



REPORT

ACTIVITY CODE:

ICB-15

“Revision of the Commercial Law of the Socialist Republic of Viet Nam”

Report

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1. SUMMARY OF THE REPORT

The point of departure of this study is Section IV of the Commercial Code in the Socialist Republic of Viet Nam (hereafter Viet Nam). It has four Programmes (See Arts 88 to 140):² i) Sales Promotion, ii) Commercial Advertising, iii) Display and Introduction of Goods and Services and iv) Trade Fairs and Exhibitions. Other pieces of legislation complement the regulations in the Commercial Code.

First, we describe each of the programmes (Section 2.1, 3.1, and Annex 1), to be classified in two categories: a) those controlling the behaviour of traders, and b) those making traders stronger (See section 2.2).

The report describes trade promotion, both in Viet Nam and abroad. When we saw an opportunity, we inserted a recommendation in a box. There are 26 recommendations, all deriving from the following:

- **Finding:** Three out of four programmes in Section IV of the Commercial Code control the behaviour of traders (*i.e.*, sales promotion, commercial advertising, and display and introduction of goods and services), and one makes traders stronger (*i.e.*, trade fairs and exhibitions).
- **Main Recommendation:** Adding more resources to activities making traders (and investors) stronger. Some of the resources currently allocated to control traders might be transferred to programmes making traders stronger (in addition to developing new resources).

a) How to Decide the Proper Level of Resources Allocated to Controlling Traders

As stated in Section 3, Viet Nam as a State has the right to decide on the values it wants to protect (we make no recommendation on this issue). Table 3 distils the values protected by the provisions in Section IV of the Commercial Code: consumer protection, health, environment, IP, tax revenue, among others. Then, we suggest searching the best vehicles to protect those values, keeping simplicity. For example, the programmes in section IV could be commingled into one (having one set of rules for all programmes, avoiding the need for harmonization across the programmes), or entrusting the protection of the value to specialized legislation (such as protecting consumers through the legislation on consumer protection).

Later we address the degrees of control available to Viet Nam. The higher the control, the more costly the programme is for traders, consumers and the competent authority. But the lower the control, the more exceptions would be allowed. We recommend that the level of control (hence cost of compliance) should be calibrated with the value protected. For example, pre-notification could be effective but costly, whereas a system based on reporting by the affected party (*e.g.*, consumers) would be less costly; but the authority would only address those cases reported by consumers (less efficiency). So, the degree of control should be decided based on the value to be protected (protecting human health may not be the same as protecting consumers).

² For an English version of the Commercial Law of Viet Nam, please see http://vbqpgl.moj.gov.vn/vbpg/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=5497 (consulted in March 2014).

We also make recommendations on specific provisions, such as those relating to the right to contract; the maximum discount permitted (50%); and the prohibited goods.

b) What Programmes Could Make Traders (and Investors) Stronger?

Section 4 addresses *programmes to make traders stronger* as implemented by other countries. Some examples might inspire Viet Nam. But we believe that the most important recommendation is that access to those programmes should be as simple and as reliable as possible.

We start with the *programmes supporting the production of goods and services*. State aids are widely used in creative forms (but they are subject to WTO rules on subsidies). Also, we found some programmes to ensure availability of key raw materials. Finally, both developed and developing countries coordinate efforts amongst government, universities and the private sector, such as those relating to research and development or joint production.

Later we address *trade fairs and exhibitions*, finding three main areas: domestic trade fairs; organization of trade fairs and pavilions; and access to national pavilions.

The *supply chain for goods and services* follows. Market and statistical information could be disseminated by trade and investment promotion agencies. They can also develop programmes to finance exports and secure payment (servicing individual transactions). Also, we found efficient examples facilitating transportation and export procedures; addressing contracts; arbitration; and promoting investment (local and foreign). Finally, trade and investment agencies can play a key role on policy advocacy, improving the trade environment in Viet Nam and preventing investment disputes under BITs.

c) Final Remarks

Trade and investment promotion is key for development. The rationale is simple: the more successful transactions a company has the stronger the company; the more stronger companies an industry has, the stronger the industry; the more strong industries a country has, the stronger the economy of the country.

Countrywide economic development is mainly focused on macroeconomic approaches. This could leave regions, industries and companies unattended. Trade and investment promotion agencies can play a key role in attending those regions, industries and companies, strengthening the economy with a bottom-up approach.

The importance of these programmes should not be underestimated.

2. THE FOUR PROGRAMMES IN VIET NAM'S COMMERCIAL LAW

2.1 THE PROGRAMMES IN A NUTSHELL

Table 1 below presents an extreme overview of the legal instruments in Viet Nam regulating trade promotion. Certainly this list is not exclusive, nor fully descriptive.

Table 1. Extreme Summary of the Main Legal Instruments in Viet Nam

Instrument	Extreme Summary
a) Commercial Law 2005 (chapter IV, articles 88-140)	Sets up the rules for the four Programmes: <ul style="list-style-type: none"> • Sales promotion • Commercial advertising • Display and introduction of goods and services • Trade fairs and exhibitions
b) Decree 37/2006/ND-CP, Decree 68/2009/ND-CP, Circular 07/2007/TTLT-BTM-BTC	Provides further details of the Programmes, setting up competent authorities, rules on registration, notification and penalties. Determines the forms to be used in notifications.
c) Decision 72/2010/QD-TTg [English version was not found]	Provides the framework for Programmes promoting trade, investment and tourism (<i>i.e.</i> , timetable, suggestions, approvals, management, implementation, financing, and reporting of the Programmes).
d) Decision 984/QD-BCT [English version was not found]	Develops and implements the national brand Programme, along with the Vietnamese logo.
e) Decree 100/2011/ND-CP and Circular 06/2012/TT-BCT	Sets up the representative offices of foreign trade promotion organizations in Viet Nam (<i>i.e.</i> , establishment, administration, penalties, and reports, among others).
f) Decree 52/2013/ND-CP, Circular 12/2013/TT-BCT12/2013/TT-BCT	Sets up advertisement methods, standards of accuracy of information, prohibitions, notification, and penalties, among others.

The four programmes in section IV of the Commercial Code can be summarized as follows:

- **Sales Promotion** is defined in Art 88 of the Commercial Code as the “... activities of... traders to promote... the sale of goods or the provision of services...” They may offer “... certain benefits to the consumers.”
- **Commercial advertising** is defined in the Commercial Code (Art 102) as “... commercial promotion activities aimed at introducing to customers their goods and services...”
- **Display and introduction of goods and services** are defined in the Commercial Code (Art 117) as “... commercial promotion activities... to introduce... goods and/or services to customers.”
- **Trade fairs and exhibitions** are defined in the commercial code as “... activities conducted in a concentrated manner at particular locations and for given periods of time to display and introduce their goods and/or services...” with the aim of increasing sales (Art 129).

Annex 1 below contains a more comprehensive summary of the four programmes.

2.2 TWO APPROACHES IN VIET NAM

2.2.1 Controlling the Behaviour of Traders

Many of the provisions in Section IV of the Commercial Code limit the behaviour of traders when engaging in activities to promote their goods or services. For example, a trader has to notify the competent authority in advance if it wishes to discount the price of its goods. *In this report, we will refer to this kind of activity as State actions controlling the behaviour of traders.*

Selected values such as the environment, health or consumer protection (to cite a few) can be protected through regulations controlling the behaviour of traders. Once the value is selected by the regulating State, a subsequent question is to determine the level of protection, such as zero tolerance or the allowance of some exceptions. Also, the proper mechanism for implementation has to be designed and implemented. The stricter the programme is, the larger the cost for the trade community that needs to comply with it. So a balance is advisable. This line of idea is developed in section 3 below.

2.2.2 Making Traders Stronger

A recent study by UNCTAD took trade promotion as meaning activities relating “... to the promotion and facilitation of exports.”³ This may include various actions by the State, such as planning a strategy, supporting traders, monitoring trends, organizing training workshops and providing incentives, among other things. We would add that trade and investment promotion seeks the elimination and reduction of obstacles faced by traders and provides incentives for them to grow. *In this report, we will refer to this kind of activity as State actions making traders stronger.*

There are several benefits in expanding trade and investment—such as the creation of jobs, the growth of the internal market, or technological development. On the one hand, the expansion of exports and imports provides benefits for the domestic market. For example, export opportunities allow domestic traders to expand the availability of potential clients for their goods or services beyond national consumption. Also, the expansion of certain imports could benefit local producers by providing access to essential inputs for downstream production, which could turn into exports. On the other hand, investment (both foreign and local direct investment) creates new players for trade in goods and services in the market at different levels: design, production, distribution, marketing, selling, and any other stage or sector that is not restricted by the law.

³ “Promoting Investment and Trade: Practices and Issues,” Investment Advisory Series A, number 4, United Nations Conference on Trade and Development, 2009. Available at www.unctad.org (consulted in March 2014).

As explained by UNCTAD, trade and investment promotion... “is motivated by market failures: circumstances under which the private sector is unable or unlikely to produce significant economic benefits to society.” For example, companies trying to expand their exports or investment abroad need key information. They need to know, for example, costs, potential business partners, available skills, taxes, key regulations, etc. Collecting this information is costly, and many companies do not have adequate resources to do so (SMEs for example). Trade and investment promotion agencies can fill those (and many other) needs, increasing the competitiveness of the traders receiving support.⁴

Recommendation 1: Revision, Creation, Implementation and Administration of Trade and Investment Programmes in Viet Nam

Viet Nam should constantly revise, create, implement and administer programmes to promote trade and investment. Such programmes are common in both developed and developing countries.

Trade and investment promotion programmes should not be underestimated. They are vehicles (operating at the micro level of companies) disseminating the benefits of the trade liberalization (operating at the macro level such as WTO or FTAs addressing entire sectors). Such programmes can be used as ladders to allow enterprises (mainly small and medium) access to the international arena.

A proper programme would help companies by increasing the number of transactions, making each transaction more reliable.

In some countries, the agency promoting trade is a private-public institution. For example, in Sweden, the Swedish Trade and Investment Council⁵ is owned in part by the business community, whereas, in Colombia, *Proexport* is an agency created with public funds in the form of a trust.⁶

Some countries have a single agency addressing trade and investment promotion such as the *Hungarian Investment and Trade Agency*. Other countries have two separate agencies, one for trade promotion and one for investment promotion such as the case of Hong Kong China with *InvestHK* to attract and retain foreign direct investment⁷ and *Hong Kong Trade Development Council for trade*.⁸ The decision to have one agency to address both trade and investment promotion, or to have two individual agencies depends on many factors perhaps the most important of which is the governmental structure.

⁴ *Idem* footnote 3, at page 4.

⁵ See <http://www.business-sweden.se/en/about-us/About-Business-Sweden> (consulted in April 2014).

⁶ See <http://www.proexport.com.co/proexport/transparencia/control-y-rendicion-cuentas> (consulted in April 2014).

⁷ See <http://www.investhk.gov.hk/about-investhk/about-us.html> (consulted in April 2014).

⁸ See <http://www.hktdc.com/mis/ahktdc/en/s/abt-hktdc-our-mission.html> (consulted in April 2014).

Recommendation 2: Coordination between the trade promotion agency and the investment promotion agency in Viet Nam

We note that Viet Nam has two agencies, one promoting trade and the other promoting investment. Both agencies should work in coordination. Even if each agency belongs to a different ministry, coordination and cooperation is fundamental, as both activities are closely linked.

- Failure and success of one agency is closely interrelated to the success or failure of the other.
- Trade and investment are closely linked. For example, investment is a service under Mode 3: Commercial presence.⁹
- Investors trade through their investments. Traders invest when they expand their premises.
- There are positive synergies when trade and investment promotion activities are coordinated. Trade promotion provides knowledge of the domestic sector, which can be used to target investors in specific sectors. Investors need suppliers, which may be connected through trade promotion activities. Local producers can export through the platforms of foreign investors.

