the pressing requirement by the society and the political determination of our party". He stressed the Party aimed to "build a clean and strong leadership and management, to overcome a huge risk that threatens the survival of our regime".

The opportunities for corruption in any society are always present whenever persons are subject to government laws and regulations. Of course, it would be impossible for a society to exist without necessary laws and regulations, and regulations concerning business registration certainly fall within the necessary category.

Much can be done to eliminate corruption by ensuring that the civil servants responsible for business registration are fairly compensated and they understand that corruption will not be tolerated and will be punished severely. However, there is another important dimension to discouraging corruption. It requires focus on the laws and regulations that provide an opportunity to engage in corrupt behavior, such as the solicitation of bribes. The greater the number of approvals that are required, the greater the number of persons who must give approvals, the greater the amount of details required to be provided to comply, the greater the subjectivity of legal requirements and the correspondingly greater discretion given to persons administering laws and regulations are all factors that increase the opportunities of corruption.

It is important, therefore, to draft regulations, such as these for business registration and registries, with an understanding of these problems and to seek to minimize the problems by minimizing each of the above factors that exacerbate opportunities for corrupt behavior. Several of the comments below are made with a view to achieving this

objective, recognizing that, in the past, business licensing and registration have been a chronic source of opportunity for governmental corruption.

A. In addition to the provisions of Article 3 of the Law, which are intended to prohibit corrupt activity, it is recommended that there be a specific prohibition against officials responsible for a business registry making false entries in, altering or deleting information included in a business registration certificate or file. This has proven to be a chronic problem in other countries, such as Russia, where, e.g. corrupt officials have altered or erased lawful evidence of enterprise ownership from business registration records.

B. Filing fees are only generally referred to in Article 23 the draft Decree. It is recommended that the collection of filing fees be centralized to the maximum extent possible and that the Decree require two copies of a written receipt to be maintained for each fee paid, indicating the amount of the fee received and the signature and printed name of the Business Registration official who accepted the fee on behalf of the Business Registry. One copy of the receipt should be given to the applicant for business registration and one should be part of the mandatory records of the Business Registry.

C. Insofar as the Business Registry information will be publicly available on a web site and otherwise, including personal identification numbers and other personal data of individuals, what consideration has been given to protection of this information against identity theft? It is suggested that it should not be necessary to publish personal identification numbers. Indeed, were it not for the fact that Enterprise Law requires personal identification numbers, there really would be no reason to collect such information in connection with business registration activity. Only the tax authorities have a valid business need for this information.

D. The provisions of Chapter VII should be revised to require Business Registry or other prosecutorial officials to bring a legal proceeding in a court of law or in an administrative hearing to revoke or otherwise challenge the validity of a Business Registration once it has been issued. Once a business registration has been issued, there should be a strong presumption in favor of its validity and freedom from challenge. Chapter VII, as currently drafted, essentially would permit government officials (possibly acting corruptly) to challenge an individual's or entity's Constitutional right to pursue economic well-being without affording the individual or entity any fair process under the rule of law. Once the Business Registration Certificate has been issued, the burden should shift to the government to prove in court that it is invalid or that there are grounds for revocation.

Specific Comments

Article 3.2. Comparing this provision to Article 2.3 of Decree 109, it appears, in the English translation at least, that reference to "bribes" has been deleted. It is suggested

that “bribes or other unlawful concessions not required by law” be added immediately after the word “exact” in Article 3.2.

Article 3.4. It is true that enterprise founders should be responsible for the information in the business registration application dossier, **at least initially**. However, in the case of many enterprises, such as shareholding companies, the founders are soon replaced by a governing body of directors and director generals. A question arises when changes have to be made in the business registration at a later time; e.g. a change in authorized capital, who should be responsible for the information provided at that time? It may be advisable to revise this paragraph to refer to the founders and, when established, the governing bodies of the enterprises.

Article 4.2. I am in agreement with this paragraph. However, it is not clear whether the paragraph envisions that there will be a uniform form for use for each type of business registration. I recommend that uniform forms be used for two reasons: (i) facilitation of the development of a national data base, including the possibility of using scanable forms for use on a web site and the electronic data-base; (ii) elimination of subjectivity and possible differences in interpretation of what information is required, which may be due to an honest misunderstanding or corrupt behavior on the part of registration officials.

