

The Legal Environment for Business Development Services in Vietnam

With focus on: Intellectual Property Services
Accounting & Auditing Services
Training Services

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PREFACE

The overall aim of the SME Promotion Project of German Technical Cooperation in Vietnam is to promote the competitiveness and the sustainable growth of small and medium enterprises (SMEs). For this purpose, a conducive policy framework and a functioning market for Business Development Services (BDS) are essential, and are thus the main focus of the Project.

The effective development of the BDS market in Vietnam is still affected by various obstacles, many of them related to regulatory constraints. Earlier research (BDS Market Assessment Study undertaken in 2001 by German Technical Cooperation together with Swisscontact Vietnam) highlighted the importance of improving the regulatory framework for BDS, with a view to creating an enabling environment for BDS market development.

The present study is intended to follow up on these concerns and to provide a comprehensive overview of key issues governing the legal environment for BDS market development in Vietnam. It analyses in detail the regulatory framework for three business services, which have been selected based on their relevance for the development of the private sector, and the importance of addressing legal concerns related to their development. It specifically focuses on Training services, on Intellectual Property Services, and on Accounting and Auditing Services.

The study has been carried by some of the key stakeholders and resource institutions in the field of BDS and private sector development. It has benefited from a very close and effective cooperation between the GTZ, the Central Institute of Economic Development (CIEM) and the Vietnam Chamber of Commerce and Industry (VCCI). Vision & Associates with inputs from Deacons Vietnam played a key role in conducting the study and undertaking the lion's share of the analytical work.

By now, first impacts from the findings and recommendations of the analysis are already notable, as throughout the process the stakeholders have fed the findings from the research into the discussion process. Some of the key concerns of the study have already been incorporated into the work of the Taskforce for the Implementation of the Law on Enterprise. Important recommendations have also been reflected in the Directive No.27/ 2003/CT-Ttg, issued on 11 December 2003, by the Prime Minister with regards to strengthening the implementation of the Enterprise Law.

Further awareness creation and a broad discussion process are necessary in order to follow up the various recommendations and suggestions made by the drafting team.

German Technical Cooperation will remain committed to this process and to stimulate a fruitful and effective discussion for the purpose of creating a more enabling legal environment for the development of BDS markets in Vietnam.

ACKNOWLEDGEMENTS

The BDS Legal Environment Study was implemented under cooperation agreements between the German Technical Cooperation Agency (GTZ), the Central Institute of Economic Management (CIEM), and the Vietnam Chamber of Commerce and Industry (VCCI). The Study was conducted by the Central Institute of Economic Management (CIEM), Vision & Associates, and Deacons Vietnam. It was carried out in close consultation with VCCI, and coordinated and monitored by Mr. Le Duy Binh, Senior Program Officer of the GTZ SME Promotion Project under the overall supervision of Mrs. Corinna Kuesel, Chief Technical Advisor.

A research team was established by CIEM. Its members included: Mr. Nguyen Dinh Cung, CIEM team leader; Mr. Tran Kim Hao, senior expert; and Mr. Trinh Duc Trieu and Mr. Phan Duc Hieu, as assistants. As General Team Leader, CIEM cooperated with Vision & Associates on provision of inputs, suggestions and comments regarding the study's preparation work, field-survey, and report compilation. CIEM also contributed to analysis of the policy and regulatory environment for the BDS market in Vietnam, and identified the policy and regulatory constraints to the development of BDS. CIEM is responsible for Part B of this Report. The Report has served to inform CIEM's policy advisory function with Vietnam's Government, strengthening its calls for more detailed supporting legal documents to facilitate implementation of the Enterprise Law.

Vision & Associates' research and writing team included: Mr. Pham Nghiem Xuan Bac, team leader; Mr. Pham Minh Hai, senior consultant; Ms Le Quynh Anh, senior lawyer; and Mr. Nguyen Dang Viet, attorney at law. Vision & Associates undertook the interview and composition work of the study, which included creation of a legal database, and design and implementation of a survey. Vision & Associates also composed the Executive Summary, Part A, Part C, Part D, Part E, Part F, and Appendixes of the Report.

VCCI reviewed the list of interviewees for the study, and recommended eligible participants. VCCI also played an important advisory role on the study's methodology, results analysis, and quality control. VCCI also reviewed earlier drafts of the Report, and organized supporting seminars and workshops. The Report can be seen as complementary to VCCI's many other activities supporting creation of a more enabling environment for BDS in Vietnam.

Deacons Vietnam, an Australian law firm, was employed to contribute valuable information on international practices and norms. It also provided comparisons with other legislation systems, and contributed to the recognition of international trends useful for the development of Vietnamese legislation relating to business development services (BDS), in general, and to targeted service groups, in particular. Professor Andrew Terry, from the Sydney School of Business Law and Taxation at Australia's University of New South Wales and Special Counsel to Deacons in Sydney, oversaw the contribution of Deacons Vietnam to this Report. Deacons Vietnam's contributions include analysis of international trends, requirements, and practices, and have been integrated in the Part B, Part C, Part D, and Part E of the Report.

Mr. Rob Hitchins, an international expert from the UK-based Springfield Centre, provided valuable field experience and international perspective throughout the study. Mr. Hitchins also provided valuable comments on earlier draft versions of the Report.

Thanks are also due to Mr. Markus Taussig who edited the English version of the report and gave suggestions for improvement of the final report.

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ABBREVIATIONS

A&A	Accounting & Auditing
APEC	Asia - Pacific Economic Cooperation
ASEAN	Association of South East Asia Nations
BDS	Business Development Services
BTA	Vietnam-US Bilateral Trade Agreement
CEPT	Common Effective Preferential Tariff
CPV	Communist Party of Vietnam
DARD	Department of Agriculture and Rural Development
DOC	Department of Construction
DOCI	Department of Culture and Information
DOET	Department of Education and Training
DOLISA	Department of Labor, War Invalids and Social Affairs
DOST	Department of Science and Technology
DPI	Department of Planning and Investment
FIE	Foreign Invested Enterprises
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariff and Trade
GDP	Gross Domestic Production
GDVT	General Department of Vocational Training
GOV	Government
GTZ	German Technical Cooperation Agency
HCMC	Ho Chi Minh City
IFC	International Finance Corporation
IP	Intellectual Property
IPRs	Intellectual Property Rights
MARD	Ministry of Agriculture and Rural Development
MFN	Most Favorable Nation
MPDF	Mekong Private Sector Development Facilities
NT	National Treatment
MNRE	Ministry of National Resources and Environment
MOC	Ministry of Construction
MOCI	Ministry of Culture and Information
MOET	Ministry of Education and Training
MOF	Ministry of Finance
MOJ	Ministry of Justice
MOLISA	Ministry of Labor, War Invalids and Social Affairs
MOST	Ministry of Science and Technology
MOSTE	Ministry of Science, Technology and Environment
MOT	Ministry of Trade
MPDF	Mekong Project Development Facility
MPI	Ministry of Planning and Investment
NA	National Assembly
NOIP	National Office for Intellectual Property
OECD	Organization for Economic Cooperation and Development
PCT	Patent Cooperation Treaty
PM	Prime Minister
PPC	Provincial People's Committee

SBV	State Bank of Vietnam
SMEs	Small and Medium size enterprises
SOEs	State owned enterprises
SSC	State Securities Committee
TTAs	Technology Transfer Agreements
TRIPs	Trade Related Aspects Relating to Industrial Property Rights
US	The United States of America
USPTO	The United States Patent and Trademark Organization
USD	United States Dollar
VIPA	Vietnam Industrial Property Association
VND	Vietnamese Dong
WTO	World Trade Organization

EXECUTIVE SUMMARY

With the overall goal of promoting the competitiveness and sustainable growth of SMEs, the **VCA-GTZ** SME Promotion Project of German Technical Cooperation (“the Project”) undertook a Preliminary Study of the Legal Framework for BDS in Vietnam. Vision & Associates was assigned to conduct the Preliminary Study with valuable contributions from the Central Institute of Economic Development (“**CIEM**”) and the Vietnam Chamber of Commerce and Industry (“**VCCI**”). Following the Preliminary Study, Vision & Associates, in conjunction with CIEM, Deacons Vietnam, and VCCI, was assigned by the Project to conduct the full-fledged study on the policy and legal framework for BDS in Vietnam.

This Study provides an overview of the policy and regulatory environment and its constraints to the BDS market in Vietnam, serving as basis for in-depth analysis of the policy and regulatory constraints for three selected services: IP, training, and accounting and auditing services. It also makes recommendations for addressing constraints at various levels, and how to develop and implement a comprehensive and integrated approach for strengthening and supporting the creation of a level playing field for private sector providers of the three service markets.

This Study identifies the following main constraints, arising from the legal environment that adversely impact on the development of the BDS market in general and three service groups in particular:

Common BDS

- The Enterprise Law is not being adequately implemented. Some local People’s Committees set their own conditions for enterprise registration, conditions that are not regulated by the Enterprise Law. Invisible barriers have blocked the entry into the market of many BDS providers and imposed restrictions on the activities of those already in operation. Some local-level stipulations or legal documents directly contradict the Enterprise Law, adversely impacting on growth of some BDS markets.
- Some important subordinate legal documents of the Enterprise Law have not yet been completed. For example, there are not sufficient legal instruments to guide the business registrar in approving names for newly registered enterprises, or withdrawing business registration certificates.
- The Law on Bankruptcy, issued in 1993, has not kept pace with economic development. Many provisions of the Law are not suitable and not sufficiently specific, making actual implementation difficult and very rare.
- Decree 87/2002/ND-CP on consulting services requires consultants to practice via certain consulting organizations/enterprises. This Decree contains stipulations that contradict the spirit of the Enterprise Law. The Decree imposes constraints on the entry into the market of consulting service providers. The Decree should be revised.
- While the National Assembly (NA) has issued the Law on Domestic Investment Promotion and the Government has issued Decree 90/2001/ND-CP, setting forth a number of measurements for promotion of business, in general, and small-to-medium-sized enterprises (SMEs), in particular, there remains a shortage of legislation in support of the business of BDS provision.

Intellectual Property (IP) Services

- In addition to the lack of adequate State and Party policies on intellectual property (IP) management, Vietnam has no comprehensive strategy enhancing public awareness in relation to IP rights protection. There is no separate law on IP, as exists in many other countries. At present, IP-related provisions are stipulated in a variety of laws, decrees, decisions and circulars.
- In theory and practice, the NOIP (previously National Office of Industrial Property) is officially identified only as a state management body. Its provision of public services is inadequate due to its lack of labor and financial resources. This has resulted in delays in NOIP's activities and prolonged the settlement of IP cases.
- The current situation of four separate IP right establishment systems is not tenable in the long run and does not accord with international practice. It is unnecessarily cumbersome with regards to: (i) the number of legal instruments issued by different authorities of four systems; (ii) human resources; and (iii) information systems which are formed and managed by the four systems separately.
- Current provisions result in the enforcement of IP rights in Vietnam being undertaken by a variety of State authorities, including the system of the People's Courts, People's Procuracy, market management forces, police, and customs offices. The inspectors of some Ministries have also played an unconstructive role in IP rights enforcement. The complicated IP rights enforcement system has not been effective in providing businesses with the protection they need.
- There is currently no framework for the establishment of a separate court specializing in IP rights dispute settlement. General civil procedures are unreasonably applied to the settlement of IP related cases. Despite the intricacy of IP disputes, the legal documents guiding settlement of IP cases are outdated and judges are not required to specialize in IP.
- Enforcement authorities are heavily dependent on the professional opinions of the NOIP, and lack information and relevant backgrounds relating to IP. The result is a very passive approach to enforcement and a prolongation of the settlement of IP cases.
- Inappropriate regulations governing IP service providers result in a limited number of providers that monopolize the market. The barriers to entering the IP service market are too high. Chief among these barriers among is the requirement of having at least 2 professionals hold IP agent certificates. This condition should be removed.
- There exists deep interference by the state in technology transfer activities, especially permitting MOST to establish requirements or limits on the contents of the TTAs between parties. This limits the rights of the contracting parties, and at the same time causes difficulties for enterprises outside of Hanoi, where MOST is located.
- While franchising is an increasingly common practice throughout the world, the concept does not yet exist in the current Vietnamese legal provisions. Franchising agreements are deemed to be a trademark license and/or technology transfer contract, and therefore are subject to different regulations under current Vietnamese law. This frustrates the development of franchising in Vietnam and wastes the time and money of enterprises wishing to enter into franchising agreements approved by and registered with the responsible authorities.

Auditing and Accounting (A&A) services

- The absence of a clear-cut policy and action plan for the development of A&A services is seen as a great constraint for the sector. The lack of compulsory application of audited financial statements for businesses of all types obviously hinders the development of the A&A service market.
- Uncertain establishment procedures present an obstacle to new entrepreneurs wishing to provide A&A services in the market. There currently exist impractical and overlapping regulations, and is no comprehensive regulation regime for the operation of A&A service providers.
- Inappropriate regulations on the provision of A&A services hinder market development. Such constraints include: the independence of A&A service providers in the course of rendering services, the lack of legal provision on the validity of audited financial statements, the complex procedures required for the provisions of A&A services to credit institutions and listed companies.
- Controversial regulations on fixed ceiling prices of auditing services are currently in place. Specifically, the MOF is empowered to fix the ceiling price for auditing work conducted by auditors/auditing firms. This is contrary to the basic principles of economic and civil transactions.
- The lack of a comprehensive accounting/auditing standard system generally obstructs the development of the A&A market.
- Laws significantly limit the tax deductibility of expenditures. Actual implementation of the laws by tax officers is sometimes inconsistent and restricts business development. Audited financial reports are not always recognized by tax authorities.

Training Services

- The policy for development of training services is general and lacks detailed provisions. In addition, training activities also face difficulties owing to the complex and unclear management system between the MOLISA, the MOET and other agencies.
- The separation of MOLISA and MOET's functions on management of vocational training schools is unclear. This lack of clarity serves as an impediment to investment into improvement vocational training networks and to their proper management.
- The procedures on establishment of vocational training providers are neither transparent nor specific. This discourages the entrance of new training providers into the market, hindering development of breadth and depth of such services.
- The required criteria for a potential entrepreneur to establish a vocational training school are too high, and the procedures are too complicated, time consuming, and costly. Establishment procedures should be streamlined, simplified, and made transparent. This would help to increase the number of entrants into the vocational training service market.
- Incentive policies for vocational/technical training have not been implemented. Generally speaking, there are inadequate policies for the enhancement of business management training systems.

- The lack of legal provisions on trainees' rights leave trainees in a weak legal position, with little leverage to ensure they receive high quality service.
- Laws limit the amount of reasonable expenses to be deducted from taxable income for training services.

PART A. INTRODUCTION

1. BACKGROUND

The VCA-GTZ SME Promotion Project has the overall goal of promoting the competitiveness and sustainable growth of SMEs. A constructive policy framework and a functioning market for BDS is essential, and guided the key objectives of the Project¹.

To better understand the functioning of the market, and with a view to adequately designing its strategy for BDS market development, the Project – in cooperation with SwissContact Vietnam – undertook a BDS Market Assessment Study. This study specifically highlighted the importance of improving the regulatory framework for BDS, with a view to creating an enabling environment for BDS market development. In this context, the Project suggested in particular:

- The importance of leveling the playing field between public sector service providers and private companies in order to stimulate private sector investment in BDS markets;
- The need to address the lack of competition in controlled markets (the Internet, media) which has resulted in low quality services;
- The importance of looking at the effects of subsidized providers on the demand and private supply of services. Subsidies from both the government and donors/social organizations should be shifted from transactions to improving the commercial supply of services and increasing the availability of information about services and providers.

The Project then decided to move ahead with a study on the policy and legal framework for BDS in Vietnam, considering it an important tool to advocate for a better enabling environment for BDS markets in Vietnam.

Vision & Associates, CIEM, Deacons Vietnam and VCCI were assigned to conduct this study. Results of both the BDS Market Assessment Study and the Preliminary Study have served as essential inputs for this full-fledged study.

The overall objective of this study is to (i) provide an overview on the policy and regulatory environment for the business development service market in Vietnam; (ii) to identify and better understand the policy and regulatory constraints to the development of BDS; (iii) to provide inputs and recommendation which facilitate different BDS market players to advocate for a more consistent and enabling policy and regulatory environment conducive to the development of the BDS market in Vietnam; and to identify factors which favor or could potentially favor an increasing availability and usage of services.

The specific objectives of the study include: (i) to provide a detailed analysis of the policy and regulatory environment for a limited number of services subject to study; (ii) to specifically identify the policy and regulatory constraints for each of these selected service markets; (iii) to provide recommendations to address constraints at various levels, developing and implementing a comprehensive and integrated approach for strengthening and supporting the creation of a level playing field for private sector providers of the three specific service markets.

Through workshops, forums, and other follow-up activities, etc., findings and recommendations obtained from the study would be shared, discussed with, and disseminated to different groups, particularly those who play important roles in improving the regulatory environment for BDS.

¹ More information about the Project can be found at : www.sme-gtz.org.vn;

2. SCOPE AND STRUCTURE OF THE STUDY

Business Development Services (BDS) refers to a wide range of services used by entrepreneurs to help them operate and grow their businesses². In this sense, there are numerous categories of BDS, including training, consulting, management services, marketing, packaging, product design, quality assurance, distribution logistics, internet, IT and computer services, accounting/auditing services, intellectual property services, courier services and advertising.

In the preliminary study, the following service sectors were studied: (i) Consulting (market research, technology transfer, and product design); (ii) Training; (iii) Accounting & Auditing; (iv) Legal services; (v) Quality and Environment Management; (vi) Management information and Computer related services; (vii) Business information and Internet based information services; and (viii) Advertisement services. Besides providing a short analysis of the general legal environment for all BDS, this Study focuses its analysis on three services: **(1) Intellectual Property Services; (2) Accounting & Auditing Services; and (3) Training Services.**

The selection of these three services for in-depth study is based on the following criteria listed in the order of priority: (i) The interest of local BDS facilitators (from the enabling environment perspective) in making improvements in the service markets; (ii) The severity of legal constraints to the development of service market; (ii) The importance of service market to SMEs; and (iii) The feasibility for the legal proposals/recommendations for changes to be implemented.

The report has 6 main parts and some Appendixes:

- Part A. Introduction;
- Part B. Overview of BDS market and the regulatory environment;
- Part C. Intellectual Property Services;
- Part D. Accounting & Auditing Services;
- Part E. Training Services;
- Part F. Conclusions and Recommendations;

3. METHODOLOGY

The study consisted of two main components: (i) a desk study; and (ii) a in-depth interview survey.

The desk study involved (i) reviewing legal instruments, (ii) gathering information from mass media, the Internet, database of Vision & Associates, CIEM, Deacons Vietnam and reference papers; (iii) analyzing and validating the findings, (iv) drafting and reviewing the Report of the Study and (v) other related works.

Together with this study's findings and results, other reference papers and conducted studies (including but not limited to the BDS Market Assessment Study and the Preliminary Study) have been used as valuable inputs to assist the analysis of the current situation of the BDS market and the impact on it from legal constraints.

Field surveys involved in-depth interviews with (i) BDS providers, (ii) customers, (iii) facilitators, and (iv) regulators. The two main documents prepared for field surveys were Question Guidelines

² Source: Donor Committee Guiding Principles, 2001; Goldmark, 1997, Tanburn, 2000, McVay, 1996.

and Questionnaires. Question Guidelines was developed for interviewers' usage, and detailed Questionnaires were designed specifically for four types of targeted respondents: service end-users, providers, facilitators and regulators. There is a slight difference between the four types of Questionnaires where both "fixed questions" and "open questions" were applicable.

In order to ensure that interviewers adhered to the objectives of the Study, and to maximize the exploitation of respondents' information and expertise, a Questions Guideline was prepared for all interviews with different respondents in the three service groups under survey. The Question Guideline was designed to provide interviewers with (i) interviewing skills and techniques, (ii) guidelines for focusing on the survey's topics, and (iii) instructions for the Questionnaires. It was used as a survey manual that interviewers had read carefully before conducting the interviews.

PART B. OVERVIEW OF BDS MARKETS AND THE REGULATORY ENVIRONMENT

1. DEFINITION OF BDS

The basic difference between commercial and self-sufficient production is in the exchange, purchasing, ownership transferring and use rights of means, materials, assets, labors among the people, from a region to region, from a country to country. Developed commercial production increases the economic growth rate, improves the living standard of the people and thereby increases and diversifies daily consumption. The more developed commercial production, the more products are made, the more diversified they are, the more their functions and the more complicated they become. It will require more types of raw materials, fuels, production tools, machines and equipment and it will go through more processes. This gives the rise of a range of supporting services to commercial production.

By the late 20th century, services had become an important sector. There are broad and narrow concepts of service:

In its broad meaning, services refer to all activities, the outcomes of which are in physical form. Service activities cover all areas at high level, and influence the socio-economic development of every country and region. They are not limited to a specific sector such as transportation, tourism, trading, banking, post, insurance but also exist in environment, culture, administration, legal consulting and sentimental advising.

In its narrow meaning, services involve working for other people or the community, satisfying needs of people in such areas as transporting, supplying water, repairing and maintaining machines, equipment or works. Each country or organization has its own specific definition of BDS based on particular socio-economic factors, and the purpose of BDS development. Over recent years, there has been much research on BDS and there are many definitions of BDS. Some definitions of BDS that widely used outside Vietnam include:

- BDS are services that improve the performance of the enterprise, through its access to market and its ability to compete. The definition of (business development services” in these Guiding Principles includes a wide array of business services, both strategic and operational. BDS are designed to serve individual businesses, as opposed to the larger business community³.
- *BDS* are any non-financial services provided to businesses on either a formal or an informal basis. In this context, this term is interchangeable with Business Services⁴.
- *BDS* are any services used by an enterprise to assist in business functioning of competence⁵.

BDS include training, consultancy and advisory services, marketing assistance, information, technology development and transfer, and business linkage promotion. A distinction is sometimes made between “operational” and “strategic” business services. Operational services are those needed for day-to-day operations, such as information and communications, management of accounts and tax records, and compliance with labor laws and other regulations. Strategic services, on the other hand, are used by enterprises to address medium and long- term issues in order to improve the performance of the enterprises, their access to markets, and their ability to compete.

³ *Business Development Services for Small enterprises: Guiding Principles for Donor Intervention, 2001 edition, p 11.*

⁴ *Kazak tan, p 3.*

⁵ *Guide to Market Assessment for BDS Program Design, A fit Manual by Alexandra Overy Miehlsbradt, ILO, Geneva, April. 2001, page xi.*

In this Study, the most popular definition is used, i.e. BDS refers to “any non-financial service used by an enterprise to assist its business functioning or growth, provided in a formal or informal manner”. A few examples of BDS are training, consultancy, management services, marketing, packaging, product design, quality assurance, distribution logistics, information, internet, information technology and computer services, business linkage promotion, accounting services, IP, courier services and advertising. BDS markets encompass providers of business services both commercial and public funded, SMEs who use BDS, and the actual provision of services”⁶. This is an internationally accepted definition.

2. SIGNIFICANCE OF BDS

Every organization – public or private, large or small – requires “support functions that are critical to its survival and competitiveness but that are not its core mandate or competency” (Dorothy I Riddle, “What do we know about BDS markets?” – Hanoi Conference for Small Enterprises in Asia 2000). BDS are vital in enhancing enterprise performance and there is increasing recognition in developing as well as developed countries of the need for appropriate policies to develop BDS markets and encourage the provision and use of these services.

Internationally, BDS are considered to be the key to enhancing performance in manufacturing and service sectors and there is universal acceptance that an effective and efficient business services sector is useful to economic growth.

Industrial countries recognize that BDS are a significant and rapidly developing economic sector (in OECD countries strategic business services have annual growth rate of 10 percent per year) which are at the core of the “new economy” and which play key roles in supporting the modernization process. There are a number of key strategic reasons for the growth of BDS, which were summarized by the OECD (*Strategic Business Services*) as including –

.... The drive by firms to increase productive efficiency in an increasingly knowledge-intensive world, the growing trend towards outsourcing and contracting out of services by firms and governments, downsizing of firms in some industries, and the increasing need for small firms to improve their economic performance through the use of external resources, knowledge and skills to supplement internal resources. Increased efficiency in business services will not only benefit business services themselves, but will also have positive spillover effects in a wide range of other service and manufacturing sectors, and lead to improved overall economic welfare. For these reasons, business services are of increasing policy interest.

Frank Niemann (*Turning BDS into Business*, Chapter 3, International best practice in developing BDS markets) notes that:

...In an increasingly complex and dynamic environment as prevailing in industrialized countries, businesses (and organizations in general) have to focus on their core area of competence in order to remain competitive and effective. This means developing effective working relationships with a range of external service providers who can do a specific task

- Better/more competently
- Cheaper/at lower cost, and/or
- With higher credibility towards internal and external stakeholders than the enterprise/organization itself.

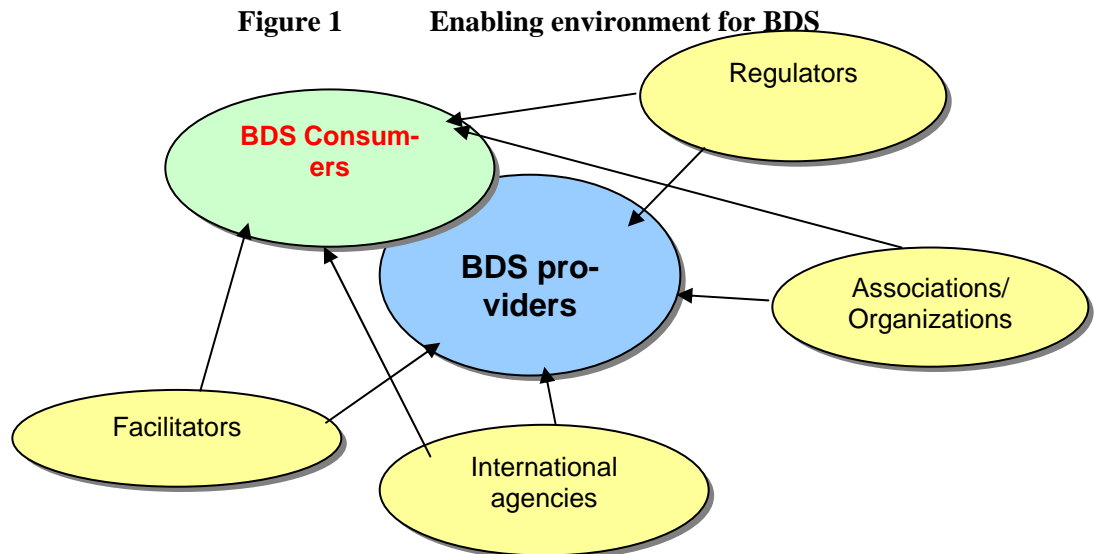
⁶ GTZ-Swisscontact: *Business Development Services in Vietnam. Hanoi/HCMCT, June 2002.*

The OECD notes that –

The provision of strategic business services is key to enhancing performance across the economy, in manufacturing and service sectors alike. Increased efficiency in the provision of strategic business services will have positive spillover effects for both large and small firms. For example, a considerable share of the growth in strategic business services is the result of outsourcing by established firms, which are shifting various functions and activities to external suppliers. Information technology services and personnel supply and training services are among the areas that are increasingly outsourced. In general, outsourcing can promote economic growth by improving efficiency for the firms that outsource by increasing the supply of effective and efficient lower-cost, high quality service inputs. Outsourcing provides the basis for greater firm specialization and restructuring in addition to promoting new venture businesses and job creation.

3. CURRENT BDS MARKET IN VIETNAM

In Vietnam, there is limited general statistical data that describes the numbers of BDS users and suppliers, market size, or growth rates. Based on some surveys and studies carried out by organizations, agencies or institutions, the general situation on the enabling environment for BDS in Vietnam can be illustrated as follows:



Based on the results of the survey on the SME private development conducted by CIEM in cooperation with IFC and MPDF in 2002 and findings from some other research studies, some basic conclusions on the current development of the BDS Market in Vietnam can be summarized as follows:

- The largest proportion of purchasers in the private sector is based in southern cities and provinces. The smallest proportion of purchasers is in the central provinces. The main users of BDS are in the big cities, especially in Hanoi and HCMC.
- Private enterprises do not appear to use/buy business services to as large an extent as might be expected. Private enterprises obtain much of what they need from staff or personal connections and consider it unnecessary to buy professional services no matter what benefits the services could bring or how common or essential the services are to conducting business.

- Many enterprises do not trust the quality of BDS due to suppliers' inexperience in the firm's industry and the perception that available "commodity" services are mediocre. Surveyed private enterprises said they would consider buying BDS in the future.
- Most private enterprises (three quarters of surveyed firms) use in-house services or obtain business services from friends, family, or other special unofficial connections.
- Recently, the obstacles faced by private enterprises in some areas such as registration and inspection have been reduced. This was also observed in BDS provision. Local governments across provinces have played a significant role in facilitating these developments.
- Some officials admitted they had been unable to provide adequate responses to the needs of firms with regard to BDS. The start-up of professional or business associations to serve the needs of the sector at local levels is not yet being encouraged.
- Associations and organizations have played and should continue to play a major role in providing BDS to private enterprises. But the membership is not as widespread as might be expected. This is because (i) few private firms appear to see the need to be a member of an organization as 'urgent'; (ii) some private enterprises do not know much about the benefits that could accrue to them once they became a member of such organizations/associations; and (iii) many enterprises do not believe that the benefits of membership in associations/organizations are significant.
- While it is accepted that business associations/organizations benefit their members, for the time being they seem to be more beneficial to SOEs than to private enterprises, especially SMEs.

