



TECHNICAL REPORT

The consistency of the new procedures with Vietnam's international commitments

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“Support MOIT in revising legal acts regulating administrative procedures for foreign direct investment”

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Prepared by: Dr. David Luff

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I. INTRODUCTION

The Ministry of Trade and Industry of Vietnam is tasked with the revision of the legal acts providing the administrative procedures applicable to foreign direct investment. This report briefly assesses the compliance of the proposed new legal acts with Vietnam's international commitments under the trade and investment agreements to which Vietnam is a party.

The terms of reference for this report very clearly provide the relevant context of the task:

“The recent entry into force of Law No. 67/2014/QH13 on Investment and the Business Law No. 68/2014/QH13 brought about a number of changes regarding the legal background for investment and business sector in Vietnam, including the sensitive sectors where investments are subject to conditions. The Ministry of Industry and Trade is in charge of drafting the implementing legal acts for the administrative requirements in the 28 sensitive sectors (in Annex I the list of the sectors).

These sectors are considered important sectors and therefore they require the Ministry of Industry and Trade to require more complex administrative procedures for authorizing investment, including requirements for dossier and other related conditions. These administrative procedures, regulated by legal acts enacted after the previous investment law, must now be revised in the light of the new investment law. It is therefore necessary, in the 28 sectors within the competence of MOIT, to start a thorough revision of the relevant legal acts to identify the existing inconsistencies and the needs for amendments. This activity will be of great benefit for individuals and organizations, especially foreign investors when they want to invest in Vietnam. The relevant legal acts are listed in Annex II”.

This report therefore assesses the compliance of the proposed legal acts, and the proposed changes in the existing legal acts, which provide the investment-related procedures affecting the 28 sensitive sectors listed below:

1. Petroleum
2. Gas (LPG)
3. Commercial appraisal
4. Materials for industrial explosives
5. Pre-chemical explosives
6. Sectors using explosive materials and pre-chemical explosives
7. Blasting services
8. Chemicals except chemicals prohibited under the Convention on the Prohibition of the Development, Production, Stockpiling, and use of chemical weapons and their destruction
9. In-organic fertilizer
10. Alcohol

11. Tobacco, ingredients of tobacco, machines, equipment related to tobacco
12. Commodity exchange
13. Electricity
14. Trading in food
15. Export of rice
16. Temporary import and re-export of goods subject to special excise tax
17. Temporary import and re-export of frozen goods
18. Temporary import and re-export of used goods
19. Franchising
20. Trading in coal
21. Logistics services
22. Trading in minerals
23. Import and export of industrial precursor chemicals
24. Trading goods and directly related trading goods of foreign investor
25. E-commerce
26. Multi-level marketing
27. Industrial pressure machine
28. Petroleum activities

For each one the 28 sectors above, Vietnamese experts have assessed the existing administrative procedures affecting foreign direct investment and provided recommendations to bring them into compliance with the Law No. 67/2014/QH13 on Investment and the Law No. 68/2014/QH13 on Business.

This report assesses the Vietnamese experts' recommendations in light of Vietnam's international commitments. The author of this report has reviewed four reports produced by the Vietnamese experts:

1. A first report (41 pages) describes in detail the conditions imposed in Vietnam on economic operators to be authorized to do business in each one of the above-mentioned 28 sectors.
2. A second report (65 pages) describes in detail the administrative procedures that are applied and managed by the MOIT to grant investment licenses and authorizations to do business to foreign direct investors in Vietnam in each of the above-mentioned 28 sectors.
3. A third report (70 pages) assesses the consistency of the conditions and the procedures applied in Vietnam to grant investment licenses and authorizations to do business with the new investment law and the new business law in each of the 28 sectors. It also contains

some recommendations regarding changes to bring to the existing conditions and procedures to do business in Vietnam in the 28 sectors concerned.

4. A fourth report (27 pages) contains suggestions to further simplify the administrative procedures in the 28 sensitive sectors, in accordance with the new Investment Law of 2014.

The assessment in this report is confined to the information provided in the above-mentioned four reports. It flags possible areas of concern related to Vietnam's international commitments under the trade and investment agreements Vietnam is a party to.

The second chapter of this report briefly describes Vietnam's international commitments affecting domestic regulation applicable to international investments. Such commitments are found in bilateral and multilateral investment treaties, and in the rules of the WTO, particularly the WTO agreement on Trade Related Investment Measures (TRIMs), the WTO Agreement on Import Licensing Procedures, and Vietnam's liberalization commitments under the General Agreement on Trade in Services (GATS).

The third chapter of this report addresses the compliance of the administrative procedures in Vietnam affecting foreign investment with Vietnam's international commitments. Compliance with the rules of transparency, due process and non-discrimination in particular are analyzed. The analysis also checks whether there are conditions in the administrative procedures concerned, which are distortive to trade or discriminatory towards imported products. The assessment also addresses consistency with Vietnam's commitments under the GATS. This chapter then highlights the few areas of concerns resulting from the legal review of Vietnam's administrative procedures in the above-mentioned 28 sensitive sectors. The analysis is preliminary in nature since it flags "prima facie" cases of violation. It would be important to review the details of the measures concerned and their practical application to produce a final legal opinion regarding these measures.

This report provides a "succinct" analysis, as requested in the terms of reference, of the legal compliance of Vietnam's administrative procedures, which are described in the reports produced by the Vietnamese experts. Therefore, this report does not comment on the relevance or desirability of the procedures concerned.

II. INTERNATIONAL COMMITMENTS OF VIETNAM REGARDING INTERNATIONAL INVESTMENT

II.1 Investment treaties

The majority of international standards regarding the treatment of foreign investors is set by customary law and international treaties, both bilateral and multilateral. International treaties pertaining to the treatment of foreign investments can have a bilateral (so-called bilateral investment treaties; "BITs"), or multilateral character.

BITs and multilateral agreements pertaining to investment concern mostly the protection of foreign investment, *i.e.*, establishing what type of measures directed at foreign investors cannot be undertaken by a host State after an investor is already established in a host State. Vietnam has

consented to 46 BITs which are currently in force, and one multilateral investment agreement concluded under auspices of ASEAN. The protection of investment does not affect the market access of new investment, *i.e.*, requirements introduced by the Vietnamese laws which in-coming investors have to meet in order to be eligible for being legally established in Vietnam. It means that any host State, Vietnam for instance, remains free to regulate conditions under which new in-coming investments are being established.

In general, foreign investment is defined in BITs and multilateral agreements in a very broad manner. Many BITs and multilateral agreements refer to “every kind of asset” and to a non-exhaustive list of assets which can constitute an investment under a respective BIT or multilateral agreement. The following types of assets are usually included in BITs or multilateral agreements as examples of a covered investment:

- movable and immovable property as well as any other rights related to property, *e.g.*, servitudes, or mortgages,
- shares or any other kinds of participation in companies and corporations,
- money claims,
- copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), and know-how,
- rights or licenses to exploit natural resources, as well as
- other rights conferred by law, by contract or by governmental decision issued in accordance with the law.