2.3 CONTROLLING TRADERS VS MAKING TRADERS STRONGER IN SECTION IV OF THE COMMERCIAL CODE

Table 2 below classifies the four main Programmes in Section IV of the Commercial Code into two variables. The columns indicate whether the Programme applies to trade within Viet Nam (column (i)), or overseas (column (ii)). The rows indicate whether the Programme controls the behaviour of traders (row (a)) or makes traders stronger (row (b)). Three out of the four Programmes control the behaviour of traders when trading within Viet Nam. One Programme makes traders stronger when trading outside Viet Nam (with also some impact within Viet Nam).

Each of the programmes in Section IV of the Commercial Code is classified based on its objective *vis-à-vis* traders. For example, participation in trade fairs and exhibitions has been classified in row (b) *Making Traders Stronger* as the programme places traders in a better position by expanding the possibilities for sale when receiving financial support to participate in a trade fair. On the other hand, commercial advertising was classified in row (a) *Controlling Traders* as it contains rules limiting how traders may promote their goods and services (such as not providing a discount larger than 50 percent).

The classification becomes blurry when we factor in the requirements to comply with the programme; but we believe it still stands and is useful to issue a recommendation. For example, both a trader wishing to participate in a trade fair and a trader wishing to discount its products would need to previously register with the competent authority (a requirement to access the programme). But a negative response from the authority in each case has entirely different consequences. A negative reply to a request to discount its products means that such trader may not discount its products. On the other hand, a negative reply to a request for funds to participate in a trade fair means that the funds will not be provided, but the requesting trader may still individually go to the fair paying its own expenses.

⁹ See Introduction to GATS at page 3, available at http://www.wto.org/english/tratop_e/serv_e/gsintr_e.pdf (consulted in May 2014).

Table 2 Matrix of Programmes under Commercial Law

	(i) Trade within Viet Nam	(ii) Trade outside Viet Nam
(a) Controlling Traders	<ul style="list-style-type: none"> Sales promotion Commercial advertising Display and introduction of goods and services 	
(b) Making Traders Stronger		<ul style="list-style-type: none"> Trade fairs and exhibitions (this also covers domestic trade)

Recommendation 3: Balance Between Controlling Traders and Making Traders Stronger in Section IV of the Commercial Code

We recommend adding more resources to activities making traders (and investors) stronger.

- Viet Nam could transfer resources from activities controlling traders to activities making traders stronger. After going through the exercise suggested in Section 3 below, it might find some areas where the existing programmes could be simplified. Resources recovered from such simplification should be used for programmes making traders stronger.
- Viet Nam should simplify the access to programmes making traders stronger. For example, it could significantly simplify the registration procedure for trade fairs and exhibitions by using procedures similar to those applied by the *Swedish Trade and Investment Agency* (see section 4.2 below).

3. CONTROLLING THE BEHAVIOUR OF TRADERS IN SECTION IV OF THE COMMERCIAL CODE

3.1 VALUES OUTLINED IN THE COMMERCIAL CODE

Table 3 below provides the values protected as distilled from section IV of the Commercial Code. The columns provide the four specific Programmes of the Commercial Code, while the rows list the values distilled. Each quadrant provides an extract from the relevant provision of the Commercial Code in which the value is protected. For example, the quadrant in column (ii) and row (a) indicates that Art 103 provides traders with the right to advertise their products and services.

Table 3. Values Protected in the Main Legal Instruments

Programme Value Protected	(i) Sales Promotion	(ii) Commercial Advertisement	(iii) Display and Introduction	(iv) Fairs and Exhibitions
(a) Right to perform the activity	<ul style="list-style-type: none"> (Art 91, 94, 95) Traders have the right to promote sales, using their goods and services, or with other goods or services. 	<ul style="list-style-type: none"> (Art 103) Traders have the right to advertise their goods and services, or to contract with somebody else to do so. 	<ul style="list-style-type: none"> (Art 118) Traders have the right to display and introduce their goods and services, or to contract with somebody else to do so. 	<ul style="list-style-type: none"> (Art 131) Traders have the right to participate in fairs and exhibitions in the official delegation, and some have the right to organize them. Registration is

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				mandatory, followed by certification.
(b) Consumer protection	<ul style="list-style-type: none"> • (Art 97, 98) Certain information to be publicly available, along with modes of notification. • (Art 100) Forbidden to untruthfully promote sales to mislead consumers. • (Art 100) Forbidden to fail to deliver the prices or gifts as promised, or to do so improperly. 	<ul style="list-style-type: none"> • (Art 109) Forbidden to advertise comparisons of business activities of similar competitors. • (Art 109) Forbidden to advertise with untruthful information (<i>i.e.</i>, quantity, quality, price, utility, design, origin, category, packing, service mode and warranty). 	<ul style="list-style-type: none"> • (Art 123) Forbidden to display and introduce when inconsistent in a way that might mislead consumers with terms of quality, price, unit of sale, design, category, packing, warranty and any other quality standard. 	
(c) Labelling			<ul style="list-style-type: none"> • (Art 121) The activities have to comply with the relevant laws on labelling. 	
(d) Human health	<ul style="list-style-type: none"> • (Art 100) Forbidden to promote alcohol for underage persons, cigarettes, or liquors with 30° or more alcohol content.¹⁰ 	<ul style="list-style-type: none"> • (Art 109) Forbidden to advertise cigarettes or liquors with 30° or more alcohol content.¹¹ 	<ul style="list-style-type: none"> • (Art 123) Forbidden to display and introduce products detrimental to human health. 	
(e) Environmental protection	<ul style="list-style-type: none"> • (Art 100) Forbidden to promote goods of inferior quality, causing harm to the environment, human health or other public interests. 	<ul style="list-style-type: none"> • (Art 107) Advertising activities may not adversely affect the environment. 	<ul style="list-style-type: none"> • (Art 123) Forbidden to display and introduce goods harmful to the environment. 	
(f) Contractual obligations		<ul style="list-style-type: none"> • (Arts 110 to 116) Contractual obligations between traders and those providing advertising services. 	<ul style="list-style-type: none"> • (Arts 124 to 128) Contractual obligations between traders and those providing display and introduction services. 	<ul style="list-style-type: none"> • (Art 130 and 138 to 140) Contractual obligations between traders and those providing services supporting fairs and exhibitions.
(g) Customs procedures			<ul style="list-style-type: none"> • (Art 122) Provides for six-month temporary importation. 	<ul style="list-style-type: none"> • (Art 134) Provides for 30-day temporary importation.¹² • (Art 135) Provides for one-year

¹⁰ Under Art 7 to the Advertising Law, the threshold for wine is 15°.

¹¹ *Idem* at footnote 10 above.

¹² (Art 136) Temporarily imported goods may be fully imported upon payment of the relevant taxes, compliance with the applicable law, and/or authorization by the competent State agency as applicable.

				temporary exportation. ¹³
(h) Intellectual property (IP) and unfair competition	<ul style="list-style-type: none"> • (Art 100) Forbidden to promote sales for purposes of unfair competition. 	<ul style="list-style-type: none"> • (Art 108) IP can be registered. • (Art 109) Prohibited advertisement when infringing an IP right, or with the aim of unfair competition. 	<ul style="list-style-type: none"> • (Art 123) Forbidden to compare the goods and services with those from competitors. 	<ul style="list-style-type: none"> • (Art 134) Forbidden to participate with goods infringing an IP right (except for comparison with the originals)
(i) Tax revenues¹⁴	<ul style="list-style-type: none"> • (Art 94 and 100) Cap on the maximum value of goods/services for promotion and maximum discount that can be provided (50%). 			

Table 3 above presents the list of values protected, as distilled from Section IV of the Commercial Code. Note that Viet Nam, as a sovereign State, has the right to select the values it wants to protect through regulation. We make no recommendation on the values selected or to be selected. The recommendations below explore ways to improve the protection of those values and some suggest yardsticks that may be useful in designing regulations and improving their strength.

Recommendation 4: Separation of the Four Programmes

The Commercial Code (section IV) divides sales promotions into four activities. We recommend assessing whether there is a need for the four sections, or whether all activities could be regulated under a single Programme. Currently, an activity performed by a trader may fall under more than one of these Programmes (*e.g.*, discounting the price of the goods during an advertising campaign). It would be significantly simpler for a trader to address a single programme that encompasses rules on all values protected.

Recommendation 5: Horizontal Rules for the Four Programmes

The Programmes contain parallel provisions protecting the same value. For instance, row (b) in Table 3 above addresses the rules on consumer protection, indicating that such value is protected in three Programmes. The lists of elements to consider when protecting the consumers are not harmonized across the three Programmes. Furthermore, the section on trade fairs and exhibitions does not contain any rule on consumer protection. We recommend exploring whether horizontal rules applicable to all four Programmes might be a simpler design for the new version of the Commercial Code. This recommendation is closely linked with the previous recommendation.

Recommendation 6: The Commercial Code *vis-à-vis* Specific Legislation

¹³ (Art 137) Goods temporarily exported may be fully exported upon payment of the relevant taxes, authorization of the competent agency or approval by the Prime Minister as applicable (Art 137).

¹⁴ It was difficult to distil the value protected by this rule. With the information we have, we understand that the rationale behind this rule is to ensure tax revenue. But the link between the value and the rule is not clear to us.

Many of the values protected in Section IV of the Commercial Code are also addressed through specific legislation, such as the section on commercial advertising and Advertising Law 2012. Other areas that might be in the same situation are customs procedures, IP and consumer protection, among others.

We recommend measuring the value added provided by the Commercial Code (Section IV) compared with the regulation in the specific legislation. Would it not be simpler to address all the rules in a single instrument? For example, it would be simpler for the customs authorities and for traders to find all the rules relating to customs in a single instrument (*i.e.*, the customs law) rather than having special rules in each programme.

3.2 DIFFERENT DEGREES OF CONTROL

As mentioned in the previous section, Viet Nam as a State has the sovereign right to decide the values it wants to protect through regulation. Likewise, it has the sovereign right to determine the level of protection it wishes for each protected value, such as zero tolerance or the allowance of some exceptions. The stronger the level of control, however, the more costly compliance is (for both the traders involved and the competent authorities).

For example, as explained in Annex 1.1, Viet Nam has adopted the following controlling steps when protecting sales promotions: (i) pre-notification by the trader, (ii) registration by the competent authority, (iii) distribution of the registration to the relevant regional agencies, (iv) possible inspection by the competent authority that might lead to the termination of the promotion, (v) report by the trader once the Programme is completed, (vi) penalties in case of a violation of the rules.

Table 4 below provides different alternatives for controls when a State protects a value. For example, Level 1 (in the rows) represents those regulations that include all the controlling steps outlined in the previous paragraph. One example of “Level 1” of control is sales promotion in Viet Nam.

Table 4. Levels of Control

	(i) Pre- Notification	(ii) Registration	(iii) Distribution of Registration	(iv) Inspection	(v) Report	(vi) Penalties
Level 1	4	4	4	4	4	4
Level 2		4	4	4	4	4
Level 3			4	4	4	4
Level 4				4	4	4
Level 5					4	4

On the other hand, an example of “Level 4” control is found in the free trade agreement between CAFTA-DR (Dominican Republic-Central America FTA). An importer/exporter that would like to benefit from the preferential import tariff has to provide (among other things) a certificate of origin. The certificate of origin is a

document issued directly by the traders without the intervention of the competent agencies. In a nutshell, if the minimum information in the certificate of origin is satisfactorily provided, the customs authorities charge the preferential import tariff. But the competent authorities have the right to verify the importation up to five years after it has occurred, charge the MFN tariff, and apply the relevant penalties.¹⁵ There is a superficial check upon importation (filling up the certificate of origin), followed by a broader control after importation that can be triggered by the competent authority (with potential penalties).

Certainly, Table 4 does not contain a limitative list of levels of controls (*i.e.*, rows) nor a limitative list of controlling steps (*i.e.*, columns). One example of a controlling step that is not included in Table 4 is the possibility for a consumer to report a malpractice by a trader to the competent authority; in this example, the regulation might provide that such a report by the consumer triggers off a verification that can lead to penalties.