There are some basic limitations of BDS, including:

- The quality of services providers in Vietnam is poor. Their development levels are much lower in comparison to those in the world and region. The services sector's share of GDP is now 50 percent, but that of BDS is just 1-2 percent.
- There are not many BDS services relevant to the requirements of SMEs. Some new services that are more relevant to SMEs have not been widely used.
- There is a weak network of BDS provision. Private providers are small in scale, and lack stability and qualifications; state-owned providers are still subsidized and lack dynamism. The participation of foreign providers is limited.
- The market for provision of BDS is not very competitive and is to some extent monopolistic. As a result, the services provided are expensive, of poor quality, and are not subject to pressure for ongoing improvement.
- There is a lack of connection, coordination, and consistency between supporting institutions towards businesses, particularly SMEs.

4. LIMITATIONS ON BDS DEVELOPMENT IN VIETNAM

4.1 The Environment of Perception

Perceptions among the general population and among important subgroups, including entrepreneurs and government officials, regarding the position and importance of BDS in the market-

based system and in the present context of integration, are neither sufficient nor accurate. This is despite the growing importance of the industrial and service sectors in Vietnam's national economy under *Doi Moi* reforms. People have not recognized the role and importance of services, especially regarding BDS. This poor understanding has served as a constraint on the development of SMEs. Bankers, for example, see mostly the negative faces of SMEs (their instabilities, low efficiency, high risks) rather than their important role in a multi-sector economy at the initial stage of industrialization and modernization.

4.2 Legal Environment and Development Policies

The legal environment in Vietnam is not favorable for BDS. The state maintains a monopoly in some services sectors, including telecommunication and goods receiving services at ports. In fact, private and foreign invested enterprises are not allowed to operate as suppliers in some BDS, such as training services and credit guarantee services. Regulations on the rights and responsibilities of BDS suppliers and consumers are still not transparent.

4.3 Economic Environment

The low income and low savings of SMEs have contributed to low demand in the services sector, in general, and the BDS sector, in particular. Most SMEs are not able to buy/use BDS in accordance with market rules.

4.4 Poor Technical Infrastructure

SMEs find it difficult to access modern technical instruments. Although the technical infrastructure for information and telecommunication development has improved quickly in recent years, indicators relating to the number of telephones, and computers used and connected to the Internet are low in comparison to those of other regional countries, while service prices are much higher. This limits SMEs from accessing information and choosing BDS suppliers.

The available resources for BDS development are not sufficient. For instance, infrastructure for the development of training services, including the accessing of information in relation to training schools, centers, and laboratories is mostly not available. To provide training services, suppliers often have to rent facilities which are often of unpredictable and poor quality. This undermines trust among service users.

5. THE LEGAL FRAMEWORK FOR BDS IN VIETNAM

The legal framework plays a vital role in developing the BDS market in Vietnam. Its role is to encourage both providers and users to participate in the market and to strengthen the competitiveness of SMEs. In an effort to create a more ideal environment, the government of Vietnam has paid significant attention to supporting enterprises in all different ownership categories, including domestic as well as foreign invested SMEs.

The government's recent policy efforts focus on two issues: *Firstly*, creation of a business environment more conducive to enterprises' effective business operations; *Secondly*, establishment of integrated support institutions, providing services for business development.

During the past two years, increasing efforts have been made to improve the investment and business environment, strengthen the confidence of the business community, and provide more favorable conditions for business activities.

The government has provided clear directions to the ministries, branches, and local administrations on implementing the Enterprise Law. Until now, there have been 41 regulatory documents for implementing the Enterprise Law. These include 10 Decrees by the government, 5 Decisions and Directions by the Prime Minister, and 26 Circulars and Decisions by relevant ministries and government agencies. About 160 licenses were eliminated, of which 150 were removed by the Prime Minister and the others by ministries and branches. The government required ministries to cooperate with VCCI to conduct studies on removing unnecessary licenses and replacing the licenses with an appropriate regulatory system. Some vital legal documents that have much effect on the development of the BDS market will be analyzed below.

5.1 The Enterprise Law

The Enterprise Law was approved by the National Assembly on 12 June 1999 and came into effect on 1 January 2000. This Law replaced the Law on Private Enterprises and the Law on Companies issued in 1991. The Enterprise Law was enacted to overcome the problems with the Law on Companies and the Law on Private Enterprises under the changing conditions of Vietnam's transition economy.

The Enterprise Law regulates the establishment, management and operation of almost all kinds of enterprises: limited liability companies, joint-stock companies, partnerships, sole proprietorships, political organizations and social-political organizations' enterprises.

The Enterprise Law allows enterprises to operate in any areas not specifically deemed to be illegal instead of just those areas specifically deemed to be legal. The Law shifted the focus from a "pre-evaluation" mechanism to a "post-evaluation" mechanism. Instead of strict conditions on business registration, current supervision addresses problems as they arise. Because of this new approach, healthy enterprises are not afraid of receiving government inspectors. Today, forms of businesses are more diversified to mobilize all resources for developing businesses. In general, the Enterprise Law has clear advantages as compared with the Law on Companies and the Law on Private Enterprises in terms of encouraging business and investment.

The new Enterprise Law has many positive and encouraging provisions that led to high growth in the number of newly established enterprises (72,601 newly established enterprises under the Enterprise Law, as of the end of September 2003).

The Enterprise Law brought about a turning point in recognizing and protecting the civil right to conduct business and constituted a breakthrough in liberalizing market entry.

In three years, from 2000 to 2002, there were 55,793 newly established enterprises under the Enterprise Law (14,417 enterprises registered in 2000, 2.49 times the number of enterprises in 1999; 21,040 new enterprises registered in 2001; and the remainder were established in 2002). The total number of enterprises operating under the Enterprise Law by the end 2002 was about 100,000 enterprises. In the first nine months of 2003, an additional 18,631 new enterprises were established, with registered capital of VND 39,377.564 million. This represented an increase of 14 percent over the same period in 2002.

In line with the rapidly growing number of enterprises, the amount of capital mobilized by businesses over the last two years also underwent a considerable increase. In 2000, the total capital of enterprises registered under the Enterprise Law amounted to nearly VND20,000 billion (including VND14,000 billion of newly registered capital and VND6,000 billion of additionally registered capital), or triple the amount in 1999. In 2001, the total capital of registered enterprises amounted to VND35,000 billion (including VND26,500 billion of newly registered capital and VND9,000 billion of additionally registered capital) or 178 percent of the 2000 figures. On the average, each enterprise registered in 2000 had a capital amount of VND 965 million and those set up in 2001 had VND 1.26 billion in capital. The Law has had a real and important impact on both the demand and supply side of all BDS markets. The rise in number of enterprises has helped to increase sharply the number of potential and actual users of BDS. On the supply side, the law has opened up many service markets, allowing the emergence of many BDS providers that had previously not existed in Vietnam before the law. Examples of new BDS sectors include debt collection services, real estate information services, bodyguard services, public relations services, and tax advisory services.

Nevertheless, there are still some constraints in regulations and enforcement process of the Enterprise Law. Some –supporting legal documents, especially those relating to the BDS market, have not yet been promulgated:

- *Some necessary legal documents have not yet been promulgated, especially those guiding the issuance of certificates of legal professional practice. There is a great confusion and ambiguity on the conditions and criteria for provision of legal services.*
- Some supporting regulations have been recently promulgated in a way contrary to the provisions of Enterprise Law⁷. For example, *Decree No. 87/2002/ND-CP on consultation services, dated 5 November 2002, stipulated that only consultants have the right to establish consulting companies and individuals are not allowed to establish an consulting enterprise unless they are working in a consulting agency/organization. The Decree is a clear example of a legal document that contains stipulations against the principle of the Law on Enterprises... The Decree has made entry into the market harder for consulting service providers and therefore should be revised.*

Some local People's Committees still maintain regulations that bar individuals from registration for company establishment in certain sectors not prohibited by the Enterprise Law. In particular, some People's Committees set their own registration conditions not regulated in the Enterprise Law⁸.

- Some supporting legal documents do not keep pace with recent changes, such as: (i) lack of regulations on approving name of enterprises; (ii) lack of regulations on functions of business registration agencies; (iii) lack of regulations on the situation of withdrawing business licenses when enterprises violated the laws; and (iv) lack of regulations on liquidation.
- There are some other limitations in management and implementation of provisions of the Enterprise Law, especially at local administration levels due to the lack of capable officials, and incorrect understanding of new provisions of the Enterprise Law.

These constraints are major obstacles to the development of private sector. Impediments to private sector development have further impeded development of the BDS market, both in terms of the start up of new BDS suppliers and the growth in number of BDS users.

⁷ There were 10 supporting regulations contrary to regulations of the Enterprise Law during 2000 - 2001.

⁸ Ho Chi Minh city, Ben Tre and some other provinces temporarily did not allow individuals to register bar-karaoke, dancing, massage, restaurant, or hotel businesses.

5.2 Law on Bankruptcy

The Law on Bankruptcy was approved by the fourth Session, IX National Assembly on 30 December 1993 and came into effect in July 1994. The Law is aimed at “protecting the legal rights and benefits of creditors, indebted enterprises and relating people, determining the responsibilities of indebted enterprises when enterprises go bankrupt to push up the efficiency of enterprises’ operation and to ensure society’s rule”⁹. It is also aimed at making the business environment healthier with clearer financial figures of enterprises.

Although the need for the Law on Bankruptcy is obvious, some current provision of this Law are not suitable. This is clear given the very small number of enterprises to declare bankruptcy in the 9 years from 1994 to 2002. The number of enterprises asking for bankruptcy averaged less than 17 enterprises a year. This does not show the reality in Vietnam. These limitations are mainly the result of the following:

- According to Article 2, it is very hard to prove that an enterprise is in danger of bankruptcy. It is especially difficult to prove the reasons for the losses, or to prove the inability to repay debts. Many enterprises do not have the money and assets left to hire auditing agencies to audit their financial statement as stipulated in Article 9.2 of the Law on Bankruptcy and Article 11.3 of Decree 189/CP, dated 23 December 1994, on implementation of the Law on Bankruptcy.
- When sending requests for bankruptcy, it is not reasonable to apply injunctive relief as stipulated at Article 16 of the Law on Bankruptcy, given that the stipulation has not allowed the Judge of competent courts to make decisions before assets of bankrupt enterprises are dispersed or collected by creditors.
- This Law has does not have any provisions regulating the suspending and withdrawing of business licenses, disapproving requirement for bankruptcy in case there is the incompliance with the laws.
- Provisions on establishment of assets management groups and assets liquidation groups are not reasonable.
- Other unreasonable provisions relate to settlement of loan abuse, guarantee, competence to send request for bankruptcy, settlement of labor matters, and the bankruptcy fee.

The above issues hinder the implementation of enterprise bankruptcy, with the result that many enterprises are both unable to continue operations and unable to declare bankruptcy. This makes improvement of the business environment difficult and has negative effects on the enterprises’ operation and business partners. This also has impact on BDS suppliers, given that they face difficulty in determining which customers really need their services. This not only reduces the efficiency of available BDS but also directly impacts on the existence and development of BDS supplying enterprises.

⁹ *Foreword, the Law on Bankruptcy, 1993.*

5.3 Decree 87/2002/ND-CP on consulting services

In recent years, consulting services have mushroomed in all fields, ranging from consulting on real estates information, jobs, abroad studies, designs and constructions to legal services and have had great influence on the energy of Vietnam's economy. This diversity proves with the growing importance of market rules. However, in addition to the positive impact of the emerging consulting sector, certain characteristics of the new consulting firms such as their profit-oriented approach, amateurism, and their unpredictable nature have raised criticism from public.

One of the main reasons for such adverse impact seems to be the absence of a consistent and detailed legal framework for consultancy services. In order to meet the demand of the society, Decree No. 87/2002/ND-CP on operations on provision and use of consultancy services was issued on 05 November 2002. In spite of the fact that the Decree regulates only the operations of consultancies without free of charge to service users, this Decree is regarded as the major tool for governing too many aspects. This legal instrument covers services of all sorts but eliminates legal services as these services are already covered by the Ordinance on Lawyers and its subordinate documents.

The most pivotal concern appeared is that the Decree seemingly does not recognize the practice of individual consultants, given that Article 6.2 requires all individual consultants must operate in a certain organization. Without entry into a consulting organization, many highly qualified experts could not utilize and share their skill and experience by provision of consultancy service individually to service users. It would be very difficult to explain the grounds for such restrictions. In this regard, the Decree is a clear example of a legal document that contains stipulations against the principle of the Law on Enterprises. The Decree has made entry into the market harder for consulting service providers.

Any consulting organization should note a condition for provision of consultancy services stipulated in the Decree. Article 6.1 requires that a consulting organization must have at least two qualified persons who satisfy conditions for provision of consultancy services. This should be construed as a new and unreasonable trading condition.

Another component of the Decree that raised concern in the consultant community is the provision on preferential policies. Article 4 of the Decree confirms that the State shall grant consultancy service providers significant support, but fails to set down more specific or explicit encouragements.

The following points of the Decree should be regarded as positive stipulations:

- Main principles of consultancy services are expressly defined in the Decree. For example, services providers are obligated to observe the professional ethics, to keep confidential all information of the service users, and to ensure the independence, truth, objectiveness and scientism of consultancy performance. Thus, those who use the consultancy services can be confident that their privacy is automatically kept secret.
- The main contents of a contract for provision of consultancy services are also listed out, but merely for orientation, not compulsion. Parties can elaborate the contents of their contract with specific articles in detail. The oriented contents may help to mitigate potential disputes due to the lack of some essential provisions in service contracts.
- The Decree sets down all obligations binding consultants. Most remarkably, consultants must create favorable conditions for service users in filing application for protection of intellectual property rights over consultancy results. Consultants must also carry out insurance on profes-

sional duties. However, there is a problem with a regard to how consultants shall carry out this responsibility in the context of a lack of professional duties insurance providers in Vietnam.

Article 16 of the Decree stipulates that all organizations using State budget sources for consultancy services must open bidding for selection of service provider, except in special cases for protection of State secrets and for urgent work.

5.4 Other Documents

Decree 90/2001/ND-CP dated 23 November 2001 on assistance of SME development. In this Decree, the government confirms the role and important position of the SMEs in the economy and introduces the essential legal provisions to the development of the SMEs, most of which are mainly domestic private enterprises.

According to Decree 90/ND-CP, legally registered domestic production units, regardless of being state owned or private enterprises, having the registered capital equal or less than VND 10 billion or employing 300 people or less, are eligible to benefit from the Decree. The assistance is to be undertaken through different programs. This new method aims at carrying out policies encouraging SMEs development in an efficient manner. In addition to current investment incentive policies, the SMEs will be granted further incentives relating to credit guarantees, production sites, market expansion (both domestic and external), competitiveness improvement, provision of information, consultancy and training.

According to this Decree, SMEs will receive subsidies for paying the costs in using training service, consulting service, financial service, credit service, and production land. This will allow them increase their ability in using services, especially BDS. In addition to the above legal documents, some other regulations also have great effect on BDS, such as the implementation of **the Law on Domestic Investment Promotion**. **The Law on Domestic Investment Promotion** has made remarkable progress, with 2,425 investment projects and total registered capital amount of VND 38,723 billion in 2001, the revision of the Labor Code, and the implementation of the Lawyer Ordinance.

Along with the improvement of the investment and business environment, the government of Vietnam also encourages the formation of supporting institutions and undertakes activities supporting enterprises and provides information for production and business activities.

During the past few years, various enterprise-supporting institutions have been established and have come into operation. These include professional associations, funds, assistance programs, clubs, assistance centers and consultant companies. Some of them were formed by the state and many by other associations, non-government organizations and international organizations. The assistance by these institutions is mainly in areas such as provision of information, capital assistance or capital access, consultancy, and training in order to support the enterprises in establishment, operation, and improvement of competitiveness.

It is noticeable that the state authorities, both at central and local levels, have actively participated in the formation of enterprise supporting institutions. In addition to the previous functions of enterprise assistance, many ministries, branches and local governments have established institutions specializing in providing assistance for enterprises. Examples include the Trade Promotion Agency formed by the MOT, the Legislation Club formed by the MOJ, the Enterprise Information Centre and the incoming Small and Medium Enterprise Promotion Bureau established by the MPI, and many trade and investment promotion institutions or sections by the local governments. This is a positive sign for the business community as the state's active involvement into the promotion

activities can be expected to help remove the obstacles and constraints in the business environment more rapidly.

However, there still remain some limitations in supporting enterprises. This is observed particularly in the case of many enterprises, especially SMEs, which have not received the necessary assistance from the state or from supporting organizations. The policies of supporting enterprises have not been implemented due to a lack of specific assistance programs. The business environment remains unfavorable with many obstacles such as cumbersome administrative procedures, the absence of efficient and close coordination among various administrative levels and industries, the widespread corruption and irresponsibility on part of the staff, lack of commitment to implementation of regulations, and poor physical infrastructure.

In order to address the aforementioned obstacles and support enterprises more efficiently in the context of international economic integration and severe competition, Vietnam's Government has confirmed its intention to continue enterprise supporting activities and policies in the year 2003 and subsequent years. These activities and policies will be designed to show the measures of appropriateness and efficiency in business practice. At the same time, they provide guidelines to ministries, industries, and local governments to implement the policies relating to enterprise assistance stated in **Resolution 05/2002/NQ-CP**. It also aims to establish the action program of the government on implementation during the 5th Conference of the IX Communist Party Central Committee in continuous improvement of policies and regulations for private sector development and to strengthen the export performance of enterprises according to the export program for the period of 2002- 2005.

In summary, the legal framework for enterprises' operation has been increasingly improved over the years to advance the development of all types of enterprises. The strong development of enterprises has enhanced the BDS market. However, Vietnam is still in a transition period. Although the regulatory system has been further improved, it has not met the demands of reality. The regulations on BDS are less satisfactory than those for other sectors due to their recent origin. Thus, it is necessary to continue improving legal documents, in general, and those relating to BDS, in particular, to develop this market in accordance with its role and position in the economy.

6. INTERNATIONAL AGREEMENTS

In recent years, Vietnam has made strong efforts to integrate into the world economy. At present, Vietnam is a member of ASEAN, and APEC and has applied to be a member of the WTO. Vietnam has also signed bilateral and multilateral trade agreements with many countries, the most recent being the Bilateral Trade Agreement with the United States (US BTA).

The structure of the legal framework for BDS is, in Vietnam as in other countries, impacted upon by obligations assumed under international treaties. However, irrespective of international obligations, the significance of the BDS sector in the domestic economy is universally acknowledged and most best practice initiatives directed to the sustained development of this sector are driven by national rather than international considerations. On WTO accession Vietnam will be committed to liberalization of some key strategic business services but the majority of best practice initiatives that Vietnam should embrace will not be forced on Vietnam by international agreement but adopted by it to put in place as environment conducive to the development of the BDS market in Vietnam.

CEPT and AFTA

Implementation of the Common Effective Preferential Tariff (CEPT) is an opportunity and also a challenge for all businesses in general and service enterprises in particular. Vietnam signed the

AFTA Treaty, together with other 9 ASEAN countries, which fixes the deadline for cutting of the import duty tariff to below 5 percent by 2006. On joining the AFTA, domestic enterprises shall enjoy some benefits such as: (i) reduced costs for imported items, and (ii) more export opportunities.

In relation to BDS in Vietnam, the most important international agreements impacting on this sector are USTBA and WTO

USTBA

The obligations assumed by Vietnam under the Bilateral Trade Agreement with the US impose, in effect, obligations in relation to trade in goods and services and IP requirements that mirror those that Vietnam will assume with WTO accession. Under USBTA Vietnam is committed to opening important services including banking, insurance and accounting services, introduce WTO-consistent protection of IP rights, phase out WTO-inconsistent measures (e.g. local content agreements) in relation to trade-related investment measures and introduce transparency into the legal system.

WTO

Vietnam's anticipated accession to WTO which has as its main purposes the liberalization of international goods and services trade and enhanced IP protection and enforcement will impose a range of significant obligations most of which have been foreshadowed in USBTA. WTO membership is expected to bring a range of benefits including (i) the system helps promote the peace; (ii) disputes are handled constructively; (iii) rules make life easier for all; (iv) freer trade cuts the costs of living; (v) it provides more choice of products and qualities; (vi) trade raises incomes; (vii) trade stimulates economic growth; (viii) the basic principles make life more efficient; (ix) Governments are shielded from lobbying; and (x) the system encourage good government.

Vietnam officially submitted application to WTO in 1995 and is now actively negotiating for its accession. The first condition for accession to WTO is that Vietnam has to sign bilateral trading agreements with current members of WTO, who wish to sign bilateral agreements with Vietnam. Vietnam-US BTA is one of the initial steps for Vietnam to enter WTO. Joining WTO, Vietnam has to implement 4 main principles: MFN, NT, opening market and fair competition. To realize these principles, Vietnam has to prove the transparency of policies and regulations on trading, services, investment and IP. Meanwhile, Vietnam has to amend laws and regulations for the suitability with international laws and legal customs.

In the context of BDS, Vietnam's obligations under WTO GATS (General Agreement on Trade in Services) are the most relevant but its impact is nevertheless limited. Services trade under WTO/GATS is more flexible and obligations much more limited than those for trade in goods under WTO/GATT.

GATS imposes *general obligations*

- Most Favored Nation (MFN) Treatment is the commitment to non-discrimination among trading partners in services transactions.
- Transparency requires that legislation, regulations and administrative practice are published, and are notified to WTO members, and that an Enquiry Point (as well as a Contact Point for developing countries) is established to respond to requests for information for all legislation and policies affecting particular services industries.
- Due Process in Domestic Regulation is the requirement that all regulatory measures affecting trade in services are administered in a reasonable, objective, and impartial manner.

- No Payments Restrictions are permitted on international transfers and payments for current transactions and restrictions on capital transfers are subject to IMF obligations.
- Recognition of Professional Standards based on mutual negotiations.
- Monopolies and Exclusive Service Suppliers shall act in a manner consistent with MFN and the schedule of specific commitments and shall not abuse its monopoly position.

It also provides for *specific commitments* that, in schedules, list specific commitments to, and limitations on, market access and national treatment for covered services sectors or subsectors.

The principle of *national* treatment, or non-discrimination does not apply in relation to particular service sectors not included in the specific commitments.

For services covered, market access commitments extend to

- Cross-border supply: non-resident service suppliers provide services across international borders into the territory of the country.
- Consumption abroad: residents of a country purchase services in the territory of another country.
- Commercial presence: foreign service suppliers establish a “commercial presence” in the territory of a country, such as an agency, joint venture, subsidiary, or branch.
- Presence of natural persons: temporary entry and stay in a territory of a country by foreign individuals in order to supply a service.

The extent of Vietnam’s commitments will be largely determined by the outcome of the bilateral negotiating rounds that precede accession. It seems inevitable judging by recent experience (for example in China) that Vietnam will be obliged to grant concessions but these will be related primarily to the opening of certain services sectors. In the context of BDS, the A&A services sector will be liberalized – a development that is taking place under USBTA influence. Most of the drivers for change in Vietnam’s legal framework for BDS will be domestic policy determinations rather than obligations imposed by WTO membership.

7. INTERNATIONAL BEST PRACTICE AND TRENDS

7.1 Regulation Generally

Regulation may be broadly classified into two categories:

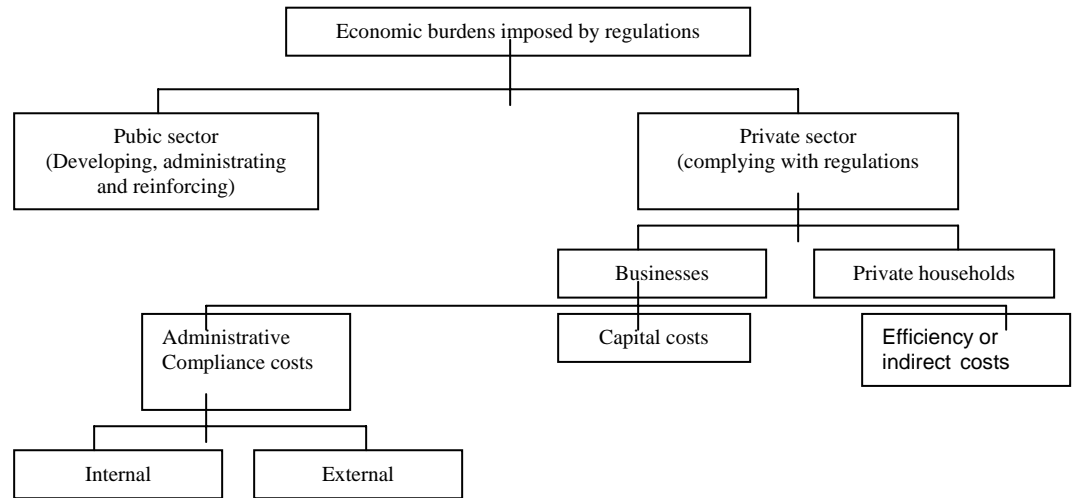
- *Economic regulation* – which is intended to influence the behavior of some or all businesses. Examples include various controls on entry to particular business activities, product standards and controls on firms’ behavior in competing with each other. Revenue-raising measures such as taxes and tariffs also represent a form of economic regulation.
- *Social regulation* – which is intended to promote non-economic objectives, but which may also have significant effects on businesses that have to comply. Examples include regulations relating to occupational health and safety, protection of the environment, consumer protection and unfair dismissal.

The 2001 OECD paper, *Business Views on Red Tape: Administrative and Regulatory Burdens on Small and Medium Sized Enterprises*, notes that:

Entrepreneurship and business activities are shaped not only by markets, but also by regulatory and administrative environments established by governments. Regulations and government formalities are important tools used by governments to carry out public policies in many areas. These kinds of interventions into markets will continue to be needed in many cases to protect public interest.

The inevitability and, in many cases, the desirability of regulation is undisputed. Regulations have the goal of increasing community welfare and should deliver substantial benefits. However, regulations also impose burdens and cost on both the private sector in complying and the public sector in administering, monitoring, enforcing and reporting.

Figure 2 Main categories of regulatory burdens



Source: OECD

The quality of regulation is a matter attracting increasing international attention. The OECD Reports warns that:

There is a real risk, however, particularly in a time of profound and rapid change in economic and social conditions, that regulations and formalities can impede innovation or create unnecessary barriers to trade, investment and economic efficiency. Regulations and formalities that are outdated or poorly designed to achieve policy goals can impose unnecessary costs. The cumulative effect of many regulations and formalities from multiple institutions and layers of government is to slow down business responsiveness, divert resources away from productive investments, hamper entry into markets, reduce innovation and job creation, and generally discourage entrepreneurship. These effects are more costly in global markets, where business competitiveness can be affected by the efficiency of the domestic regulatory and administrative environment.

The OECD Report was based on a multi-country business survey (Australia, Austria, Belgium, Finland, Iceland, Mexico, NZ, Norway, Portugal, Spain and Sweden) and identified both direct and indirect administrative compliance costs.

The *Direct Costs* were found to be “substantial and economically significant” and amounted to a “significant proportion of company’s revenue (around 4 percent of annual turnover and found to be increasing over time). The Survey noted a disproportionate effect on smaller companies (due to scale and diversion of entrepreneurial attention) and found that service sector companies experienced a higher level of administrative compliance than manufacturing companies.

Indirect costs were also noted. The regulatory burden affected the ability of companies to innovate, operate efficiently, and respond to changes in the competitive environment.

The burdens of regulation fall particularly heavily on small and medium sized enterprises which are less well equipped to deal with these problems than are larger enterprises: they have less management depth, less turnover to absorb increases in fixed costs, and fewer financial resources. SMEs rely more on flexibility and speed for their competitive edge in the market. The OECD suggests that, proportionally, the smallest companies endured more than five times the administrative burden per employee than larger firms did.

A recent Australian Report (the Bell Report 1996) noted that:

The small business community is frustrated and overwhelmed by the complexity and cost of dealing with government regulation and paperwork. Small businesses often do not understand their compliance obligations and have an underlying fear from doing the wrong thing...

A recent report in The Times newspaper (London 28 October 2003) recorded that business leaders and members of parliament have renewed calls for more rigorous scrutiny of new regulations imposed on small business:

The Government's failure to consider the cost to employers of new laws is creating unmanageable levels of red tape and risks driving jobs and business from the UK.

These comments followed the release of a new survey by the Institute of Chartered Accountants showing that red tape is costing the UK economy more than £6 billion each year.

The challenge for governments is to produce the benefits of regulation while reducing their negative effect on economic performance. Some key international initiatives to reduce the quantity and improve the quality of regulations and their administration are discussed below.

Reference is made to several recent Australian Reports but the principles referred to are universal and reflect regulatory best practice that is increasingly applied in developed countries and should be aspired to in developing countries.

It was suggested above that apart from liberalization of specific strategic service sectors which will be determined by WTO bilateral negotiations the most significant changes to Vietnam's legal framework will be driven not by international obligations but by domestic policies. The international trends to liberalizing service trading and encouraging innovation through competition will be influential but ultimately the extent to which Vietnam encourages its BDS sector, particularly in relation to SME service providers, is a matter for Vietnam.