Article 4.4; Article 22. This provision indicates that there will be two copies of the Business Registration Certificates while Article 22, which is also in the Enterprise Law, refers to other copies of the Certificates being distributed. Perhaps Article 4.4 should clarify that the copies referred to therein are the “official” copies. Also, even though the law provides for distribution of the Certificates to the persons indicated in Article 22, it is suggested that the Law might be reconsidered in this respect for at least two reasons. First, if the information in the certificates is publicly available and to be posted on a web site, why do all of the other parties require physical copies? This seems an unnecessary bureaucratic exercise. Second, this is information about business registration. Why is it necessary to give copies of this information to commune-, ward- and town-level People’s Committees. This is often where corruption begins.[1] The Committees receive information regarding a new business enterprise and use this opportunity to corruptly seek bribes and concessions from the enterprise. I am not suggesting that the Committees should not have access to the information. It should be publicly available, but let the Committees look it up like everyone else.

Article 6.1. It is suggested that the lead-in phrase be deleted or revised to refer only to central and provincial levels. Nothing in Chapter IX or elsewhere in the Enterprise Law requires lower levels of government to be involved in the organization or administration of business registries. It is respectfully suggested, with the exception of Hanoi and Ho Chi Minh City, that there should be only one Business Registry office per province. Greater centralization would not be a significant burden on businesses and it would further the objectives of the law of creating a national business registry by minimizing the

[1] A similar potential problem exists with respect to tax authorities, but in the case of taxation, there is at least bona fide reason for making information regarding a new business available to tax authorities with the hope that most of them will use it for lawful purposes.

potential for lack of uniformity. It would also reduce the number of local officials involved in business registration activity, thereby also reducing the potential for corruption among officials. Corresponding changes should be made in the remainder of Article 6 insofar as it refers to lower level governmental unit involvement in places other than Hanoi and Ho Chi Minh City.

Article 8.4. It is suggested that this provision be revised to refer only to an annual reporting requirement. It is not common practice in most jurisdictions to require other than annual reports from business enterprise and, indeed in many cases, no annual reports are required of sole proprietorships and general partnerships, recognizing, of course, that such entities would already be required to file annual tax information. I also point out that the Business Registry officials position would not be weakened by this change since they retain authority under the Enterprise Law and Article 8.6 of the draft Decree to inspect or examine any enterprise. However, the vague reference to requiring other reports of business performance, without specification of frequency or content, is as noted in my general comments, an invitation to engage in corrupt behavior and enterprise harassment.

Chapter IV – General. In most jurisdictions of the world, an enterprise usually can be formed by filing an organizational document, such as a charter, establishing proof of capital when there is a capital requirement, and paying a required filing fee. Unfortunately, the Vietnamese Enterprise Law requires additional information and, of course, the Decree should be faithful to the requirements of the Law. There is, however, one mistake made in the Law that is repeated in the draft Decree, which might be corrected. That is, in the case of shareholding companies and some of the other entities as well, some of the information enumerated as separately required for business registration is also a requirement for inclusion in the enterprise's charter under the Enterprise Law. To the extent the information will be included in the Charter, it is suggested that it is unnecessary to require it to be repeated separately since the Charter is an integral part of the business registration application.

Article 30. This Article is too generally worded. It should clarify that "registered investment" means an investment that changes the capital of the enterprise. As currently worded, the Article may imply that persons who purchase or sell shares of a publicly traded enterprise in the secondary market place may be subject to this Article even though such transactions have no effect on the amount of capital of the enterprise.

Article 31.[2] The requirement for verification by an independent auditor in the case of more than 50% foreign ownership of the capital should be deleted because it is inconsistent with national treatment and might require an enterprise not otherwise subject to an independent audit requirement to undertake the costs of an audit. It is suggested that this be left to the same certification of capital requirements that would apply to this type of enterprise if it were not foreign owned.

[2] The paragraphs are not properly numbered in the English translation.

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