The protection of investment in BITs and multilateral agreements provides for standards of treatment which should be afforded to foreign investors. The scope of these standards is in principle consistent between various treaties, and in many elements it stems from the development of customary international law on treatment of aliens. However, some minor differences can occur, especially among recently concluded BITs which aim at preserving more regulatory space of host states against the protection of foreign investors’ claims of legitimate expectations and against regulatory expropriation. Vietnam has concluded at least two investment agreements of this new generation (*i.e.*, Free Trade Agreement with the EU, and the Trans-Pacific Partnership).

In general, the BITs of Vietnam confer the following standards of protection:

- Fair and Equitable Treatment (“FET”),
- Full Protection and Security (“FPS”),
- Most-Favorable Nation (“MFN”).

Fair and Equitable Treatment (“FET”) consists of a few rules such as those ensuring:

- The protection of investors’ legitimate expectations regarding the stability and continuity of their investment. This principle concerns in particular:

- the stability and predictability of the regulatory framework in the host State,
- transparency of licensing conditions and procedures, and
- due process regarding the granting of license and authorizations. This includes procedural propriety, good faith, and freedom from coercion and harassment.

Key aspects of FET are the principles of transparency and due process.

The principle of transparency requires that any state measures addressed to foreign investors must not be ambiguous and lead to uncertainty (*Tecmed v. Mexico*, Award of 29 May 2003, para. 172). Moreover, a national policy and practice towards investors should be coherent, consistent and independent from the conduct of investors (*MTD v. Chile*, Award of 25 May 2004, para. 165). Furthermore, the rule of transparency requires a State and the national authorities to act consistently. An investor should be able to rely on any national authorities' conduct and representations. Any uncertainty about the scope of the officials' acts, their validity or effect might constitute a breach of transparency (*SPP v. Egypt*, Award of 20 May 1992, para. 82-83). In addition, all relevant laws should be published and easily accessible, as well as strictly followed and applied by national officials. Criteria which national implementing authorities apply should be known to every potentially applying investor.

The standard of due process requires not to deny justice to foreign investors. This obliges national authorities to act in accordance with procedural fairness in both judicial and administrative proceedings. The question of due process usually appears in investment disputes in which obtaining or extending a license has been required in a host state. The key element of due process is the right to be heard and submit investors' claims to respective authorities, either judicial or administrative. In general, an investor should always have a right to present its arguments (*Metalclad v. Mexico*, Award of 30 August 2000, para. 176; *Tecmed v. Mexico*, Award of 29 May 2003, para. 162). In addition, administrative authorities should properly notify an investor about its conduct, when it is necessary.

The principle of Full Protection and Security ("FPS") relates to the physical security of investment. It implies obligations of host states to undertake all measures necessary to prevent the investment from destruction and ensure security of all people engaged in running the investment on the territory of the host State. In recent case law, FPS is interpreted more broadly extending its scope of application to other than the physical aspect of investments' security, such as legal and commercial security.

Finally, MFN ensures that the domestic laws of the host State do not discriminate among foreign investors, according to their origin. Exceptions are possible if parties to an investment agreement agree not to extend benefits which they provide for investors of other states as a result of membership in a regional economic integration organization (so called the "REIO exception").

It results from the above that the key principles according to which administrative procedures affecting foreign direct investment (FDI) in Vietnam must be assessed are the rules of FET, in particular transparency and due process, and MFN. This latter analysis implies that a comparison is made with the definition of foreign investment in Vietnam with the definition in the BITs and

multilateral agreements. Indeed, in case the definitions do not match, there is a possibility that Vietnam treats foreign direct investment falling under the scope of its legislation differently from the FDI falling outside its legislation. This may create differences among FDIs of different origins.

II.2 Rules of the WTO

The relevant rules of the WTO are those contained in the Agreement on the Trade-related Investment Measures (TRIMs), in the Agreement on Import Licensing Procedures and in Vietnam's commitments under the General Agreement on Trade in Service (GATS), particularly those made under mode 3 of supply of a service (commercial presence).

A. The WTO TRIMs Agreement

The Agreement on the Trade Related Investment measures (TRIMs) was concluded in 1994 and is an important agreement in the framework of the WTO. Its scope of regulation and application is tightly connected to GATT and it applies the core rules of National Treatment and prohibition of quantitative restrictions to investment measures which contain trade-related provisions.

Under the TRIMs agreement, WTO Members cannot adopt investment measures which contain provisions which are inconsistent with the provisions of Article III or Article XI of GATT. The agreement contains an illustrative list of possible trade-related investment measures which are prohibited:

- “1. *TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:*
 - (a) *the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or*
 - (b) *that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.*
2. *TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:*
 - (a) *the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;*
 - (b) *the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or*

- (c) *the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production”.*

Therefore, under the TRIMs agreement, it is important to verify whether administrative procedures affecting foreign direct investment (FDI) in Vietnam contain trade conditions which are distortive to trade or discriminatory, such as local content requirements, foreign exchange restrictions, export restrictions (domestic sales requirements) or trade balancing measures (requirement that the number of imports is the same as that of exports).

B. WTO Agreement on Import Licensing Procedures

The WTO Agreement on Import Licensing Procedures requires import licensing to be simple, transparent and predictable. The Agreement generally authorizes automatic import licensing procedures. These are those that are systematically granted to applicants. Their purpose is only to register imports for statistical purposes for instance. There are few situations, however where licenses are not issued automatically. These situations concern products for which tariff rate quotas are established (typically in the sector of agriculture) or the few situations in which quantitative restrictions are authorized under the WTO, such as the establishment of a safeguard measure. Here, the agreement tries to minimize the importers’ burden in applying for licenses, so that the administrative work does not in itself restrict or distort imports.

The agreement requires governments to publish sufficient information for traders to know how and why the licenses are granted. It also explains how countries should notify the WTO when they introduce new import licensing procedures or change existing procedures. The agreement offers guidance on how governments should assess applications for licenses. Applicants for import licenses must be granted a deadline of at least 21 days to present their application¹. A maximum of three administrative bodies can be established to assess applications and applications cannot be refused for minor mistakes in the documents provided².

The assessment of the conformity of Vietnamese procedures for investment with the Agreement on Import Licensing Procedures requires to analyse whether the investment-related procedure contain trading aspects and whether these are consistent in law and in practice with the provisions of the agreement.

C. Vietnam’s commitments under the GATS

Vietnam’s commitments under the GATS concerning investments are those made in specific sectors under mode 3 of supply of a service. This mode of supply of a service is defined as a supply of a service through a foreign company setting up a subsidiary or branch to provide services in another country (e.g. foreign banks setting up operations in a country). This mode of supply of a service is referred to as “Mode 3 - commercial presence”.

¹ Article 1.6 of the Agreement on ILP.

² Article 1.7 of the Agreement on ILP.

Under GATS, each Member of the WTO took specific market access and national treatment commitments in selected services sectors for each mode of supply, including mode 3. Commitments in mode 3 mean that the WTO member concerned offers market access for a foreign service supplier establishing a commercial presence in its territory in the service sector concerned. It also means that the foreign service supplier cannot be discriminated against the like domestic service suppliers (national treatment). A Member of the WTO, however, can also limit its market access and national treatment commitments in its schedule of services commitments for the sector concerned. Hence, with respect to Vietnam, it is relevant to analyze Vietnam's commitments and limitations in its schedule of services commitments, which might affect the 28 sensitive sectors which are subject to this report:

The table below reproduces Vietnam's commitments in relevant sectors which have an impact on the 28 sensitive sectors. The first column indicates the sector concerned. The second column indicates the market access commitments and limitations for the sector concerned, according to the "Mode 3 - commercial presence". The third column indicates the national treatment commitments and limitations for the sector concerned, according to the "Mode 3 - commercial presence". When the word "none" is provided, it means there are no limitations to market access or national treatment. When the word "unbound" is provided, it means that no commitments are made. The footnotes to the table are those contained in the original schedule of commitments of Vietnam.