7.2 Improving the Quality of Regulation

Despite the lure of deregulation, economic and social growth depends on "a highly complex economy, which requires sophisticated rules and enforcement procedures across a wide range of activities" (Henry Bosch, former Chairman of the Australian Securities and Investments Commission). It is increasingly recognized that regulation is not necessarily detrimental to innovation. Indeed as noted by Frank Niemann cited above:

"Appropriate creation and reform, respectively, of regulations can also stimulate competition and innovation, and promote new growth areas, as can be observed in environmental services and the market for new media".

The key issue is not the fact of regulation but the quality of regulation and administrative processes. Reforms of the type addressed below benefit all businesses but are particularly valuable for SMEs, which carry, proportionately, a high compliance burden.

Improving the quality of regulation requires a multi-targeted approach incorporating design, implementation and evaluation – elimination of unnecessary regulations, more simple compliance, easier access to information on regulatory requirements, and strict tests of public benefit for new regulations and eradication of inconsistencies in regulations between jurisdictions and agencies.

The Australian Report, *Best Practice Regulatory Design* identified the following regulatory design principles:

- Targeting:** Does the regulation target the problem effectively, and apply to the right groups?
Does the regulation apply too widely or narrowly?
- Timely:** Does the regulation solve the problem in sufficient time?
- Additionality:** Does the regulation have an impact on the problem the regulation is intended to target? Note that compliance might be high, but additionality low. Does it duplicate other regulations?
- Duration:** Does the regulation have the right duration?
- Best-practice regulatory administration and delivery:** Is it administratively efficient for government and for business? Is compliance and administration simple and low cost? Does the regulation increase uncertainty? Do the regulatory paperwork requirements fit in with standard commercial practices, and with those required by other regulations? Does the paperwork require information from firms that could be obtained from other existing records? Does the design of administrative and delivery systems of the regulation account for differences between firms? Are reporting requirements for firms (in terms of frequency and detail) set appropriately? Is the administrative structure optimal for regulatory coordination, delivery and information provision to businesses? What systems are in place to ensure that the behavior of regulators when dealing with the regulated are fair and appropriate?
- Consistency:** Does the regulation introduce inconsistencies and adverse interactions with other regulations and policies?
- Accountability:** Is the regulation clear, and processes for its application transparent and contestable?
What are the risks posed by the regulation?
- Risk management:** Offsetting or adverse behavior by firms, bureaucrats or others (including corruption);
Are the regulations overly risk averse, or do they fail to deal with some high cost risks?
Possible liabilities for governments or others.
- International obligations:** Does it breach Australia's international obligations?
- Enforcement:** Is the enforcement regime appropriate (monitoring, fines, sanctions, education)?
Is any penalty in proportion to the seriousness of the offence?
- Flexibility:** Is the regulation likely to be effective as technology, market structures, firm conduct and other aspects of the business environment change? Is it likely to be

effective for different sorts of firms and industries, or is it only effective for a subgroup? Is the regulation flexible enough that a firm has the freedom to search for lower cost ways of achieving the goals of regulation?

- Cost recovery:** Who should pay for the government administrative and business compliance costs of regulation (business, taxpayers generally, a particular benefited group, the source of any externality)?
- Distributional impacts:** Does the regulation unintentionally transfer significant resources from one group to another? How can these transfers be avoided or reduced? Is the regulation unfair?
- The business impact test:** Does the regulation reduce competition and/or business innovation, with increased prices or reduced quality of goods and services? How much does it affect costs, quality or availability of inputs? Does the regulation require operational changes, including changes in personnel, or physical capital? Does it constrain business practices, for example, joint ventures?

Some key issues in this exercise are:

Regulatory design and process: Many jurisdictions around the world have developed or are developing better regulatory design and process protocols including transparency, consultation and forewarning, grievance procedures and “sun setting” (building in machinery for review of the regulations after a period). One of the major criticisms of business throughout the world is the inconsistency between competing and overlapping regulations, the solution to which requires clarification of the roles and scope of regulations of different agencies and evidence-based assessment of the appropriate requirements. The Australian Report noted that:

One of the safeguards against badly designed (and therefore overly costly) or unnecessary, regulation, is genuine appraisal of existing and new regulations to ensure that they meet a public benefit test, combined with conscious and publicly accountable decisions by regulators about the why, how, who and when of any regulation. Australia and many other countries have introduced formal systems of regulatory appraisal as a tool to filter out any unnecessary regulations and to increase the chance that necessary regulations are better designed.

Regulatory administration and enforcement: Often major concerns of business, especially small business, is the way in which regulations are administered and delivered by the multiple regulatory agencies with which they have to deal, rather than the regulations themselves. Governments in many OECD countries are seeking to improve how they administer and implement regulations. This is important because, in general terms, it helps regulators achieve higher levels of compliance. Poor administration and decision-making are major drivers of the costs that must be borne by companies and citizens. Lack of coordination between different government agencies is a major concern of business that needs certainty and simplicity and less change in the regulatory environment.

Facilitating business registration and formalities by, for example, streamlining business licenses, introducing one-stop services, and improving information on registration requirements and procedures is also a priority. A recent Australian initiative is *Business Entry Point* which provides a service to Australian businesses – of any type and in any location – to make it easier to access information from and fulfill the compliance requirements of all government agencies – national, state and local. The BEP provides an environment (internal and physical outlets) whereby “where information and transaction facilities are integrated so that users can be confident of receiving comprehensive, up to date, targeted information and can carry out transactions with agencies se-

curely and privately [and which] will link as much as possible with initiatives at other levels of government”.

Regulatory review: The Australian Report notes that “in recent years, many OECD countries have adopted programs of regulation review and simplification, aimed at making compliance easier for all businesses:

These programs may be of particular relevance for SMEs, which typically find the costs of compliance higher in relation to their turnover.

Australian regulation review policies are broadly similar to those that apply in most OECD countries. In Australia, these policies have resulted in some existing regulations being simplified. There are also requirements for all new regulations to pass through a process of scrutiny, intended to ensure that they do not impose unnecessarily high compliance costs.

Under the review process emphasis is on:

- Clarifying the objectives of the legislation and identify and analyze the nature of restriction on competition and on the economy more generally’ and
- Assessing the balancing the costs and benefits of the restriction and consider alternative means for achieving the purposes of the regulation, including non-legislative approaches.

Reference was made above to “sun setting”. Regulations often become anachronistic with technological change, altered community attitudes and evolving markets. The Australian Report notes that:

It is desirable to indicate when the regulation will next be reviewed, and the performance indicators on which the review will base recommendations to cease or continue the regulation. For example, what outcomes would mean the regulation had failed or succeeded? This represents a shift to ‘evidence-based’ regulation.

7.3 BDS Market Liberalization and Competition

Liberalization: International experience clearly indicates that much can be gained from market liberalization and regulatory reform in major service sectors such as transport, telecommunications and financial services. The GFA SME Development Paper notes that:

The effects of trade and investment liberalization for professional and strategic business services are less well documented, because market access restrictions on foreign providers of professional services are still widespread within OECD countries. However, the OECD reports that where restraints on the commercial aspects of professional practice have been relaxed, prices are lower and new services are appearing in response to consumer demand. Foreign entrants have increased competition, and introduced innovative concepts, services and ideas into the market. Market access restrictions on foreign providers are limiting the ability of service providers to address the needs of clients that are expanding internationally, and reduce incentives for developing services geared at supporting globalization.

Competition: The liberalization of trade services under WTO/GATS framework is not as advanced as the liberalization of world trade in goods through lowering of tariff barriers and removal of non-tariff barriers under WTO/GATT. However, the liberalization of international trade in professional services forms one of the six priority areas within current WTO GATS sectional negotiations.

Apart from the issue of liberalizing market entry to foreign business development service providers, innovation and efficiency can be encouraged through domestic legal frameworks, which support competition. In the language of the GFA Report:

Domestic regulation is often the most limiting factor for competition. Regulations can create an environment in which firms have less incentive to economize on resources. This can result in inefficient management of operations and firms being less likely to innovate. Where they have been implemented, reforms have often boosted growth and stimulated innovation in ways that would have been unimaginable several years ago. Since innovation, technological change, and efficiency gains through outsourcing are major driving forces for BDS demand, market liberalization is the most effective means to strengthen demand for business services. A specifically important area for reform is reducing administrative barriers for start up firms, since this can promote greater business dynamism and entry.

7.4 Outsourcing

There is today wide recognition among developed countries generally that BDS are essentially a private sector task and that, where possible, the state should facilitate the private sector to provide services rather than providing them itself. The role of the government is to develop the appropriate policy and regulatory frameworks to support and encourage, on both the supply and demand side, a strong, competitive and innovative BDS market for the ultimate benefit of all citizens.

7.5 BDS and SMEs

In most countries governments provide a range of programs to encourage greater use of external business advice including, information services which direct firms towards sources of business advice or training (often termed ‘signposting services’), provision of business advice through public agencies and subsidies for the user of private sector advisers.

The challenges faced by SME in BDS and other sectors of the economy are frequently debated but there is growing consensus that international best practice in developing BDS markets is achieved not by specific support measures and transactional level interventions but by the implementation of favorable framework conditions noted above.

The enhanced provision of BDS is particularly significant in improving the performance of SMEs. Policy makers in Australia and many other countries consider that SME operators often make insufficient use of a range of external sources of business advice that could assist in improving their efficiency and policy initiatives to encourage outsourcing of non-core competency are important. The small business sector is a dynamic source of employment generation, an important supplier to the production processes of larger businesses and a breeding ground for innovation and entrepreneurship. The maintenance of a dynamic and innovative small business sector is therefore a critical element in the development of economic and industry policies. However there is an increasing support for the proposition that these factors do not provide, by themselves, a basis for governments to introduce any industry program in order to safely assist the small business sector. The priority of governments is directed more to encouraging greater use of external business service providers than developing specific regulatory regimes for SME.

8. MEASURES TO DEVELOP BDS SUPPLY AND DEMAND

8.1 Enhancing Awareness of and Policies for BDS

BDS is a part of the production process and must be considered a physical production factor.

Enhancing propaganda and education by organizing seminars, training courses, activities of business associations, etc in order to help owners and managers of enterprises fully and clearly recognize the benefits of outsourcing business services in comparison with their "self-service" system is a key priority. The owners and managers should be guided to choose suppliers and to manage business co-operation with other partners so that they are supplied services with demanded high quality and price.

Revising the legal system and eliminating unreasonable barriers that prevent enterprises from entering into the market or limits demand on use of BDS. Activities should include:

- Establish, supplement, revise legal provisions in order to facilitate the development of legal consulting, training, technology transfer and intellectual property right, accounting, and auditing services.
- Revise and eliminate unreasonable constraints of expenditure for using outside services, including BDS. Eliminate or revise unclear stipulations that lead to discretion of tax administration officers on tax collection in terms of "item" and "level" expenditure.
- Reduce and lower the entry requirements that potential BDS providers have to meet in order to enter some service markets. Further remove unnecessary business sub-license and invisible entry barriers.
- Encourage the participation of private BDS providers in many service markets; ensure a level playing field for domestic private, state-owned, public and foreign BDS providers.

8.2 Strengthening Support for BDS

The government and other donors should support BDS suppliers in enhancing their capabilities, especially in the areas of human resource, equipment and technology, marketing technique and skill, etc so that they could meet the requirement of users.

There is a need to continue enhancement of SOEs equitization process and other diversification methods, especially monopolistic SOEs that supply BDS.

Annually, the Government through appropriate organizations and mechanisms should assess BDS suppliers' ability based on appointed standards and conditions. Based on this assessment, the Government should set up a list of BDS suppliers who meet the requirements of BDS users and then support them so that they can increase their ability in supplying BDS for enterprises, especially SMEs.

In case where there are no domestic suppliers, international franchises should be allowed to offer their services under certain conditions; and in areas or regions that have no local suppliers, the regional franchises should be allowed in order to provide business services for local enterprises.

The government and other donors should support BDS suppliers, especially suppliers who provide BDS for SMEs on the principle that the BDS users can choose the kinds of services based on their need, select the suppliers appointed by the government (who are considered to meet requirements of users), set up the time of service supply by their own decisions. After the users make the deci-

sion to buy services, the government and donors should pay part of the expenditure. This process should be permanently assessed so that the principles, conditions could be changed reasonably to take the most efficient way.

Decree on the state's support and management of BDS development should be promulgated in order to establish co-operation system, use the modern support measure, and improve the effectiveness and stability of the state' support for BDS.

8.3 BDS Suppliers Self-improve their Quality of Provided Services

BDS suppliers should time over increase their ability in providing BDS in terms of quality and quantity, especially manager training capacity and inner management. The ISO 9000 system should be applied to the service provision process so as to create higher quality of supplied services.

Business associations and professional associations should set up their own principles or regulations on professional standards and business virtues for their organization and all their members must accept these principles and regulations. By organizing training courses and other activities of their own organization, this will encourage their members to improve their quality.

The two above measures will increase the prestige of BDS suppliers as well as the users' trust so that increasing number of enterprises will use BDS in the future.

PART C. INTELLECTUAL PROPERTY SERVICES

1. IP AND IPRS

Intellectual property (IP) relates to the output that results from intellectual activity in the industrial, scientific, literary and artistic fields. Traditionally intellectual property is divided into two branches: (1) Industrial Property, *including inventions; trademarks and service marks; industrial designs; trade secrets; geographical indications; utility solutions; technical know-how; integrated circuits; and some other objects*, and (2) Copyright.

The protection of IP is conferred through laws that grant to the creators of intellectual products certain time-limited rights to control the use of their creations (these rights being known as intellectual property rights, or IPRS). These rights apply to the intellectual creation as such, and not to the physical object in which the work may be embodied.

The comments of a former Australian government minister (Senator Chris Schacht, foreword to Mischelwski, *Sustaining Competitive Advantage*, 1995) in relation to the increasing importance and management of intellectual property in the Australian context is equally applicable to Vietnam:

Innovation is becoming increasingly more important for Australia and we are to meet the challenges and take advantage of opportunities presented by the rapid growth in world trade, particularly in the Asia-Pacific region. An innovative culture is critical if we are to capture those opportunities and secure Australia's future by continually creating new areas of competitiveness, meeting emerging market demand, enhancing efficiency and improving productivity.

Effective management of intellectual property plays a critical role in the innovation process. Provision of intellectual property protection encourages enterprises to innovate and it facilitates trade in innovative products, processes and services. Innovative enterprises need to be aware of the strategic importance of effective management of their intellectual property and how to use the intellectual property system to their commercial advantage.

The development of Vietnam's IP system to accord to international best practice as reflected in TRIPS is a necessary and inevitable concomitant of WTO accession. The strengthening of the IP framework through new and improved recognition of IP objects, and more effective administration and enforcement of IP as part of the WTO process, is necessary to encourage international trade, investment and technology transfer but also to encourage innovation among domestic enterprises.

In addition to these necessary structural reforms to the IP system there is also an urgent need to, in the words of the Australian government minister cited above, to encourage "effective management of intellectual property". This requires the development of skilled IP professionals, service providers and better education of the business community generally as to the vital role of IP in contemporary business.

2. IP SERVICE MARKET

2.2 The Nature of IP Services

IP services in Vietnam generally include advice on IP laws, filing and prosecution of applications for protection of trademarks, designs, patents, copyrights etc., conducting of availability searches, assignments and renewals, taking procedures for oppositions and cancellations, negotiation, drafting and registration of contract of licensing, technology transfer, franchising and distribution, and taking of enforcement and anti-counterfeit actions. Additional services for monitoring infringements of IP rights were also offered.

2.2 Market Supply

Types of providers

Currently there are 27 IP service providers in Vietnam, two of which are state owned enterprises with the rest belonging to the private sector. The following parts address why the number of IP service providers is limited.

As an IP agent, the enterprise is in a position to provide all of IP services. There is no difference between IP providers in terms of ranges of services provided. The only distinction that can be seen between the existing providers in Vietnam is that some of them purely provide IP services while some others at the same time involve in provision of legal and consultancy services. In addition, it is worthy to note that a very few copyright-related services are being provided by IP service providers.

Location of providers

All the existing IP service providers have offices in Hanoi (in most cases they are the head offices), resulting from the fact that IP service activities require face-to-face communications with the state management agencies (i.e. NOIP, Office For Copyrights) located in Hanoi. About 50 percent of IP service providers have representatives in HCMC, and a few have offices in Hai Phong and Da Nang cities. One IP provider opened a representative office in Cambodia.

Service quality

Since service quality is of the most competitive criteria, all providers attempt to strengthen the quality of services. With the relatively similar staff backgrounds and similar leaders/management experience in the market, the levels of service quality between existing players do not differ much. IP service quality in Vietnam is relatively high because most customers are foreign and demand international standard performance.

2.3 Market Demand

Awareness and understanding

The level of awareness and understanding of end-users towards IP services varies between local end-users and overseas/foreign-invested end-users. Overseas/foreign invested enterprises have an extremely high awareness and understanding of the IP services because of their comprehensive background of IP services. Furthermore, since foreign businesses apply the consistent standards on a worldwide scale, they apply these in Vietnam market where outsourcing IP services are essential part of their business. Such a high awareness results in high rate of usage of the services.

Consequently, overseas/foreign invested enterprises demand for IP services for any of their presence in the local market. They can be considered the major source of IP services' end-users for the time being.

Meanwhile, local end-users' awareness and understanding remains limited despite recent improvement. This is thanks to the enterprises' practice of doing business and the active role of mass media in advertising and raising enterprises' awareness through cases of local businesses' losing trademarks in international markets (for example Trung Nguyen coffee).

The level of awareness for IP services differs between enterprises located in different provinces/cities, depending on the level of economic and trade development. For example, enterprises in HCMC have the highest level of awareness, hence highest level of registering trademarks (over 50 percent of the whole country, according to VIPA's sources), followed by Hanoi, Binh Duong, and Dong Nai Meanwhile enterprises in some localities, such as Bac Can, have any trademark for protection.

By types of end-users, while state sector seems rather negligent to the IP services, small and medium enterprises or private sector in Vietnam now have higher awareness and understanding of the services, thus being sharp and active in IP service usage. Despite this fact, the proportion of SMEs using the services remains limited compared to the whole country. This makes sense that the local market is quite potential and still untapped.

Reasons for using IP services

Customers use IP services because they want to protect, maintain and promote their business as well as the products/services in the long term. IP services also help enterprises to develop their competitive edge in the market. Users are highly aware of the threat to their own business that arises when their trademarks are not protected—a threat that can arise from competitors, distributors or agents. Obviously, enterprises also use IP services because they need to claim back their trademarks through proceedings against violators of their registered rights. Finally, local enterprises use IP services to increase their exports and protect their products internationally.

3. OVERVIEW OF THE LEGAL ENVIRONMENT

3.1 Development of the IP Legal Framework

In the past decade, Vietnam has made considerable progress in establishing a legal framework for the protection of IP rights. In parallel with the development of the national economy and the general legislative system of Vietnam, IP legislation has been developing through significant milestones.

In the North, after the liberation of the Hanoi Capital in 1954, to implement the Party's policies for encouragement of technical ideas and renovation, some legal instruments were issued such as Resolution 175/TTg dated 8 March 1958 of the Prime Minister on trademarks, Decree 20/CP dated 8 February 1965 of the Government Council on rewarding technical ideas, renovation, manufacturing rationalization, professional and work amelioration. However, during this period in the North, IP right protection system was not formed. IP was deemed as an asset of all the people. IP generators were given only some "spiritual" and material encouragements, which were sufficient for the workers and IP makers to foster their working attitude.

In the South, the Southern administration issued much higher legal instruments relating to protection of IP rights such as the Law 12/57 dated 1 August 1957 on protection of inventions, the Law 13/57 dated 1 August 1957 on protection of trademarks, and the Law 14/59 dated 11 June 1959

dealing with counterfeit goods. As such, like its economy, the IP law system in the South was much more developed than that of the North.

After the national reunification in 1975, the formation of IP right protection system in Vietnam was marked with the issuance of the Government Council's Decree 31/CP dated 23 January 1981, providing the Regulations on ideas for technical renovation, manufacture rationalization, and inventions. Decree 31/CP was followed soon by some other Decrees such as 197/HDBT dated 14 December 1982 on trademarks, 85/NDBT dated 13 May 1988 on industrial property, 200/HDBT dated 28 February 1988 on utility solutions, and 201/HDBT dated 28 December 1988 on sale and purchase of licensing etc.

From 1981 to 1989, there were no IP service providers in the market as there was no legal framework for IP service providers' operation although there were a number of patents, utility solutions, trademarks, industrial designs applied for registration and protection in this period (except the case of the VCCI which provided registration services for foreign owners).

During the period from 1989 to 1996, the legal system of IP right protection was developed in line with the development of the market oriented national economy. The first specific legal document on industrial property was issued. That was the Ordinance on protection of industrial property rights announced on 28 January 1989 by the President of the State Council. The 1992 Constitution also sets forth in Article 60 a fundamental for protection of copyright and industrial property. There were also some other related documents issued in this period such as the 1989 Ordinance on procedures for settlement of civil cases, Circular 03/NCPN dated 22 July 1989 guiding for settlement of disputes in industrial property right, and Decree 140/HDBT dated 25 April 1991 on examining and dealing with the production and trading of counterfeit goods. It was the first time the 1989 Ordinance on protection of industrial property rights recognized the roles of industrial property agents, and created the foundations for the establishment and appearance of the first IP service providers in 1989.

3.2 Government Policy

The IX Congress of the Communist Party of Vietnam approved the Strategies for the development of the economy and society in the period of 2001-2010. The overall targets of the Strategies are: (i) to speed up the economic renovation and construction of foundation to the year 2020; and (ii) to make Vietnam to become an industrial and modern country under the integration into the regional countries and the world.

The Communist Party recognized that protection of IP rights is a vital matter during the process of integration. IP is becoming more and more important in daily commercial and technology activities. IP-related provisions have been appeared in almost all agreements and treaties, to which Vietnam is a party or a signatory. The Communist Party also recognized that in order to successfully bid for the WTO accession, and to effectuate and codify in local laws the provisions of the signed and ratified international treaties and agreements, some appropriate changes to the legal system on IP, are very imperative and essential.

Beside the general policies of the Communist Party for the development of the national economy, the Party has also a separate Resolution of the Fifth Plenum, setting forth the policies and mechanism to continuously promote and facilitate the development of private sectors. The Resolution again confirms that private economic sector is an important component of the national economy and provides for a number of important policies for private sector development.

To implement the Fifth Plenum's Resolution in reality, the Prime Minister issued Decision 94/2002/QĐ-TTg on the 17 of July 2002 which has implications to SMEs in general and to IP service users and providers in particular, including:

- MPI's actions to: (i) to build supportive programs for SMEs; (ii) set up the SME Development Department and the Council for Encouraging and Developing SMEs; (iii) Technical assistance centers in several cities; (iv) amend the Enterprise Law.
- MOST's actions: (i) to expand scientific and technological consultancies for business households and businesses; and (ii) to assist the businesses with IT and IP protection.

To implement the BTA and trade integration, the Prime Minister issued Decision 35/2002/QĐ-TTg on 12 March 2002 on action plans for implementation of the BTA and Decision 37/2002/QĐ-TTg on 14 March 2002 on action plans for implementation of trade integration, including some plans for improvement of domestic IP management system. Under such plans, the MOSTE (now the MOST), MOT, MOCI and the Governmental Board of Personnel Organization (now the Ministry of Interiors) were assigned to prepare a detailed proposal for renovation of structure, management regimes and methods of protecting copyright and IP matters. At the moment, IP management system is being reformed under such instructions.

In the time being, the bodies in charge are following the said plans although outcomes are unclear. Almost all respondents suggested that the plans relating to IP setting forth in Decision 35/2002/QĐ-TTg and Decision 37/2002/QĐ-TTg are not specific enough and needed amendments in the near future. The policy on state-management over trademark matters is not stable. It was an intention of the government leaders that the MOT would be involved in management of trademark matters instead of the NOIP. However this can be changed and the NOIP may still be in charge of trademark registration.

3.3 The IP Regulatory Regime

The most notable IP legislative regime of Vietnam is the Civil Code, which recognizes and grants intellectual property rights to creators of intellectual products.

The Government and relevant ministries have promulgated a series of guiding regulations for implementation of the Civil Code, of which the most important legislation is Decree 63/CP dated 24 October 1996, which was amended by the Government's Decree 06/2001/ND-CP dated 1 February 2001.

Relating to copyright, the Government issued Decree 76/CP dated 29 November 1996, creating a legal framework for the licensing and operation of copyright service providers. The MOCI has also a guiding Circular 27/2001/TT-BVHTT dated 10 May 2001 to detail the provisions of Decree 76/CP. Architectural works are also copyrighted under the first legal instrument issued by the MOC, which is Inter-Ministerial Circular 04/2003/TTLT-BVHTT-BXD dated 24 March 2003.

In the Government's Decree 60/CP dated 6 June 1997, the Government reconfirmed the State's recognition and protection of copyright and IP rights in general with respect to IP related civil transactions involving foreign elements.

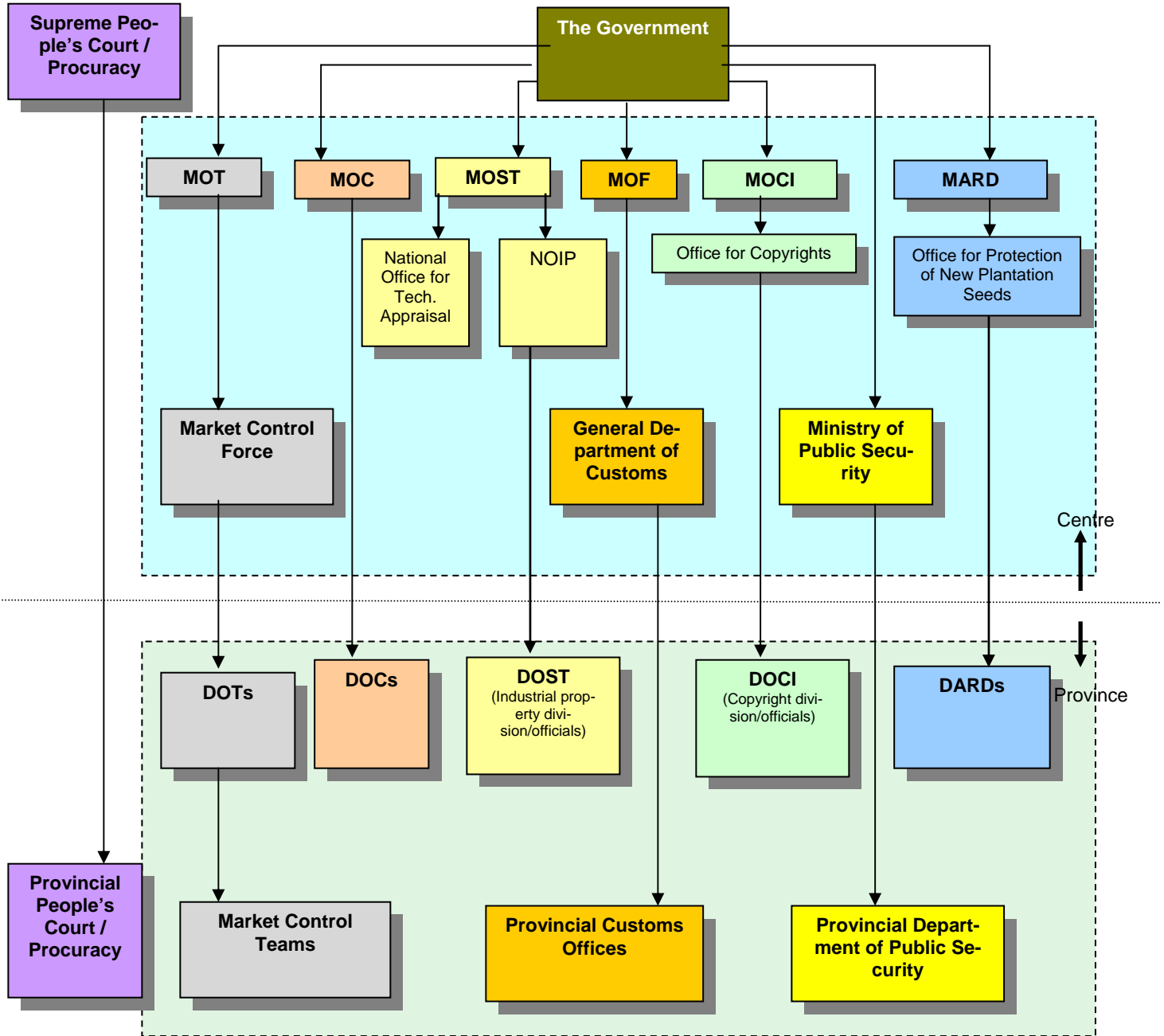
The Government also issued also Decree 72/2000/ND-CP dated 5 December 2000 on publication and dissemination of novels abroad.

There are several legal documents governing technology transfer, such as the Civil Code¹⁰, Decree 45/1998/ND-CP dated 1 July 1998 of the Government Circular 1254/1999/TT-BKHCHNMT dated 12 July 1999.