Recommendation 7: The Economic Effects of the Current Level of Control

We recommend measuring the economic effects of the level of control currently applied for the Programmes in Section IV of the Commercial Code, such as sales promotion. The assessment might be as follows:

- (i) Calculating the compliance cost incurred by a trader when setting up a sales promotion.
- (ii) Calculating the cost incurred by the competent authority when following up a sales promotion request.

Three variables could be used to calculate such costs: a) time, b) number of people employed, and b) money allocated. These variables may be valuable for cost calculation by both traders and the authorities when dealing with pre-notification, registration, and so on.

Once the cost is calculated, Viet Nam would be in a better position to decide whether or not to recalibrate the level of control in the protection of a given value. For example, once it distils the value protected in the cap on 50 percent maximum discount (ensuring tax revenue, as we understand – see Table 3. Values Protected in the Main Legal Instruments) it might want to review to what extent it wished to maintain the protection of that value in the light of the cost of compliance. Alternatively, it could recalibrate the level of control and reallocate the resources (or part of those resources) towards new programmes making traders stronger (and in the long term expand tax revenues).

3.3 RIGHT TO CONTRACT AND TO ACT

Many legal systems recognize the freedom of contract: what the parties have lawfully agreed upon has the effect of law as between them.¹⁶ This freedom of contract is limited by what the law prohibits. Schwenzer *et al* have described the balance between the freedom of contract and the legal limitations as follows:

¹⁵ See Arts 4.15, 416, 4.19 and 4.20 of the CAFTA-DR available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> (consulted in April 2014).

¹⁶ See for example Art 1134 of the French Civil Code, and Constitutions of countries like Germany (Art 2 of Basic Law), or Turkey (Art 48).

Freedom of contract encompasses several aspects. First, it means that the parties are free to enter into contracts or not to enter into contracts at all. Secondly, they are free to choose with whom they contract. Thirdly, and most importantly, they may shape the content of their contract—this includes the liberty to formulate a species of contract not necessarily described in statute or to mix and match from different and already recognized categories of contracts. Fourthly, freedom of contract means freedom from the requirement of form, including the freedom to include form requirements according to the particular desires of the parties. Finally, the parties are free to alter or terminate their contract.

Naturally, this freedom is not unlimited. All legal systems reserve the right to deny validity to contracts or individual clauses which are not tolerated by the frameworks set by the mandatory rules set by the respective legal systems [footnote omitted]. The freedom to enter or not to enter into a contract finds its limits in many areas of the law... The sheer number of mandatory rules will greatly depend on the political system of the country... [The author provides an illustrative list of limitations inserted in various pieces of legislation, such as: State or other monopolies of essential goods or services (such as water supplies); minimum/maximum prices set by the State; antitrust legislation; validity of the contract or clauses; capacity to contract; mistake and error, fraud and duress; illegality and immorality; excessive benefits and unfair advantages; form requirements; among others.]¹⁷

The authors suggest that in many legal systems there is a freedom of contract, which is limited by what the law prohibits. Freedom of contract includes the possibility for traders to perform the activities themselves or contract with other traders, unless the law prohibits those activities or those contracts. So, under the freedom of contract, a trader in association with other traders (or alone) is entitled to perform all aspects of trade as long as no legal prohibition exists.

Recommendation 8: Right to Contract and Right to Act

We recommend assessing whether the current legal system in Viet Nam has incorporated the concept of freedom of contract. If so, to re-evaluate whether Section IV of the Commercial Code needs provisions on the right to perform the activity (*i.e.*, row (a) in Table 3 above) or contractual obligations (*i.e.*, row (f) in Table 3 above). It might be the case that the general rules on contracts in Viet Nam already cover those provisions. If this is the case, the role of the Commercial Law should be to set out the acts/contracts/clauses that are prohibited by the law in light of the protection of specific values.

3.4 MAXIMUM BUDGET FOR DISCOUNTS AND GIFTS

We found two ceilings on the budget a trader can use for trade promotion (see Annex I below).

- A gift (good or service) provided to promote sales may not exceed 50 per cent of the value of the good or service promoted: The use of coupons follows this rule (Art 92 of the Commercial Code and Arts 5 and 10 of Decree No. 37/2006/ND-CP)
- A discount on a good or service may not exceed 50 per cent of the price of the discounted good or service (Art 92 of the Commercial Code and Arts 6 and 9 of Decree No. 37/2006/ND-CP)¹⁸

¹⁷ See Ingeborg Schwenzer, Pascal Hachem, and Christopher Kee, *Global Sales and Contract Law*, Oxford University Press (2012), para. 4.47 to 4.50, and 4.55.

¹⁸ A similar ceiling for tax purposes has been found, and is briefly addressed in footnote 80 below.

Recommendation 9: Maximum Budget for Discounts and Gifts

We recommend assessing the cost of having these rules and the cost of compliance with them and measuring that cost in light of the values they protect. The cost can be calculated using the following variables:

- (i) The cost for consumers in having a cap on the maximum benefit they might get in promotions (gifts or price discount), or having few discounts/gifts opportunities.
- (ii) The cost for traders in providing all the inputs required by those rules. It might be the case that traders are less inclined to make discounts if the cost of compliance with the rules is high.
- (iii) The cost for the competent authority in following up all the activities on trade promotion.

Our recommendation is to determine whether the limitations on consumers and the burden on the competent authorities and traders are worth the benefits obtained by safeguarding the value protected under these rules (tax revenue if that is the case).

3.5 LIST OF PROHIBITED GOODS

Viet Nam's legal framework provides a list of prohibited goods and acts relating to trade promotion (see Table 3. Values Protected in the Main Legal Instruments, row d, and Annex I). The lists in the four Programmes are not harmonized. We make recommendations on two items.

a) Promoting cigarettes (including their use as promotion), or advertising cigarettes (Commercial Code Arts 100 and 109).

The government of Australia has enacted legislation on plain packaging. It prohibits the use of logos, brand imagery, and promotional text on tobacco products and packaging, and includes restrictions on the colour, size, format and materials of packaging, as well as the appearance of brand and variant names. It includes new and expanded health warnings required to appear on all tobacco retail packaging.¹⁹

Australia has been taken to international tribunals. First, Philip Morris International has initiated investment arbitration under the Bilateral Investment Treaty (BIT) between Australia and Hong Kong China. According to the complainant, it is entitled to a large payment of damages, as Australia violated its obligations under the BIT relating to:

- Unlawful expropriation (Art 6(1))
- Fair and equitable treatment (Art 2(2))
- Unreasonable impairment of investments (Art 2(2))
- Protection and security (Art 2(2))
- Breach of international law on IP (TRIPS, Paris Convention and TBT).²⁰

¹⁹ See information from Australia's Department of Health at <https://www.health.gov.au/internet/main/publishing.nsf/Content/ictstpa> (consulted in April 2014).

²⁰ See information provided by PMI International at http://www.pmi.com/eng/media_center/press_releases/documents/20111121_australia_plain_packaging_lawsuit.pdf, and the Permanent Court of Arbitration at http://www.pca-cpa.org/showpage.asp?pag_id=1494. The text of the BIT between Hong Kong China and

Secondly, Indonesia (DS467), Cuba (DS458), Dominican Republic (DS441), Honduras (DS435), and Ukraine (DS434) have taken Australia to the WTO courts claiming WTO violation through its plain packaging legislation. Although each case has its own claims, the main ones include national treatment, more trade restrictive than necessary, and various provisions on intellectual property (Paris Convention, national treatment, protectable subject matter, restriction of trademark and diminishment of GIs), among other things. The panel has not been established yet, so public information on the case is limited.²¹

Recommendation 10: Promoting and Advertising Cigarettes

The restrictions on promotion and advertisement of cigarettes in Viet Nam are, at first sight, significantly lighter than those applied by Australia. But, both measures restrict sales promotion of tobacco. Neither of the two tribunals (WTO and investment arbitration) has issued a ruling yet.

We recommend monitoring the evolution of Australia's disputes in both *fora*. Also, we recommend assessing Viet Nam's restrictions in light of its international law obligations under WTO and its BITs.

b) Promoting liquors with 30% or more alcohol content (including use of those products as promotion), or advertising those products (Commercial Code Arts 100 and 109)

Under WTO law, some specific differential treatment in domestic laws based on the level of alcohol content has been found to violate national treatment (Art III of the GATT); the WTO courts have found *de facto* violations²² in cases where the domestic liquors with low alcohol content pay a lower tax rate than the imported like products (or directly competitive products) with high alcohol content. See for example *Japan - Taxes on Alcoholic Beverages* (DS8, 10, 11), and *Chile - Taxes on Alcoholic Beverages* (DS87, 110). There are similar findings when tax differences are made based on the ingredients of the spirits rather than the content of alcohol in *Philippines - Taxes on Distilled Spirits* (DS396, 403). Finally, *Korea - Taxes on Alcoholic Beverages* (DS75, 84) used a hybrid system of tax categorization and was found to be in violation.

Australia may be found at <http://investmentpolicyhub.unctad.org/IIA/country/11/treaty/207> (consulted in April 2014).

²¹ See information from the WTO dispute settlement cases at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (consulted in April 2014).

²² As explained by WTO secretariat in training materials, a measure discriminates *de jure* when it is clear from the wording of the legal instrument that it provides an advantage to a domestic product, without extending such advantage to like products from a WTO Member. When the discrimination does not appear on the text or face of the legal instrument, it can still be *de facto*, or in practice, discriminatory. *De facto* discrimination occurs when an apparently neutral legal instrument, is in effect or in fact, discriminatory. To establish *de facto* discrimination, all the facts relating to the application of the measure must be reviewed. See module 2 on Trade in Goods at <https://etraining.wto.org/> (consulted in June 2014).

Note that *de facto* violation of national treatment has also been found in non-tax measures (*Mexico – Soft Drinks* (DS308) and *US – Tuna* (DS381)).²³ Also, Art 100 and 109 of the Commercial Code constitute non-tax measures relating to trade promotion of alcohol. In principle, the findings in the cited jurisprudence (applicable to tax measures) may be transposed to non-tax measures, such as those under our scrutiny.

The legal test on national treatment under WTO law depends on the subject matter (*e.g.*, goods, tax and non tax measures; services; or intellectual property). But, generally speaking there are three baskets: i) whether the products/services/IP treatment are like/similar; ii) whether the treatment of local product etc. compared with its foreign equivalent is discriminatory (such as less favourable treatment); and iii) whether the issue falls under the rules of any specific subject (*e.g.*, intellectual property, technical regulation under TBT Agreement, etc.).

At first sight, the national treatment provision seems simple: no discrimination against foreign products etc in favour of domestic ones. But, when it gets down to interpreting the WTO rules complexity starts. More complex legal questions arise once the rules are applied to the facts (*i.e.*, actions by a WTO Member). Table 5 below provides an overview of the main legal provisions under WTO law relating to national treatment, but many provisions have been omitted in the interests of simplicity.²⁴

Table 5. Bird’s-eye View of Selected NT Legal Tests under WTO Law

	(i) Likeness ²⁵	(ii) Discriminatory treatment	(iii) Scope
Goods:			
- Tax measures (III:2 GATT)	Like products	Not the same tax	Taxes and other charges
	Directly competitive products	Different tax to afford protection	
- Non-tax measures (III:4 GATT)	Like products	Less favourable treatment	Measures affecting internal sale, offering for sale, etc.
- Technical regulations (2.1 TBT)	Like products	Less favourable treatment	Technical regulations

²³ See http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (consulted in April 2014).

²⁴ The table has been prepared for Chapter 8C “Cross-cutting Observations on National Treatment” by Jorge A. Huerta-Goldman in the book “*WTO Litigation, Investment Arbitration, and Commercial Arbitration*,” Ed Huerta-Goldman *et al*, published by Kluwer Law International. For a summarized discussion on the WTO jurisprudence, see Chapter 8A “National Treatment in WTO Litigation” by Tania Parcero Herrera, in the same publication.