The relevance of each commitments in each of the 28 sectors is provided in the second part of this report.

Sectors and sub-sectors	Limitations on Market Access	Limitations on National Treatment
(e) Engineering services (CPC 8672) (f) Integrated engineering services (CPC 8673)	(3) None, except: For the period of 2 years from the date of WTO accession, 100% foreign-invested enterprises may only provide services to foreign-invested enterprises in Vietnam. Foreign enterprises have to be juridical persons of a WTO Member.	(3) None, except: The supply of services related to topographical, geotechnical, hydro geological and environmental surveys and technical surveys for urban-rural development planning, sectoral development planning are subject to the authorization of the Government of Vietnam ³ .

³ For greater transparency, this commitment allows the maintenance or adoption of limitations or restrictions for national security and public order reasons that would be justified under Article XIV and Article XIV bis of the GATS.

Sectors and sub-sectors	Limitations on Market Access	Limitations on National Treatment
<p>a) Advertising services (CPC 871, excluding advertising for cigarettes)</p>	<p>(3) None, except:</p> <p>Upon accession, foreign service suppliers are permitted to establish joint venture or business cooperation contract with Vietnamese partners who are legally authorized to do advertising services.</p> <p>Upon accession, joint ventures shall be allowed with foreign capital contribution not exceeding 51% of the legal capital of the joint venture. As of 1 January 2009, there shall be no limitation on foreign capital contribution in the joint ventures.</p>	<p>(3) None.</p>
<p>(b) Market research services (CPC 864, excluding 86402)</p>	<p>(3) None, except:</p> <p>Upon accession joint ventures shall be allowed with foreign capital contribution not exceeding 51% of the legal capital of the joint venture. As of 1 January 2009, 100% foreign-invested enterprises shall be permitted.</p>	<p>(3) None.</p>
<p>(c) Management consultant services (CPC 865)</p>	<p>(3) None.</p> <p>After 3 years from the date of accession, branching is allowed.</p>	<p>(3) None, except that the chief of the branch has to be a resident in Vietnam.</p>

Sectors and sub-sectors	Limitations on Market Access	Limitations on National Treatment
<p>(h) Services incidental to mining (CPC 883)</p> <p>1. The commitments specified hereunder are not understood to cover the following activities: supply of equipment, materials and chemicals, supply base services, offshore/marine support vessels, accommodation and catering, helicopter services.</p> <p>2. The commitments specified hereunder are made without prejudice to the rights of the Government of Vietnam to set out the necessary regulations and procedures to regulate the oil and gas related activities carried out within the territory or jurisdiction of Vietnam in full conformity with the rights and obligations of Vietnam under the GATS.</p>	<p>(3) None, except:</p> <p>Upon accession, joint ventures with foreign capital contribution not exceeding 49% shall be permitted. After 3 years from the date of accession, this limitation shall be 51%. Two years thereon, 100% foreign-invested enterprises shall be permitted.</p>	<p>(3) None, except as indicated in the market access column.</p>

Sectors and sub-sectors	Limitations on Market Access	Limitations on National Treatment
(i) Services incidental to manufacturing (CPC 884 and 885)	(3) None, except: After 3 years from the date of accession, only joint ventures with foreign capital contribution not exceeding 50% shall be permitted. Five years thereon: 100% foreign-invested enterprises shall be permitted.	(3) Unbound.
(m) Related scientific and technical consulting services ⁴ (CPC 86751, 86752 and 86753 only)	(3) None, except: Upon accession, joint ventures with foreign capital contribution not exceeding 49% shall be permitted. After 2 years from the date of accession, this limitation shall be 51%. Two years thereon, 100% foreign-invested enterprises shall be permitted.	(3) None, except as indicated in the market access column.

⁴ The supply of services related to prospecting, surveying, exploration and exploitation is subject to the applicable laws and regulations of Vietnam.

Sectors and sub-sectors	Limitations on Market Access	Limitations on National Treatment
<p>Value-added services</p> <p>(h) Electronic mail (CPC 7523 **)</p> <p>(i) Voice mail (CPC 7523 **)</p> <p>(j) On-line information and database retrieval (CPC 7523**)</p> <p>(k) Electronic data interchange (EDI) (CPC 7523**)</p> <p>(l) Enhance/value-added facsimile services, incl. store and forward, store and retrieve (CPC 7523**)</p> <p>(m) Code and protocol conversion</p> <p>(n) On-line information and data processing (incl. transaction processing) (CPC 843**)</p>	<p>(3) None, except:</p> <p>Non facilities-based services:</p> <p>Upon accession: business cooperation contracts or joint ventures will be allowed. Foreign capital contribution shall not exceed 51% of legal capital of the joint ventures.</p> <p>Three years after accession: Foreign capital contribution shall not exceed 65% of legal capital of the joint ventures.</p> <p>Facilities-based services: Upon accession, business cooperation contracts or joint ventures (JV) with telecommunications service suppliers duly licensed in Vietnam will be allowed. Foreign capital contribution shall not exceed 50% of legal capital of the joint ventures.</p> <p>Fifty-one % gives management control of the joint venture.</p> <p>In the telecommunications sector, foreign investors in BCC will have the possibility to renew current arrangements or to convert them into another form of establishment with conditions no less favourable than those they currently enjoy.</p>	<p>(3) None.</p>

Sectors and sub-sectors	Limitations on Market Access	Limitations on National Treatment
<p>Value added services</p> <p>(o) Other</p> <p>- Internet Access Services IAS⁵</p>	<p>(3) Non facilities-based services:</p> <p>Upon accession: joint ventures with telecommunications suppliers duly licensed in Vietnam will be allowed. Foreign capital contribution shall not exceed 51% of legal capital of the joint ventures.</p> <p>Three years after accession: joint venture will be allowed without limitation on choice of partner. Foreign capital contribution shall not exceed 65% of legal capital of the joint ventures.</p> <p>Facilities-based services: Upon accession, joint venture (JV) with telecommunications service suppliers duly licensed in Vietnam will be allowed. Foreign capital contribution shall not exceed 50% of legal capital of the joint ventures.</p>	<p>(3) None.</p>

⁵ Services providing internet access to the end users.