3.4 Regulatory agencies

In addition to the policy-oriented organizations, such as the central economic party of the CPV, the regulatory agencies, which are involved in making policies and legislation, governing the IP service sector at both central and local level, are identified in Figure 3 below.

Figure 3 Layout of the regulatory agencies in IP matters



¹⁰ Chapter II, Part VI

3.4.1 The Central level

As illustrated in Figure 3 above, the central regulatory agencies responsible for state management of IP matters in Vietnam, include the MOST, MOCI, MOC, Office for Protection of New Plantation Seeds (MARD), and MOT (as the case might be).

Ministry of Science and Technology (MOST)

According to the Government's Decree 54/2003/ND-CP dated 19 May 2003, the MOST is responsible for assisting the Government in state management over, inter alia, (i) science and technology activities and (ii) intellectual property.

With regard to IP management, the MOST has the following functions of (i) Implementation of the establishment of IP rights; (ii) Implementation of measures for protection of legitimate IP rights and interests of the State, organizations and individuals; and (iii) Regulating and instructing the operation of IP management system, directing branches, provinces and enterprises with respect to IP matters.

The MOST, however, no longer¹¹ has the state management function over trademark related matters, and it has the function of management of neither copyright of art nor literature works. With regard to science and technology management, the MOST has function to manage the technology appraisal, consulting and transferring activities.

The Division under the MOST, which is in charge of managing the technology transfer activities, is the National Office for Technology Appraisal. The role of such Office is to assist the MOST in management and registration of technology transfer matters.

The Division under the MOST that is in charge of managing IP matters is the National Office for Intellectual Property (the NOIP). The role of such Office is to assist the MOST in management and registration for protection of IP rights, but excluding copyrights of art and literature works.

Ministry of Culture and Information (MOCI)

According to the Government's Decree 63/2003/ND-CP dated 11 June 2003, the MOCI has the function of, inter alia, managing copyright of art and literature works.

The Office for Copyrights is responsible for assisting the MOCI in all matters relevant to management and protection of copyright of art and literature works.

Ministry of Trade (MOT)

The functions, tasks, authority and organizational structure of the MOT are stipulated in Decree 95/CP, issued by the Government on 04 December 1993. According to this Decree, the MOT is responsible for state management of commercial activities, including the market control relating to the IP issues on the aspect of enforcement of laws/regulations.

Together with the issuance of the Government's Decree 54/2003/ND-CP, the Government purported to remove the function of trademark management from the NOIP of MOST to the MOT. However, a new Decree for adjusting the functions and competence of the MOT, is still pending, and it is said that this controversial Decree 54/2003/ND-CP shall be amended in the manner that the function of trademark management will be "returned" to the NOIP as currently.

Ministry of Construction (MOC)

According to the Government's Decree 36/2003/ND-CP dated 4 April 2003, the MOC has only minor functions relating to IP management, the management of the protection of architectural works. The MOC in coordination with the MOCI issued Circular 04/2003/TTLT-BVHTT-BXD

¹¹ It used to have this function, and it will likely to have such function again in the coming time.

dated 24 March 2003 setting forth the legal basis for protection of IP rights of architectural works.

Ministry of Agriculture and Rural Development (MARD)

The Government issued Decree 73/CP on 1 November 1995, regulating the functions, missions, tasks, competence and organizational structure of the MARD. However, the specific functions of managing and organizing the protection of new plantation seeds, are stipulated in Decree 63/CP dated 24 October 1996 of the Government. The Office for Protection of New Plantation Seeds under the MARD is assigned to carry out these functions of the MARD.

3.4.2 The Local Level

There are a number of competent state agencies at local levels that are involved in the management of IP matters, especially in enforcement of IP right protection. In principal, all provincial departments under the provincial people's committees such as DOST, DOT, DOC, DOCI, are responsible for assisting the people's committees in management of IP related matters.

3.4.3 Other state agencies

Other State authorities involving in IP management are people's courts, market control teams, polices and customs offices.

The Supreme **People's Court** and people's courts of provinces and cities have the function of settling administrative, civil and criminal cases relating to IP issues. Each court may have one or more judges specialized in IP. Parallel with the People's Court system is the **People's Procuracy** system, which is involved in inspecting and prosecuting the settlement by the courts and law compliance by all the people. The roles of procuracy system are especially manifested in criminal cases.

Market control teams have the functions of imposing fines on breaches of IP rights, checking and supervising the circulation of commodities with respect to IP matters. Each team/department may have one or more staff specialized in IP.

Polices at all levels have authority of investigating, supervising the situation of IP-related breaches and enforcing administrative sanctions and criminal punishments with respect to IP related breaches. Each police department at both the province and the district level may have one or more policemen specialized in IP management.

Custom officers are empowered to carry out measures to protect IP rights at the border gates such as checking of goods, cancellation of import and/or export of goods violating IP rights, and application of sanctions. Each customs office may have one or more officers specialized in IP rights management.

3.5 International Influences

At present, Vietnam has already signed a number of multilateral international conventions and treaties on IP right protections, which include:

- Paris Convention for the Protection of Industrial Property Rights
- Madrid Agreement Concerning the International Registration of Marks
- Patent Cooperation Treaty
- ASEAN Framework Agreement on Intellectual Property

In addition, provisions for mutual protection of intellectual property rights is contained in *bilateral* agreements between Vietnam and other foreign countries,

- Agreement Between the Government of United States of America and the Government of the Socialist Republic of Vietnam on the Establishment of Copyright Relations
- Agreement Between the Government of United States of America and the Socialist Republic of Vietnam on Trade Relations
- Agreement Between the Republic of Switzerland and the Socialist Republic of Vietnam on the protection of intellectual property rights.

WTO

The major international influence on Vietnam's IP system will be the comprehensive obligations regarding the recognition, protection, administration and enforcement of IPRs that will be imposed under the TRIPS treaty on Vietnam' WTO accession. TRIPS sets out in Part I general principles of reciprocity (requiring each member to accord to nationals of other members treatment no less favorable than that it accords to its own citizens with regard to IP: art 3) and most favored nation (that arrangements for most favored nation status or treatment must be accorded immediately and unconditionally to the nationals of all other members: art 4). Minimum standards on copyrights and related rights, trade marks, geographical indications, industrial designs, patents, integrated circuit layouts and undisclosed information are set out in Part II. Enforcement is dealt with in Part III: procedures and formalities for acquisition and maintenance of IPRs are set out in Part IV: transparency of IP laws and decisions thereon, and disputes between members, are set out in Part V: transitional arrangements for developing countries are set out in Part VI.

BTA

The Vietnam/USA Bilateral Trade Agreement of 13 July 2000, which came into effect on 10 December 2001, is of particular significance. Although it is a bilateral treaty it commits Vietnam to fully meeting TRIPS obligations to recognize, protect and enforce IPRs and therefore will be a key driver for the changes that will be required for upon WTO accession.

In summary, Vietnam's IP system will be strongly influenced by international trends and best practices in particular as expressed in WTO/TRIPS which commits all member countries to standardized IP recognition, protection and enforcement. The TRIPS obligations apply to all member countries but of course pose particular challenges for developing countries where distinct historical, political, social, cultural and economic circumstances require significant adaptation. The experience of other developing countries is instructive. China is a case in point. Despite the difficulties involved with IP protection and enforcement in China the Chinese Government has made significant progress over recent years with significant reforms to the recognition and enforcement of IPRs. Originally this process was driven by external coercion originally from the USA but more recently by the standardized international obligations under WTO/TRIPS with which China is obliged to comply in order to obtain the full economic and trade benefits of WTO membership. The reforms in China, as for all other developing countries, may have been driven originally by such external measures but they are increasingly driven by a measure of self-interest as domestic pressure for better IP protection. Strong IP laws protect all owners of IP- foreign and domestic. Domestic inventors/entrepreneurs are of course significant beneficiaries of better IP protection and are currently driving the increasing reform activities in China. In any event the intertwining of IP protection with global trade, trade services, finance and investment activities is such that economic development generally demands an increasingly effective IP system.

4. KEY CONSTRAINTS AND RECOMMENDATIONS

4.1 IP Related Policies

4.1.1 The current situation

Vietnam has few policies for the development of IP management and IPR protection systems. As a consequence, these systems are not developed and negatively impact on the IP service market.

As indicated above, there are only two specific overall policies outlined in the PM's Decision 35/2002/QD-TTg and Decision 37/2002/QD-TTg, assigning the MOSTE (now MOST), the MOT, and the MOCI to prepare a proposal for improvement of domestic IP management system to match with the BTA and global trade integration trends and requirements.

Some other policies are scattered through several documents of the CPV such as:

- In Part V of the Report on the Documents of the Congress IX of the 8th Party Congress, there is only a sentence “to well implement the policies for protection of IP”;
- Part IV, Section 3 of the political report of the 8th Party Congress, has the same sentence;
- Part V, Section 5 of the directions, missions and plan for 2001-2005 economic development, has a sentence “to create favorable conditions for scientific organizations, universities, enterprises and individual to be protected in terms of IPRs, to complete the legal system on protection of IP rights”;
- Resolution 02/NQ-HNTW of the 8th Party Congress on directions for development of science and technology has indicated a mission to complete the legal system of IPR protection.

In addition to a lack of adequate State and Party's policies on IP management, some interviewed respondents noted that there is no comprehensive state policy on the raising of public awareness on IPR protection. The disadvantage of no separate Law on IP like in other countries was also noted. As a consequence of the lack of appropriate legal provisions, understanding about the IP-related matters of some state agencies is still poor. The level of understanding is not the same, and varies from one to another. Most state officials working at both the central and local agencies do not have a full knowledge and understanding about IP matters. The concepts or definitions of trademarks, patents, industrial designs, utility solutions are unknown or uncertain to many state officials. Even in the juridical agencies such as people's courts and prosecutors' offices, there are few judges or prosecutors knowledgeable of IP matters. That explains why the settlement of IP-related disputes and enforcement remain very weak in Vietnam.

State policies in every country play vital roles in developing the management system and also the service market. Almost all our respondents agreed that the current systems of IP management and IPR protection are undeveloped. As a result, the IP service market has not benefited from an enabling environment for development. In particular, the lack of policy on raising public awareness on IPR protection is a fact that directly and negatively affects the demand for the use of IP services.

4.1.2 International practices and trends

There are currently gaps in Vietnam's IP protection, which will be filled as a requirement of international obligations - particularly WTO accession which will commit Vietnam to compliance with TRIPS, the Agreement on Trade Related Aspects of Intellectual Property Rights including Trade in Counterfeit Goods under the WTO framework. The mandatory TRIPS obligations, necessary

for Vietnam to join the global trading community, will undoubtedly benefit the international community, particularly the international owners of IPRs, but will also have a vital role in encouraging a culture of innovation, competitiveness, efficiency and productivity domestically.

4.1.3 Recommendations

A majority of respondents noted a need for more specific policies on IP and IPR protection, in particular a policy to raise the public awareness on IPR protection. Special attention needs to be paid to the policies, resolutions or directives for the next five and ten-year periods (i.e. from 2005), which will be drafted late 2004 to early 2005.

The need for greater awareness of and education in IPR's and their management is widely recognized in developed countries today and is an increasing priority for developing countries as the role of IP in economic development becomes better appreciated. The introduction of government policies to improve awareness and understanding of the IP system generally should be a priority for Vietnam as it is in other countries at a similar stage of development. In new policies to raise awareness on IP and IP services, it is recommended that:

The IP agencies have roles in delivering awareness programs to the business community and in encouraging education providers to deliver appropriate programs and industry associations to provide opportunities for members. Appropriate industry and professional associations (VIPA, Vietnam Lawyers' Association) should also be involved in these programs.

4.2 State Management of IP

4.2.1 The current situation

The NOIP's lack of human resources has resulted in the timeframe for settlement of IPR registration being prolonged. This is negatively affecting IP service providers and delaying the development of the IP service market.

At present, the NOIP is actually playing two separate roles i.e. the role of State management and the role of provision of public services. The role of State management involves assisting the MOST in drafting legal documents, strategies and policies, scheme for the development of IP. The role of provision of public services is that of the NOIP is providing public services such as appraisal of applications for granting of titles for protection of IP rights, organizing the IP information system, organizing the publication and searching of IP information system, examination of IP right violations, training in IP sector etc. There is a close relationship between the two roles.

However, in the perception of the Government and authorities and in all prevailing legal documents and regulations (e.g. Government's Decree 63/CP (Article 63), Decision 94/TCCB dated 28 February 1997 of the MOSTE regulating functions, tasks of departments and working rules applicable to the NOIP), the NOIP is regarded as a mere State management body under the MOST. As a consequence, the applicable organization, financial and labor regime of the NOIP are as the same as other state without taking into account the NOIP's roles of public service provision. The human resource capacity of the NOIP is, thus, limited. As the operations of the NOIP are funded totally from the State budget, they are limited in recruitment of new staff under labor contracts.

This has created problems in the process of receipt, examination, and granting of titles. There are many applications pending and examination time is prolonged. As a majority of the human resources of the NOIP has been mobilized for examination of applications, it lacks a labor force for completion of other missions.

The NOIP is the major body advising the MOST and the Government on management of IP matters, settlement of IP rights establishment and disputes. The unreasonable institutional structure of

the NOIP has caused delays in almost procedures settled by the NOIP as mentioned above. This has, in turn, negatively affected the IP service market, in general. For example, due to a lack of human resources, time for the NOIP to examine and register a trademark may take around 14-15 months, much longer than the regulatory time frame of 12 months. Enterprises may therefore hesitate to go ahead with registration for protection of their products' trademarks. On the other hand, IP service providers are also being affected as they waste more months in following up cases of trademark registration.

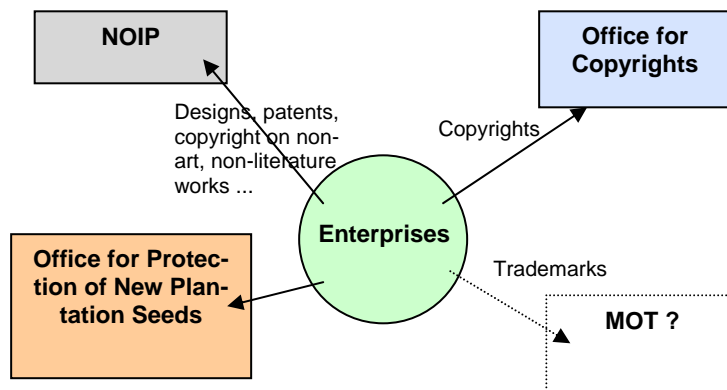
The IPR establishment system is inappropriate and unstable. That is one of important causes of an undeveloped IP services market.

When the Government issued Decree 54/2003/ND-CP amending the functions, tasks, jurisdiction and structure of the MOST, the Government withdrew the functions of trademark management of the MOST. According to this Decree, from June 21, 2003 the MOST is appointed to be in charge of intellectual property, *but excluding trademarks and copyright over literary and artistic works*. Along with this provision, the function of the NOIP is restricted to non-trademark matters but extended to cover copyright over the non-literary and art works, which used to be part of the functions of the Office for Copyrights under the MOCI. Decree 54/2003/ND-CP also changes the name of the National Office of Industrial Property to the National Office of Intellectual Property.

However, there has not been any identification of the body overtaking the trademark matters of the NOIP although the disintegration date of the NOIP's Trademark Division was notified. As a result, businesses have been flocking into the NOIP to file applications for their trademarks. The number of trademark applications filed with the NOIP has steadily increased, as has the number of applications still pending.

It is intended under Dispatch 3080/VPCP-CCHC, dated 30 June 2003, of the Government Office, that the MOT shall take over the management function of trademarks from the NOIP. When and if it is realized and comes into effect, there will be 2 state agencies in charge of industrial property management¹². In this case, to enjoy full protection for one product bearing different IP features, manufacturers must have the product registered for its trademark, copyright, and design in two or more offices (See the illustration layout below). This will create obstacles for manufacturers in establishing and enjoying their lawful rights over their products.

Based on the above documents, Decree 63/CP and Decree 73/CP, Vietnam now has three¹³ separate IP right establishment systems, which are industrial property management agencies, copyright management agencies, and new plantation seed management agencies. Such system is reflected in the layout below:



¹² It is contrary to the world trend which is to have only one state agency for management of industrial property.

¹³ This may become four if the MOT takes over trademark management.

It is obvious that the above structure is not very efficient and does not fit with international practice. Three systems are cumbersome with regards to (i) the number of legal instruments issued by different authorities of three systems; (ii) human resources; and (iii) information systems which are formed and managed by three systems separately.

Our literature study on 86 countries in the world has shown that: there are 66 countries having an industrial property management agency and a copyright management agency separately, and 20 countries having only one organ for management of industrial property and copyright matters.

4.2.2 International practices and trends

Fragmentation

The agencies that administer a country's IP laws are obviously central to the efficacy of its IP system. The competency and efficiency of the agency and its personnel is vital to the overall efficiency of the national IP system. A justified criticism of the current Vietnam system noted above is the "fragmentation" of IP responsibilities between various government agencies and systems which results in legal and administrative difficulties and unnecessary complexities and which frustrates the centralized accumulation of experience and coherent policy.

In relation to the key IP objects – patents, trademarks and copyright – in the United Kingdom and Canada one agency (the UK Patent Office and the Canadian Intellectual Property Office) deals with all three objects. In the US and Australia the one agency (the US Patent and Trademark Office and IP Australia) administer the laws relating to patents and trademarks. National IP agencies frequently do not have a primary copyright mandate, a consequence flowing from the fact that copyright typically does not centre on a registration process. There is less uniformity in relation to the range of other IP objects – a reality that has not escaped serious criticism in Australia. The Office in the Chief Scientist's Report on the *Role of Intellectual Property in Innovation* was particularly critical of such "fragmentation":

The most serious shortcomings of the Australian intellectual property system are the absence of a coherent policy and the fragmentation of ministerial and administrative responsibility, which had led to *ad hoc* and often contradictory responses to problems, which have arisen.

The criticism relates not simply to the administration of the IP systems but to development, reform and wider policy issues. The Report supported the submission of the IP Committee of the Law Council of Australia:

- i) The present fragmentation of administrative responsibility for different intellectual property laws should be ended and a single Office of Intellectual Property should be established. This would be answerable to one Minister, would be charged with responsibility for all intellectual property laws and intellectual property policy and would include a strong policy and research unit and an international section;
- ii) An Intellectual Property Law Reform Commission should be established. This would separate from the Office, would consist of independent experts, and should receive adequate research and funding support; and
- iii) An overall "peak" Council of all interested parties should be constituted. The purpose of this body would be to keep open channels of communication between those administering and formulating intellectual property laws, those working the area, and the owners of such rights. It would also have some role in advising on policy and in coordinating approaches to issues.

Mission

National IP agencies have a role that is larger than simply administering the IP objects with which they are entrusted.

The mission of the USPTO for example is “to promote industrial and technological progress in the United States’ and strengthening the national economy by administering the laws relating to patents and trademarks and advising the Secretary of Commerce, the President and the Administration on patent, trademark and copyright protection, and/or the trade-related aspects of intellectual property”.

The main aim of the UK Patent Office is ‘to stimulate the growth and development of those areas of commerce and industry based on new ideas and technologies, through the establishment of industrial property rights, and to help literature and the arts flourish through an effective copyright law.

Independence

The agencies referred to above are formally or operationally independent to ensure that decisions in relation to the granting of trademarks and patents are based on independent objective judgments and not on political considerations. Users of the IP system pay for the service provided by the IP agencies but Australia has moved further in this direction than most other countries through government policy that requires IP Australia recover its full costs from charges for its services. Although moves to “user pays” offices have been mooted in a number of countries, few claim to be solely funded by those registering intellectual property rights.

Information dissemination

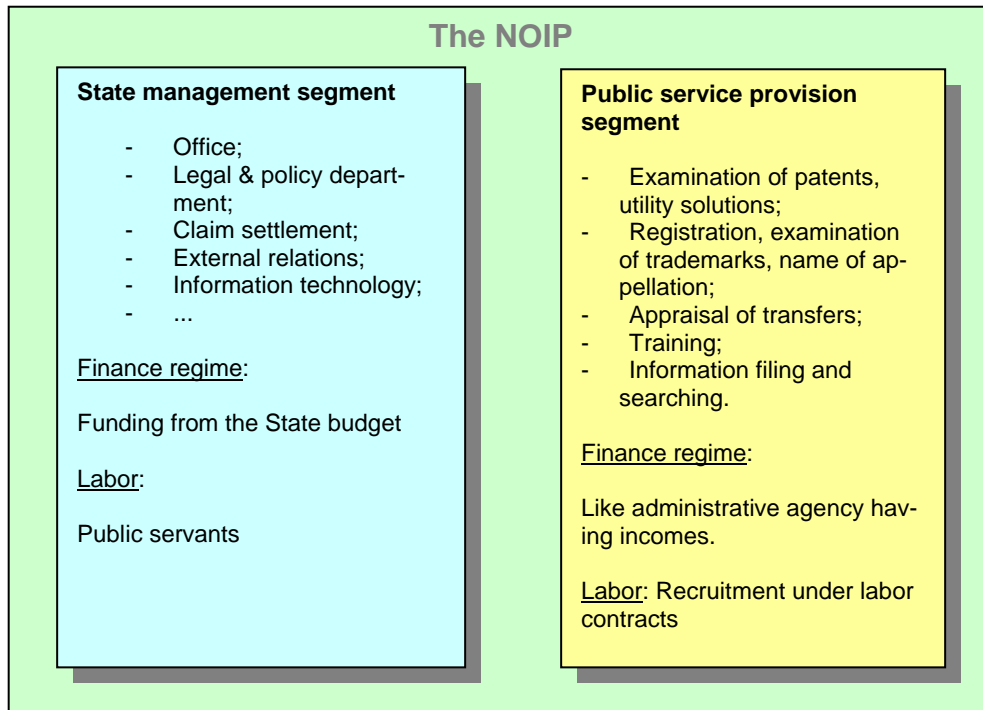
The role of IP Agencies in disseminating information should be noted. IP Agencies have traditionally had a role in making existing IP information available to users. More recently however there has been a move to IP Agencies expanding their role to reach out to new IP applicants and users, especially among SMEs to reach business and inventive sources” which are not yet utilizing IPRs (Global Change and Intellectual Property Agencies). This newer more expansive role has not escaped criticism as it raises the issue of the extent to which public IP Agencies should be allowed to compete with the private sector. The role of developing and delivering education programs designed to help existing and potential owners of IP rights to understand what their rights entail, how to manage these rights and enforcement strategies, is one that could be provided by IP service providers.

4.2.3 Recommendations

To strengthen the role of the NOIP

There is a need to restructure the NOIP to accommodate the clear-cut understanding that the NOIP has two separate roles, (2) The organizational structure, labor recruitment and funding regime of the NOIP should also be adjusted correspondingly as recommended in the diagram on next page.

In addition, the roles of the NOIP should be strengthened. Labor resources should be soon improved so that the NOIP can deal more quickly with the process of examination and registration of IPR. The NOIP as a public service organ should be transparent in dealing with IP related cases. The cooperation between the NOIP and IP service providers should be more steadfast so that they can support the development of the domestic IP service market.



To keep the IPR establishment system stable

The functions of conducting trademark registration should be returned to the NOIP. The system of IPR registration and establishment should not be separated any more. The roles of the NOIP should be rapidly strengthened in order to gradually separate IPR registration and establishment towards an independent system working as a public service provision system.

4.3 IP Service Providers

4.3.1 The current situation

Decree 63/CP dated 24 October 1996 which was amended and supplemented by Decree 06/2001/ND-CP dated 1 February 2001 has a separate Chapter providing regulations for licensing and operation of IP agents, including individual IP agents and conditions for organizational IP agents (i.e. IP service providers). An organizational IP agent is defined as an enterprise registered for operation in IP agent service. An individual IP agent is defined as a professional member of organizational IP agent who has been granted the Certificate of Individual IP Agent by the NOIP. Article 58 of Decree 63/CP (amended by Decree 06/2001/ND-CP) stipulates that -

An individual who meets all of the following conditions, may be granted the Certificate of individual IP agent:

- Being a Vietnamese citizen having full civil act capacity;
- Permanently residing in Vietnam;
- Possessing an university graduate diploma specializing in law or technology sectors;

- Possessing a certificate of an official industrial property training course; or has been directly working in the industrial property profession for at least five consecutive years; or has been directly working as an industrial property application examiner in a national or transnational organ for at least five consecutive years;
- Possessing a valid certificate of passing the examination on industrial property laws issued by NOIP;
- Not working for the State organization that is not an enterprise;

An enterprise engaging in IP agent services must meet all of the following conditions:

- Being a Vietnamese entity;
- Having no foreign invested capital;
- Having its Business Registration Certificate recording its business as the provision of industrial property services, legal services or science and technology services;
- *Having at least two professional members being individual IP agents (which is extremely difficult to obtain), one of whom is the director of the enterprise, or is the representative being empowered by the director of the enterprise.*

It is worthy to note here that a foreign invested enterprise is not allowed to act as an organizational IP agent in Vietnam.

Decree 76/CP stipulates that to get the certificate of copyright service provider, the head, deputy heads or staffs of an enterprise must have passed a training course organized by the MOCI. Like Decree 63/CP, Decree 76/CP as appraised by the most of respondents, has positive provisions for management and registration of copyright. However, it has also negative impact in limiting the copyright service providers in the market.

The above business conditions for IP service providers are unnecessarily high and thereby limit the number of IP service providers and contribute to creation of a monopoly in the supply of the service

Although IP service activities started since the early 1990, the network of IP service providers in Vietnam is still poor. At the moment, there have been 27 enterprises being organizational IP agents, and over 80 persons holding the Certificate of individual IP agent. However, there are only a few of them, providing both industrial property services and copyright service concurrently. There is no enterprise that provides merely copyright services.

Some respondents were concerned that the limited number of IP service providers has created a monopoly in the IP service market that has been unevenly developed across the whole country as all providers are based in Hanoi and/or Ho Chi Minh City.

In addition to the strict legal requirements, the actual implementation of granting of IP agent certificates has also been causing problems. Some respondents expressed their concern about the practice that a very few IP-training courses and examinations have been held by the NOIP. As a consequence, few individuals could meet the requirements to be granted with the Certificate of Individual IP Agent.

4.3.2 International practices and trends

With the developing importance of IP, markets have opened for a range of IP service providers delivering the range of expertise necessary to support a viable IP sector. In developed countries where IP is more strongly established the range of service providers include the following:

- Patent attorneys/agents and trade mark attorneys/agents who are legally qualified and registered and who help clients obtain or avoid conflict with enforceable IP rights.
- IP lawyers.
- Accountants who deal with the financial reporting aspects of IP and who may advise on commercialization of IP.
- Consultants who advise on commercialization of IP.
- IP searching firms.
- IP monitoring service providers.
- IP agency personnel who administer the IP system.
- IP advisers in government and the private sector.
- Judges who adjudicate IP disputes.
- Academics who teach IP in law and business courses.

As IP assumes increasing importance in Vietnam there is a need for the range of IP services noted above which are typically available in the developed countries to be available also to Vietnamese enterprises.

Patent agents/attorneys and trademark agents/attorneys are generally subjected to a regulatory requirement requiring legal qualifications and registration. In most western jurisdictions registration is a pre-requisite to a “holding out” that the person is an “industrial property” agent. Others can provide IP services and lawyers can advise on IP matters but the appellation “IP agent” is reserved for those registered. In developing countries where the IP system is less developed it is more common for a number of IP service roles to be entrusted only to “IP Agents”.

The appropriate allocation of IP service responsibilities becomes an increasing challenge for a regulatory regime as the boundaries between related services become increasingly blurred. Although the complexity of obtaining a patent invariably leads to a potential applicant obtaining the services of a qualified patent agent, the same considerations do not necessarily apply in relation to trademark applications. Indeed, an Australian study on *Review of the Regulatory Regime for Patent Attorneys* reached the conclusion that competition in such services would be further aided by allowing others such as accounting and management consultants to provide trademark services. Indeed, it sought to allow ‘any person to prepare and lodge trademark applications for gain. There are a range of IP services necessary for the development of a strong IP system, all of which require IP knowledge and expertise but not necessarily to the level of the specialist IP Agent. A regulatory regime should not impede the development of the overall IP system by restrictive registration requirements that place unnecessary obstacles in the path of the development of a range of ancillary IP support services.

4.3.3 Recommendations

A majority of respondents have recommended the following amendments to the existing legal provisions and/or actual implementation:

For IP agents

- The certificate of the official industrial property training course should be removed;
- A focus be given to holding a certificate for passing an examination on IP laws. The examination may be more difficult, but it should be held more frequently and widely publicized to enable all interested people to be able to participate;
- The requirement on experience should be removed;
- ***Only one individual IP agent be required, instead of two for the purpose of establishment of an organizational IP Agent;***
- There shall not be any policy or regulation restricting the number of IP agents.