²⁵ In the different contexts we consider, widely different ‘likeness’ tests exist, *e.g.*, like products, directly competitive products, like services and service suppliers, like circumstances / similar situations. For the purposes of this work, however, we collectively refer to these as the ‘likeness’ test.

Intellectual Property (3 of TRIPS)	(Nationals of WTO Members)	Less favourable treatment	Protection of IP Subject to exceptions ²⁶
Services (XVII GATS)	Like services and service suppliers	Less favourable treatment	Based on the schedule of a Member

Recommendation 11: Liquors with 30° or more alcohol content

We recommend assessing the market conditions of liquors in Viet Nam to undertake a legal analysis of national treatment (*i.e.*, potential *de facto* discrimination). Viet Nam is not only a WTO Member, but has FTAs and Bilateral Investment Treaties with obligations on National Treatment.

Also, we recommend assessing the economic (cost of compliance with the rules) and health effects (efficiency in protecting health) of the prohibition on promoting and advertising liquors with 30° or more alcohol content.

4. HOW OTHER COUNTRIES MAKE THEIR TRADERS STRONGER

4.1 PRODUCTION OF GOODS AND SERVICES

4.1.1 State Aids

Both developed and developing countries disburse State aids to support certain companies, industries or regions. State aids are subject, among others, to the WTO rules contained in the Agreement on Subsidies and Countervailing Measures (ASCM). But, they are widely used by many WTO Members in various creative forms.

In a nutshell, the ASCM allows WTO Members to attack a subsidy (as defined in Art 1 of the ASCM) granted by other WTO Member in the following two ways:²⁷

- **Direct challenge to a subsidy through WTO dispute settlement mechanisms.** First, a Member may challenge a prohibited subsidy: those contingent upon the export performance or contingent upon the use of domestic over imported goods (Art 3 of the ASCM). When the subsidy has been found a prohibited one, the ASCM provides for a fast track towards the imposition of retaliatory measures if the subsidy is not withdrawn within a short period of time (Art 3). An actionable subsidy, on the other hand, might be also directly challenged before WTO courts but the standard of review is higher than that of a prohibited one. A complainant has to establish that the subsidy is specific (Art 2 of the ASCM) and causes serious prejudice to the complainant (Art 6 of the ASCM). Retaliation is also the final remedy if the subsidising WTO Member does not withdraw the subsidy or its effects within the given time (Art 7 of the ASCM).

²⁶ E.g., the exception provided in the 1967 Paris Convention.

²⁷ For a further explanation on the WTO rules relating to subsidies, see “*The Law and Economics of Contingent Protection in the WTO*” by Mavroidis, Messerlin and Wauters, published by Elgar International Economic Law.

- *A subsidy may also be partially nullified through countervailing duties (CVD)* imposed by the importing WTO Member. The CVD is a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise (Footnote 34 of the ASCM). A CVD does not attack the subsidy directly, like the actions presented in the previous paragraph. But, it aims at isolating the distortive effects of the subsidy in the market of the importing WTO Member (that of the country imposing the CVD). The WTO Member imposing a CVD has to follow the procedure set out under Part V of the ASCM entitled Countervailing Measures. The exporting WTO Member, affected by the imposition of a CVD, may challenge the proper imposition of the CVD by starting the WTO dispute settlement procedure.

The EU has a detailed system on State aids, which aims at balancing the economic development produced by the State aid (provided by an EU Member State) on the one hand, and the proper functioning of the EU internal market on the other hand. EU Member States may provide State aids, subject to surveillance and control by the EU Commission to maintain such balance. The EU has a system of pre-notification of the State aid to be granted, followed by a review and potential challenges by the EU Commission or Member States.²⁸ Art 107 of the Treaty on the Functioning of the European Union indicates that:

... any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

The limitation on granting State aids does not apply to *small and medium enterprises (SMEs)*, as per Commission Regulation (EC) No 70/2001 (this regulation does not cover the agriculture, fishing and/or aquaculture and coalmining sectors). The regulation provides for several State aids specially crafted for SMEs: aid for investment (which might be combined with other aids based on the region involved); aid to consultancy services and other extraordinary services and activities (such as participation in trade fairs and exhibits); aid to research and development (including the cost of staff, materials and instruments relating to the research, and ranging from 30% to 100% of the costs); and aid to cover the costs of obtaining licences and other intellectual property rights.²⁹ Finally, there is a similar regulation relating to agricultural products (Commission Regulation (EC) No 1857/2006 of 15 December 2006).

In a nutshell, an EU Member State may provide a State aid. But it is subject to the EU Mechanism on State aid (with the exceptions for SMEs). Also, WTO law applies to both EU Member States and the EU itself (including the ASCM). So, Member States provide State aids in light of this regulatory framework.

²⁸ For a brief explanation on the State aid system within the EU, see http://europa.eu/legislation_summaries/competition/state_aid/126045_en.htm (consulted in June 2014).

²⁹ For more information on this EU legislation, see http://europa.eu/legislation_summaries/competition/state_aid/126064_en.htm (consulted in June 2014).

The US has several programmes financing exports. One of them is the *export credit guarantee*. Under this programme, the *United States Commodity Credit Corporation* guarantees the repayment of credit made available to finance commercial export sales of agricultural commodities on credit terms that do not exceed three years; issues guarantees for the repayment of credit made available for a period of not more than 180 days by a US exporter to a buyer in another country; and guarantees the repayment of credit made available by financial institutions in the US to finance commercial export sales of agricultural commodities on credit terms of between 3 and 10 years. The amount of credit available per fiscal year has been around \$5,500,000,000 in credit guarantees under the three export credit guarantee programmes. Parts of these programmes were found to be WTO inconsistent (for example the *General Sales Manager 102* export credit guarantee programme), including even the compliance procedure under Art 21.5 of the Dispute Settlement Understanding. The Appellate Body found that the *General Sales Manager 102* programme is not designed to cover its long term operating costs and losses. Hence, it falls under the item (j) of the illustrative list in the ASCM on export subsidies. Therefore, it violates Art 3.1(a) of the ASCM (and Art 10.1 of the Agreement on Agriculture).³⁰

- **Recommendation 12: State Aids for the Production and Sale of Goods and Services**

Many countries have implemented State aids to support their traders in their production and export of goods and services. Developed countries have complex and creative systems that may serve as basis for programmes in Viet Nam.

State aids are subject to WTO law (among others, the Agreement on Subsidies and Countervailing Measures).

We recommend revising current State aids and implementing new State aids to search for creative programmes that support Vietnamese companies (especially SMEs). In doing so, Viet Nam should ensure it is assisted by a WTO expert on subsidies, to avoid any unpleasant surprises.

4.1.2 Availability of Raw Materials for Industries in Viet Nam

The availability of raw materials has a direct impact on industrial production. The government of Viet Nam could develop certain programmes to ensure availability of key raw materials for industries in the country, if they have not been already implemented. Implementation of these programmes requires an open dialogue between the trade and investment promotion agencies and the industry. This dialogue could provide a list of key raw materials as the basis for the programmes.

- Applied tariff lines for the raw materials selected: The applied tariff (most favourable treatment) of the key raw materials selected should be low or zero for downstream industries to profit. Unfortunately, imported raw materials

³⁰ See WTO Original Panel Report in *US – Subsidies on Cotton (WT/DS267/R)*, at paragraph 7.236 to 7.244. Also, see the Appellate Body report in *US – Subsidies on Cotton Recourse To Article 21.5*, at paragraph 448 (b).

may not be accounted, in some cases, for the preferential tariff in an FTA for the downstream product (imports of steel in the production of cars, for example)—if the preferential rule of origin applicable to the goods is value added. Also, if there is local production of the raw material, reducing the applied import tariff may face opposition from local producers, but decisions can be taken on a case-by-case basis.

- Securing investment in key sectors of raw materials: The investment promotion agency could make sure that there are enough incentives for investment (local and foreign) to initiate the production of the key raw materials. Raw materials locally produced may be accountable for the certificate of origin in FTAs as explained in the previous bullet point. Please note that incentives for investment in the production of raw materials may clash with attempts to reduce the applied tariffs on those raw materials selected.
- Extended rules of origin in FTAs: The competent government unit administering Viet Nam's FTAs could adopt the latest practice on extended rules of origin. Imported raw materials from an FTA partner may be accountable for purposes of determining origin based in another FTA. There are new trends in the application of extended rules of origin that may benefit key industries in Viet Nam. One example of such rules could be the FTA between Canada and Peru (Art 306, para. 3 and 4).³¹

• **Recommendation 13: Ensuring Availability of Key Raw Materials**

Trade and investment promotion agencies already monitor the market constantly. They could also determine the key raw materials for important industries in Viet Nam (in coordination with the industry and other government agencies), advocating and monitoring the implementation of programmes to ensure their availability in Viet Nam.

Some alternatives available to Viet Nam are:

- a) Management of applied tariffs,
- b) promoting investment in the production of key raw materials, and
- c) extending the rules of origin in FTAs.

4.1.3 R&D and Interaction with Universities

In various countries, coalition between government, universities and companies is key for the development of certain sectors (this is true for both developed and developing countries). For example, companies can advise universities on needs for expertise in specific fields. Companies and the government can also collaborate with universities to develop better alumnae for future professionals (for instance, developing the school of oceanography in collaboration with the sea food industry in Viet Nam). Finally, companies, and the government, can contract universities to undertake research and development (R&D) in a specific field. Symbioses of this kind are key.

³¹ See <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/chapter3-chapitre3.aspx> (consulted in May 2014). Indeed, a MUTRAP expert has been working on rules of origin: Mr Brian Rankin Staples (brianstaples@rogers.com).

The Mexican *National Council of Science and Technology* (CONACYT) administers the Innovation Promotion Programme. The programme incentivises research and development in various corporations by means of a number of complementary benefits. For example, between 2009 and 2013, the funds disbursed to specific companies (of all sizes) was around 858,989,000\$US (using the exchange rate for June 2014). Through an official application process, companies apply for the benefits by completing the relevant application form.³²

In 1996 *Bocconi University* in Milan, Italy, developed a programme called “Partners for Development.” It coordinates collaborative efforts between companies and the university on innovation, education and research. Companies and the University design and execute specific programmes and projects of collaboration for mutual benefit. It also has fund-raising programmes where companies may invest in strategic sectors for training and research.³³

Columbia University in New York is one of the top universities in the US. It has several collaborative efforts with companies on training and research. For example, the Engineering School has a list of research projects subject to fund-raising activities. One of them addresses the solidification of concrete (*i.e.*, the transformation from liquid to solid concrete). Solidification of concrete has a direct application in key industries such as the extraction of oil and gas. As explained by the researcher, the 2010 BP oil well disaster in the Gulf of Mexico is an example of an insufficient cementing operation causing a massive accidental marine oil spill. Even though the research is undertaken in the laboratory, working with industry is key and can make a huge impact.³⁴

Recommendation 14: Collaboration between Companies, the Government and Universities

Trade and investment promotion agencies can boost collaboration between key companies and universities. The knowledge of these agencies can be used to connect universities with companies for capacity building and research. These programmes could easily be coupled with State aids.

4.2 TRADE FAIRS AND EXHIBITIONS, AND OTHER MARKETING ACTIVITIES

4.2.1 Domestic Activities

Palexpo SA manages and administers the largest exposition and conference centre in Geneva Switzerland (with an investment of 439 Mill CHF, an area of 108,000 Mts² of covered space, and 21,000 Mts² in open air), along with all the services required for trade fairs, such as restaurants, bars, publicity, etc. It is a private company owned mainly by the Canton of Geneva. The economic spin-offs for the Canton of Geneva in 2010 were 545 Mill CHF (including 36 Mill CHF in tax revenue). The

³² See <http://www.conacyt.mx/index.php/fondos-y-apoyos/programa-de-estimulos-a-la-innovacion> (consulted in May 2014).

³³ See <https://paytool.unibocconi.it/onlinegiving/?key=banner> (consulted in May 2014).