Sectors and sub-sectors	Limitations on Market Access	Limitations on National Treatment
<p>Construction and related engineering services</p> <p>A. General construction work for building (CPC 512)</p> <p>B. General construction work for civil engineering (CPC 513)</p> <p>C. Installation and assembly work (CPC 514, 516)</p> <p>D. Building completion and finishing work (CPC 517)</p> <p>E. Other (CPC 511, 515, 518)</p>	<p>(3) None, except:</p> <p>For the period of 2 years from the date of accession, 100% foreign-invested enterprises could only provide services to foreign-invested enterprises and foreign-funded projects in Viet Nam.</p> <p>Foreign enterprises have to be juridical persons of a WTO Member.</p> <p>After 3 years from the date of accession, branching is allowed.</p>	<p>(3) None, except that the chief of the branch has to be a resident in Viet Nam.</p>
<p>Measures applicable to all sub-sectors in Distribution Services:</p> <p>Cigarettes and cigars, books, newspapers and magazines, video records on whatever medium precious metals and stones, pharmaceutical products and drugs²², explosives, processed oil and crude oil, rice, cane and beet sugar are</p>	<p>(3) None, except:</p> <p>A joint venture with a Vietnamese partner(s) is required, and foreign capital contribution shall not exceed 49%. As of 1 January 2008, the 49% capital limitation shall be abolished. As of 1 January 2009, none.</p> <p>Upon accession, foreign-invested companies engaging in distribution services will be</p>	<p>(3) None.</p>

Sectors and sub-sectors	Limitations on Market Access	Limitations on National Treatment
<p>excluded from the commitments.</p> <p>A. Commission agents' services (CPC 621, 61111, 6113, 6121)</p> <p>B. Wholesale trade services (CPC 622, 61111, 6113, 6121)</p> <p>C. Retailing services (CPC 631 + 632, 61112, 6113, 6121)⁶</p>	<p>permitted to engage in the commission agents', wholesale and retail business of all legally imported and domestically produced products except for: cement and cement clinkers; tyres (excluding tyres of airplanes); papers; tractors; motor vehicles; cars and motorcycles; iron and steel; audiovisual devices; wines and spirits; and fertilizers.</p>	

⁶ For transparency purposes, this commitment includes multi-level sales by properly trained and certified Vietnamese individual commission agents away from a fixed location for which remuneration is received both for the sales effort and for sales support services that result in additional sales by other contracted distributors.

Sectors and sub-sectors	Limitations on Market Access	Limitations on National Treatment
	<p>As of 1 January 2009, foreign-invested companies engaging in distribution services will be permitted to engage in the commission agents', wholesale and retail business of tractors; motor vehicles; cars and motorcycles.</p> <p>Within 3 years of Vietnam's accession, foreign-invested companies engaging in distribution services will be permitted to engage in the commission agents', wholesale and retail business of all legally imported and domestically produced products.</p> <p>The establishment of outlets for retail services (beyond the first one) shall be allowed on the basis of an Economic Needs Test (ENT)⁷.</p>	
D. Franchising services (CPC 8929)	<p>(3) None, except a joint venture with a Vietnamese partner(s) is required, and foreign capital contribution shall not exceed 49%. As of 1 January 2008, the 49% capital limitation shall be abolished. As of 1 January 2009, none.</p> <p>After 3 years from the date of accession, branching is allowed.</p>	(3) None, except that the chief of the branch has to be a resident in Vietnam.

⁷ Applications to establish more than one outlet shall be subject to pre-established publicly available procedures, and approval shall be based on objective criteria. The main criteria of the ENT include the number of existing service suppliers in a particular geographic area, the stability of market and geographic scale.

Sectors and sub-sectors	Limitations on Market Access	Limitations on National Treatment
<p>A. Maritime Transport Services</p> <p>(a) Passenger transportation cabotage (CPC 7211) less</p> <p>(b) Freight transportation cabotage (CPC 7212) less</p>	<p>(3) (a) Establishment of registered companies for the purpose of operating a fleet under the national flag of Vietnam:</p> <p>After 2 years from the date of accession, foreign service suppliers are permitted to establish joint-ventures with foreign capital contribution not exceeding 49% of total legal capital. Foreign seafarers may be permitted to work in ships under the national flag of Vietnam (or registered in Vietnam) owned by joint-ventures in Vietnam but not exceeding 1/3 of total employees of the ships. The Master or first chief executive must be Vietnamese citizen.</p>	<p>(3) None.</p>

Sectors and sub-sectors	Limitations on Market Access	Limitations on National Treatment
	<p>(b) Other forms of commercial presence for the supply of international maritime transport services⁸:</p> <p>Upon accession, foreign shipping companies can establish joint ventures with 51% foreign ownership. After 5 years from the date of accession, foreign shipping companies can establish 100% foreign-invested enterprises.</p> <p>Upon accession, foreign-invested enterprises are only permitted to carry out activities from (1) to (5) as indicated below:</p> <ol style="list-style-type: none"> 1. Marketing and sales maritime transport services through direct contact with customers, from quotation to invoicing; 2. Acting on behalf of the cargo owners; 3. Provision of required business information; 4. Preparation of documentation concerning transport documents including customs documents, or other documents related to the origin and character of the goods transported; and 5. Provision of maritime transport services including cabotage services by Vietnamese flagged vessels for the supply of integrated transport services. 	

Sectors and sub-sectors	Limitations on Market Access	Limitations on National Treatment
	<p>After 5 years from the date of accession, activities from (6) to (7) shall be allowed.</p> <p>6. Acting on behalf of the company, organising the call of the ship or taking over cargoes when required;</p> <p>7. Negotiate and sign contracts for road, rail, inland waterways transportation related to cargoes transported by the company.</p> <p>The number of joint ventures by foreign shipping companies will be limited to 5 companies upon accession. Three additional companies will be allowed every two years thereafter. After 5 years from the date of accession, no limitation on the number of joint ventures.</p>	
<p>B. Internal Waterways Transport</p> <p>(a) Passenger transport (CPC 7221)</p> <p>(b) Freight transport (CPC 7222)</p>	<p>(3) Upon accession, foreign service suppliers are permitted to provide services only through the establishment of joint ventures with Vietnamese partners in which the capital contribution of foreign side not exceeding 49% of total legal capital.</p>	<p>(3) None.</p>

⁸ "Other forms of commercial presence for the supply of international maritime transport services" means the ability for foreign shipping companies to undertake locally activities which are related to the cargoes carried by them and necessary for the supply of the integrated transport service to their customers, within which the international maritime transport constitutes a substantial elements and is supplied by the concerned foreign shipping company.

Sectors and sub-sectors	Limitations on Market Access	Limitations on National Treatment
<p>E. Rail Transport Services</p> <p>(a) Passenger transportation (CPC 7111)</p> <p>(b) Freight transportation (CPC 7112)</p>	<p>(3) Unbound except: Foreign suppliers are permitted to provide freight transport services through the establishment of joint ventures with Vietnamese partners in which the capital contribution of foreign side not exceeding 49% of the total legal capital.</p>	<p>(3) Unbound.</p>
<p>F. Road Transport Services</p> <p>(a) Passenger transportation (CPC 7121+7122)</p> <p>(b) Freight transportation (CPC 7123)</p>	<p>(3) None, except:</p> <p>Upon accession, foreign service suppliers are permitted to provide passenger and freight transport services through business cooperation contracts or joint-ventures with the capital contribution of foreign side not exceeding 49%.</p> <p>After 3 years from the date of accession, subject to the needs of the market⁹, joint-ventures with foreign capital contribution not exceeding 51% may be established to provide freight transport services.</p> <p>One hundred % of joint-venture's drivers shall be Vietnamese citizen.</p>	<p>(3) None.</p>

⁹ The criteria taken into account are among others: creation of new jobs; positive foreign currency balance; introduction of advanced technology, including management skill; reduced industrial pollution; professional training for Vietnamese workers; etc.