As for the copyright service providers

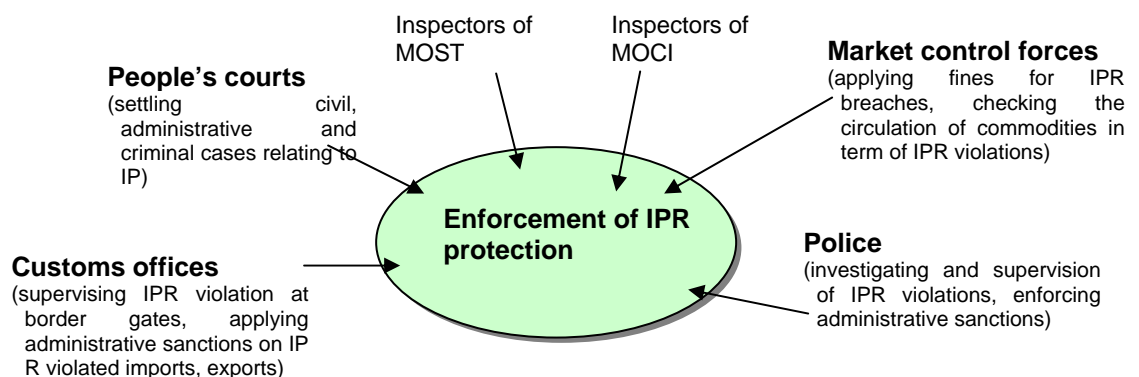
- The Certificate of copyright service providers should be abolished.
- As a consequence, any enterprise having registered this service in its business line is permitted to provide such services to clients.

4.4 IP Enforcement

4.4.1 The current situation

IP enforcement is indispensable to a visible IP system. The IP service market in Vietnam is being adversely affected due to the complicated enforcement and weak coordination system.

As noted above under current regulations the enforcement of IPRs in Vietnam is undertaken by a variety of State authorities, including: the people's courts, market management forces, police and customs offices. The inspectors of some ministries also interfere in IPR protection. This complicated IPR enforcement, as illustrated in the layout below, has created impediments to businesses seeking to enforce their IP.



Problems also exist in the court system which, for settlement of IP cases, is very weak. The current legal provisions have not yet created a framework for establishment of a separate court spe-

cialized in IP right disputes settlement. Some courts have only one judge specialized in settlement of IP right disputes and judges generally seem to have poor knowledge and understanding of IP issues.

According to the current regulations, the procedures for settlement of civil cases are applied to IP related cases. However, there is no legal document setting forth the requirements and qualifications for being a judge specialized in IP settlement. IP disputes are often very complicated but the legal document guiding for settlement of IP cases is outdated. There is only a very old legal document in this matter (i.e. Circular 03-NCPL dated 22 July 1989 of the Supreme People's Court.).

In the view of most respondents, the coordination between the state management and enforcement authorities has some shortcomings such as:

- Enforcement authorities have not utilized their competence sufficiently in deciding violations in IP right protection sector, but have been heavily dependent on professional opinions of the NOIP and the Office for Copyrights;
- The IP information system is inadequate. The enforcement authorities do not have enough information and background relating to IP and they are not active in enforcement; and
- Time for settlement of a case is prolonged. Enforcement agencies wait for the professional opinions of the others and the applied measures are ineffective.

The current system as analyzed above suggests that the IPR enforcement in Vietnam is still undeveloped. This of course negatively affects the development of the IP service market. The IP enforcement system plays an indispensable role in the IP service market. IP service providers are adversely affected by the undeveloped and complicated IP enforcement and coordination system as they meet difficulties in provision of IP enforcement service to their clients. In addition, all IP owners who want to register IP objects for protection need strong protection. A weak enforcement system that limit, such protection demands. A viable and effective IP system requires not only the recognition and conferring of IPRs but also the mechanism for their effective enforcement. An IPR is valueless unless the owner can enforce the right granted.

4.4.2 International practices and trends

The following passage from Australia's Advisory Council on Industrial Property's paper, *Review of Enforcement of Intellectual Property Rights* (March 1999) summarizes the relevant considerations that must be addressed by every nation:

If owners of industrial property rights cannot enforce them with some certainty of outcome, the IP system can serve no useful purpose. Businesses will invest in developing innovations protected by IP rights only if they are confident about the outcomes of enforcement decisions relating to their rights.

Any IP system that does not have avenues for the effective enforcement of the rights it creates is an incomplete system. At the same time, a system that inhibits commercial activity because it makes it too difficult to challenge dubious rights, except at great financial risk, is also faulty. Equally necessary is that decisions of the courts should be consistent and predictable.

The system should be such that, so far as practicable, enforcement and the testing of rights should be fast, cheap and predictable and that the outcomes of enforcement actions are fair, just and independent of the financial strengths of the parties to the dispute.

Expensive, time consuming or unfair dispute resolution mechanisms will discourage firms from taking enforcement action. This will discourage them from using the IP system and

the nation will lose out on the benefits system should produce. Moreover, complex and costly enforcement procedures impose a burden on society, given the opportunity costs of tying up a highly skilled, creative people and other resources in a largely unproductive activity”.

Effective enforcement requires a multi-pronged approach addressing (i) transparency in the granting of IP rights and the review, appeal and enforcement processes; (ii) reliance on adjudication rather than administration discretion; and (iii) effective administrative, civil and criminal remedies.

The TRIPS treaty lays down the requirements of the administrative and enforcement regime which Vietnam, on WTO accession, will have to comply with albeit after the extended compliance period granted to least developed countries. Effective enforcement measures benefit all owners of IP rights. Counterfeiting, piracy and other IP contraventions of course damage overseas owners but local enterprises are also damaged, and their competitiveness and efficiency is also impaired by the current lax enforcement regime.

TRIPS (and BTA) lay down significant requirements in relation to effective domestic enforcement in Part III. TRIPS provides comprehensive guidelines for effective domestic enforcement including:

- Provision of effective action, civil and criminal, for infringement including expeditious remedies to prevent and deter infringement
- Power to judicial authorities to issue injunctions, award damages, legal costs to successful rights holders and to dispose of goods and the machinery for their production
- Provision for transparency of IP laws, the publishing of reasons for decisions and review by a judicial authority of final administrative decisions
- Enforcement procedures must be effective, fair and equitable and avoid unnecessary complexity, cost, time limits or delays

The introduction of the such enforcement provisions will demand a significant overhaul of enforcement practices in Vietnam as it has in other developing countries as the enforcement issue is ultimately the area where most disputes about compliance with TRIPS are likely to occur particularly given the limited administrative and judicial resources and capacities of the judicial systems of many developing countries including Vietnam. Again the experience in China is instructive. Despite the difficulties in enforcing IPRs the Chinese government under domestic as well as international pressure has recently made significant progress combating IPR infringement with Chinese administrative authorities and courts becoming increasingly involved.

4.4.3 Recommendations

To overcome this weak enforcement and coordination system, it is suggested that:

- First, it is necessary to improve the State officials’ skills and knowledge on IP. The State should have detailed policies on improvement of the skills and knowledge on IP of the state officials. IP training courses for specialized officials should be more frequently conducted. A special focus should be paid to the court system. Especially, some typical studies on the settlement of the cases relating to the valuation of IP assets, methods of valuation of damages due to IP right violations, should be implemented. State officials in charge of IP management should have relevant background knowledge and experience or otherwise they must participate in mandatory IP training courses. Circular 03-NCPL dated 22 July 1989 of the Supreme

People's Court should be replaced by updated legal documents to comprehensively deal with these matters.

- Second, in order to improve the enforcement of IP, the roles of market management forces (under the MOT) and of police forces (under the Ministry of Public Security) should be strengthened. Other authorities should not be the main forces in IP right enforcement. It is recommended to have a Decree/Decision of the Government on the roles of joint units for IP enforcement, which are to be established by the provincial market management and police forces.
- Third, it is necessary to establish a new regime for gathering professional opinions relating to registration and violations of IP rights. The NOIP should not be the sole authority in deciding an IP violation act. The role of the VIPA in this regard should be considered. It is also recommended, to establish an appraisal board, which includes experts from various branches and authorities. Such board should not be dependent on the NOIP or the MOST with regards to personnel and management matters. If so, the results of appraisal and conclusion of violations shall be more unbiased. Any interested parties, who disagree upon the appraisal results and conclusion of the board, may refer the cases to the competent court for settlement. To be able to do so, it is necessary to amend the mechanism for claiming and settlement of IP right violations as currently stipulated in Decree 63/CP.

4.5 Technology Transfer and Franchising

4.5.1 The current situation

The interference of the state in technology transfer activities has caused uncertainty for businesses and delays in the process of entering into technology transfers.

The current technology transfer activities in Vietnam are under utilized as the prevailing related regulations are regarded by the respondents as too strict and subject to interference by the state. The majority of transferred technology has been by the foreign invested enterprises with their foreign parent or holding companies. There have been few commercial technology transfers between independent enterprises.

There are several legal documents such as the Civil Code¹⁴, Government Decree 45/1998/ND-CP dated 1 July 1998, Circular 1254/1999/TT-BKHCHNMT dated 12 July 1999, Decree 45/1998/ND-CP, and Circular 1254/1999/TT-BKHCHNMT, which generally regulate the scope and contents of technology transfers, the requirements of the technology transfer agreement, and registration/approval of technology transfer agreements (which are sometimes used with the name technical assistance agreements).

The significant interference of the State and the strict requirements are seen in Decree 45/1998/ND-CP and in Decree 59/2002/ND-CP dated 4th June 2002 with:

- (i) Stipulation of a ceiling price for the royalty rate of any technology transfer agreement (TTAs), which must not exceed:
 - 5 percent of net sale prices; or
 - 25 percent of after-tax incomes, generated from the sale of products or services using the transferred technology;

¹⁴ Chapter II, Part VI

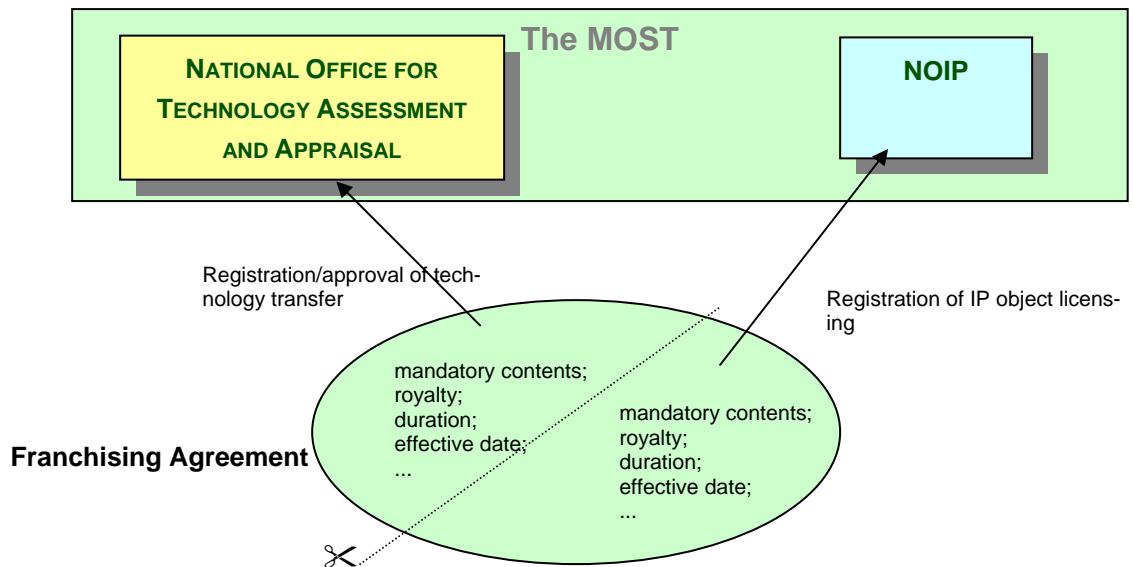
- 8 percent of investment capital in cases of investment contribution by technology;
- (ii) Stipulation of compulsory approval of the following TTAs:
- Agreements for technology transfer abroad;
 - Agreements for technology transfer within the country where there is a transfer of ownership of right to use industrial property objects between the parties, in which one party is a State organization or has capital contribution by the State;
 - Agreements for technology transfer between the Joint Venture Parties under the Law on Foreign Investment in Vietnam where the local party is a state-owned company and the price is more than US\$30,000; and
 - Agreements for technology transfer of the projects where the investment is decided by the Government or the MPI.
- (iii) Stipulation of compulsory registration of all the other types of the TTAs at the MOST.
- (iv) Limit on the rights or consensus of the contracting parties (i.e. transferees and transferors). According to Article 13 of Decree 45/1998/Nd-CP, the following provisions cannot be stated in the TTAs:
- Forcing transferee to buy or receive materials, raw materials, tools, equipments, machines, semi-products, right to use industrial property objects etc. from the transferor or from the third parties assigned by the transferor;
 - Forcing the transferee to accept the limitation on scale and quantum of products, selling prices, fixed consumers/agents;
 - Limiting the market for selling the products;
 - Restricting the transferee from developing the technology transferred after the expiration date of the TTA;
 - Waiving responsibilities of the transferor with respect to defects of technology or attached machines and equipments transferred;
 - Prohibiting the transferee from continuously using the technology transferred after the expiry date of the TTA.
- (v) Limiting the power/competence of the local authority. According to Decree 45/1998/ND-CP, the MOST has the competence in registration and approval of almost all TTAs. Provincial people's committees have authority to appraise and approve the transfers of technology only for the investment projects funded and decided by the provincial People's Committees. This causes difficulties for those enterprises not located in Hanoi, as they must work with the Hanoi-based MOST for the purpose of registration or approval of the TTAs.

Vietnam does not have a unified legal instrument on franchising, a business practice that widely recognized by developed countries as crucial to business and technical development.

Franchising is described as a “contractual integrated system of marketing and distribution of a product, defined as goods, services or a way of doing business, or any combination of these three” whereby the franchisor contracts with another person or entity, the franchisee, to provide the right and license to sell the product in that business format. The franchisor receives the royalty on sales from the franchisee for the supply of a brand identity, training, finance and technical expertise.”

While franchising is utilized worldwide the concept barely exists in Vietnam, largely because of the current Vietnamese legal provisions. Without a legal reference point, the Vietnamese authorities simply consider a franchising agreement as a trademark license and/or technology transfer contract. Such agreement will therefore be subject to different regulations under current Vietnamese laws.

As required under Article 9 of Decree 45/1998/ND-CP, in regards to a TTA involving the licensing of industrial property objects, the contents relating to the licensing of industrial property objects must be divided in separate parts of the TAA, and subject to legal provisions on IP (i.e. Decree 63/CP). Nevertheless, the legal restrictions applicable to the licensing of industrial property objects are quite different from those applicable to the transfer of technology in terms of (1) mandatory contents, (2) maximum royalty; (3) maximum duration (duration of a TTA does not exceed 7 years, but duration of IP object licensing agreement is not limited); (4) approval/registration agencies.



This is a problematic issue as the contracting parties must divide the agreement into two separate parts and submit the same agreement to two different authorities under the MOST. This is a troublesome procedure, which wastes of time and money of the enterprises when they need a franchising agreement approved/registered by the competent authorities. As a consequence, enterprises that provide franchising supporting services in general and technology transfer services in particular are very few and undeveloped.

4.5.2 International Practices And Trends

TTA

Given the ability of the owner of IP rights in technology to impose unfair restrictions on its use, technology transfer agreements in developing countries are usually subject to approval and registration requirements. But technology transfers are a key method for a developing country to receive modern technology and associated operational expertise. A regulatory regime that unnecessarily impedes technology transfer can be counterproductive. The international trend in developing countries as well as in developed countries is to gradually dismantle regulatory barriers to technology transfer.

Unlike Vietnam, there are numerous developing countries that have quite liberal regulations on TTAs. Strict legal requirements and State involvements are only applicable to some issues of a TAA, such as money transfers abroad. For example, in India, there is no single legislation dealing with all aspects of technology transfer, and TTAs are not required to be approved or registered at all, except TTAs with royalties of more than 5 percent on local sales and 9 percent on export sales, and lump sum payments of over 2 USD million.

In developed countries, specific restrictions on TTAs are not common, reliance being placed on competition/fair trading. Revenue laws and administrative approval are generally not required. Such restrictions are more common in developing countries, but under WTO and domestic market liberalization pressures, are increasingly being dismantled. China, for example, which until recently had comprehensive TTA requirements, has recently liberalized the regulatory environment.

Franchising

Franchising is a method of business operation that, since its development in the US in the 1950s, has spread to most countries around the world. In North America, Europe, Japan and Australia, business format franchise systems have been developed in relation to virtually all consumer goods and services, and franchising has extended its influence into business services and even quasi-professional services (such as tax return preparation and book-keeping services). The success of franchising (which in the US accounts for about 50 cents of each retail dollar) is a consequence of its unique synergies – the franchisor providing a proven business concept, an entire business system, an established and recognized trade mark, training, economies of scale, networking, ongoing support, and the franchisees applying its own capital, labor, and commitment to operating a business according to the franchisor's proven model.

In most developed countries, franchising is not subject to any regulatory or administrative regime. Franchising is of course subject to the underlying laws regulating commercial activity generally—contract, revenue, IP, property, and business organization laws— but is not subject to a separate regulatory regime of approvals or registration specifically set up for franchising. Some developed countries supplement the general underlying legal environment with specific franchising regulations, but such regulation is designed to provide franchisees with prior disclosure information or to provide other "consumer protection" type measures to protect small business franchisees from unfair and inappropriate conduct by franchisors. Such legislation exists in US, Australia, Japan, Canada, and France.

In developing countries, the general practice is as above -i.e. that franchising is subject not to any specific regulatory regime, but simply to the laws that apply to business operation generally. There are exceptions. Over the last few years, China, Malaysia, and Indonesia have each enacted franchising laws.

In the case of China, the 1997 Trial Measures for Franchising, state that they are issued: "for the purpose of standardizing franchise operations, protecting the lawful rights of and interests of both the franchisor and franchisee, and further promoting the growth of chain business." The regulation is written as a general guide to basic rights and obligations, and its main significance is in providing a basic framework for the operation of franchises in China. It, in effect, is a recognition by the government of franchising and a means of encouragement its utilization. There is no formal registration approval process but prior disclosure documentation must be lodged with the quasi-governmental body established to promote franchising.

In Indonesia, the 1997 Franchising Regulations, was issued to "create orderliness in business by means of franchising; regulate, nurture and develop franchises; and promote the role of small and medium scale enterprises". The law requires registration of franchisees.

In Malaysia, the 1998 Franchise Act has a strong government policy underpinning in relation to prompting the development of local Malay entrepreneurs and encouraging SME activity in particular regions. There are registration requirements, which appear onerous but that, in practice, are simply formalities that do not impede the adoption of franchised business operation.

In relation to the above initiatives it may be said that they exist for the dual roles of encouraging the orderly development of franchising, as well as to protect the interests of franchisees by measures such as obligatory prior disclosure.

A priority for Vietnam is to adopt a policy framework and a regulatory regime to encourage the orderly development of franchising, so that the significant benefits of this unique business system can be more readily available to the business community, consumers, and to the economy generally.

4.5.3 Recommendations

TTA

According to the survey results, almost all respondents agree that greater competence should be given to the provincial authority with regard to registration/approval of TTAs. Almost all the interviewed users, providers, and facilitators expressed that the legal limitation on royalty rates and contents of the TTAs should be removed. The State authorities should not become too deeply involved in technology transfer, and should respect the mutual agreements of the parties.

Franchising

The ideal means for overcoming problems is a “one door procedure”, where a franchising agreement or TTA having a transfer of IP right, is submitted to only one department of the MOST. Agreements could then be concurrently appraised by two departments of the MOST, according to respective areas of responsibility.

In the long-term, franchising should be recognized in a harmonized legal document to encourage its smooth implementation and development.

PART D. ACCOUNTING/AUDITING SERVICES

1. ACCOUNTING AND AUDITING

In this report, A&A services studied the services of accounting and auditing, which are rendered on regular basis by accounting/auditing companies/entities in possession of business registration for provision of accounting and/or auditing services.

1.1 Significance

Accounting and auditing services play vital roles in the economy of Vietnam. The recording and reporting of the transactions of enterprises to provide an accurate picture of the enterprise's financial health, assets, liabilities and success of its trading activities is a necessary resource.

Financial statements, usually prepared by accountants but amounting to representations of management, are used for a variety of purposes. Audited financial statements in which the auditor has the responsibility to express an opinion on whether management has fairly presented the information in financial statements are necessary.

The need for accurate and accessible financial information requires a strong and independent accounting profession applying appropriate and recognized accounting standards. The essentially self-regulatory model that has developed in the developed nations is not appropriate in developing countries, where the role of accounting has come into more recent prominence with economic reforms and economic growth. In Vietnam, it is necessary for the government to provide the legal and regulatory framework for the development of the accounting profession and accounting standards.

Vietnam's integration into the world economy creates great opportunities and challenges for local businesses in general and A&A service providers in particular. The world economy integration will increase and stimulate the market demand for A&A services because there will be: (i) more cross-border transactions; and (ii) more investments. A&A services are of vital importance to improve the competitiveness of market players as well as the transparency of investment activities. Managers will likely need their accounting books and financial statements to be well prepared in a more professional way. Thus, A&A service providers are expected to have more opportunities to approach both foreign and local clients.

However, A&A service providers will also face challenges during Vietnam's integration into the world economy, most notably that there will be more demanding clients and fiercer competition. The question is how the A&A service providers should be prepared to cope with this trend. Plenty of measures are proposed to be made in the course of integration, including: a plan for better application of informatics for A&A activities; improvement of the qualification of A&A providers; Exchanging experiences with, and gaining more support from, the international A&A association, and organizations.

1.2 Perception

State Authorities And Officials

Regulatory stakeholders recognize the important role of A&A service providers in assisting enterprises make their bookkeeping, accounts, and financial statements transparent, reliable, precise, and compliant with the requirements of the superior bodies, tax collectors, business partners, and society.

The attitude of most State officials is that A&A services contribute to the creation of a transparent business environment, and reduce possible illegal operation of businesses. Because of the activities of A&A service providers, State management agencies and tax collectors spend less time checking and examining accounts, vouchers, and receipts. A&A services help ease and facilitate official monitoring/examining.

However, there are a small number of State officials, especially tax collectors, who do not accept the accuracy and reliability of accounting/auditing information. They suspect the objectivity of the auditors/A&A service providers who may help the clients/customers record expenditures in a manner acceptable to the tax authority. Audited financial reports are not always recognized by tax collectors. The well-known cases of Enron and Worldcom, audited by Anthur Andersen, and several local cases involving An Giang Foodstuff Company, Bitexco, and Hiep Hung Shoe Company, have, to some extent, damaged the good image of auditing.

Business

Most interviewees were of the opinion that the most significant hindrance to the provision of A&A services to businesses was the perception that it was not necessary to use external A&A services.

When asked about their view on using external A&A services, many respondents expressed concerns about confidentiality. They were concerned that the services providers might misuse the information of their daily operations and business results. In the opinion of most entrepreneurs, accounting data, books, and other financial information are confidential, and should not be disclosed to outsiders except where it is required by the law or in special circumstances.

In addition to these common concerns, the perception and preference for using A&A services differs from business to business, depending on the size, scope, and ownership of businesses as noted below:

- For the larger companies, where financial and accounting management is more complicated, most managers had a positive perception of the role of A&A service providers in helping customers build a good accounting bookkeeping system and create certified financial statements.
- FIEs, listed enterprises, and large SOEs understood the necessity of A&A services, not only for meeting legal requirements or administrative instructions, but also for gaining the trust of customers, business partners, owners, and investors.

With regard to SMEs, many entrepreneurs do not recognize the need for A&A services. This attitude comes either from their limited financial resources or their concern for confidentiality. In their view, the use of external A&A services in ordinary situations is quite unnecessary. The use of A&A services would be used only in special cases, like when they are in the process of mobilizing capital, preparing for listing, or expanding production scale/business.

2. ACCOUNTING AND AUDITING SERVICE MARKET

2.1 Market Supply

Types Of Providers

The accounting/auditing sector has been in operation for, and developed over, 11 years. There are currently nearly 60 enterprises providing accounting/auditing services in Vietnam, participating in all economic sectors. The approximate proportions of different types of providers are 60 percent, 26 percent and 14 percent respectively for private, state-own and foreign invested enterprises. Despite having the overwhelming share in terms of enterprise numbers, the private sector's revenues remain modest, accounting for about 4 percent of the total accounting/auditing service market. The few foreign-invested enterprises control 71 percent of total market share. The remaining 29 percent are revenues generated by state sector.

The above figures illustrate the fact that foreign-invested enterprises and State owned enterprises operate on a much larger scale than the private sector. This presents a challenge to the private sector. State-owned accounting/auditing companies have the advantage in the State-owned customer market because of the coordination of their management agencies. Only foreign invested enterprises are capable of bidding for auditing contracts from foreign invested enterprises and internationally funded projects. The private sector, in turn, with lesser resources and relationships with customers, faces fiercer competition in developing its market share.

Location Of Providers

Over 80 percent of the accounting/auditing service providers are located in Hanoi and HCMC, and the rest are distributed between Hai Phong, Quang Ninh, and Da Nang. While private enterprises normally have just one head office in one of these big cities, State-owned and foreign invested enterprises usually also have branches or representative offices in other major cities and some provinces as well.

Service Quality

Customers in GTZ's BDS Market Assessment perceive accounting/auditing services as being of good quality. About 48 percent of respondents said they are extremely satisfied with accounting/auditing services, another 48 percent are somewhat satisfied, and only 4 percent say they are somewhat dissatisfied with the services. It is essential that providers frequently upgrade and strengthen their human resources qualifications and consolidate service quality. Out of the three types of providers, foreign invested enterprises are ranked first in service quality, followed by State-enterprises, and finally private ones.

2.2 Market Demand

Awareness and Understanding

An extremely high proportion of interviewed customers in the BDS Market Assessment have awareness (98 percent) and understanding (96 percent) of accounting/auditing services. Nevertheless, it is believed that customers have not been well aware of the usefulness of the services for their business, and have not properly evaluated the services. As a result, currently there has been limited usage of accounting/auditing services.

This study reveals that demand for auditing services greatly depends on the enterprise. Services are utilized by FIEs and joint-stock companies listed on the stock market, which are subject to

compulsory auditing. Services are also voluntarily used by some joint-stock and private limited enterprises where ownership and management rights are separated and the Board of Management needs to supervise the financial situation by acquiring auditing services. Demand for auditing services from these enterprises has increased recently, though it remains limited.

The reason for the low level of A & A service usage is closely related the limited awareness of the need for financial reporting of sound economic management, the requirement of different types of auditing for financial reports, and termination reports for construction work. The financial report is the most common document subject to auditing. However, in practice, business partners do not usually find it important to require financial reports, let alone audited financial reports, on their business relations. In practice, most domestic banks provide loans based only on their valuation, without requiring clients' audited financial reports.

Reasons For Using A&A Services

The main reason why enterprises outsource accounting/auditing services are: (i) to comply with laws and regulations; (ii) lack of capacity to perform the function in-house. Therefore, providers should advertise their capacity to perform a critical business function at a reasonable cost and higher quality than hiring enterprises can provide for themselves. Providers should also emphasize how they can help enterprises comply with regulations in an efficient manner. In order to generate regular users and positive recommendations/referrals, providers must assure confidentiality of customers' business information and provide strong, regular after-sales service.

In addition, customers will acquire A&A services because they want to increase their credit with banks when they need loans, or to absorb potential investors. Others need audited financial reports to persuade partners to enter into joint-ventures, or to persuade suppliers to permit late payments/installments.

3. OVERVIEW OF THE LEGAL ENVIRONMENT

3.1 Development of the Legal Framework

Before 1988, the notable documents were the Charter on Organization of State Accounting issued together with Decree 175-CP dated 28 October 1961 of the GOV, and Decision 222-TC/DKT of the Minister of Finance dated 11 October 1980 on the promulgation of an accounting regime on fixed assets in State run enterprises.

Since 1988, it has been recognized that the initial development of the A&A Service market was achieved thanks to the promulgation in 1998 of the Ordinance on Accounting and Statistics, which was considered by respondents as a legal milestone, providing the basis for the introduction of other subordinate legal documents on accounting activities. The Ordinance, the highest ever-issued legislation on accounting, laid the foundation for the prevailing regulations on accounting.

Other notable legal instrument of this period include Decree 52/HDBT dated 19 February 1992 on administrative punishment in the field of accounting¹⁵, which provided the tax authorities and other State agencies with a useful tool to cope with violations by businesses, inclusive of A&A service providers.

From 1994 onwards, there has been a noticeable increase in the number of A&A professional firms, compared with the previous period. According to MOF statistics, 60 auditing companies have been established to date, with most of them also providing accounting services.

¹⁵ Decree 52 is no longer valid.

In addition, there are many companies providing accounting services or some kind of accounting-related work. The increased number of A&A service companies is attributable to the positive impact of the Enterprise Law passed by the National Assembly in 1999 with its simplified establishment procedures for enterprises providing A&A services¹⁶. This has created a potential market for auditing service providers. The increase of A&A service companies is attributed to the issuance and application of Decree 07/CP dated 29 January 1994 of the GOV on promulgation of the Regulation on Independent Auditing in the National Economy, and then to Circular 22/TC/CDKT dated 19 March 1994 of the MOF guiding the implementation of Decree 07/CP, which created the first legal basis for auditing services provided by independent firms. The requirement for compulsory auditing of annual financial statement of FIEs also played a vital role in the development of the auditing market.

3.2 Government Policy

In the years since Vietnam started its Doi Moi policy in 1986, the private economic sector has gained significant ground and prestige in the eyes of policy makers. The CPV considers the private sector an important part of the multi-sectoral socialist-oriented market economy, and tries to create favorable environment for the development of the private sector as a whole.