³⁴ See <http://engineering.columbia.edu/shiho-kawashima-cementing-path-solid-construction> (consulted in May 2014).

building of the current facilities started in 1968, but the City of Geneva has had another trade fair centre since 1926. The company provides services in the organization of trade fairs as a whole, as well as services relating to an individual stand in a given trade fair; so Palexpo SA serves both the organizer of trade fairs and individual participants holding a stand in a trade fair.³⁵ Palexpo SA provides a variety of services for organizers of trade fairs and other events.³⁶

There are 41 events scheduled for 2014 such as trade fairs (e.g., the world renowned automobile trade fair, the 84th International Motor Show), exhibitions (e.g., 42nd Geneva International Exhibition of Inventions), congresses, or sports activities (e.g., Davis cup ¼ Finals).³⁷

Palexpo SA has developed the *General Regulations for the Users of the Palexpo Site*. The document contains many of the general legal requirements under internal law that also apply to trade fairs. For example, a merchant selling directly to consumers needs an *Itinerant Merchant Permit* issued by the respective cantonal authority. This would certainly apply to food sold to a consumer at the facilities restaurant, but also to sales of the products advertised at the trade fair when directly sold to consumers. But sales to traders, within the trade fair, are not subject to this requirement (Art 12.2 of the regulation). Similar rules are applicable to foodstuff and consumer items (Art 12.1 of the regulation).³⁸

Based on information gathered over the phone, there is no need for any *a priori* permit from a local authority in order to organize a trade fair at Palexpo. But, in light of the *General Regulations for the Users of the Palexpo Site*, the general trade limitations under Swiss law would be applicable to trade fairs such as the prohibition, by Swiss criminal law, of trade (including at a trade fair) in illegal drugs to cite an example. Finally, since Palexpo SA is a company owned by the Canton of Geneva, the State operates an indirect surveillance of the activities organized at the facilities.

Recommendation 15: The Municipal Government and Permanent Exhibition Centres

Palexpo SA in Geneva Switzerland presents a successful example of local government involvement in building a permanent exhibition centre. The company owned by the State administers the centre, providing guidance for trade fair organizers using the facilities. They have compiled in its internal regulations some of the main legal requirements applicable under domestic law, such as sales to consumers, advertisement of alcohol, tax and labour law requirements.

This may be a good example for assessment by the authorities of a city in Viet Nam. These centres provide positive spill over effects, including economic and tax revenue, to the local community

³⁵ See <http://www.palexpo.ch/en/index.php> (consulted in May 2014).

³⁶ See http://www.palexpo.ch/resources/Service_Marketing_E.pdf (consulted in May 2014).

³⁷ See <http://www.palexpo.ch/en/Manifestations/index.php> (consulted in May 2014).

³⁸ See http://www.palexpo.ch/externe/PdfsShop/General_Regulations.pdf (consulted in May 2014).

The Swedish Trade and Investment Agency organizes various activities for the domestic industry to boost international trade. For example, the Global Automotive Supply Project 2014 prepares Swedish companies for matchmaking with large buyers of auto parts, such as Fiat/Chrysler, Tesla, Tata Motors, AutoVaz and Great Wall. The agency presents Swedish companies to selected large auto producers and follows up. This activity started on 31 May 2014 and registration was available between 11 February 2014 and 31 May 2014 (*i.e.*, the day of the initial event). The project has three steps:

- Step 1: Meetings with the potential suppliers as first contact.
- Step 2: After assessment of proposals by the Swedish companies, there is a kick off meeting to prepare the first contact with the large auto producers (collection of sales materials and fine-tuning of the offer in light of the standards set by the large auto producers).
- Step 3: Meeting with the large auto producers and follow up support.³⁹

The Swedish Trade and Investment Agency organizes informational and training events in key sectors and regions. For example, on 22 May 2014 a Seminar on Global Business Opportunities with the Oil and Gas Sector took place in Göteborg, Sweden. The event was free of charge, and registration closed few days before it took place (from 7 April to 15 May 2014). Experts from several focus markets in the Middle East and Europe talked about the latest developments in the Oil and Gas industry in the Middle East and Europe. The seminar provided understanding of opportunities and demand for Swedish products and services, the industry structure and how to prepare an approach to these attractive markets.⁴⁰

Recommendation 16: Matchmaking Events

We recommend that the trade and investment promotion agencies organize events for matchmaking among traders. Such events could include actual meetings to make connections and preparatory sessions to set up proposals by Vietnamese traders. This could prepare them for the first contact with the potential clients.

The *Instituto Jalisciense de Tecnologías de la Información* (IJALTI) is the regional institute (in Jalisco, Mexico) for information technology. IJALTI provides office space and services (internet, servers, telephone, etc.) for start-ups in the software industry. It hosts 28 SMEs in its premises (10,000 Mts²) in an old commercial centre. The SMEs provide services locally and internationally, and pay a fee for the use of the offices and the shared services they receive. The project was set up by the local government, the State University and the private sector, and is self-sustainable.

Recommendation 17: Centres for SMEs

We recommend that Viet Nam assess whether a centre for SMEs, such as IJALTI in Mexico, could be established for a particular branch of trade (IT or any other). Start-ups face several logistical problems that could be overcome through these projects (office space, access to facilities such as servers, image, advice, conference room, brainstorming, among others).

³⁹ See <http://www.business-sweden.se/en/> (consulted in May 2014).

⁴⁰ See <http://www.business-sweden.se/en/> (consulted in May 2014).

This is a permanent platform where start-ups are able to prepare, work and expose their services (a permanent exposition centre). Investing in these projects assists the capitalization of local creativity.

4.2.2 Activities Abroad

The Swedish Trade and Investment Agency has offices in 57 countries around the world promoting trade and investment. For 2014, it has 55 events registered in its calendar of activities. Participation in some events is free, but some of the events have a participation fee to be paid by the beneficiary. The events range from short ones (e.g., business breakfasts) to a series of fairs and exhibitions on a particular industrial sector in a region, such as the activities on energy:

- Five selected conferences/study tours in Canada and the US in the energy sector. Various events under this programme take place in Sweden, the US and Canada between 29 April and 3 December 2014. In May, registration was still open through direct contact with the event coordinator in the agency, and a subsidy was still available for some events. The events are for Swedish companies that are ready to engage in the North American market, getting the following benefits:
 - Business and network support from the agency
 - Access to Swedish pavilions at selected conferences
 - Participation in networking and match-making activities
 - Participation in tailored meetings and workshops
 - For every five activities in North America, there is an exclusive offer for 3-5 Swedish companies to participate for free (excluding travel and accommodation), with an estimated value of \$2,500-4,000 USD per activity (the allocation of the subsidy is provided on first come first served basis). Interest must be expressed directly to the event coordinator from the agency.⁴¹

The ProMexico Trade and Investment agency provides support for participation in trade fairs abroad. Mexican companies may contact the agent from ProMexico that is closest to where they are located. The agency provides services (the activities paid for by the Mexican company) or benefits like financial support (activities paid for by the Mexican company and later reimbursed by the agency). ProMexico has drafted guidelines on how it provides such services and benefits.⁴² Activities abroad can be summarized as follows:

- Trade fairs with a national pavilion are available as a service. The interested companies are entitled to be part of the pavilion upon the payment of a fee per stand.⁴³ Users are requested to contact ProMexico at least two months prior to the date of the trade fair. No direct financial support is provided for trade fairs

⁴¹ See <http://www.business-sweden.se/en/> (consulted in May 2014).

⁴² See <http://www.promexico.gob.mx/archivos/PDF/FormatosServicios2014/LineamientosV601ene2014.pdf> (consulted in May 2014).

⁴³ According to information received from ProMexico, the fee for the stand varies depending on those charged by the trade fair organizer (10,000 USD per stand was given as a reference fee).

with a Mexican pavilion. The international fairs with a pavilion are the same every year with few variations (more than forty trade fairs).⁴⁴ Trade associations may suggest new trade fairs, but there are few changes.

- Participation in trade fairs with no national pavilion may be subsidized by ProMexico. The subsidy, in the form of reimbursement for some of the costs, is up to \$5,500 USD per event with a maximum of three events per company over a year. The beneficiary may return (with a subsidy) to the same fair up to twice in subsequent years but the amount of the subsidy decreases. The subsidy is available to Mexican companies or individuals exporting goods or services.⁴⁵ Reimbursement is limited to the following activities:
 - Rent of a stand
 - Shipment of samples (not for temporary exports)
 - Operational expenses
 - Expenses relating to the installation of the stand⁴⁶
- Other activities are available with financial support. The amount of the subsidy ranges from \$3,000 USD per month to up to a lump sum of \$50,000 USD. Various activities are included, such as foreign representation, travel expenses, distribution systems, trademarks, development of new products, analysis of potential new buyers and logistics, among others.⁴⁷ As mentioned above in the section on trade fairs, the Mexican company contacts ProMexico and the subsidies are given on a case-by-case basis subject to budgetary restrictions.

Switzerland Global Enterprise has been commissioned by the Swiss government to handle export, import and investment promotion, providing special support to SMEs. It has a list of events, many of them with fairs containing a Swiss Pavilion, which may be expanded upon request of a trade fair organizer.⁴⁸ The size of the pavilion is normally between 100 and 400 mts², and the cost for the participants is subject to the cost of the whole pavilion as set by the organizer of the trade fair. According to the agency, the benefits of participating in the pavilion (either Swiss Pavilion or Mini-Swiss Pavilion for smaller groups) over individual participation are:

- Professional service by the team from Switzerland Global Enterprise (including logistics and the functioning of the stands)
- Attractive location within the exhibition venue (as negotiated by the agency)
- Design for the trade fair stand within the pavilion

⁴⁴ See <http://www.promexico.gob.mx/work/models/comercio/Resource/137/1/images/CalendarioEventosProMexico2014.pdf> (consulted in May 2014).

⁴⁵ According to the information provided by ProMexico, first, the company contacts the agent of ProMexico that is nearest to its location in Mexico to request the support (preferably two months prior to the trade fair). ProMexico assesses the company with regard to nationality, export capacity and presence in the international market. Subject to budget availability, the benefit may be approved and the money reimbursed after the date of the trade fair. Once the support has been approved the beneficiary sends evidence of its participation in the trade fair.

⁴⁶ See http://www.promexico.gob.mx/es_mx/promexico/Participacion_Individual_en_Eventos_Internacionales (consulted in May 2014).

⁴⁷ See <http://www.promexico.gob.mx/archivos/PDF/FormatosServicios2014/CatalogoAyS01ene2014.pdf> (consulted in May 2014).

⁴⁸ See <http://www.s-ge.com/en/events/all?language%5B%5D=en-eu> (consulted in May 2014).

- Readiness of the stand for immediate occupation (with various services relating to infrastructure/stand construction, publicity/communication and logistical organization)
- Flexibility on the size of the stand required by the participant (6 Mts², 9 Mts², and 12 Mts², or larger sizes if needed)
- Utilization of the Switzerland umbrella brand
- Logo of the participant in the Swiss list of exhibitors
- Access to the general infrastructure of the pavilion (*e.g.*, meeting areas, storage area, and bistro) is provided by the SWISS Pavilion and is supported in part with subsidies (as explained by the agency, the Export Promotion Act does not allow direct financial subsidies to individual firms at federal government level; but they can be provided at cantonal level)⁴⁹

UBIFRANCE, the French trade promotion agency, has a straightforward practice of leaflets in *pdf* form for each trade fair having a French Pavilion. For example, with respect to “APTA Expo” on public transportation in the US, the leaflet contains key information a potential participant may need: the deadline for registration (ending *c.a.* 6 months prior to the event); the price of the stand (including the full price and the subsidised price granted to some); the benefits of participation through the pavilion (publicity, access to internet, logistics of the stand, common areas, hostess, among others); and the potential opportunities in the US market for goods and services relating to public transportation (information on government expenditures in this sector).