Sectors and sub-sectors	Limitations on Market Access	Limitations on National Treatment
H. Services Auxiliary to all Modes of Transport (a) Container handling services, except services provided at airports (part of CPC 7411)	(3) Upon accession, foreign service suppliers are only permitted to provide services through the establishment of joint ventures with Vietnamese partners with the capital contribution of foreign side not exceeding 50%.	(3) None.
(b) Storage and warehouse services (CPC 742) (c) Freight transport agency services (CPC 748) ¹⁰	(3) None, except that upon accession joint ventures with foreign capital contribution not exceeding 51% can be established. Seven years after accession, none.	(3) None.

In addition to the above specific commitments and limitations, Vietnam has adopted for mode 3 “commercial presence” a series of general commitments and limitations, which apply to all services sectors listed in its schedule of commitments, as below:

Market access	National Treatment
(3) Unless otherwise specified in each specific sector or sub-sector of this Schedule, foreign enterprises are allowed to establish commercial presence in Vietnam in the form of business co-operation contract ¹¹ , joint venture enterprise, 100% foreign-invested enterprise.	(3) None, except: Eligibility for subsidies may be limited to Vietnamese service suppliers, i.e. to juridical persons established within the territory of Vietnam, or a part thereof.

¹⁰ Including freight forwarding services. These services mean the activities consisting of organizing and monitoring shipment operations on behalf of shippers, through the acquisition of transport and related services, preparation of documentation and provision of business information.

¹¹ Business co-operation contract is a document which is signed by two or more parties (of which at least one party must be Vietnamese legal entity and one party must be foreign legal entity) and which stipulates the responsibilities of, and the sharing of business results between, the parties for the purpose of conducting investment and business in Vietnam without creating a legal entity.

Market access	National Treatment
<p>Representative offices of foreign service suppliers are permitted to be established in Vietnam, but they shall not engage in any direct profit-making activities¹².</p> <p>Unless otherwise indicated in each specific sector or sub-sector of this Schedule, the establishment of branches is unbound.</p> <p>The conditions of ownership, operation and juridical form and scope of activities as set out in the respective licenses or other form of approval establishing or authorizing the operation or supply of services by an existing foreign service supplier shall not be made more restrictive than they exist as of the date of Vietnam's accession to the WTO.</p>	<p>The granting of one-time subsidization to promote and facilitate the process of equitation is not in breach of this commitment. Unbound for subsidies for Research and Development. Unbound for subsidies in the Health, Education and Audio-visual sectors. Unbound for subsidies aimed at promoting the welfare and employment of ethnic minorities.</p>
<p>Foreign-invested enterprises shall be permitted by competent authorities of Vietnam to lease the land to carry out their investment projects. The land leasing period shall correspond to the time of operation of those enterprises and shall be stipulated in their investment licenses and shall be extended whenever the time of operation of those enterprises is extended by competent authorities.</p> <p>Foreign service suppliers are permitted to make capital contribution in the form of buying shares of Vietnam's enterprises. In this case, the total equity held by foreign investors in each enterprise may not exceed 30% of the enterprise's chartered capital unless otherwise provided by Vietnam's laws or authorized by Vietnam's competent authority.</p> <p>One year after accession, the 30% foreign equity limitation for acquisition of Vietnamese enterprises shall</p>	

¹² Representative office is a subordinate unit of foreign enterprises, established under the Vietnamese law in order to seek, promote trade and tourism opportunities but is not allowed to engage in any direct profit-making activities.

Market access	National Treatment
be eliminated, except for capital contribution in the form of buying shares of joint-stock commercial banks, and except for the sectors not committed in this Schedule. For the other sectors and sub-sectors committed in this Schedule, the level of equity held by foreign investors in acquisition of Vietnamese enterprises shall be corresponding to the limitations on foreign capital participation set forth therein, if any, including the limitations in the form of transitional periods, where applicable.	

Generally speaking, Vietnam's commitments above regarding market access do not limit the capacity of Vietnam to impose licensing conditions and requirements for the purposes of assessing compliance with Vietnam's domestic regulation, such as standards or prudential rules, to the extent such domestic regulation is not restricting the volume or value of the services supplied. Domestic regulation which may undermine commitments taken and which could therefore be problematic in light of the GATS is domestic regulation which consists of one of the following measures (Article XVI:2 of GATS):

- “(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;¹³
- (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
- (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment”. (emphasis added)

¹³ Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

In case a licensing condition or requirement is based on one of the measures above, it is important to assess whether it is covered by one of the limitations provided in Vietnam's schedule of services commitments for the sector concerned. If it is covered, then the licensing condition or requirement is consistent with Vietnam's international commitments. If it is not, then it becomes an area of concern.

III. CONSISTENCY OF VIETNAMESE DOMESTIC PROCEDURES WITH INTERNATIONAL OBLIGATIONS

III.1 General

As indicated above, it is important to assess the administrative procedures affecting foreign direct investment (FDI) in Vietnam in the 28 sensitive sectors essentially according to the principles of Fair and Equitable Treatment ("FET"), transparency, due process, Most Favoured Nation ("MFN") treatment, non-distortion to trade and trade liberalization commitments in services' sectors.

As indicated above, under FET, a country is expected to protect investors' legitimate expectations regarding the stability and continuity of their investment and the stability and predictability of the regulatory framework in the host State. Since it is the entire purpose of Vietnam's new investment law of 2014 to grant such predictability and stability, this report will not further elaborate on this issue, under the assumption that the administrative procedures, once established will not be amended in a way that would undermine authorized investors' presence¹⁴. Of course, the proposed changes aimed a facilitating procedures and conditions for investments, which are recommended in the fourth report analyzed, do not contravene the FET principles, since they are precisely intended to alleviate burdens to private investors.

Furthermore, the Investment Law of 2014 seems to overall satisfy the requirement of transparency, despite there are few specific areas of concern, which are described in section III.2 below. In particular concerns arise in those sectors in which licensing conditions and procedures have not been well defined yet. The Investment Law of 2014, together with its relevant implementing administrative procedures, provides a complex framework regulating the conduct and entrance to the market of investors. The administrative procedures, where specified, are very detailed; they generally provide clear milestones, deadlines and assign responsibilities to identified authorities. The Vietnamese experts formulated several recommendations to further simplify and publish all administrative procedures for foreign investment. These recommendations are fully in line with Vietnam's international commitments and the principle of transparency.

For instance, the Vietnamese experts, in Reports 3 (pages 30 and following) and 4, recommended specific amendments to the complex structure of Vietnamese investment laws and regulations. They advised as follow:

¹⁴ This is confirmed by the adoption, in the new investment law of the negative list approach (see Report 4, page 3).