The Resolution of the Fifth Plenum¹⁷ of the Central Committee of the CPV on March 2002 identified and established a number of policies to support to the development of the private sector, including a specific policy for the development of the accounting/auditing service market. This specific policy intends to:

- (i) Amend and supplement the accounting system in accordance with the level of development of SMEs;
- (ii) Enable private enterprises to use auditing services
- (iii) Publicly disclose the annual financial situations of enterprises

Although there have not yet been any specific resolutions or directives of the Party or State on A&A services, the Party's and State's recognition and awareness of the important role of A&A services can be seen in several speeches by the General Secretary of the CPV and the Deputy Prime Minister Vu Khoan. Both spoke at the recent National Conference, discussing the 15 years of implementation of the Ordinance on Accounting and Statistics. In these speeches, the Party and State leaders addressed four major tasks for the development of the A&A services:

- Implementing the Law on Accounting at the grass roots level by accountants and all related people;
- To further enact the issuance of legal documents governing A&A issues needed to create a consistent and transparent legal framework for A&A activities
- The further improvement of the role and capacity of A&A professional associations and organizations in drafting/proposing laws/regulations/standards and in training/educating accountants and auditors
- Increased focus on facilitating a fast and sustainable development of A&A services.

¹⁶ According to Decree 03/2000/ND-CP, only one auditor certificate is required for auditing company establishment.

¹⁷ This Resolution is on the continuation of renovating policies and mechanisms to promote and facilitate the private sector development.

These policies are expected to provide impetus to the operation of the A&A service market in the future and to provide a base for improving the legal environment.

3.3 The Regulatory Regime

There have been numerous regulations governing and/or relating to accounting and/or auditing activities. The most significant initiative in this area is the new 2003 Law on Accounting, effective 1 January 2004. This Law and the other key regulations effecting A&A activities are discussed below.

The New Law On Accounting

The Law on Accounting issued by the NA on 17 June 2003 will play a key role in the development of A&A activities. It has been constructed on the basis of the inheritance and improvement of the 15-year implementation of the earlier Ordinance on Accounting and Statistics together, and with international practices and development trends of accounting activities. The Law on Accounting contains a variety of advanced provisions not found in the Ordinance.

Accounting as a profession is recognized. While the Ordinance was silent on the accounting profession, the Law, in Chapter III, provides for the structural organization of accounting, and in Chapter IV for accountants and the accounting professional practice.

The Ordinance On Accounting And Auditing

The Ordinance on Accounting and Statistics, which was issued on 10 May 1988 by the State Council, laid out a foundation for the accounting system of Vietnamese enterprises. It had a significant impact on the A&A services market. When the Law on Accounting takes effect, the Ordinance's contents relating to statistics will still remain in force.

Other Documents

Government Decree 07/CP dated 29 January 1994 and its guiding Circular 22/TC/CDKT dated 19 March 1994 of the MOF, are deemed to be the most important legal documents for the establishment and operation of auditing companies, and contain specific provisions for auditors and auditing companies.

With the aim of developing a unified accounting regime, Decision 1141 TC/QD/CDKT, dated 1 November 1995 by the Minister of Finance, requires all enterprises to apply the "enterprise accounting regime." Based on this accounting regime and on other guiding documents issued by the superior body (when applicable), an enterprise can make financial reports, bookkeeping, and accounts in accordance with its business/production, operation, and accounting management.

To meet the new requirements for economic and financial management of enterprises, the MOF promulgated Decision 167/2000/QD-BTC on 25 October 2000, abolishing and replacing the system of financial statements stipulated in Decision 1141. Decree 167 has streamlined the compulsory financial reporting regime of enterprises based on the type of ownership. Accordingly, the obligations of private enterprises and FIEs on financial reporting are reduced. They are no longer required to submit financial reports to the tax and statistic authorities quarterly as previously. As a result, there are less A&A work required of businesses, which could potentially result in less demand for A&A services.

Other Provisions On Specific Type Of Enterprises

Based on the common requirements defined in the Ordinance on Accounting and Statistics, and Decision 1141 and Decision 167, the MOF and other State agencies issued a number of legal documents governing A&A activities for different types of businesses.

SMEs/private enterprises are required to use the accounting regime (for SMEs) stipulated in Decision 1177/TCQD-CDKT dated 23 December 1996 of the MOF and its amending Decision 144/2001/QD-CDKT. Larger private enterprises, mass organizations, and professional administrative organs are entitled to choose the accounting regime in either Decisions 1177 and 144, or Decision 1141 and Decision 167. As the current law and regulations on the SMEs and private enterprises do not address compulsory audits of financial statements, SMEs can decide at their own discretion whether or not to audit their balance sheets and financial statements.

Under the Law on Foreign Investment in Vietnam, FIEs are required to make annual financial statements to be audited by independent auditing companies. Circular 60-TC/CDKT dated 01 September 1997 and its amending Circular 155/1998/TT-BTC dated 08 December 1998 of the MOF provide guidelines on accounting & auditing work at FIEs. They also provide the principles for the implementation of A&A work. These Circulars also provide the criteria for selection of either a Vietnamese accounting regime or commonly-used international accounting regime, and stipulate compulsory auditing for all FIEs. With regard to the application of Vietnamese accounting systems for FIEs operating in Vietnam, the MOF also issued Circular 55/2002/TT-BTC dated 26 June 2002, which allows FIEs using the Vietnamese enterprise accounting regime to have some specific adjustment as defined in Decision 1141 and Decision 167 to meet the needs of their business and operation. It is perceived that the prevailing regulations on A&A work applicable to foreign companies facilitates the development of the A&A services market by creating large-scale market demand for auditing and/or accounting services.

Government Decree 59/ND-CP dated 03 October 1996 on the Regulation of Financial Management and Business Calculation of SOEs and its amending Decree 27/1999/ND-CP dated 20 April 1999, provide the basic requirements on accounting, auditing, and statistics. SOEs are entitled to select either internal auditing or independent auditing¹⁸. Most SOEs tend to use internal auditing, to the detriment of A&A service providers.

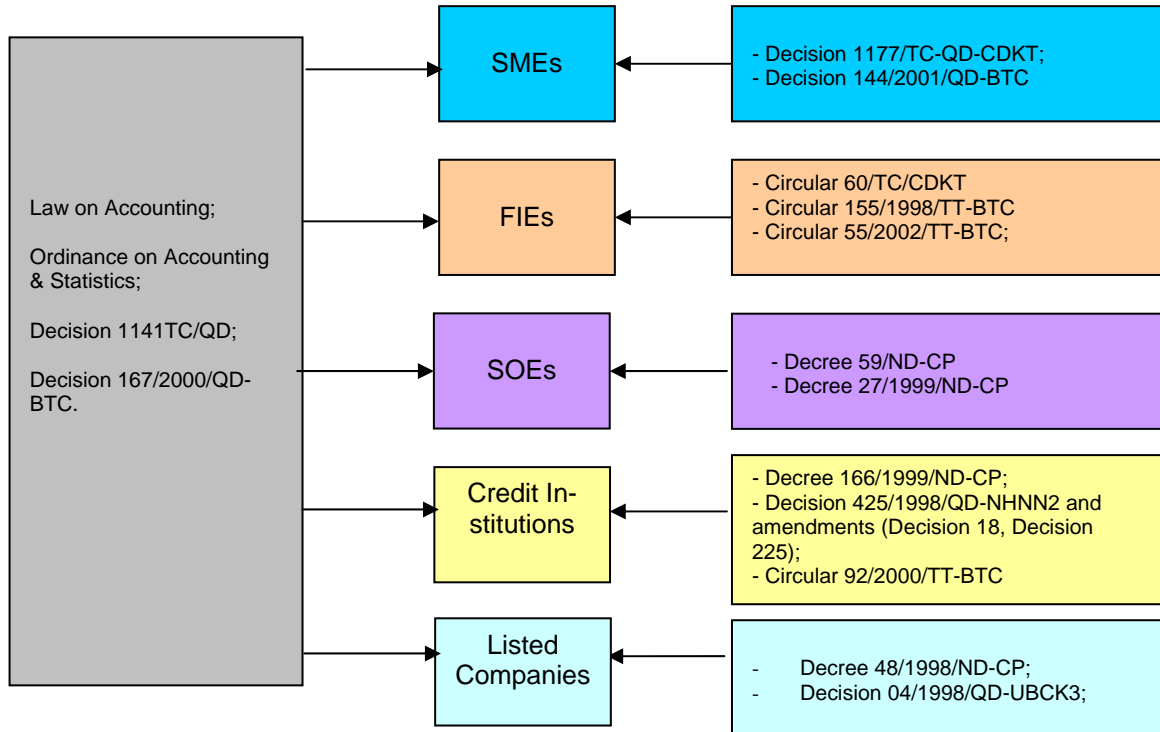
A&A work for credit institutions is governed by several regulations, including the Law on Credit Institutions, Decree 166/1999/ND-CP dated 19 November 1999 on the financial regime of credit institutions, Circular 92/2000/TT-BTC dated 14 September 2000 of the MOF, Decision 425/1998/QD-NHNN2 dated 17 December 1999 on the accounting system of credit institutions and its amendments, Decision 18/2000/QD-NHNN2 dated 14 June 2000 and Decision 225/2001/QD-NHNN dated 23 March 2001. Credit institutions must have both internal and independent auditing. The selection of auditing companies by credit institutions is also subject to the approval of the State Bank of Vietnam.

Listed companies are obliged to hire an independent auditing company to audit their annual financial statements, per the requirements of Decision 04/1998/QD-UBCK3 dated 13 October 1998 of the SSC. However, the legal requirements for independent auditing companies to render auditing services to listed companies are quite high; too high to be met by a large number of SMEs, *which could hardly be met by auditing SMEs*. According to Decision 26/2000/QD-UBCK2 dated 05 April 2000 of the SSC, the auditing companies of listed companies must have: (i) at least 10 auditors licensed to practice in Vietnam; (ii) minimum chartered capital of VND 2 billions for local companies and USD 300,000 for foreign invested companies; (iii) at least 3-years experience operating in Vietnam; (iv) at least 50 audited clients, and (v) the approval of the SSC.

Business households are free to decide on the use of an accounting regime. They are allowed to have very simple bookkeeping procedures for the purpose of tax declaration in accordance with Decision 169/2000/QD-BTC dated 25 October 2000 of the MOF on the regulations of accounting regime of households. No auditing is required for households.

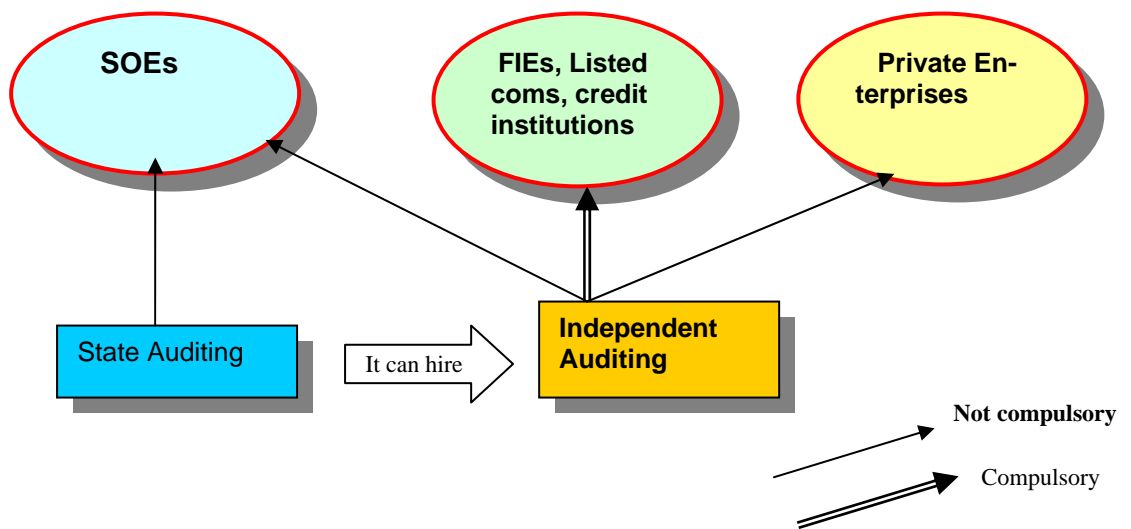
Finally, the current legislation on accounting and/or auditing, as it is applicable to different types of businesses, in terms of ownership or field of operation, are illustrated in the Figure 4 below.

Figure 4 Legal instruments on accounting regimes of enterprises depending on types



The influence of independent auditing services depends on the type of enterprise utilizing it. The figure below illustrates the use of independent auditing services for three groups of major clients: FIEs, SOEs, and private enterprises.

Figure 5 Auditing obligations of enterprises depending on types



3.4 Regulatory Agencies

3.4.1 At The Central Level

The agencies responsible for State management of the A&A service sector at the central level are the MOF and the MPI.

Ministry Of Finance (MOF)

Per Government Decree 77/2003/ND-CP dated 01 July 2003, which deals with the MOF's functions, tasks, rights, and structural organization, the MOF is the governmental body responsible for unified State management in the areas of finance, accounting, and state budget.

Under the MOF, the Department of Accounting and Auditing Policy (DAAP) and the General Department of Tax (GDT), are the bodies most involved in the management of A&A service providers and users.

The DAAP currently plays the most significant role in the development of A&A activities. Its main functions include: (i) Building and improving the accounting regime, including Vietnamese accounting standards; (ii) Instructing, directing, and monitoring the implementation of the accounting regime; (iii) Performing State management functions for accounting activities; (iv) Taking part in studying accounting sciences, and providing training and education to accountants and related individuals; (v) Performing State management functions for auditing (e.g. managing and monitoring the quality of auditing services provided by service providers, holding examinations, and granting auditing certificates to qualified Vietnamese and foreigners); and (vi) Supervising and supporting the VAA and Chief Accountant Club.

The GDT, according to Decision 218/2003/QD-TTg dated 28 October 2003 of the Prime Minister, is responsible for providing guidance on tax declaration and calculation, inspecting, examining and supervising of tax declaration, reimbursement and exemption, settling tax violations and disputes, and organizing the implementation of accounting work, tax statistics, and financial reports as regulated by the laws.

Ministry of Planning and Investments (MPI)

The MPI is the State agency responsible for evaluating and issuing investment licenses to foreign-invested enterprises specializing in A&A services.

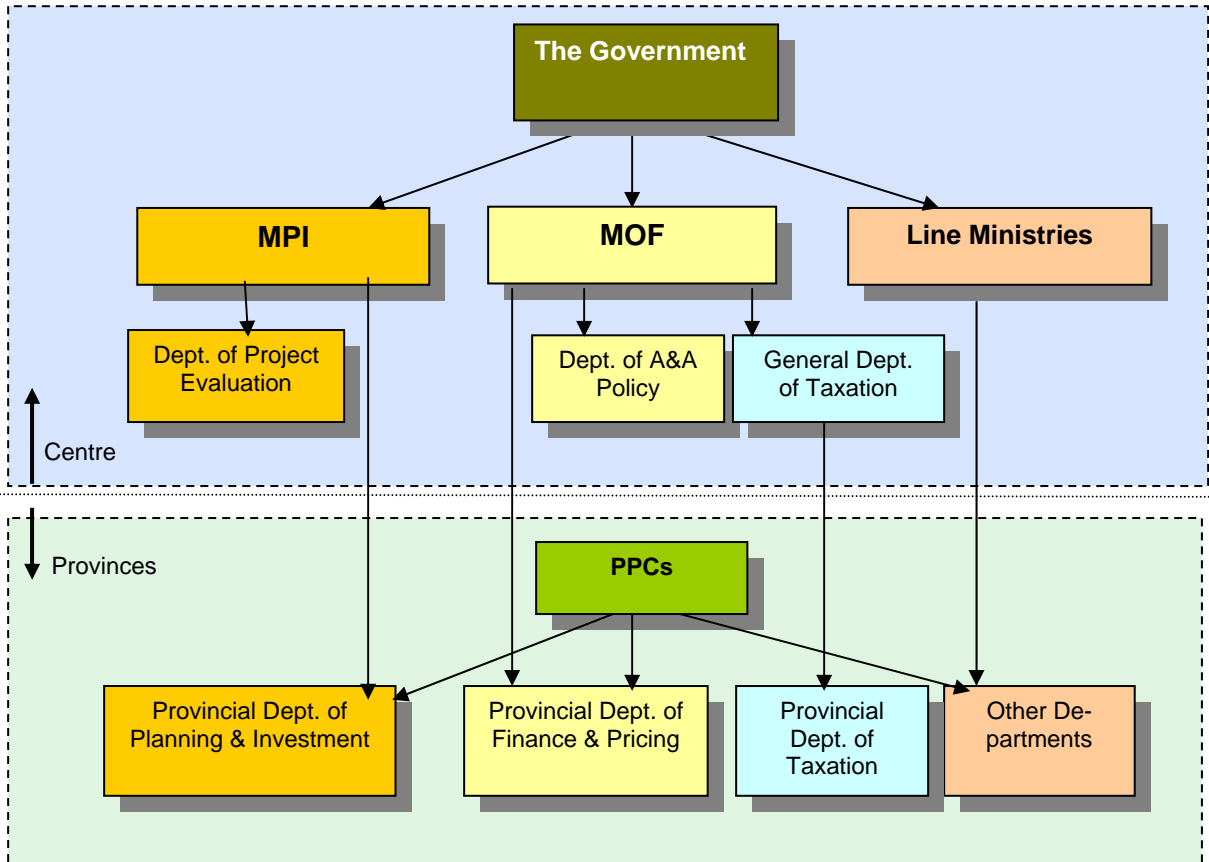
3.4.2 At The Local Level

There are several State agencies at local levels involved in the management of A&A activities. These include: the Department of Planning & Investment (DPI), the Department of Finance (DOF) and the Department of Taxation (DOT).

The DPI is responsible for granting business certificates to business entities; the DOF is responsible for guiding the financial work of accounting units; and the DOT is responsible for overseeing and collecting taxes from business enterprises.

The regulatory agencies involved in State management of A&A services are summarized in Figure 6 below:

Figure 6 The Regulatory Agencies Involved In The Management By The State Of A&A Services



3.5 International Influence

Vietnam’s WTO accession negotiations will undoubtedly drive the professional services trade. This is a key negotiating area, and it is expected that market liberalization will be required. However, as noted elsewhere in this Report, in the longer term, it would not be unrealistic to expect that further liberalization of the services sector will take place after the entry of foreign firms, which will provide higher standards, education assistant, competency promotion, and enhanced training for auditing/accounting services. It is expected that foreign influence will create greater appreciation for these services, in effect promoting domestic providers.

4. KEY CONSTRAINTS AND RECOMMENDATIONS

4.1 Auditing and Accounting standards

4.1.1 The Current Situation

Accounting standards are defined as the basic rules and guidelines for accounting methods and principals. These standards provide the basis for recording, financial information and making

financial statements commonly applicable to enterprises in all economic sectors. Accounting standards ensure the authenticity, reasonableness objectivity, and comparability of financial statements.

In 1998, Vietnam commenced drafting and issuing its own A&A standards, which incorporated three requirements: (i) that domestic standards be based on international accounting/auditing standards; (ii) that they be in accordance with the development of the Vietnamese economy and legal system, skills, and; and (iii) that they be simple, clear, and compliant with the laws of Vietnam. Two steering committees for drafting A&A standards were set up. One committee was responsible for drafting Vietnamese accounting standards, and the other for consulting the GOV and the Minister of Finance on accounting profession matters. The deadline for issuance of all accounting and auditing standards as stipulated in Decision 38/2000/QD/BTC dated 14 March 2000 of the Minister of Finance, was the end of 2003.

However, only 10 accounting standards and 21 auditing standards have been issued to date. The MOF has indicated that there must be 35 Vietnamese standards for accounting and auditing. Thus, there is no full and comprehensive system of A&A standards. This creates difficulties for accounting/auditing users and service providers.

The differences between Vietnam's accounting system and other international systems have been an impediment to the operation of FIEs in Vietnam. Almost all FIEs in Vietnam wish to apply the accounting system of the investor's country, because the accounting system of Vietnam is so different from their own. Therefore, creating harmony between the accounting systems of different countries is an urgent priority.

In addition, unlike international practice, where A&A standards are drafted and issued by professional associations, in Vietnam all standards have been drafted and issued by the MOF. Under these circumstances, Vietnamese A&A standards might be regarded as tools for State control of tax calculation and payment. Some respondents expressed their wish for a more active role for the VAA in drafting the remaining A&A standards.

4.1.2 International Practices and Trends

The development of accounting and auditing standards has, in the West, traditionally been a role for professional bodies. Still, throughout the twentieth century, developed nations have shown a clear trend to increasing legislative recognition of accounting standards in company law, and increasing prescription of legislative requirements.

The past reluctance to incorporate standards into law because was due to the perceived undesirability of a legislative approach, in part because of a reduction in the ability of the financial community to respond quickly to new developments. This rationale is not so compelling today. High-profile corporate collapses have challenged the wisdom of the past, and the necessity for legislative backing is universally accepted today.

An associated development has seen significant changes in the prescription of accounting standards. Whereas in the past this was essentially a private regulatory mechanism under the control and jurisdiction of professional accounting bodies, statutory backing for the standard-setting body is now the norm.

The most recent development in greater regulatory involvement has been the global movement toward the uniformity of accounting standards through internationally. Traditionally, each nation has developed its own accounting rules. The International Accounting Standards Board (IASB) was established in 2001 to create a global set of high quality standards and regulatory rules by which companies everywhere could abide. The IASB expects that by 2005, 91 countries will require or allow companies to report using international standards.

The legal framework for the development and adoption of standards with professional involvement through a strong professional body is a goal that Vietnam should strive to meet. In the short term, there is a need for more comprehensive local standards-- a priority for all developing nations- but Vietnam should work towards the adoption of international standards.

4.1.3 Recommendations

It is clear from the above analysis that A&A standards should be rapidly formulated and promulgated, taking into account international best practices and trends. Some respondents suggested that the MOF should consider passing the function of drafting A&A standards to business associations.

4.2 Professional standards

4.2.1 The Current Situation

At present, there is no code of ethics for A&A service providers. Some provisions relating to professional principles for accountants and auditors are found in the provisions in the Law on Accounting, which become effective 1 January 2004. However, such moral requirements are regarded by many respondents as too general and in need of clarification.

4.2.2 International Practices And Trends

In every country there is the need for professional A&A services delivered through a strong, specialized, competent, and independent profession. A legal framework for the development of A&A service providers is a priority for Vietnam.

Professional standards in the developed Western countries are imposed and supported by the ethical standards of the profession, and supported by a regulatory framework demanding increasingly greater accountability.

Professional services are typically regulated more stringently than other business services. Even in the developed Western nations, which inherited the British tradition of an essentially self-regulating profession under the stewardship of the professional accounting bodies, there is an increasing move to greater regulation, or at least co-regulation by government and professional bodies. For Vietnam, a legal framework establishing qualifications for entry, standards of practice, and provisions for the overall organization of the profession, is the appropriate and inevitable model.

Following recent well-publicized corporate collapses, the self-regulatory model of the West is being overhauled, and legislative and regulatory requirements surrounding company accounts, corporate governance, and the regulation of the auditing profession are assuming greater significance. Although not universally welcomed within the profession, the clear benefit is that “this new and more solid basis of regulation is a good platform for the launch of the fully comprehensive set of international accounting standards in a couple of years time” (Howard Davies, Chairman *Financial Services Authority*).

The development of accounting/auditing services in which SMEs play a viable role requires a legal framework for the accounting profession, incorporating appropriate competency and accounting/auditing standards.

The Report notes difficulties for SMEs in providing A&A services. The bias against enterprises and governments outsourcing accounting services to SMEs could be addressed by removing regulatory, administrative, or policy barriers to the provision of services by SMEs. However, a greater level of confidence in the competency of SME providers is likely to be a key factor. Education, qualifications, experience, professional standards, and disciplinary processes are significant issues.

The SME accounting services provider sector, as well as the business community, is in this respect well served by additional and stronger safeguards.

The relationship between professional bodies and tertiary institutions is important in raising standards. In Australia, for example, the professional bodies, the Australian Society of Certified Practising Accountants, and The Institute of Chartered Accountants are committed to encouraging excellence in accounting education and effective co-operation with tertiary institutions in the process of professional accreditation.

The goal of accounting education and experience is to produce competent and professional accountants. There should be no bias against such professionals in large or small enterprises.

4.2.3 Recommendations

The survey identified a need for the drafting and issuance of a Code of Ethics for A&A service providers. The Code would encourage integrity, independence, competence, and professional excellence. It was suggested that VAA be responsible for drafting this document. Ultimately, the market for local SMEs A&A service providers is largely dependent on a strong, specialized, competent, ethical, and independent A&A profession. Government initiatives to encourage this development are necessary and desirable.

4.3 Professional bodies

4.3.1 The Current Situation

There are two professional associations in the accounting/auditing sector: the Vietnam Accounting Association (VAA) and the Chief Accountant's Club (CAC).

The VAA, founded in 1994, is the professional membership body for accountants and auditors in Vietnam. The Association targets its activities at encouraging those who work in accounting/auditing, to maintain and develop the profession, improve their professional quality and skills, and embrace high ethical standards. The Association currently has 8,790 members who are all qualified chief accountants, heads and deputy heads of accounting departments, management and researching staff in ministries, universities, research institutes, and accounting staff in State agencies, etc. The VAA operates in eight provinces and cities, in nine ministries and sectors, as well as three major universities and developed economic regions.

The CAC, established in 1989, is the predecessor to the VAA. After combining with the MOF to establish the VAA, it continues to exist as a sub-committee within the VAA. The CAC currently has 865 official members and 270 ad hoc members (. members participating in specific activities/meetings). There are also, in a number of cities and provinces like Nghe An, HCMC, and Thua Thien Hue, local/provincial Chief Accountant's Clubs that serve to strengthen professional supporting activities.

The problem, according to respondents, is that those professional bodies are not performing their roles effectively. They are not as strong nor independent as is needed to meet the needs of this sector.

4.3.2 International Practices And Trends

The development of a strong, competent, and independent profession of domestic providers of accounting and auditing services is a key government priority for Vietnam. A particular challenge is to regulate the profession within a framework that allows for the emergence of an independent profession. In China, for example, CPAs and their organization, CICPA, have not been granted a fully independent statute. Governmental interference is considered to be the biggest problem in

the development of the profession. Currently in Vietnam, the role of the State (through the MOF) is very strong, and that of the professional bodies is very weak. A more productive partnership between the government and the profession, with respective roles clarified in a revised legal framework, would be a desirable development.

The legal framework for this development should not subject the profession to government influences – a criticism leveled at regulatory initiatives in many developing countries, including China. Government must put in place the regulatory framework that is necessary to protect the users of financial information, but independence is nevertheless an important attribute of the accounting profession.

4.3.3 Recommendations

A strong A&A service sector needs a strong professional association that provides professional leadership, entry and practicing qualifications and standards, and disciplinary procedures for members who breach professional standards. While this professional association must work closely with the Government in these activities, international best practices suggest there should be independence from the Government. As noted above, Governmental interference is considered the biggest problem in China in relation to the development of the A&A profession.

4.4 Regulatory Impediments

4.4.1 The Current Situation

Inadequate Policy

Despite the progress made in recent years, the absence of a clear-cut policy and action plan for the development of A&A services is seen as a significant constraint for these services. No clear policy encouraging favorable conditions for the development of A&A services is found in any single legal document. Instead, a patchwork of policies are scattered throughout several documents issued by the policy-makers (the 5th Resolution of the CPV, and Decision 20/2002/QD-BTC, dated 04 March 2002 on administrative reform, for example.).

According to the survey, a large number of respondents believed that there is a lack of adequate policies and legal framework for the development of the A&A service market.

Some respondents were concerned that there was no State policy on compulsory auditing application of financial statements for all types of businesses. According to the prevailing regulations, all FIEs are obliged to use external independent auditing for their annual financial statements, whereas the SOEs are entitled to choose either internal or external independent auditing, and private enterprises have no obligations at all. This policy hinders the development of the auditing service market.

Legal Constraints On Establishment

In addition to the common legal constraints on post-registration procedures like seal making, registration of the tax code, and purchase of value added tax invoices faced by all the SMEs, the A&A service companies also face ambiguous registration procedures.

In past years, according to Government Decree 07/ND-CP dated 29 January 1994 providing the Regulations on Independent Auditing, an auditing company should have at least five licensed auditors, inclusive of the company's director, as a prerequisite to carry out auditing activities. This strict requirement is a major obstacle, preventing entrepreneurs from establishing new auditing companies.

Furthermore, Decree 07/ND-CP also confused some respondents with its vague provisions on the types of auditing entities - the auditing company and the auditing office. To date, there are no guidelines on the differences between the auditing company and the auditing office. As a consequence, all 60 existing auditing entities are in the form of a private limited liability company, but no auditing office has been set up. Respondents understood the need for a diversified form of auditing organizations, but also recognized the necessity for an unlimited liability auditing office to meet the demands of certain customers.

The Enterprise Law in 1999, and its by-law, Decree 03/ND-CP dated 3 February 2000, created a better environment for business establishments by simplifying post-registration procedures. According to Decree 03/ND-CP and Circular 08/2001/TT-BKH dated 22 November 2001 of the MPI, only one public certified auditor is required to be the director or other important managerial position of a newly set-up auditing company. This new provision has resulted in a considerable increase in the number of auditing companies since its enactment.