The US Department of Commerce uses a system of Trade Fair Certification, where a trade fair organizer is certified by the US government and is entitled to build a **US Pavilion** and use government facilities, support and database. The programme provides Department of Commerce endorsement, show-related services, oversight and coordination of event services, promotional support, exhibitor marketing facilitation, and in-country/show site assistance for private sector organizers to recruit and build a US Pavilion at selected foreign trade shows. According to a description by the US government, a trade fair organizer or participant acquires several benefits when selling the services to US companies: such as

- Signals official US Government support
- Conveys the message that the show is a safe venue and a good market for US firms
- Standardizes, leverages, coordinates and initiates USDOC support domestically and worldwide
- Allows the recruitment of potential buyers under the banner of the US Department of Commerce
- Provides recognition that the US show organizer/agent is a reliable firm capable of building a US pavilion
- Provides confidence for, and increases participation by, new-to-market, infrequent, and small exporters
- Arranges organizer support services from the Commercial Service in over 90 Commercial Service overseas

⁴⁹ See <http://www.s-ge.com/switzerland/export/en/content/know-how-faq> (consulted in May 2014).

- Provides US exhibitors with helpful contact facilitation, market information and counselling⁵⁰

Amongst the 39 international trade fairs scheduled between July 2014 and May 2015, we found two events with a US Pavilion.⁵¹ This suggests that there are not many private companies willing to build a US Pavilion.

4.2.3 Viet Nam's Rules on Trade Fairs

The Commercial Code (Arts 129 *et seq.*) and Decree No. 37/2006/ND-CP regulate trade fairs and exhibitions in Viet Nam and the participation of Vietnamese delegations in trade fairs abroad. For a summary of these provisions, please see Annex 1 and Table 3. Values Protected in the Main Legal Instruments.

Recommendation 18: Distinguishing the Various Rules in Trade Fairs

Each of the following sections should be addressed independently in the new rules:

a) Trade fairs within the territory of Viet Nam

- The organization of trade fairs within the territory of Viet Nam should be as liberalized as possible, to allow traders to capture any opportunity they see that may boost domestic trade.
- Activities taking place in trade fairs within Viet Nam should be subject to the applicable domestic laws generally applied: such as tax law for transactions, consumer protection, IP, criminal law, etc.
- Cities in Viet Nam could follow the example of Palexpo SA in Geneva, Switzerland: select an appropriate zone in the city and set up a company to administer facilities for trade fairs in particular areas of the city. Further examples might be assessed to develop the model to be used in Viet Nam.

b) Participation in trade fairs outside Viet Nam

- - This is already liberalized, and liberalization should be maintained. But there could be more support to Vietnamese traders wishing to participate (information, subsidy, or tax cuts, for example).

c) Organization of Viet Nam Pavilions in trade fairs abroad

- This practice needs improvement. Traders need certainty, in a timely fashion, on the availability of a Viet Nam Pavilion in trade fairs in order to plan their participation.
- The Viet Nam Pavilion could be organized by the government (as in the case of UBIFRANCE) or by a private organizer (as in the case of a US Pavilion).
- Participating in a trade fair through a Viet Nam Pavilion should be more advantageous than direct participation in individual stands (otherwise, the government effort is not worth it).
- The available subsidies might be disbursed to the whole Viet Nam Pavilion for the benefit of all (as in the case of the Swiss Pavilion) or to specific companies (like UBIFRANCE).

See section 4.2.2.

⁵⁰ See http://www.export.gov/tradeevents/eg_main_018560.asp (consulted in May 2014)

⁵¹ See http://export.gov/eac/show_short_trade_events.asp?CountryName=null&StateName=null&IndustryName=null&TypeName=International%20Trade%20Fair&StartDate=null&EndDate=null (consulted in June 2014).

d) *Access to the Viet Nam Pavilion by traders*

- Traders, users of Viet Nam Pavilion, need certainty in their access to the Pavilion.
- The deadline to request inclusion in the Viet Nam Pavilion in a given trade fair needs to be as close to the event as possible (*i.e.*, the minimum to allow for the organization of the pavilion).
- The subsidy to be provided should be reliable, even its size is small. This would benefit the traders immensely (especially small and medium companies), so they know whether they are financially able to invest in the trade fair, and have clarity on the cost as early as possible. A fixed budget per trade fair could be assigned, to be allocated equally amongst all the participants (*i.e.*, the common areas of the Pavilion could be financed by the government and each participant pay for its stand (using the formula applied by the Swiss Pavilion). In addition, if money allows, the price per Mts2 of all stands in the Pavilion could be equally subsidised to reduce the cost for Vietnamese companies.

4.3 SUPPLY CHAIN FOR GOODS AND SERVICES

4.3.1 Market and Statistical Information

Companies expanding to international trade have several needs. Trade and investment promotion agencies could play a role in helping them cope with the following needs, among others:

- **Market research** in foreign countries (size and quality of consumers, consumption trends, availability of competitors, domestic production, etc.).
- **Marketing strategies**, see some of the work done by the *International Trade Centre* in Geneva.⁵²
- **Statistical information on trade flows** (imports, exports and prices), see the *Trade Map* prepared by the *International Trade Centre* in Geneva.⁵³
- **Tariffs (NTBs)** to enter a country: the *Market Access Map* by the *International Trade Centre* in Geneva provides information for final users and trade promotion authorities on tariffs, NTBs, trade remedies among others;⁵⁴ also, *Switzerland Global Enterprise* provides *MendelOnline* for local companies, with tariffs, NTBs and customs procedures.⁵⁵
- **Non-tariff measures (NTBs)** are vast in form, shape and application. The *International Trade Centre* has a compilation and explanation of some of the most common NTBs.⁵⁶
- **Voluntary standards** are widely used in several markets, and especially relevant for certain products (such as agricultural products). The

⁵² See <http://www.intracen.org/publication/Social-marketing-for-small-businesses/> (consulted in June 2014).

⁵³ Trade Map provides - in the form of tables, graphs and maps - indicators on export performance, international demand, alternative markets and competitive markets, as well as a directory of importing and exporting companies. See <http://www.trademap.org/> (consulted in June 2014).

⁵⁴ See <http://www.macmap.org/> (consulted in June 2014).

⁵⁵ See <http://www.s-ge.com/switzerland/export/en/content/static/Customs-tariffs-worldwide> (consulted in June 2014).

⁵⁶ See <http://www.intracen.org/itc/market-info-tools/non-tariff-measures/understanding-ntms/> (consulted in June 2014).

International Trade Centre has compiled a database with some of the most relevant international standards.⁵⁷

Trade and investment institutions can obtain support from the *International Trade Centre* in Geneva, in tuning and developing their services to local enterprises.⁵⁸

The Swedish Trade and Investment Council provides various information products. One is the Export Manager's Index, a quarterly index measuring the temperature of the export industry, compiling information provided by 225 export managers in both large and small companies (export sales, market demand, margins, etc).⁵⁹

Also, trade and investment agencies may provide tailor made services for specific industries or companies. For example, they can design strategies for market access in key countries, unifying efforts from various governmental agencies and trade disciplines (for example utilizing market access negotiations in FTAs and the benefits of a bilateral investment treaty).

Recommendation 19: Market Access Tools and Strategies

Trade and investment agencies should develop and provide key tools for Vietnamese traders relating to market access. They could be free of charge or subject to payment of a fee.

Also, trade and investment agencies could work on *ad hoc* studies and strategies for particular industries or companies. Being a government institution provides them with the access to key agencies, able to work in coordination to support the industry or company (using the available legal framework such as FTAs or BITs).

4.3.2 Insurance, Financing and Secure Payments

Insurance, financing and secure payments in trade transactions are key for traders (the higher the number of successful transactions, the stronger the trader).

Bancomext, Mexico's Development Bank, provides several services for Mexican traders, as follows:

- Letters of credit (to export). Bancomext can function as the exporter's bank (allowing easy access to this vehicle for local traders). It also offers stand-by letters of credit, import letters of credit, and domestic letters of credit.⁶⁰
- Credits for industrial development. Bancomext offers various credits, such as those for working capital loans, equipment, investment projects, industrial

⁵⁷ See <http://www.standardsmap.org/identify> (consulted in June 2014).

⁵⁸ See <http://www.intracen.org/itc/trade-support/improving-your-organization/> (consulted in June 2014).

⁵⁹ See <http://www.business-sweden.se/en/> (consulted in May 2014).

⁶⁰ See <http://www.bancomext.com.mx/Bancomext/secciones/english/financial-services/letters-of-credit/index.html> (consulted in May 2014).

warehouse construction and leases, structured credits, syndicated loans and corporate loans.⁶¹

- International Factoring (securing payments in exports and imports) combines working capital financing, credit risk protection, accounts receivable, bookkeeping and collection services. It is offered under an agreement between the factor and a seller. Under the agreement, the factor purchases the seller's accounts receivable, normally without recourse, and assumes the responsibility for the debtor's financial ability to pay. Bancomext offers:
 - finance up to 90 percent of the value of the invoice
 - if the debtor goes bankrupt or is unable to pay its debts for credit reasons, the factor will pay the seller
 - administration of the invoices and receivables
 - cashing invoices abroad through its partners⁶²
- Endorsements and guarantees are support mechanisms Bancomext provides to back the payment or contractual commitments companies assume in completing their export manufacturing or commercial activities.⁶³
- Venture capital investment funds are a temporary source of investment. Third parties contribute to a company's net worth so they can maximize their business opportunities and increase their value with solutions for business projects, by sharing risks and yields.⁶⁴

The *Export Credit Guarantee Corporation of India Ltd*, a government of India Enterprise, is essentially an export promotion organization seeking to improve the competitive capacity of Indian exporters. It provides them with credit insurance coverage comparable to that available to their competitors in other countries. It keeps its premium rates at the lowest level possible. It provides export credit insurance facilities to exporters and banks in India, and functions under the administrative control of the Ministry of Commerce & Industry. For example, it has a product for SMEs introduced in 2008, providing the SME Sector easy administrative and operational system covering:

- Commercial Risks, such as insolvency of the buyer; failure to pay, failure to accept the goods and other risks related to the operation of the letter of credit.
- Political Risks, restrictions by the government of the buyer, war or belligerent events, new import restrictions, interruption or diversion in transportation, and any other cause of loss occurring outside India not normally insured by general insurers.⁶⁵

ASEI is the sole export credit agency of Indonesia for non-oil and gas commodities, and is wholly owned by the Republic of Indonesia. Its mission is to

⁶¹ See <http://www.bancomext.com.mx/Bancomext/secciones/english/financial-services/credit/index.html> (consulted in May 2014).

⁶² See <http://www.bancomext.com.mx/Bancomext/secciones/servicios-financieros/factoraje/factoraje-internacional-de-exportacion.html> (consulted in May 2014).

⁶³ See <http://www.bancomext.com.mx/Bancomext/secciones/english/financial-services/guarantees/endorsements-and-guarantees.html> (consulted in May 2014).

⁶⁴ See www.fondodefondos.com.mx (consulted in May 2014).