- To regulate all relevant business investment conditions in one appropriate level of law, or decree. The decrees which should be amended in order to implement this recommendation are related to:
 - transportation of industrial explosives,
 - explosives and explosive precursors,
 - producing and processing LPG,
 - producing and repairing LPG cylinders,
 - testing LPG cylinders,
 - inorganic fertilizer production,
 - food advertising,
 - first establishment of foreign investors,
 - producing explosive precursors,
 - producing and trading chemicals,
 - temporary import for re-export of frozen food,
 - temporary import for re-export of goods subject to special excise tax,
 - temporary import for re-export of goods on the list of used goods,
 - on-line trading,
 - e-commerce of services,
 - reliability assessment of e-commerce website,
 - coal export and trading,
 - rice export,
 - trading of minerals,
 - assessment of conformity,
 - audit and consulting services in some sectors,
 - registration of MLM activities;
- To simplify dossier content in several sectors;
- To separate content of business license and investment license (in respect of goods trading); as well as
- To remove all documents of dossier content which are inconsistent with other decrees or Investment Law provisions.

The above-mentioned proposed changes to the existing Vietnamese regulations are entirely in line with the principle of transparency and international treaties to which Vietnam is a party.

It should be noted that the OECD Policy Framework for Investment (2015 Edition) recommends the creation of simple and accessible database of all legal acts and procedures. This increases the level of transparency and predictability in the host state (page 26). This solution is recommended for Vietnam. The complexity of national laws on investment and licensing, as such, is not a violation of international standards and commitments of Vietnam regarding transparency. However, it increases the risk of misapplication of law due to its complexity, triggering simultaneously concerns regarding the transparency and FET principles.

Furthermore, even were administrative procedures seem to be clear, easy and straightforward, attention should be given to their practical application, since this aspect generally constitutes an important barrier to foreign investment. This concerns law enforcement. It is thus essential to ensure that the supervision over law enforcement is strong enough.

Generally speaking, the Investment Law of 2014 seems to overall satisfy the requirement of due process and the right to be heard. The procedures analyzed grant the possibility to investors to submit all necessary arguments when filing an application to a relevant body. Moreover, in the case when an application is not complete, there is an obligation for public authorities to submit to an investor a request for additional documents/information (as it is described in Study Report 2). However, as rightly pointed out in the recommendations of the third Report (p. 41), it will be important to ensure sufficient training and capacity of all individuals and authorities participating in the granting of licenses and reviewing the procedures conducted in case of complaint. The Judiciary authorities dealing with investments may also have to be reinforced.

Finally, with respect to the MFN principle, attention needs to be paid to the fact that most investment agreements to which Vietnam is a party have a very large scope. They apply MFN to “every kind of asset” and any slighted foreign investment. Vietnamese law, however, establishes differences of treatment between foreign investment and Vietnamese investment. A foreign invested enterprise (FIE) in Vietnam is defined as an investment holding more than 51% of a company’s chartered capital. Report 3, page 6 provides several specific variances of what constitutes a FIE. Thus, this leaves aside all companies in which foreign investment does not match these cases¹⁵. Therefore, there are possible situations in Vietnam of preferential treatment granted to a Vietnamese investment under Vietnamese law, but which would be considered as a foreign investment under an investment treaty. In that case, such preferential treatment can be considered as a violation of MFN that is not consistent with Vietnam’s international investment treaties. It would also be a violation of the national treatment principle and thus a violation of the treaties providing for the application of the national treatment.

The following section analyses possible areas of concern sector by sector.

III.2 Analysis sector by sector

1. Sector 1: Petroleum

This section concerns petrol and oil production, petrol and oil exporters and importers, petrol and oil distributors, petrol and oil general and retail agents, petrol and oil retail stations.

¹⁵ Article 23 of the 2014 Investment Law

According to report 3 the foreign investors' participation is limited in this sector for public interest reasons. However, the investment law states that in case of conflict between the law and an international agreement, the latter prevails. It means that where the law limits foreign investment, but the international treaties, bilateral or multilateral, allow it, the investment should be authorized.

A. Investment treaties

The Report 2 draws attention to the fact that the administrative procedures related to business and investment are not specified for the following services:

- Services to lease ports and depots for receiving petrol and oil;
- Petrol and oil transport services;
- Petrol and oil processing
- Petrol and oil distributors
- Petrol and oil retail franchisees

Where administrative procedures for services related to petrol and oil are not specified, there is a risk that the transparency and predictability are not ensured. Thus, this constitutes an area of concern in terms of consistency with all investment treaties concluded by Vietnam containing investment protection provisions, including the Trans Pacific Partnership Agreement and the EU Vietnam FTA.

The remaining administrative procedures do not raise any concerns in terms of transparency. No inconsistency has been identified in respect of any investment agreements in this regard.

B. WTO TRIMs agreement

The TRIMs agreement contains a national treatment rule and prohibits quantitative restrictions.

A rather complex mechanism of conditions are provided for the importation and exportation of petroleum products (Report 1, age 4). Most of these conditions concern the capacity of the importer to store and transport the petrol under safe conditions. Some others require the importers to develop a complex distribution system for oil. While most conditions could be justified by obvious security and environmental concerns, there is a concern that some of the conditions are too burdensome and useless for the purposes of security or environment. This is the case of the distribution-related conditions, such as the obligation to have *“its own petrol and oil distribution network in at least two (2) provinces or centrally run cities and with at least five (5) petrol and oil retail stations under its ownership or co-ownership and at least ten (10) stations of petrol and oil retail agents which are granted petrol and oil retail eligibility certificates under Article 25 of this Decree”*. Therefore there is a concern that these conditions might constitute an undue restriction to trade in violation of Article XI of the GATT and the Agreement on Import licensing procedures.

Furthermore, in the sector of petrol and oil imports and exports, a process is established to assign a minimum petrol and oil import quota based on *“the total demand for petrol and oil for domestic sale and the total quantity of petrol and oil for domestic production and processing”* (Report 2, page 5). This process is clearly trade distortive and inconsistent with Article XI of the GATT and the TRIMs agreement.

C. WTO Agreement on Import Licensing Procedures

The WTO Agreement on Import Licensing Procedures requires import licensing to be simple, transparent and predictable and to meet specific deadlines and less than three agencies in charge of the assessment of applications for import licenses.

No inconsistencies have been observed regarding the national administrative procedures described in the Vietnamese experts’ reports in this sector.

D. Vietnam’s schedule of commitments under GATS

The administrative procedures described in the Vietnamese experts’ reports relate to:

- Petrol and oil production;
- Petrol and oil imports and exports;
- Petrol and oil distribution;
- Petrol and oil general agents and retail agents and stations;

These procedures include standards, licensing and certificates. Such measures are consistent with Vietnam’s GATS commitments, since Vietnam has excluded the sector of processed oil and crude oil from its commitments under distributions services.

It should be noted that Vietnam maintains a requirement that *“The general agent’s distribution system must be within the distribution system of a key trader and subject to control by such trader”* (page 5 of Report 1). Should Vietnam liberalize the sector of processed oil and crude oil in its FTAs, it will be important to identify what a “key trader” is and to ensure that such condition is not restricting the market access rights of the foreign petrol and oil general agents.

2. Sector 2: Liquefied Petroleum Gas (LPG)

The analysis below encompasses trading of LPG including activities related to LPG production and processing, LPG bottling stations, automobile LPG-filling stations, LPG supply stations, bottled LPG selling stores, LPG export and import, grade I LPG distributors, LPG trading general agents, leasing of storehouses and port for LPG exportation and importation, LPG transport services, LPG bottle producing and repairing and LPG bottle testing.

Under Vietnamese law, the foreign investors’ participation is limited in this sector, to the extent the international agreements, which prevail, do not state otherwise.