Some respondents still see obstacles in Auditing Standard 700¹⁸, which requires two signatures in an audited financial statement. One signature is of the assigned auditor, and the other is of the Director (or his proxy) of the auditing company, which has been assigned to do the audit. As a legal consequence, an auditing company needs to have at least two auditors or must hire one external auditor to comply with Auditing Standard 700. Some interviewees regarded such requirements as a cumbersome because it increased the operating costs of a small auditing company.

According to the Law and by-laws on Foreign Investment, the establishment of a FIE providing A&A services is subject to the approval of the Prime Minister, regardless of the scope of investment capital. This results in more complicated procedures and a lengthy establishment period.

PROVISION OF A&A SERVICES

An issue raised in the survey by several respondents was the independence of A&A service providers in the course of rendering services. Under Item 16 of the Accounting Standard 200 issued together with Decision 120/1999/QD-BTC dated 27 September 1999 of the MOF on promulgation of four Vietnamese auditing standards, auditors are not permitted to render accounting services and auditing services to one client. However, there is actually no regulation prohibiting auditing companies from doing so. Thus, it can happen that an auditor provides auditing services to a company and is also provided accounting services by the auditor's company. In this case, the auditing results may not be objective, and there is the potential for defects in the financial statements of the audited company to be covered or repaired. A similar scenario may occur with the affiliated A&A service companies that provide accounting and auditing works to one client.

The problem resulting from this situation is that enterprises that only provide accounting services have not survived because consumers prefer to use one-stop services for accounting and auditing. The use of separate accounting and auditing firms increases consumer's costs and creates the risk of changes to the accounted figures.

Another issue was raised in relation to the provisions of A&A services to credit institutions and listed companies. Under the prevailing regulations (Decree 166/1999/ND-CP dated 19 November 1999, Decision 322/1999/QD-NHNN5 dated 14 September 1999), auditing companies must satisfy certain criteria to provide auditing services to credit institutions. In addition, it is also of concern that auditing companies, especially the smaller ones, selected by credit institutions are subject to the approval of the State Bank of Vietnam. Some auditing companies maintained that because of this barrier they could not provide services to credit institutions, despite having the capacity to service small and medium size banks.

¹⁸ Issued in conjunction with Decision 120/1999/QD-BTC dated 27 September 1999 of the Minister of Finance.

Similarly, opportunities to provide auditing services for listed companies are restricted. According to Decision 26/2000/QĐ-UBCK2 dated 05 April 2000 of the SSC, auditing companies must have: (i) at least 10 auditors licensed to practice in Vietnam; (ii) minimum chartered capital of VND 2 billion for local companies, and USD 300,000 for foreign invested companies; (iii) at least 3-years experience operating in Vietnam; (iv) at least 50 audited clients and (v) approval of the State Securities Committee.

A Ceiling Price For Auditing Services?

According to Decree 07/ND-CP, the MOF is empowered to fix the ceiling price for auditing work conducted by auditors/auditing firms. This legal provision was supported by several interviewed end-users but was criticized by most providers, who considered it State interference. Interviewed providers stated that the fixed ceiling price is contrary to the basic principle of economic and civil transactions, i.e. parties to a contract must have the full authority to decide on the price of products and services, and full authority to change the price during the execution of the contract, with the exception of the price of public service or in special cases. Auditing services cannot be regarded as so special that the contractual price must conform to those fixed by the State. The price can vary depending on the quality of auditing service, the scope of its liability, and the reputation of the auditing firm.

The MOF has not yet issued any ceiling price applicable to the auditing services rendered to enterprises, except a fee restriction imposed on the auditing services provided to investment projects funded by the State budget, as stipulated in Circular 45/2003/TT-BTC of the MOF dated 15 May 2003 on providing guidance on finalization of investment capital (previously stipulated in Circular 07/2000/TT-BTC dated 17 July 2000).

4.4.2 International Practices And Trends

Because of its domestic regulatory nature, deregulation of the professional services trade, including accounting and auditing services, is a sensitive issue, involving professional associations and regulatory agencies. There is a clear trend in developed countries to liberalization of the services sector. In developed Western countries, for example, accounting/auditing sector regulation is in place mainly to protect consumers and to ensure service quality. However, in other countries, particularly developing countries, access to professional service providers, including accounting/auditing service providers, is problematic. The Australian Government Report, *Trade Outcomes and Objectives Statement 1998*, refers to trade/market access barriers frequently erected by nations which affect foreign professional service providers, including restrictive commercial arrangements with local firms: standards, recognition of qualifications, establishment controls, residency requirements, nationality, employee quotas, visa controls, work permits, and national treatment. The Report notes that “in many of Australia’s trading partners, access for professional services providers is problematic, complex and nontransparent. In most cases, Australian professionals operate in these markets on a consultancy basis; this does not give them the same rights and benefits as being able to practice in a professional capacity with a local license. The benefits of removing regulatory restraints, increasing competition and liberalizing entry have been noted above.”

4.4.3 Recommendations

All the interviewed A&A providers requested that the compulsory use of external independent auditing be applicable not only to FIEs, but also to SOEs and private SMEs.

Interviewed service providers opined that the aforesaid requirements prevent SMEs from participating in this market segment, and as a result, hindered a level playing field for all types of businesses. The view of small and medium auditing firms is clear: the above requirements should be eased.

Ultimately, neither auditing companies nor affiliated auditing companies should be allowed to provide accounting and auditing services to the same client. This new prohibition is recommended for inclusion in the Draft Decree on Independent Auditing Firms.

4.5 Actual Implementation

4.5.1 The Current Situation

Tax Deductibility Of Expenditures

The legitimate expenses for income-tax deduction are described in the Law on Corporate Income Tax, Decree 26/2001 ND-CP dated 4 June 2001, Decree 30/1998/ND-CP dated 13 May 1998, and Circular 18/2002/TT-BTC dated 20 February 2002. These regulations list all items that are considered as legitimate expenses for deduction from taxable income. Respondents are of the opinion that the listing of items of legitimate expenses does not cover all expenses actually paid by enterprises. In some cases, enterprises do not know how to account for their expenses under the current regulations and laws.

The current regulations limit expenses for deduction on taxable income to 10 percent for advertisement and promotion expenses, for example, and there are further limitations place on expenses for the use of training services (further analyzed in the section “Training Services” below).

Notwithstanding the regulations, implementation by tax officers is often varied and based on personal discretion rather than the laws. At times, tax officers, during the tax finalization process, decide the amount of expenses that can be deducted from taxable income. As such, the remaining expenses that have already been paid by the enterprise are not deemed tax deductible. Sometimes tax officers impose strict requirements on enterprises, forcing them to show vouchers, receipts, signature of buyers (which may not be collected in every case), contracts, or even provided products/services (in order for tax officers to be sure that the contracts are not faked).

Such constraints have caused accounting difficulties not just for businesses, A&A service providers as well. The constraints are central to why enterprises and A&A service providers violate tax laws.

To avoid the regulations, businesses will create two-accounting book-systems, one for accounting their real expenses, and another for dealing with tax regulations and officers. Even with help from A&A service experts, the two-accounting book-system is unavoidable. Enterprises simply have no other option if they wish to survive.

Audited Financial Reports Not Accepted By Tax Authorities

Audited financial statements, balance sheets and profit and loss statements are not recognized by the tax authorities for the purpose of tax calculation. Some services users argue against the requirement of an independent auditing service when they are essentially of negligible legal value. Most end-users and providers suggested that there should be specific regulations recognizing the validity of audited financial statement so that enterprises can benefit from the auditing services they are required to buy.

4.5.2 Recommendations

The above analysis clearly reflects the demands of businesses for bettering the current implementation system. Legal provisions and tax officers should not impose artificial strict limitations on expenditure for deduction of taxable incomes. Businesses and enterprises must be required to strictly comply with the regime on financial invoices and should be subject to high penalties if they act in violation.

Auditing figures should be recognized by the tax authorities. In return, auditing firms and auditors should be held responsible for their audited figures. This reform is much needed to raise the quality of auditing services and encourage enterprises' use of auditing services.

PART E. TRAINING SERVICES

1. TRAINING SERVICES

Training services are undoubtedly among the most widely used BDS. Although their general meaning is largely understood, they have yet to be specifically defined. For the purpose of this study, training services have a broader meaning than in the previous study on the BDS market of GTZ. It refers to any kind of training activities of the two following groups:

- (i) Vocational/Technical training, where trainers provide information on how to use and take full advantage of a machine, or to improve the expertise of trainees in a certain skill or trade;
- (ii) Business management training, which is generally offered in a classroom setting, related to various aspects of business establishment and operation. At present, this kind of training is increasingly popular in areas such as entrepreneurship, general business management, marketing, import-export, production, and finance.

It is noted that some training services, such as those attached to technology transfer agreements or technical assistance agreement, are not covered by this Study, and are not included in the above definition.

Unlike the Preliminary Study on the Legal Framework for BDS in Vietnam, which focused on the analysis of the legal environment for vocational/technical training services, where most of customers are individuals (e.g. undergraduates, pupils, junior workers etc...), this Study concentrates on assessment of the legal framework for the business-related training sector, where corporate customers (i.e. SMEs) predominate.

The integration of Vietnam into the world economy creates a common market for the world in Vietnam, including the labor market. This provides an opportunity, but also a challenge, for training services in Vietnam.

Labor export is function of training output. Vietnam's comparative advantage is its low-cost labor. However, that advantage is meaningless if employees do not meet the standard of employers. In comparison with employees elsewhere in the region Thailand, for example, Vietnamese employees are less skillful, and therefore, receive simpler jobs with lower pay. The gap between Vietnam and the standard's outside the region is even larger. Improving the skills of Vietnamese working both for domestic and export use is a national requirement.

Modern technology is increasingly being introduced into Vietnam. This is not only an opportunity, but also a challenge, whereby Vietnam must produce employees who can meet the requirements of both modern technology and management mechanisms.

In fundamental sectors, investment in training branches should be considered. Other training norms, such as training for labor export and business management training, need given incentives to develop and to reach international standards. All respondents urged the State to create appropriate and timely measures for the development of training activities, including improvement of policies and legal frameworks.

2. THE TRAINING SERVICE MARKET

2.1 Market Supply

Types Of Providers

For the purposes of this survey, providers of training services can be categorized into two groups: (i) vocational/technical training, and (ii) business management training.

Vocational/Technical Training Services

Providers of these services can be categorized into four sub-groups:

- Technical colleges: a limited number (about a dozen) of colleges partly involved in vocational/technical training services;
- Vocational training schools: 194 schools;
- Technical/vocational training secondary schools: 266 schools;
- Vocational training units/centers: thousands of units/centers of this kind currently involved in providing vocational training services. This group includes small professional providers of vocational training services, and also amateur ones providing short training courses to new employees prior to commencing work. Providers of this sub-group normally provide short-term courses.

Despite the fact that most providers in the first three sub-groups are state-owned (182 out of 194 vocational training schools and 236 out of 266 technical/vocational training secondary schools are state owned) the market as a whole is still dominated by private providers.

However, with the much larger operational scale of the first three sub-groups compared to the last one, the State-owned sector overwhelms the private sector in terms of training capacity.

Business Management Training Services

In addition to the private and State sectors, this category includes the involvement of international donors and non-governmental organizations (NGOs) in supplying business management training services. Despite the participation of a variety of sectors, the number of entities providing services is still limited to dozens of institutions, of which about 26 percent are private and State entities. The remaining 74 percent are international donors/NGOs.

Location Of Providers

Vocational/Technical Training Services

Providers of vocational/technical training services are present in almost all provinces. While State-owned institutions are located in both urban and rural areas, private providers mainly concentrate in urban areas. However, for vocational training units/centers, both State and private sector are seen in urban and rural areas.

Business Management Training Services

Providers of business management training services are mostly concentrated in Hanoi and HCMC. Users from other provinces must go to these cities to purchase training services. However, some providers of business management training also periodically offer services in other cities. Providers doing so are normally State-owned institutions, international donors, or NGOs.

In general, while the supply of vocational/technical training is sufficient throughout the country, there is a lack of convenient and accessible business management training in all locations outside Hanoi and HCMC.

Service Quality

Vocational/Technical Training Services

GTZ's BDS Market Assessment Study found that about 62 percent of respondents maintain that they are somewhat satisfied with these training services, while about 32 percent are extremely satisfied with the services. The rest indicate their dissatisfaction with the services. These figures objectively illustrate the fact that vocational/technical training service quality is, to a certain extent, acceptable.

Nevertheless, from a comprehensive point of view, the skills of workers after training are limited, leading to end-users' lower production efficiency. This is due to a series of inadequacies in the training system, such as capital, the technology level of training aids, training curriculum, lecturers, and other factors.

Business Management Training Services

The BDS Market Assessment Study returns results for the level of customers' satisfaction with business management training services are as follows: 21 percent, 73 percent, and 6 percent of customers are “extremely satisfied”, “somewhat satisfied” and “somewhat dissatisfied” respectively. With adequate funding, qualified trainers/lecturers, and modern training methodology, service providers are regarded as competent to supply quality service to customers and directly meet their demand on training issues.

2.2 Market Demand

Awareness And Understanding

Vocational/Technical Training Services

It should be noted that there are two types of customers of vocational/technical training - individuals (pupils/students) and institutions (enterprises). Pupils/students are highly aware of the services. However, since they are not the targets of this study, the Report places emphasis on an analysis of institutional customers.

Enterprises also have a high awareness and understanding of the services available. The difference between them and the students/pupils is the vast gap between institutional customers who know and understand the services and those who use them. Vietnamese enterprises are not familiar with outsourcing services in general, and training services in particular. While a number of enterprises perceive these services to be essential, others find they do not appropriately meet their requirements. In fact, existing provision of services remains limited to simple techniques and skills, which are easily learned and practiced. Therefore, instead of outsourcing the services, enterprises normally provide on-the-job training, which is not costly and, in most cases, can equip workers with more practical skills.

Foreign invested enterprises, meanwhile, are familiar with outsourcing services, and many of them operate in industries requiring staff with high-tech skills. However, they find local training incapable of meeting their requirements. As a result, they often have to send staff abroad for training.

Business Management Training Services

The awareness and understanding of customers toward business management training is slightly lower than those for vocational/technical training. This mostly results from limited supply, and limited advertising/promotion to raise customers' awareness. Many enterprises are aware of the services, however, still do not understand thoroughly the usefulness of using them. Customers also suspect the efficiency of using training services for their businesses, given Vietnamese reserve in trying new services. Consequently, the proportion of customers trying services, when compared with those aware of them, is still limited.

Overall, unfamiliarity with outsourcing services with Vietnamese enterprises can be considered the key reason for customers' opting not to purchase services. Additionally, limited financial resources and the perception of enterprise management that the services are not essential also significantly hinder market demand.

Reasons For Using Training Services

Vocational/Technical Training Services

Student/pupil customers generally choose to undertake vocational/technical training because it is the only existing viable career choice other than academic study at university. If customers are incapable of entering universities, either for financial or academic aptitude reasons, they look to vocational/technical training institutions.

Enterprises purchase technical/vocational training to help them compete, and they expect that the training will positively improve their capacity in this regard. More specifically, enterprises find it essential to deliver proper training to their workers in order to meet the changing and heightening demands of customers. Through improved workers' skills, enterprises can indirectly increase their competitiveness through the capacity to manufacture higher quality products. Enterprises in garment and electronic industries primarily purchase training services for this purpose.

Business Management Training Services

The key reasons for enterprises purchasing business management training is to help them handle business growth and/or increase competitiveness. Users of services face various management and operational problems and expect to resolve these problems with business management training. By applying what they learn in training, businesses hope to operate more efficiently, enhance their professionalism, and thereby increase their competitiveness in the market.

Enterprises also use business management training because they are financially capable, and also find the services practical. This is in large part due to experienced trainers and the integration of information updates on current business issues.

3. OVERVIEW OF THE LEGAL ENVIRONMENT

3.1 Development of the Legal Framework

The enactment of the Labor Code (1994), the Education Law (1998), and the Enterprise Law (1999), are considered the significant turning points for the development of the training service market. Prior to 1986, the business management training service market did not exist as the entire economy was centrally planned and there was no legislation governing training activities.

After 1986, the shift to a market economy and strong economic growth in Vietnam led to an increase in the demand for education and training services. The first significant legal document creating framework for operation of training service enterprises is the Company Law issued in 1990. The Company Law enabled limited liability companies and joint stock companies to select business fields in areas not prohibited by laws, but they were required to apply for registration certificates. With the enactment of the Company Law, there was some development of private companies in Vietnam, including those engaged in provision of training services. However, the majority of training activities were carried out by State run sector in this period.

As a fundamental law, the Constitution 1992 sets out fundamental factors for training system such as training targets, contents, plans, teaching standards, regulation of examination and certificate system etc. The Constitution 1992 (Article 36) encourages public and private training schools and other training forms. The investment capital sources beside the State's budget for training are encouraged. In line with the Constitution 1992, some specific legal instruments on training and education have been promulgated such as the Government's Decree 90/CP dated 24 November 1993 on the structure of the national education and diploma system which served as basis for the issuance of the Law on Education thereafter.

Issued in 1994, the Labor Code has a separate chapter on vocational learning and training activities in enterprises. Some of the vocational schools of foreign entities were established in the Vietnam market as a result of Government's Decree 115/CP dated 5 September 1994 regulating the operation of vocational schools of foreign entities in Vietnam.

The Asian financial crisis urged many efforts from Asian countries to improve and reform their economic and legal systems. Since 1998, there has been much legal development in the training sector, the most influential of which are the Law on Education and the Enterprise Law.

Promulgated in 1998, the Law on Education regulates vocational and technical training. Under this Law, training activities could be organized in long-term or short-term classes under the form of public, semi-public or private schools.

Enacted in 1999 and with effect from 1st January 2000, the Enterprise Law treats training services in the same way as other businesses. Enterprises in all economic sectors are allowed to provide training services after obtaining business registration from the local authority and an operation license from the MOET. The previous monopoly of public schools no longer exists.

It is widely recognized that the introduction of the Law on Education and Enterprise Law paved the way for the development of private training businesses. The present number of non-state training schools is 70 out of 260 total training schools. Thousands of small-scale private units have also been established to provide training services.

3.2 Government Policy

The Communist Party has made several resolutions in the fields of science, technology, education, and training. The perceptions, policies, and directions of those resolutions have been implemented, enabling the science, technology, and training sectors to develop.

The most notable resolutions of the Party, with regard to training, are those adopted in the 2nd Plenum of the 8th Congress and 5th Plenum of the 9th Congress.

The 2nd Plenum, held in 1996, adopted a Resolution on the Strategic Orientation on Development of Education and Training, and a Resolution on Strategic Orientation on Development of Science and Technology in the period of industrialization and Modernizations up to the year 2000.

The resolution noted:

- Achievements of the education system in Vietnam, including the development of a network of training centers; improvement of education quality in several disciplines; implementation of nationwide active learning campaigns; diversified forms of schools; renovations in policies; and enhanced international cooperation.
- The weaknesses of the education and training system, including: inappropriate structure of education and training, where the ratio of higher education graduates of vocational education to trained workers is too small compared with the same in the region; low quality and efficiency of education and training a rising trend of negatives and in disciplines; social inequality in education; weak and insufficient teachers.

The Resolution of the 2nd Plenum indicated seven reasons for such weaknesses, and outlined: (i) a strategy for Education and Training Development in the Industrialization and Modernization Period; and (ii) the targets and tasks for education development until the year 2000.

To overcome the identified difficulties, and to improve the enabling environment for the development of education and training sector, the 2nd Plenum adopted the following measures: (i) To increase resources for education and training by increasing the state budget, tuitions/fees; socializations of education and training; and diversifying the forms of educations; (ii) To build up teachers' teams, creating the momentum for lecturers and learners; (iii) To further improve the content of education, and the facilities of schools; and (iv) To improve education management.

It is, nevertheless, observed that the 2nd Plenum of the 8th Party Congress placed more focus on education than training. This fact explains the great unbalance between the investment in education and training.

To implement the policy set out in the 2nd Plenum on the socialization of education, the Government adopted Resolution No. 90/CP dated 21/08/1997 on the direction and orientation of socialization¹⁹ of education, healthcare, and culture activities. The following actions are to be implemented:

- (i) Gradual transfer of public training centers to semi-public ones;
- (ii) Development of private training centers;
- (iii) Strictly cementing training to the market (e.g. corporate customers);
- (iv) Promulgation of specific policies to support non-state schools by creating favorable conditions. For example, the provincial People's Committees would authorize agencies to grant or lease land for building schools; commercial banks would give preferential loans for school construction and equipment purchase; teachers in public schools and scientists in research institutes would be entitled to teach in non-state schools
- (v) Teachers who shift from public to semi-public and private schools shall retain their social and health insurances.

As the terminology "socialization" suggests, Resolution 90 shall encourage and attract the participation of all economic sectors in education and training.

The 5th Plenum of the 9th Party Congress in 2001 took a major step toward creating a much more favorable environment for the development of the private sector. The resolution stressed the Party's determination to develop a multi-sector economy where: (i) the State sector continues to play a leading role, (ii) the State and collective sector provide the firm foundation of the national economy, (iii) the private sector is encouraged to be widely developed in all business and production areas where the laws do not prohibit it.

¹⁹ Socialization of one sector is understood as the participation of private sectors in such sector.

To help promote and develop the private sector, Resolution 5 has identified a number of actions to be implemented in the coming years, some of which amend and supplement policies relating to the support of the training sector.

To implement Resolution 5, the Prime Minister approved the Action Plan in Decision No. 94/2002/QD-TTg in 2002. This Action Plan included 39 actions, 12 of which are actions relating to the policy on labor, salaries, training, and other factors.

Additionally, the Prime Minister issued Decision 48/2002/QD-TTg dated 11 April 2002, approving the Plan on Training Networks for the period 2002-2010, which created a sound basis for the development of the vocational/technical market. According to this Decision:

- Until the year 2005, each province or city should have at least one training school and each district should have one short-term training center;
- Training units in SOEs, private enterprises, and FIEs, and training courses in community education centers are encouraged to develop;
- It is planned to raise the ratio of long-term vocational students to the total number of vocational students from 16 percent in 2000 to 22 percent in 2005 and 27 percent in 2010; advanced training will account for 7 percent in 2005 and 15 percent in 2010;
- It is planned to raise the ratio of students in non-state vocational schools/training units to 70 percent in 2010, compared to relatively 24 percent in 2000.

The Decision confirmed the State's confidence in the non-State training service sector and its commitment to support and create favorable condition for non-State training providers. However, it should be noted that there is no State policy on the development of business management training. Further analysis of this limitation is discussed below.

3.3 The Regulatory Regime

As noted above, the key legal instruments governing and affecting the training sector are the **Education Law** and the **Enterprise Law**, which were issued in 1998 and 1999 respectively.

The Law On Education

According to the Law on Education, there are numerous forms of entities that could provide training services. These include: vocational high schools, training schools, training centers, training classes organized independently or in conjunction with business/production organizations or other training institutions, or colleges or universities. The Education Law confirms that the national education system includes: (1) pre-school education; (2) school education; (3) vocational education; and (4) higher education. The Law entitles the Government to issue separate legal instruments for the operation of education and training establishments other than the school system. It has a separate section governing cooperation with foreign entities in education and training, and also a separate section governing investment in education and training. Both foreign and local investment in the education and training sector are encouraged. Nothing contained in the Law specifically relates to business management training activities.

The Government has also issued a series of Decrees to govern specific education and training issues: particular Decree 43/2002/ND-CP dated 30 August 2000 guiding the implementation of a number of Articles of the Education Law; Decree 02/2001/ND-CP dated 9 January 2001 guiding the implementation of vocational training provisions for the Education Law and the Labor Code; Decree 06/2000/ND-CP dated 06 March 2000 regarding foreign cooperation in the field of medi-

cal examination and treatment, education, training, and scientific research; Decree 73/1999/ND-CP dated 19 August 1999 on policies for encouragement and socialization of educational, health care, culture, and sport activities; and Decree 18/2001/ND-CP dated 4 May 2001 on the establishment and operation of foreign culture and education foundations in Vietnam.

The Enterprise Law

As provided by the Enterprise Law of 1999, any individual or organization in any sector could participate in providing training services. Irregular training and education activities, without issuance of any degree and/or certificate under the auspices of Vietnam's national education system, such as short-term business management training, could be carried out by business entities after registration of "irregular training and education activities." However, the Enterprise Law is a common law for regulating the establishment and internal matters of enterprises. Any specific activities must comply with specific laws (e.g. the Law on Education). As a consequence, the establishment and operation of diploma conveying training schools issuing belonging to the national education system, must strictly comply with the regulations on establishment and operation of education and training schools. **In principle, the private sector could legally operate as training service providers. In practice, these providers meet with difficulties that shall be further analyzed below.**

Other Documents

To implement Resolution 90/CP dated 21 August 1997, the Government issued Decree 73/1999/ND-CP dated 19 August 1999 on policies for the encouragement and socialization of educational, health care, culture, and sport activities. Under this Decree, non-State run education and training establishments receive incentives relating to infrastructure, as well as taxes, fees and charges, and other incentives, including an exemption on the import duty of imported equipment, and incentives with loan capital.

According to Decree 02/2001/ND-CP dated 9 January 2001, vocational schools, centers and classes (commonly known as training units) shall be organized independently or in conjunction with business and production units or other education units.

Foreign investors could also provide training services under the forms as stipulated in the Law on Foreign Investment in Vietnam and the Government's Decree 06/2000/ND-CP dated 6 March 2000.

3.4 Regulatory Agencies

3.4.1 At The Central Level

Ministry of Education and Training (MOET)

According to Government Decree 29/CP dated 30 March 1994, the MOET has the following functions regarding education/training activities: (i) Promulgating the list of training sectors and professions of technical/vocational secondary schools; issuing targets, programs, contents and methodologies for training at all levels; (ii) Examining and granting permits for the publication of text books and documents for training; (iii) Promulgating regulations on the examination of training results; Creating procedures for withdrawal of training certificates/diplomas; (iv) Coordinating with related agencies to develop standards applicable to teachers at technical/vocational schools.

The Division in charge of managing training matters at the MOET is the Department for Professional Secondary Training. The function of this Department is to assist the MOET in managing the system of secondary professional schools.

Divisions directly in charge of training service management activities, as outlined above, include: the Department of Foreign Affairs, the Department of Vocational and Professional Education, the Department of Planning and Investment, the Department of Higher Education, and the Department of Postgraduate Studies.

Ministry Of Labor, War Invalids And Social Affairs (MOLISA)

Unlike the MOET, the MOLISA is specifically in charge of managing vocational training activities that are closely related to employment. This management function is stipulated in Article 2 of Decree 96/CP dated 7 December 1993 of the Government on functions, tasks, competence and the organizational structure of the MOLISA. The vocational training forms that fall within the governing scope of the MOLISA are short-term training courses and internal training activities conducted by vocational training units and enterprises for their employees.

The General Department of Vocational Training (GDVT), established under Government Decree 33/1998/ND-CP dated 23 March 1998, is responsible for assisting the MOLISA in carrying out the overall management of vocational training activities.

Ministry Of Finance (MOF)

The MOF is the government body responsible for unifying State management in the field of finance, accounting, and the State budget. The agency has promulgated a series of legal papers on the financial aspects of training services. In cooperation with the MOLISA and the MOET, the MOF issued Circular 44/2000/TTLT-BTC-BGD&DT- BLDTBXH dated 23 May 2000 on guiding the financial management system in non-State owned units operating in training/education areas.