⁶⁵ See http://www.ecgcindia.in/en/Pages/ECGCAPSmallAndMediumEnterprise.aspx?qstrSelVal=EB_SME (consulted in May 2014).

promote Indonesian exports and support the competitiveness of Indonesian goods and services in the international market, offering export credit insurance, credit insurance, guarantees for products, surety for products and general insurance.⁶⁶ In Malaysia the *Export-Import Bank of Malaysia Berhad* is the similar government-owned development financial institution and is a wholly owned subsidiary of the Ministry of Finance. It was established to promote sectors such as capital goods, infrastructure projects, and shipping, value added manufactured products and to facilitate the entry of Malaysian companies to new markets, particularly non-traditional markets.⁶⁷ *SERV* in Switzerland provides similar services to Swiss traders.⁶⁸

Three international institutions address the fundamental issue of export credits. First, the *OECD* provides a forum (*Working Party on Export Credits and Credit Guarantees*) to exchange information on export credit systems, business activities and national policies (anti-bribery, environmental issues, social due diligence, and sustainable lending). Also, it has the *Export Credit Arrangement* that provides financial disciplines for standard export credits, exports in certain sectors (ships, nuclear power projects, aircraft, and renewable energy, climate change mitigation and water projects), terms for project finance transactions, etc. In addition, the Arrangement provides disciplines for trade-related aid. The Arrangement is not an OECD act, but a "Gentleman's Agreement" between certain countries that are all Members of the OECD.⁶⁹

Second, the *Berne Union* has the mandate to actively facilitate cross-border trade by supporting international acceptance of sound principles in export credits and foreign investment. It provides a forum for professional exchanges amongst members (79 private and state export credit companies in the field of insurance from around the world). It is a leading global organisation for the export credit and investment insurance industry. According to their calculations, in 2012, its members collectively insured \$1.8 USD trillion of exports and foreign direct investment and since the global financial crisis in 2008, have indemnified approximately \$22 USD billion to exporters and investors (protecting them from losses suffered due to buyer defaults in all regions of the world).⁷⁰

Finally, the International Chamber of Commerce, as private organization, has been working in international finance. Swift and the ICC Banking Commission have jointly produced a set of rules *on Bank Payment Obligation (BPO)*, with the aim (among others) of making letters of credit more efficient through electronic means.⁷¹ This method is new and being tested and implemented.

Recommendation 20: Financial Instruments

⁶⁶ See <http://www.asei.co.id/?lang> (consulted in May 2014).

⁶⁷ See <http://www.exim.com.my/> (consulted in May 2014).

⁶⁸ See <http://www.serv-ch.com/en/products/products-for-exporters/supplier-credit-insurance/> (consulted in May 2014).

⁶⁹ See <http://www.oecd.org/tad/xcred/about.htm> and <http://www.oecd.org/tad/xcred/participants.htm> (consulted in May 2014).

⁷⁰ See <http://www.berneunion.org/about-the-berne-union/> (consulted in May 2014).

⁷¹ See [http://www.iccwbo.org/About-ICC/Policy-Commissions/Banking/Task-forces/Uniform-Rules-for-Bank-Payment-Obligation-\(URBPO\)/](http://www.iccwbo.org/About-ICC/Policy-Commissions/Banking/Task-forces/Uniform-Rules-for-Bank-Payment-Obligation-(URBPO)/) (consulted in May 2014).

We recommend the adoption, if they do not already exist, of financial instruments to support individual transactions. As mentioned in Section 4.3.1 above, they could be in the form of insurances or direct financing.

Please note that financial instruments could be subsidies in some cases (see section 4.1.1 above). When addressing financial instruments, Viet Nam should ensure it is assisted by a WTO expert on subsidies, to avoid any unpleasant surprises.

4.3.3 Facilitating Transportation and Export Procedures

Easy Export (*Exporta Fácil*) is a programme to simplify export and postal procedures for small packages, developed in Brazil (with the State company *Empresa Brasileira de Correios e Telégrafos*) and regionalized later to other countries in Latin America.

The post acts as a customs broker. The SME fills up the application over the Internet (creating a simplified export declaration) and then presents the parcel for revision to a post office, which closes the package and ships it. The procedure was shared with private postal operators as well.

The programme exploits the capillarity of large pre-existing postal networks to offer affordable transport of low-valued exports from locations that private carriers would not serve, or would serve with a higher cost.

Through cooperation between the government, the post and customs, Easy-Export slashed the number of forms that had to be completed to dispatch parcels under 30 kg with a value of less than 10,000 US dollars (this threshold was subsequently raised to 50,000 US dollars). Easy-Export also freed exporters from having to deal with other authorities involved in the export process, such as customs, health and environment agencies, export agencies, etc., as the post took on this responsibility.

Easy-Export not only reduces transportation prices, but also has other positive spill over effects. For example, the exporter does not need to go to a major city, contract a trade specialist, or take specialized training. Also, the number of forms to be completed can be reduced and they can be simplified and made easier to fill out while duplication of information can be eliminated by the use of a single database.⁷²

Recommendation 21: Simplifying Transportation and Procedures for Small Exporters

Implementing a programme similar to Easy-Export (simplified export procedures, implemented by the post offices, for small exports—less than 30 kgs and \$10,000 USD in value for example) in Viet Nam could provide significant benefits for SMEs, along with other positive spill over

⁷² See report by the OECD at <http://www.oecd.org/aidfortrade/47086606.pdf>. Also, the programme has been implemented in Panama. The competent authority provides information on “how to use it,” see <http://www.exportafacil.gob.pa/> (consulted in May 2014).

effects. The agencies involved in trade and investment promotion should play a fundamental role in the implementation of this programme.

4.3.4 Contracts

Most of the security in an international transaction is reflected in the contract.

The purpose of the *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, 1980) (CISG) is to provide a modern, uniform and fair regime for contracts for the international sale of goods. It is an international treaty that provides a careful balance between the interests of the buyer and of the seller.

The CISG would apply whenever contracts for the sale of goods are concluded between parties with a place of business in Contracting States. In these cases, the CISG would apply directly, avoiding recourse to rules of private international law to determine the law applicable to the contract or negotiating a clause in this regard, adding significantly to the certainty and predictability of international sales contracts. This means that an SME, for instance, would not need to negotiate or assess the applicable law for every international sale it undertakes, and thus is placed in a better bargaining position. Besides, by knowing the CISG it has a better control over the rights and obligations in the contract.

Viet Nam is not a Party to the CISG. But many of its competing countries are, such as China, Singapore, Russia, Brazil, among others (81 Parties in total). Sales of goods involving Vietnamese traders might still be governed by the CISG (through the rules on conflicts of laws) but each transaction is unique. Besides, a consequence of not being a Party to the convention is that Vietnamese traders are less familiar with its rules, even if such rules may be applicable to some of their contracts.⁷³

Recommendation 22: Convention on the International Sale of Goods

We recommend assessing the impact of not being a party to the Convention on the International Sale of Goods in the negotiation and implementation of sales contracts by Vietnamese traders.

Some trade promotion agencies provide model contracts to support traders. In this way traders can get access to a basic generic contract. Also, some trade promotion agencies provide explanatory support on contract law. Many small companies do not have access to the necessary contract forms to protect themselves. The International Trade Centre in Geneva has developed eight *generic contract templates* that incorporate internationally recognized standards and laws for some business situations.⁷⁴

⁷³ See http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (consulted in June 2014).

⁷⁴ See <http://www.intracen.org/itc/exporters/contract-templates/> (consulted in June 2014).

The *International Commercial Terms (INCOTERMS 2010)* are a short internationally recognized standard used worldwide in international and domestic contracts for the sale of goods. They help traders avoid misunderstandings by clarifying the tasks, costs and risks involved in the delivery of goods from sellers to buyers.⁷⁵ These terms are widely known, but common mistakes still occur, such as using FOB (free on board) in air transportation, as this INCOTERM was designed for sea and inland waterway transportation. In litigation, such mistakes can be costly. Trade promotion agencies should train traders in these terms.

Recommendation 23: Contract Forms and Training

The Trade promotion agency should develop generic contracts to be used by traders.

Also, the agency should train traders in the basics of contract law and the use of INCOTERMS 2010. This could be done through seminars or manuals.

4.3.5 Arbitration

Recommendation 24: Promotion of Arbitration

The Vietnam International Arbitration Center (VIAC) is an active institution administering international commercial arbitration.

- International Commercial Arbitration could be jointly promoted amongst Vietnamese companies by the VIAC and the trade promotion agency. For example, if the trade promotion agency addresses “Recommendation 23: Contracts Forms and Training” (above), it would have to address arbitration when dealing with the section of the contract relating to dispute settlement.

4.4 ATTRACTING FOREIGN AND DOMESTIC DIRECT INVESTMENT

The decision to invest, both for local investment and foreign investment, usually involves senior personnel taking long-term decisions. Among many factors, they assess the commercial viability and the legal framework (domestic laws and the relevant international agreements such as FTAs and BITs). The work of an investment promotion agency is to provide those decision makers with the relevant solutions and incentive packages for them to invest. This requires the coordination of several ministries and municipalities addressing issues of tax law, land availability, and related procedures. Matchmaking activities, information gathering and package design are necessary.

The Swedish Trade and Invest Council provides information and key manuals on how to start a business in Sweden: mergers and acquisitions, starting a branch, starting a business, starting a franchise, starting a private limited liability company

⁷⁵ See <http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/> (consulted in June 2014).

(among others). It also provides guidance on how to run the business using various manuals: costs and prices of key services, buying and building property in Sweden, leases and rents, corporate taxes, employing staff, regional financial incentives, social security and pensions, tax relief for foreign employees, and work and resident permits and business visas. The council also provides access to fairs and exhibitions, industry opportunities by sector, as well as the following tailor made services for potential foreign investors:

- 1 Strategic investment advice and tailored business information
- 2 Matchmaking and introduction to investment opportunities
- 3 Meeting arrangements in Sweden
- 4 Information about how to establish and run a business
- 5 Network access - introductions to public and private companies and organizations

Recommendation 25: Promotion of Investment

Promoting investment cannot be decoupled from trade promotion. Both agencies involved have to work in direct contact, as an investment package offered to investors should also contain trade elements. They can design standard packages and tailored-made packages for potential investors.

4.5 POLICY ADVOCACY

Some trade and investment promotion agencies provide policy advocacy in the form of efforts to effect changes in regulations, laws and government policies as a way of improving the business climate. The rationale behind this role is that trade and investment promotion agencies get access to detailed knowledge about problems faced by traders and investors. This allows them to advocate for efficient reforms in laws, regulations and practices in favour of a better business environment. A recent study by UNCTAD outlines a four-step process of policy advocacy: (a) problem-identification and agenda-setting; (b) developing the best policy remedy; (c) consensus-building; and (d) monitoring and evaluation.⁷⁶

For example, using its advocacy capacity, Korea's investment promotion agency (*Office of the Foreign Investment Ombudsman - KOTRA*) has been promoting substantial reforms in Korea. Over the last decade, the office has resolved more than 4,000 grievances. It was created as a non-profit organization within the Korea Trade-Investment Promotion Agency to help improve the investment environment and promote the success of companies in Korea that have received foreign investment. As an example of what it does, an investor reported that it was not allowed to remit capital back to its mother company abroad. On 1 July 2005, the ministry amended the law to permit the return of funds remitted from abroad for use in the start-up of Republic of Korea subsidiaries of foreign companies.⁷⁷

⁷⁶ "Investment Promotion Agencies as Policy Advocates," Investment Advisory Series A, number 2, United Nations Conference on Trade and Development. Available at http://unctad.org/en/Docs/iteipc20076_en.pdf (consulted in April 2014).

⁷⁷ Idem at box 1. Further information about KOTRA is found at http://english.kotra.or.kr/foreign/biz/KHENKO140M.html?TOP_MENU_CD=INVEST (consulted in May 2014).

Another example was presented in Mexicali, in the north of Mexico near the border with the US. *The Industrial Development Commission of Mexicali (IDC)* became aware of a significant decline in exports of TV sets from the factories in the city. After a careful assessment, it found that the cost of electricity had significantly increased during the previous few years. IDC worked with federal and state utility regulators to develop a mechanism by which the television industry – a regionally strategic one responsible for 52,000 jobs – could import electricity at a much cheaper rate from its northern neighbour, the US state of California. In the three years since then, the industry has seen approximately \$534 million in new foreign direct investment and over 12,000 new jobs created.⁷⁸

Recommendation 26: Policy Advocacy by Trade and Investment Agencies

Trade and Investment agencies in Viet Nam should play a role as policy advocates. This could have the following two benefits:

a) The trade and investment environment could be improved (using their knowledge of trade and investment)

b) Potential investment arbitration disputes under bilateral investment treaties could be avoided through proper actions by the State (*e.g.*, amendments to legislation, modification of the conflicting measures or elimination of damages). Indeed some countries are setting up an agency to avoid investment disputes. Such an agency could be combined with policy advocacy. Please note that according to UNCTAD, Viet Nam has 60 bilateral investment treaties and 12 international investment agreements (not all of them in force).⁷⁹

5. FINAL REMARKS

Trade and investment promotion is key for development. The rationale is simple: the more successful transactions a company has the stronger the company; the more stronger companies an industry has, the stronger the industry; the more strong industries a country has, the stronger the economy of the country.