A. Investment treaties

According to the expert report 2, the administrative procedures have not been prescribed for

- LPG import and export,
- grade I LPG distributors,
- LPG trading general agents and trading agents,
- leasing of storehouses and port for LPG exportation and importation,
- LPG transport services, and
- LPG bottle producing and repairing.

This may lead to a confusion and may not satisfy the transparency requirement included in major investment treaties signed by Vietnam.

The remaining administrative procedures do not raise any concerns in terms of transparency. No inconsistency has been identified in respect to any investment agreements in this regard.

B. WTO TRIMs agreement

The TRIMs agreement contains a national treatment rule and prohibits quantitative restrictions. No inconsistencies have been observed in respect to the national administrative procedures. Indeed, these affect trade in services. It remains to be seen what the conditions imposed on LPG import and export will be, upon their adoption.

C. WTO Agreement on Import Licensing Procedures

No inconsistencies have been observed regarding the national administrative procedures described in the Vietnamese experts' reports in this sector.

D. Vietnam's schedule of commitments under GATS

The administrative procedures concerned concern standards and certificates. As mentioned above such measures are consistent with Vietnam's GATS commitment if they do not provide for restrictions of the volume or value of the services supplied. No such restrictions have been identified in this respect in this sector.

3. Sector 3: Commercial Assessment Services

A. Investment treaties

The administrative procedures concerned seem consistent with the investment treaties signed by Vietnam.

B. WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures

The administrative procedures prescribed seem consistent with the WTO TRIMs agreement and the WTO Agreement on Import Licensing Procedures.

C. Vietnam's schedule of commitments under GATS

The administrative measures prescribed seem consistent with Vietnam's GATS commitments. No volume or value restrictions have been identified.

4. Sector 4: Materials for industrial explosives

This sector concerns the trade of material used for explosives. Under Vietnamese law, the foreign investors' participation is prohibited in this sector, to the extent the international agreements, which prevail, do not state otherwise.

A. Investment treaties

The administrative procedures concerned seem consistent with investment treaties signed by Vietnam.

B. WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures

The administrative procedures prescribed seem consistent with the WTO TRIMs agreement and the WTO Agreement on Import Licensing Procedures.

C. Vietnam's schedule of commitments under GATS

Vietnam has excluded explosives from its specific schedule of commitments under GATS.

Hence, the existing administrative measures, including prudential rules, standards and licenses, as they are described in the Vietnamese experts' Reports are not inconsistent with Vietnam's commitments under GATS.

5. Sector 5: Pre-chemical explosives

This section concerns trading in explosive precursor. Under Vietnamese law, the foreign investors' participation is limited in this sector, to the extent the international agreements, which prevail, do not state otherwise.

A. Investment treaties

Among administrative procedure, foreign investments in explosive precursors must be approved by the Prime Minister. This means the investor may face a refusal. The criteria for the Prime Minister approval are not specified. The time-limit for the Prime Minister to render the opinion is not specified.

While the requirement for authorization of the Prime Minister may constitute a market access limitation, the procedures as such for the granting a license also raise a transparency issue as it undermines predictability of the investment. In this respect, the administrative procedure concerned constitutes an area of concern as far as its consistency with major investment treaties is concerned.

B. WTO TRIMs agreement

The same possible refusal of investment by the Prime Minister may amount to a trade restriction of explosive precursors. If the reasons for the refusal are connected with security, then they could be justified under Articles XX and / or XXI of the GATT.

C. WTO Agreement on Import Licensing Procedures

The administrative procedures prescribed seem consistent with the WTO Agreement on Import Licensing Procedures.

D. Vietnam's schedule of commitments under GATS

According to expert Report 3, a state enterprise has a monopoly in the field of explosive precursors trading. Paragraph 4(a) of Article 25 of the recently amended Ordinance 16/2011/UBTVQH12 stated that business organizations operating in industrial explosives and explosive precursors must be enterprises with 100% state-owned capital who is assigned by the Prime Minister as proposed by the MOIT, the Ministry of Public Security and the Ministry of Defense.

This requirement of 100% state-owned capital is consistent with Vietnam's commitment under GATS, since Vietnam has excluded explosives from its schedule of commitments under GATS as far as distribution services are concerned.

6. Sector 6: Sectors using explosive material

A. Investment treaties

Report 3, at page 16, suggests that foreign investment is prohibited to foreign investors in this sector. Report 3 of the Vietnams experts indicates at page 19 that "*MOIT has not regulated administrative procedures for that sector*". This is a source of concern, since in fact this sector can affect several sectors using explosive material, such as construction, mining, and destruction, transportation and storage of explosive material. Lack of specification of the sectors concerned and of the procedures affecting investment in these sector pose an important transparency problem and is inconsistent with Vietnam's investment treaties.

B. WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures

These agreements are not applicable since they concern trade in goods and the sector concerned does not seem to affect such trade. Indeed trade in materials for industrial explosives is addressed in sector 4 above.

C. Vietnam's schedule of commitments under GATS

Since it is unclear which specific sector of economic activity is concerned by the restrictions to foreign investment, it is difficult to assess with precision possible inconsistencies with Vietnam's commitments under GATS.

It should be noted that Vietnam took substantial commitments under mode 3 for Services incidental to mining (CPC 883), transportation services, storage and warehouse services (CPC 742), freight transport agency services (CPC 748), and construction and related engineering services. The prohibition affecting foreign services suppliers in the markets "using explosive" could be inconsistent with Vietnam's commitments under one of the above-mentioned services. Vietnam, however, could invoke the national security exception or the life protection exception provided in Articles XIV and XIV bis of the GATS to justify restrictions in services sectors when explosives are being employed.

7. Sector 7: Blasting services

A. Investment treaties

Foreign investors are in principle not allowed to invest in blasting services¹⁶ (Report 3, p. 17). This may be justified by national security and defense reasons. This stated, the licensing conditions and procedures described in Report 2 (pages 19 and 20) do not seem incompatible with Vietnam's Investment treaties.

B. WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures

These agreements are not applicable since they concern trade in goods.

C. Vietnam's schedule of commitments under GATS

Blasting services are not included in Vietnam's schedule of specific commitments. Hence, no specific obligation, other than MFN, is imposed on Vietnam regarding blasting services.

8. Sector 8: Chemicals except chemicals prohibited under the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and their Destruction

This section concerns in particular conditional production and trade in the industrial sector of chemicals, trading in restricted chemicals, production of schedule 1, schedule 2 and schedule 3 chemicals, import and export of schedule 1, 2 and 3 chemicals and production of DOC (discrete organic chemicals) and DOC-PSF (Phosphorus, Sulphur and Fluorine (PSF)-containing chemicals).

Under Vietnamese law, the foreign investors' participation is limited in these sectors, to the extent the international agreements, which prevail, do not state otherwise.

A. Investment treaties

As mentioned above, transparency is a basic requirement of each investment protection treaty.

In the case of chemicals, the Prime Minister's positive opinion is required to enable import and export activities of schedule 1, 2 and 3 chemicals. Furthermore, the opinion of the relevant line ministries is required with respect to Schedule 1, Schedule 2, Schedule 3 chemicals used for specific purposes (medical, pharmaceuticals, agriculture, protection) (Report 1 page 18). These opinions are not included in the time span of the procedure and the time limit to render such opinions is not specified. This raises transparency concerns.