Ministry Of Planning And Investment (MPI)

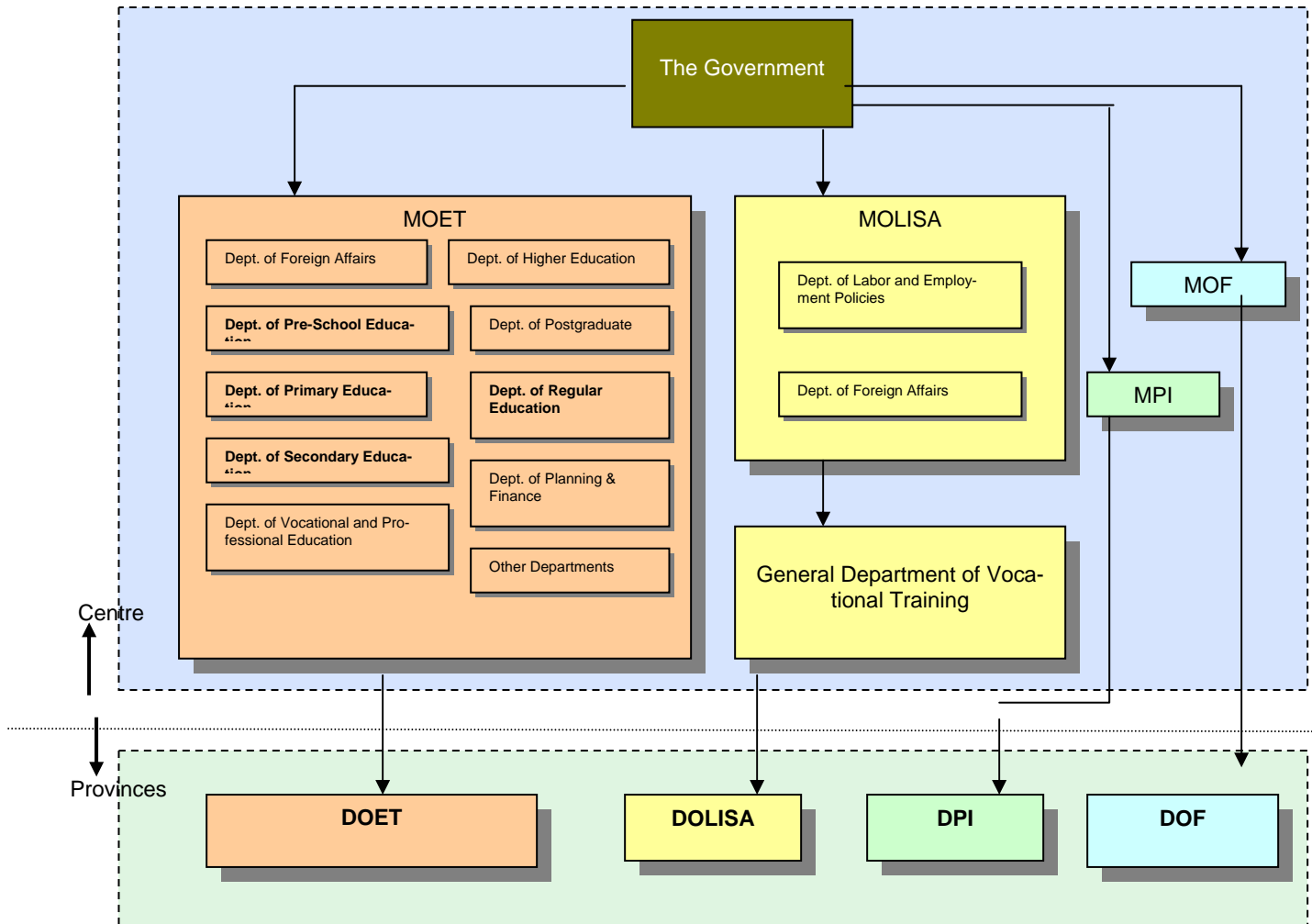
In relation to training services and activities, the MPI is responsible for State management of domestic and foreign investment in the education/training sector. The functions, tasks, competence, and organizational structure of the MPI are stipulated in Government Decree 61/2003/ND-CP dated 6 June 2003. Another function of the MPI is to manage and organize business registration activities conducted by DPIs nation-wide.

3.4.2 At The Local Level

There are several State agencies at the local level involved in the management of training activities. These include: the DOETs, DOLISAs, and DPIs.

The DOETs are responsible for managing the primary and secondary education and vocational schools, while the DOLISAs are in charge of managing vocational training centers. The DPI is assigned to grant business registrations to training businesses.

Figure 7 Regulatory Agencies in Training Services



3.5 International Influences

Vietnam’s international obligations currently have no impact on training services. On WTO accession, GATS, which has as its objective the liberalization of services trade, may, as a consequence of the outcome of bilateral negotiations, facilitate the entry of foreign service providers in this sector. With the increasing awareness of the advantages to the domestic economy that can flow from market liberalization – competition, innovation, diversity, technology, transfer, raising standards – trade barriers are likely to be progressively lowered.

On WTO accession, the TRIPS obligations for more effective IP protection will improve the position of providers of training services. Training is a knowledge commodity and the owners of the IP in training materials will, along with originators of IP in other fields, benefit from an effective IP system.

4. KEY CONSTRAINTS AND RECOMMENDATIONS FOR IMPROVING THE TRAINING SERVICE MARKET

4.1 Policies

4.1.1 The Current Situation

It is noted that there are inadequate policies and directions for the development of a vocational/technical training system, and no policy encouraging business development training.

There are several specific policies and directions of the Party, State and government for the development of vocational/technical training systems, all of which recognize the importance of vocational training to the national economy.

In Decision 48/2002/QĐ-TTg dated 11 April 2002 of the Prime Minister on approval of the master plan for vocational training school networks in the period 2002 – 2010, there are some targets for the development of vocational training systems, in term of levels of vocational training, arrangement of vocational training school networks, scale of recruitment of trainees for vocational training schools, structure of sectors of vocational training, and policies for enhancement of the quality of teachers. However, the solutions set forth therein are not specific enough to effectively and efficiently achieve the given targets. Most of the solutions are nominal and could hardly be put into practice. For example:

- Regarding the organization of training schools, Decision 48/2002/QĐ-TTg urged the branches and provincial authorities to review the current schools in order to propose suitable solutions. The Decision promised to issue policies for encouraging and attracting teachers in the vocational training sector without setting any specific policies;
- Regarding investment, the Decision promised to increase State investment in the vocational training sector without specifically providing how State investment would be increased. The Decision also urged the mobilization of investment from non-State sector and cooperation with foreign counterparts; but private and foreign investment in the training sector are still faced with numerous difficulties and impediments to the establishment of projects;
- Regarding management, the Decision promised to enhance State management of investment activities and to renovate the financial management regime, but without any more details.

As a result, the encouragement policy is not strictly followed in practice, and the legal system in other sectors is not uniform. For example, Vietnamese young people are, in general, not attracted to vocational training, which is perceived to result in unsatisfying jobs salaries. Business entities face impediments from other areas of the legal system in establishing vocational training units (e.g. difficulties in leasing land and site clearance and compensation).

Vietnam has few official business management training schools and universities. Almost all business management training is conducted in the form of short-term courses organized by several universities (the National University and National Economic University), institutes (the Institute for Business Management), organizations/associations (VCCI and the International Labor Organization), and enterprises. It is clear that adequate policies have not yet been created for the enhancement of business management training systems. Furthermore, both vocational training networks and management training networks are too few in number and unevenly located throughout the country.

Decision 48/2002/QĐ-TTg is seen as an ambitious plan for the development of a training system. According to some interviewed services providers, State intervention in the education and training

sector should be made in such a manner as to retain the balance between the demand for and supply of labor, but should not create obstacles. The vocational training system is under-developed not only due to the lack of legal instruments, but also from the impact of poor implementation of state policies.

Currently, the State seems to pay less attention to vocational/technical training activities than to higher education. The national budget for each professional secondary pupil is just VND3.6 millions per year as opposed to VND4.3 million per year for a vocational training student, and VND6million per year for a colleges/university student. These number meet just 60 percent of existing demand.

The figures from the Report's interviews show that the quality of training services meet the normal requirements of domestic end-users, but do not satisfy foreign end-users or the demands for advanced training. Vocational systems also primarily focused on traditional jobs like auto maintenance, civil construction, tailoring, car driving, cooking. The number of training activities in industry, service, and agriculture are still small. The lack of trainers is another reason for the low quality of training services. To overcome these obstacles, it is necessary to create a policy giving more financial support to the training sector.

4.1.2 International Practices And Trends

Education and training are key aspects of a policy framework for a business environment supportive of the development of strategic business services.

In a recent paper entitled, "Commercializing Training Product Development", delivered at the 2000 Hanoi Conference on Business Services for Small Enterprises in Asia, Stevens and Nielson noted that:

The confluence of globalization, technological, economic and social change has created an unprecedented demand for individuals, organizations and indeed, entire countries, to continually acquire new skills and knowledge. Within the context of global competitiveness, it is now generally accepted that the capability and capacity of a country to develop its "human capital" through education and training is a key source of competitive advantage. For emerging economies like Vietnam, an enormous challenge will be to implement strategies that enable rapid, cost effective skill and knowledge acquisition and dissemination in key sectors of the economy.

As economies transform from an agricultural to a manufacturing base, knowledge becomes an increasingly valuable commodity. Education and training services play key strategic roles in disseminating new knowledge in both developed and developing countries. The SME sector, which drives job growth and business innovation in both developed and emerging economies, has particular needs. In this sector it is widely recognized that managers and employees require training in order to improve the efficiency of their operations. Stevens and Nielsen note that in the SME sector:

A lack of management and business skills tends to be the greatest impediment to both survival and growth. There remains a chronic under-investment and under-participation in all kinds of formal training. The evidence of this demand weakness can be found in the simple fact that there are very few commercial training suppliers who target this sector, but rather focus the majority of their products and services on larger firms.

There is universal recognition in developed countries that a strong and vibrant training sector plays a key role in the transfer of knowledge and expertise to enterprises, with SMEs as key recipients. Business growth and economic development across countries is dependent on a supply of relevant business related skills and the provision of such training within a national quality and accreditation framework.

4.1.3 Recommendations

In Vietnam, it has been clearly demonstrate that a high potential demand for management training by domestic private companies exists. As this Report acknowledges, the Vietnamese government has recognized the importance of vocational and management training systems to the national economy, and has established a number of policies to encourage the sector. The BDS training sector is nevertheless underdeveloped. A priority for Vietnam is, therefore, the formulation of appropriate policy and regulatory frameworks for a business environment supportive of the development of education and training services. Access to such services is a necessary resource for all enterprises.

It will be necessary to issue more detailed and specific guiding documents for better implementation of solutions. Financial solutions and solutions for encouragement of non-State investment should be afforded due attention.

Most respondents agreed that the Government should provide details supporting the initiative policies in Decision 48/2002/QĐ-TTg. The target of the socialization of training activities will be hard to reach unless strong and clear legal instruments defining specific tools and initiatives are set forth.

4.2 Administration

4.2.1 The Current Situation

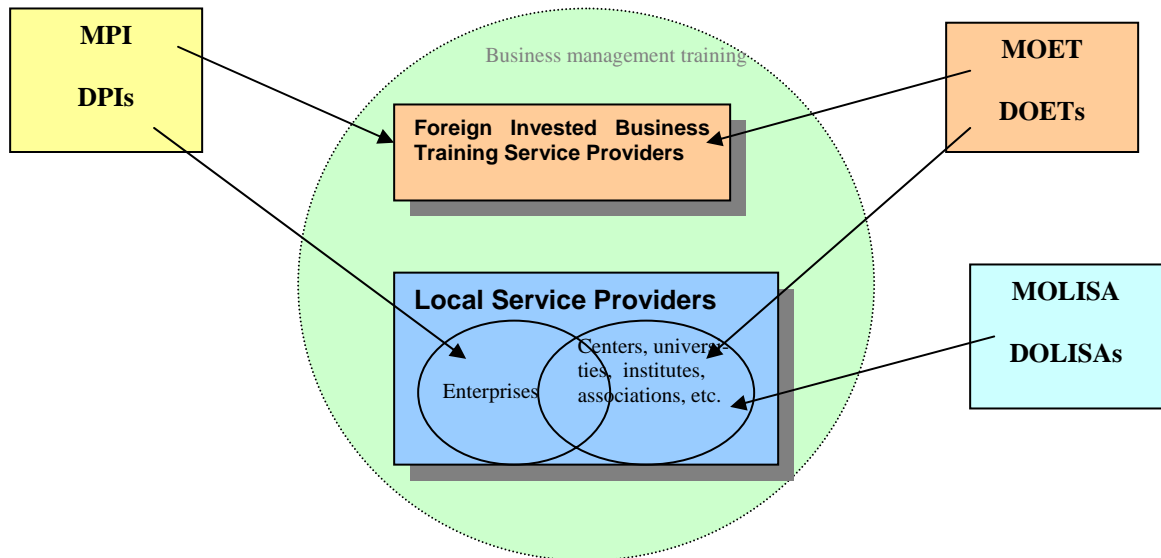
Overlap Between The MOLISA And The MOET's Functions In Management Of Vocational Training Schools

Presently, there exist various agencies involved in the management of the training sector in Vietnam. According to Government Decree 43/2000/ND-CP on detailing and guiding the implementation of some articles of the Law on Education, these agencies are MOET and MOLISA (represented by the General Department for Vocational Training). MOET is responsible for managing professional secondary schools, while MOLISA is in charge of vocational training units, which include vocational training schools and centers. Under these legal documents both MOET and MOLISA are in charge of the management of vocational training schools.

However, the prevailing legal documents do not clearly separate the management functions of the MOET and the MOLISA in relation to vocational training schools. As a consequence, the improvement of the vocational training school network is inadequately invested and managed.

Unclear Management Of Business Management Training

The prevailing legal framework is complicated, and inadequately defines the management system for the business management-training sector. Some respondents argue that Vietnam currently has no system for nurturing business management training activities, particularly business management training. The management agencies differentiate not only between foreign and locally invested providers, but also between domestic providers themselves. While domestic enterprises are subject to the management of both the DPIs and the DOETs (investments license granted by the DPIs and permits for training operations granted by the DOETs are required for certain business training activities), domestic non-enterprise providers (i.e. centers, institutes, associations) are under the sole management of the MOET, DOETs, and/or the MOLISA. For foreign invested providers, management bodies include the MPI and the MOET, respectively granting the investment licenses and training permits needed for these enterprises to commence operation. The structure of the current business management training activities system can be reflected in the following diagram:



The above structure is problematic. There is no State agency overseeing the development of business management training activities. Business management training is crucial to the development of enterprises and to the national knowledge-oriented economy. However, little time is spent by State agencies in management, and no single agency is the primary governmental entity in charge of management. This has resulted in undeveloped business management training facilities in Vietnam.

4.2.2 International Practices And Trends

The quality of both the training “product” and the training “provider” is the key issue of best practice in structuring an appropriate framework for the development of training services for Vietnam’s enterprises. In addition, there is a need for enhanced awareness of the need for better business education and training that will enable Vietnamese enterprises to compete efficiently in a rapidly changing global economy where knowledge is a high-value commodity.

There is a demonstrated need in Vietnam for the range, quality, and quantity of training services to be increased. The removal of unnecessary regulatory barriers that discourage entry and thus limit competition is a key factor. Outsourcing – from both government departments and business enterprises to private sector training service providers – is also important but is dependent on high quality training products and providers for these services.

On a wider policy level, academic institutions should be encouraged to provide degree and other programs that strengthen academic education in business and management.

Regulatory hurdles should not be placed in the path of private sector enterprises that wish to develop and offer training services. However there are international trends bringing business and vocational training into a coordinated national strategy in which the priorities of governments and the diverse needs of industry, enterprises, and individuals are united in a coordinated system of standards, accreditation, and nationally recognized qualifications. A national training framework for business services and vocational education and training incorporates national competency standards that define the competencies required for effective performance in the workplace. A competency comprises the specification of knowledge and skill, and the application of that knowledge and skill, at an industry level to the standard of performance required in employment. Competency standards can be either industry or enterprise based. Delivery of training packages by registered training organizations lead to nationally recognized qualifications.

The key components of the Australian national training framework are training packages delivered by registered training organizations.

Training packages are sets of nationally endorsed standards and qualifications for recognizing and assessing individual's skills. They provide an integrated set of nationally endorsed competency standards, assessment guidelines, and qualifications for a specific industry, sector, or enterprise. A training package describes the skills and knowledge needed to perform effectively in the workplace. However, a training package is not a curriculum and does not prescribe how training should take place—these must be developed by the training provider. Training packages are developed by national industry training advisory bodies, qualified to meet the training needs of specific industries or sectors. They comprise three core components – competency standards, assessment guidelines, and qualifications. To obtain national endorsement of a training package, developers must provide evidence of extensive consultation and support within an industry or industry sector. Where there is no relevant training package, qualification courses can be accredited if they justify the standards prescribed.

Another component is the delivery of training under a framework for quality assurance for both public and private trainers. A training organization must be registered if it wants to issue nationally recognized qualifications and deliver and/or assess associated training. While training providers do not have to be registered, a registered trainer has a competitive edge in the market because it can issue nationally recognized qualifications highly valued by employers and career seekers.

4.2.3 Recommendations

Most respondents to the Report's survey agreed that the Government should give oversight of business management training to one body. Most suggested the MOET or the MPI. The MOET would be responsible for proposing and enacting policies, and implementing legal provisions and policies. As noted above, the functions of the MOLISA and the MOET should be clearly separated.

4.3 Regulatory Impediments

4.3.1 The Current Situation

Unclear And Complicated Provisions On Establishment

Vague Provisions

It could be said that the conditions for establishing a vocational training school or center provided by the Government in Decree 02/2001/ND-CP and its guiding documents are neither transparent nor specific enough. As stipulated in Article 4 of Decree 02/2001/ND-CP, to establish a public, semi-public or privately founded vocational training unit, an organization must meet the following conditions:

- Possession of facilities for methodology and practice training equipment and the means to ensure registered training quality; conditions ensuring labor safety and hygiene for trainees;
- Teachers who meet the standard skills as stipulated in Article 67 of Law on Education;
- Vocational training programs in accordance with the principles on vocational training programs provided by the MOLISA;
- Textbooks in accordance with targets and contents of vocational training;

- Capital and assets to ensure training activities.

Under this Article, the MOLISA is assigned the role of providing the principles for construction and organization of short and long-term training programs for vocational training units' recruitment and the improvement of the skills of vocational training teachers. However, the MOLISA has not yet issued detailed guidelines for implementing the prescribed conditions. The provisions of Decree 02/2001/ND-CP are not specific and provide little guidance for the related authorities to assess whether or not applicants for vocational training school establishment satisfy the requirements.

Almost all training service providers agreed that the existing legal provisions are not specific. They encountered difficulties in the preparation of their application dossier for the establishment of vocational training schools/units. Even the authorities lack a sufficient legal framework and objective standards necessary for the assessment and appraisal of application dossiers.

Conflict Provisions

For foreign invested vocational training units, Article 6 of Decree 02/2001/ND-CP stipulates that the establishment of foreign invested vocational units shall be in compliance with the Law on Foreign Investment in Vietnam (i.e. under the form of joint venture, 100 percent foreign invested, or business cooperation contract). Article 6 of Decree 02/2001/ND-CP further requires that foreign invested vocational training units register with the MOLISA. Decree 02/2001/ND-CP sets out no further details on procedures and document requirements for the registration of operation with the MOLISA. It is likely that these requirements do not accord with the principles of the Law on Foreign Investment in Vietnam, as foreign investors only need investment licenses for the establishment of vocational training units. Foreign investors and enterprises established under the investment licenses should be entitled to do business as stated in the investment licenses. They do not need to register operations with any other agencies.

The conditions for establishment of vocational training units are also different in some legal documents. For example, Clause 1, Article 18 of Decree 43/2000/ND-CP stipulates that a school shall be considered to be established if it has a proposal that ensures the following conditions:

- Conformity with the national schools network;
- Training targets, contents, plans, and size conforming to the development orientation of relevant training levels and standards;
- Sufficient conditions for management, teachers, and financial and technical facilities as required by the MOET, the MOLISA, and the MOF.

However, Article 5 of Decision 39/2001/QD-BGD&DT dated 28 August 2001 promulgating the regulations on organization and operation of non-State schools simply requires that a non-State school be considered established if it ensures sufficient conditions as provided for in the relevant School's Charter. Meanwhile, the standard Charter of vocational training school has not been issued yet.

It therefore could be concluded that the conditions for a vocational training school establishment are too difficult, the procedures and conditions for the establishment are not clear and criteria for the establishment are too high. Regulations and legal documents governing vocational training schools and centers are vague and contradictory... **Those, together with other problems, are limiting the entry into market of training service providers, especially those of the private sector.**

No Legal Provision On Trainees' Rights

Trainees are very important stakeholders in the training service market. However, current laws are deficient in relation to recognizing and protecting trainees' rights. Article 75 of Education Law provides some rights. These rights include:

- Non-discrimination by schools;
- Full prior disclosure regarding training services;
- Permission to use equipment and facilities for training activities;
- To directly and indirectly make suggestions regarding their lawful rights and benefits.

Trainees have the right to ensure they are provided high quality services, which are likely to lead to a suitable job after training. Limited assurances in this regard are an important factor in the hesitancy of individuals to consider training services.

Almost all respondents share our view that trainees have few choices. They are trained with low expectations for finding a suitable job in the future.

Limitation Of Expenses For Use Of Training Services

When stipulating reasonable expenses deductible from incomes for calculation of corporate income tax, Section B.III.4 of Circular 18/2002/TT-BTC dated 20 February 2002 provides that expenses used for education and training must not exceed 130 percent of the standard spending levels set by the State. Almost all respondents were not aware that State spending standard levels were regulated.

This provision discourages enterprises that would like to use training services. In addition, enterprises using training services from universities/institutions find it difficult to collect appropriate invoices for the deduction of expenses from their taxable income. Almost all universities/institutions issue sealed invoices for tuition fees. Tax authorities always require red invoices for the deduction of tuition fees from taxable income, but few universities/institutions have registered for red invoices.

4.3.2 International Practices And Trends

International best practice in developed countries regarding the circumstances noted above is that there should exist no regulatory or administrative impediments to the provision of business training services by service providers. Training providers may choose to participate in a national accreditation scheme that will impose clearly defined obligations, but this is not a requirement of or a prerequisite to providing such services. Specific regulatory protection for trainees is not a common policy, the protection for trainees simply being a matter for general contract law or fair trading laws of general application (such as Australia's laws prohibiting misleading or deceptive conduct in business). Similarly, specific provisions relating to limits on deductions for training expenditures are not found in developed countries, the deductibility of such expenditure being governed by normal tax laws.

4.3.3 Recommendations

All service providers in our interviews agreed that the current provisions on the requirements and procedures for establishment of vocational training units are unclear and complicated. Some of our respondents attempted to establish vocational training units but did not succeed due to burdensome and unreasonable procedures. The State agencies did not have regulatory criteria for appraisal, but required applicants to have satisfactory facilities (i.e. land, office, equipment, etc.) before submission of an application dossier. Some respondents complained that there were no guar-

antees that State agencies would permit establishment of a unit, even after investment in facilities needed to meet the current requirements. It is, therefore, strongly recommended that the Government, MOET, and relevant bodies review the existing criteria for vocational training unit establishment and revise them towards simplification.

Ultimately, as noted above, more comprehensive provisions on trainees' rights should be provided and the limitation on expenses for use of training services should be removed.

PART F. CONCLUSIONS AND RECOMMENDATIONS

1. GENERAL ASSESSMENT

Notwithstanding the limitations and constraints regarding perception, the economic environment, and the technical infrastructure (all of which clearly do adversely affect the development of BDS in Vietnam), the constraints from the legal environment—including state policies, legal instruments, and approach to law implementation—are the most significant factors hindering the development of Vietnam’s BDS market.

The most notable legal constraint on BDS is that subordinate legal instruments of the Enterprise Law, which have a vital impact on businesses, are not yet complete and have not been adequately implemented by responsible authorities. The State and the Government have not paid sufficient attention to completing the policy and legal framework for BDS development.

Vietnam’s IP system is undergoing rapid development as a consequence of globalization via the nation’s international IP treaties and agreements. Certain impediments to local IP service-related legal provisions still remain, and need to be addressed to keep pace with international requirements and trends. According to the study, the two most important issues impacting the current IP service market are: (i) the low level of public awareness with respect to IPR protection and the roles of IP services; and (ii) limitations restricting the establishment of IP service providers.

As with IP services, the legal framework for A&A and training services is still in the process of being completed. Current provisions contain numerous inadequacies, resulting in an undeveloped and unprofessional market in Vietnam. The most prominent issues in A&A services are (1) the incomplete state and complexity of A&A and professional standards, and (2) the low level of State recognition with respect to the validity of auditing reports.

Last but not least, training services, in general, and management training services, in particular, face special impediments to their development because of inadequate policies and unclear management mechanisms.

As such, it can be stated that Vietnam still has much to do to refine its legal environment supporting support of the development of BDS, in general, and the three service groups, in particular. Over the next decade, greater efforts should be made.

2. SUMMARY OF KEY RECOMMENDATIONS

This Report briefly summarized, in Part B, the key constraints on BDS, in general, and the specific three service groups of IP, A&A and training, in particular. The following provides a summary of salient recommendations for improving the legal framework for BDS generally and each service groups to create a favorable legal environment for BDS service market development.

2.1 Common BDS

2.1.1 Changing Awareness And Policies For BDS

The MPI, in cooperation with the MOT and the MOST, should assist the Government in developing policies and carrying out activities to raise public awareness of BDS. Actions should be immediately taken in 2004.

2.1.2 Revising The Legal System And Eliminating Unreasonable Barriers That Prevent Enterprises From Entering The Market

The MOF should revise and eliminate unreasonable constraints on expenditures for using outside services. It should eliminate or revise unclear stipulations that give excessive discretion to tax administration officers regarding "item" and "level" expenditures. Immediate action is required.

The MOF should propose to the Government and the NA a zero percent VAT rate on some BDS, and low income tax rates on BDS suppliers. This proposal should be made immediately and the change should be effective with 2005.

In 2005, the Government should consider revising Decree 87/2002/ND-CP with the goal of removing the requirement for consultants to practice via consulting organizations.

The MOJ/MPI should issue, or propose that the Government issue, guidelines for the granting of legal service business certificates, acknowledging that anyone with sufficient knowledge and experience on legal aspects should have the right to provide legal services.

2.1.3 Improving And Changing Support Mechanisms

In general, the legal environment should assist the Government in strengthening support for the development of BDS. It should encourage BDS suppliers to enhance their capability, and enhance the SOE equitization process. Immediate action is required.

The MPI should draft and the Government should issue a Decree detailing the State's support and management of BDS development in 2004.

2.1.4 Improving The Roles Of Professional Associations

All related business and professional associations should be required to immediately formulate their own principles or regulations on professional standards and business ethics for their members.

2.2 IP Services

2.2.1 IP related policies

The MOST should have the primary role in assisting the Government and the Party to develop IP policies. Special attention should be paid to policies raising public awareness. Proposals should be considered in 2004 or early 2005, ensuring inclusion in the next five and ten year period plans. VIPA should also take part in this mission.

2.2.2 IP related state management

The MOST should be active in proposing to the Government mechanisms for the improvement of the NOIP's internal management. This should be initiated in 2004 and completed by the end of 2005.

The Government should, as soon as possible, return the function of trademark management to the NOIP.

2.2.3 IP service providers

The MOST should be the body responsible for proposing to the Government measures to eliminate unreasonable conditions on IP service providers. It should also create more open doors for business to enter the market. This should be considered in 2004. The input of the VIPA is also valuable to this process.

2.2.4 IP enforcement

All related agencies in IP enforcement should be active in improvement of the system, but the MOST should have the primary role in this process. Special attention should be paid to improving the education and knowledge of State officials and to changing the mechanism of coordination. This initiative should be immediately and promptly carried out.

2.2.5 Technology Transfer And Franchising

The MOST should have the ultimate role in making proposals to the Government for the gradual removal of the State's interference in technology transfer. It is imperative to recognize franchising in legal provisions. Initially, the MOST should simplify procedures for registration/approval of franchising agreement. Then the MOST and the MOT should be jointly active in drafting unique legal provisions on franchising, commencing in 2005.

2.3 A&A Services

2.3.1 A&A standards

The MOF should immediately complete the drafting of A&A standards. The VAA should take part in advising the MOF during the process of drafting A&A standards.

2.3.2 Professional Bodies

The VAA should develop its role, strive for independence, and be active in advising the MOF and the Government on the management of the A&A profession. The MOF should propose, and the Government should provide, more autonomy and responsibility to the VAA in the drafting of professional standards. This should begin immediately in 2004.

2.3.3 Regulatory Impediments

The MOF, the MPI, the SBV, and the SSC should all be concerned with impediments to the provision of A&A services. They should make proposals to the Government for revoking the current barriers in 2004.

The MOF should clarify the issue of the ceiling price for auditing service and revise related circulars/decisions. This should be completed within 2004 also.

2.3.4 Actual Implementation

No body has a more vital role in changing the current situation than the MOF. This may not be a short-term process. The first step must be that the harassment by officials with respect to enterprises should be immediately strictly forbidden. Then prevailing laws, decrees, circulars and decisions relating to accounting and tax finalization should be gradually revised to respect financial figures properly accounted for by enterprises. Skills of officials and mechanisms for inspecting financial reports should be improved. In parallel, the roles of auditing services should be strength-

ened. Audited financial reports should be accepted and recognized by tax authorities. The Government should dispatch strong directives to related agencies and ministries to give effect to these initiatives.

2.4 Training Services

2.4.1 Policies

After commencing with drafting policies for the next five-year period (i.e. 2005-2010), the Prime Minister should detail the initiative policies set forth in Decision 48/2002/QD-TTg. Special attention should be paid to the policies for improvement of the current business management training system.

2.4.2 Administration

The Government should immediately clarify the management functions of the MOET and the MOLISA. More importantly, it should confer the functions of overseeing the business management training sector on the MPI so that the MPI will have legal authority to prepare and expand programs for the development of business management training systems. It is recommended that Government action be conducted in 2004.

The MOET should improve the current business administration training school/university system. Along with the present private business administration training universities, and faculty belonging to State-owned universities, the MOET should consider establishing a State-owned business administration training university by 2006.

The MOET should also issue more open policies on cooperation with foreign counterparts in business management training. This would help local training service organizations access modern technology, know-how, and knowledge.

2.4.3 Regulatory Impediments

The MOET and the MOLISA should review the current regulations on conditions and procedures for the establishment of training service organizations, and make proposals to the Government for new regulations that are clearer, simpler, and more transparent. This should be conducted as soon as possible.

The MOF should revise Circular 18/2002/TT-BTC to revoke the limitation of expenditures for training services within the first half of 2004.