Countrywide economic development is mainly focused on the macroeconomic level. This could leave regions, industries and companies neglected. Trade and investment promotion agencies can play a key role in attending those regions, industries and companies, strengthening the economy with a bottom-up approach.

The importance of these programmes should not be underestimated.

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⁷⁸ Idem at box 2. Further information about the IDC is found at <http://www.mexicaliindustrial.com/> (consulted in May 2014).

⁷⁹ See <http://investmentpolicyhub.unctad.org/IIA/CountryBits/229#iialInnerMenu> (consulted in June 2014).

ANNEX 1 – SUMMARY OF THE FOUR TRADE PROMOTION PROGRAMMES IN THE COMMERCIAL CODE

1. CONTROLLING THE BEHAVIOUR OF TRADERS

1.1 SALES PROMOTION

Art 88 of the Commercial Code defines trade promotion as the “... activities of... traders to promote... the sale of goods or the provision of services...” They may offer “... certain benefits to the consumers.” The promotion can be provided directly by the sellers or by other traders on a contractual basis. Promotion of sales (Art 92 of the Commercial Code) can be performed through the following:

- a) Samples of goods or services;
- b) gifts (free of charge);
- c) discounts (as registered and announced);
- d) coupons;
- e) selling the goods/services along with a ticket to a contest for a prize (in accordance with the relevant rules);
- f) participation in a game of chance (in accordance with the relevant rules);
- g) frequent consumer Programme;
- h) cultural, artistic or entertaining Programmes; and
- i) other ways approved by the competent authority.

Some elements have to be notified at the place where the goods/services are sold or displayed, and in their packages under certain circumstances. For example, the name of the promotion and the trader involved, along with the duration of the promotion, the conditions applicable, the expenses to be borne by consumer, the value of discount or coupons, among others (Art 97 and 98 of the Commercial Code).

The Commercial Code provides a list of prohibited acts when promoting sales (Art 100):

- a) Promoting sales of goods/services, or using them to promote others, which are banned from circulation or subject to business restrictions.
- b) Promoting alcohol, or using alcohol as promotion, when targeting minors (*i.e.*, under 18 years old).
- c) Promoting cigarettes or liquors with 30° or more alcohol content, or using those products as promotion.
- d) Untruthfully promoting sales to mislead consumers.
- e) Promoting goods of inferior quality, causing harm to the environment, human health or other public interests.
- f) Conducting promotions in schools, hospitals, and offices of State agencies, political organizations, and units of the People’s Armed Forces.
- g) Not providing the prices or gifts as promised, or doing so improperly.
- h) Promoting sales for purposes of unfair competition.
- i) Exceeding the value of sales promotion goods/services, or the maximum discount or value of the good/service used for promotion, as per Art 94.4 of the Commercial Code.

Decree No. 37/2006/ND-CP further develops these rules on Sales Promotion. For instance, a gift (good or service) provided to promote sales may not exceed 50 per

cent of the value of the good or service promoted (Art 5). The use of coupons follows this rule (Art 10). Similarly, a discount of a good or service may not exceed 50 per cent of the price of the discounted good or service (Art 6 and 9). But samples may be provided to potential consumers (Art 7 and 8). Promotions using games of chance and promotional contests must be notified, relevant information is to be provided by organizers, and 50 per cent of the prices not allocated have to be remitted to the State budget (Art 11 and 12). These rules apply to sales promotion over the Internet (Art 14).

Pre-notification of the sales promotion activities is mandatory, followed by a report after the conclusion of the activities (Art 101 of the Commercial Code). Decree No. 37/2006/ND-CP also regulates the control by the State of sales promotion. The trader organizing promotional activities has to file a pre-notification with a minimum content. Registration by the competent authority follows, which has to be sent by the trader to the regional authorities of the provinces where the promotion is going to take place. Later, the trader has to file a final report to the competent authority after the promotion is over (Arts 15 to 17). The competent authority may order the termination of the sales promotion (Art 20). Finally, the competent authorities may inspect the implementation of particular promotional activities, and affected traders are able to report any abuses by inspectors (Arts 39 to 41).

1.2 COMMERCIAL ADVERTISING

Commercial advertising is defined in the Commercial Code (Art 102) as "... commercial promotion activities aimed at introducing to customers their goods and services..." Art 103 of the Commercial Code provides for the right to advertise to certain traders. It includes images, actions, sounds, voices, scripts, symbols, colours and lights (Art 105 of Commercial Code). They can be provided through mass media, other means of communication, publications, all kinds of signboards, signs, banners, panels, and other means (Art 106). Advertising activities have to comply with the relevant laws and regulations, and may not affect the environment (Art 107). Intellectual property rights relating to advertising may be registered (Art 108).

The Commercial Code contains a list of prohibited advertisements (Art 109):

- a) Advertisements threatening the security of the country.
- b) Advertisements contrary to the customs and practices of the country.
- c) Advertisements of goods or services banned by the State, or those whose circulation is not yet permitted.
- d) Advertisements of cigarettes or liquors with 30° or more alcohol content.
- e) Advertisements that might cause harm to the interests of the State, organizations or individuals.
- f) Advertisements comparing business activities of similar competitors.
- g) Advertisements with untruthful information (*i.e.*, quantity, quality, price, utility, design, origin, category, packing, service mode and warranty).
- h) Advertisements infringing an intellectual property right.
- i) Advertisements with the aim of unfair competition, according to the applicable law.

Finally, Arts 110 to 116 of the Commercial Code regulate the contractual obligations between traders and those providing advertising services.

Decree No. 37/2006/ND-CP further develops these rules on commercial advertisement. It contains provisions to protect children from speculative advertisements (Art 23). Products must comply with the laws on healthcare (Art 25). Also, the goods have to comply with the applicable technical standard and quality regulations (Art 26). The competent authority may stop the advertising campaign (Art 27). Finally, the competent authorities may inspect the implementation of particular promotional activities. A trader can report any abuses by inspectors (Arts 39 to 41).

We are aware that there is a threshold for tax purposes with respect to the cost of advertising. Only a certain amount of the advertising expenses may be deducted for tax purposes. The amount depends on the size of the company or trader, as it is calculated as a percentage of their trading activities: 15 per cent of the turnover (before it was 10 per cent).⁸⁰

1.3 DISPLAY AND INTRODUCTION OF GOODS AND SERVICES

The Commercial Code (Art 117) defines display and introduction of goods and services as "... commercial promotion activities... to introduce... goods and/or services to customers." It allows traders to display and introduce their goods and services, or to contract these services out to other traders (Art 118).

Display and introduction can be provided through: showrooms, trade centres, sporting, cultural or artistic activities; and online (Art 120). The goods and services have to be legally traded and comply with the relevant laws on labelling (Art 121). Goods can be temporarily imported for six months in order to be displayed and introduced (Art 122).

Some activities to display and introduce goods and/or services are prohibited (Art 123):

- a) Activities harmful to national security, the environment or human health.
- b) Activities relating to State security.
- c) Activities to compare the goods and services with those from competitors.
- d) Activities inconsistent in terms of quality, price, unit size, design, category, packing, warranty and other quality standards that might mislead customers.

The Commercial Code contains provisions relating to the contractual relationship between the traders of goods and services and those contracted to introduce and display such goods and services (Arts 124 to 128).

Under Decree No. 37/2006/ND-CP, the competent authorities may inspect the implementation of particular promotional activities, and affected traders can report any abuses by inspectors (Arts 39 to 41).

⁸⁰ For a brief explanation, see White Book of Trade / Investment Issues & Recommendations of EUROCHAM, available at <http://www.eurochamvn.org/node/12731> (consulted in April 2014).

2. MAKING TRADERS STRONGER

2.1 TRADE FAIRS AND EXHIBITIONS

The Commercial Code defines trade fairs and exhibitions as “... activities conducted in a concentrated manner at particular locations and for given periods of time to display and introduce their goods and/or services...” with the aim of increasing sales (Art 129). Art 130 determines the concept of services as support in the participation or organization of trade fairs and exhibitions. The contract for those services has to be in writing. Art 131 provides traders with the right to participate, and some of them can organize trade fairs and exhibitions (under Art 131.3, foreign traders may not organize trade fairs and exhibitions). Also, the organization of trade fairs and exhibitions in Viet Nam has to be pre-registered and certified by the competent authorities (Art 132). Organizers of trade fairs and exhibitions outside Viet Nam have to be registered as service providers, and foreign fairs and exhibitions have to be approved (Art 133).

The Commercial Code contains a list of prohibited goods and services that may not be displayed in fairs and exhibitions (Art 134):

- a) goods banned by the law,
- b) goods banned from importation, and
- c) goods infringing an intellectual property right (except for comparison with the originals),

Goods temporarily imported for participation in a fair or exhibition in Viet Nam, must be re-exported within 30 days after the end of the fair or exhibition, and must comply with the applicable law (Art 134.3 and 134.4). Goods temporarily imported may be sold or offered as gifts only after payment of the relevant taxes, compliance with the applicable law, and/or authorization by the competent State agency (Art 136).

All kind of goods and services are allowed to participate in fairs and exhibitions outside Viet Nam, unless they are subject to an export ban (which may be waived upon approval by the Prime Minister). The temporary export of goods must be in accordance with the applicable law, and they must be re-imported within one year to avoid the payment of the applicable taxes and financial charges (Art 135). Goods temporarily exported can be sold or offered as gifts only after payment of the relevant taxes, authorization of the competent agency or approval by the Prime Minister as applicable (Art 137).

The Commercial Code contains provisions covering the contractual relationship between the traders of goods and services and those providing services relating to the participation and organization of fairs and exhibitions (Arts 138 to 140).

Decree No. 37/2006/ND-CP further develops these rules on trade fairs and exhibitions. The goods have to comply with the applicable rules on labelling (Art 29). The competent authority has to approve the comparison of any counterfeited goods with the original ones (Art 30). Organization of fairs or exhibitions has to be registered prior to the month of October of the year before the date of the event, and the competent authority has to provide a certification (but may refuse to certify). After the event, traders or their contractors have to report on the results of the event to the competent authority (Art 34). Likewise, the organization of participation by traders in events

outside Viet Nam has to be registered before October of the year before the event, certified by the competent authority, and reported by the trader after the event (Art 36). But, traders may directly participate in fairs and exhibitions outside Viet Nam and are then exempt from these requirements (Art 36.7). Finally, the competent authorities may inspect the implementation of particular promotional activities, and affected traders can report any abuses by inspectors (Arts 39 to 41).

2.2 OTHER PROGRAMMES ADDITIONAL TO THOSE INCLUDED IN THE COMMERCIAL LAW

Viet Nam Logo

Under Art 5 of Decision 984/QD-BCT, those companies holding the logo of Viet Nam benefit from: State organized activities, advice on IP registration, access to databases, participation in fairs and exhibitions, and legal assistance on disputes relating to IP.

Decision 72/2010/QD-TTg

Decision 72/2010/QD-TTg sets out the framework for Programmes promoting trade, investment and tourism. It provides the basis for timetable, suggestions, approvals, management, implementation, financing, and reporting of the Programmes, along with the roles of the relevant authorities.

Some of the main aims are:

- Maintaining updated market information, such as databases.
- Developing the image of Viet Nam and its regions.
- Providing technical consultancy on the development of products, quality, and exports, among others.
- Organizing workshops.
- Organizing trade fairs and exhibitions, as well as conferences.
- Managing trade delegations from overseas to Viet Nam and vice versa.
- Developing market access strategies.
- Organizing events to develop technologies, sales, transportation and market research in various areas in Viet Nam (including rural areas).

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