In the same field, the overall time limit for application and notification of authorization for import and export is not specified and the same occurs as far as application for production certificate is concerned.

Consequently, the above-mentioned procedures are a possible source of concern in terms of the transparency conditions contained in the major investment treaties signed by Vietnam.

B. WTO TRIMs agreement

¹⁶ Article 26(1) of Decree 135/2009/ND-CP.

The TRIMs agreement contains a national treatment rule and prohibits quantitative restrictions.

The possible refusal of investment caused by a refusal of import and export of schedule 1, 2 and 3 chemicals by the Prime Minister or line ministers, as indicated above, may amount to a trade restriction, which is inconsistent with Article XI of the GATT.

Vietnam could however try to argue that the reasons for the refusal are connected with national security objectives or necessary for the protection of the life and health of humans, animals or plants. The trade restrictions would then be justified under Articles XX and / or XXI of the GATT.

C. WTO Agreement on Import Licensing Procedures

No inconsistencies have been observed regarding the national administrative procedures affecting the importation and exportation of chemical products described in the Vietnamese experts' reports (Report 2, pages 27 and 28).

D. Vietnam's schedule of commitments under GATS

The administrative procedures concerned concern standards, prudential rules and permits. As mentioned above such measures are consistent with Vietnam's GATS commitment if they do not restrict the volume or value of the services supplied. No restrictions affecting trade in services in the chemical sector have been identified in this respect.

9. Sector 9: Inorganic fertilizers

Under Vietnamese law, the foreign investors' participation is limited in this sector, to the extent the international agreements, which prevail, do not state otherwise.

A. Investment treaties

The administrative procedures concerned seem consistent with investment treaties signed by Vietnam.

It should be noted that several bilateral investment treaties, such as the Japan-Vietnam BIT, do not grant rights to foreign entities to invest in the field of fertilizers.

B. WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures

The administrative procedures prescribed seem consistent with the WTO TRIMs agreement and the WTO Agreement on Import Licensing Procedures.

C. Vietnam's schedule of commitments under GATS

Vietnam GATS commitments specify, with respect to distribution services (Commission agents' services (CPC 621, 61111, 6113, 6121), Wholesale trade services (CPC 622, 61111, 6113, 6121) and Retailing services (CPC 631 + 632, 61112, 6113, 6121)) that "*within 3 years of Vietnam's accession, foreign-invested companies engaging in distribution services will be permitted to engage in the commission agents, wholesale and retail business of all legally imported and domestically produced products*". This commitment therefore covers fertilizers. Hence a refusal

to grant a license to trade and distribute fertilizers for reasons other than technical and quality requirements could be contrary to Vietnam's obligations under GATS.

The Vietnamese experts' reports do not mention legal restrictions affecting the volume or value of the services in the fertilizers' sector. The licensing requirements and procedures provided in Vietnamese domestic legislation seem to be consistent with Vietnam's obligations under GATS.

10. Sector 10: Alcohol

This section concerns procedures related to granting of wine mass production license, wine small-scale production license and license for alcohol trading and wine retailing.

It is to be observed that, as indicated in the expert report 3 (p. 21), wine belongs to conditional sectors where foreign investors participation is allowed to the extent it is decided so in Vietnam's international agreements.

A. Investment treaties

No inconsistency in relation to Vietnam investment treaties has been observed.

B. WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures

The administrative procedures prescribed seem consistent with the WTO TRIMs agreement and the WTO Agreement on Import Licensing Procedures.

C. Vietnam's schedule of commitments under GATS

GATS commitments include unlimited market access for foreign invested companies to engage in wholesale and retail business of all legally imported or produced products including wine and spirits.

In this respect, the obligation imposed in Vietnamese law for the issuing of licenses for alcohol trading to have "*a system of wine distribution on at least 06 provinces (there must be at least 03 wine wholesalers in each province)*" appears to be inconsistent with the commitment taken. (Report 1, page 21). It should be reminded in this respect that Vietnam's 2014 Investment Law grants priority to the international agreements.

The other licensing and prudential rules prescribed are permitted under GATS provided that they do not lead to a trade restriction in value or volume. No restrictions have been observed in this respect.

11. Sector 11: Tobacco, ingredients of tobacco, machines, equipment related to tobacco

This section concerns administrative procedures related to the issuance of licenses to manufacture tobacco, license to trade in tobacco, license to trade in tobacco ingredients, import of tobacco ingredients and cigarette paper, certificate of eligibility to invest in tobacco cultivation, import of machinery and equipment for tobacco manufacturing, investment in upgrading equipment and technologies, investment in manufacture and processing of tobacco for export, moving, investment in tobacco ingredient processing.

Under Vietnamese law, the foreign investors' participation is limited in these sectors, to the extent the international agreements, which prevail, do not state otherwise.

A. Investment treaties

The conditions imposed on investments in manufacturing and processing tobacco, which restrict possibilities for new investments and expansion of scale or capacity of the factories (report 2 page 28), could run counter investors' legitimate expectations regarding the stability and continuity of their investment. Therefore, these conditions may raise concerns as to their consistency with the FET principles and with major investment treaties concluded by Vietnam.

It should be noted, however, that several investment treaties, such as the Japan – Vietnam BIT, do not grant rights to private investors in the tobacco sector.

B. WTO TRIMs agreement

Basic rules of TRIMS agreement are national treatment and the prohibition of quantitative restrictions. The administrative procedures described in the Vietnamese experts' reports raise concerns with respect to both rules.

Firstly, in order to obtain a license to manufacture tobacco, a foreign investor must ensure that tobacco ingredients used for tobacco manufacturing are those planted in Vietnam (Report 2, page 22). In other words, this requirement conditions the grant of the license on the use of locally sourced goods. This is a local content requirement which is a trade distortive measure that is prohibited under the WTO TRIMs Agreement.

Secondly, according to the administrative procedures described in the Vietnamese experts' reports (Report 2, page 27 and report 3, page 42), the import license for tobacco ingredients and cigarettes must state an import quota on tobacco ingredients and cigar paper. This is a domestic regulation which restricts the possible volume of the goods supplied. It constitutes a quantitative restriction and is thus contrary to the WTO TRIMs Agreement.

Thirdly, the Vietnamese experts' reports indicate, with respect to the conditions for the issuance of the License to manufacture tobacco that “*all machinery and equipment used for tobacco manufacturing have legal origins*” (Report 2 page 22). It is unclear to which rule the concept of “legal origin” refers to. It suggests however, that imports of machinery and equipment of certain origins may be prohibited. If that was the case, it would be contrary to both the NFN principle included in Article I of GATT and to the prohibition of quantitative restrictions included in Article XI of GATT. The same applies to the conditions for the issuance of the License to process tobacco ingredients (Report 2 page 25)

C. WTO Agreement on Import Licensing Procedures

Procedures are also provided for the import of machinery and equipment for tobacco manufacturing (Report 3 page 43). These procedures may lead to a refusal of the import by the MOIT. The conditions for such refusal are not specified. This is not consistent with the WTO Agreement on Import Licensing Procedures.

D. Vietnam's schedule of commitments under GATS

GATS commitments include unlimited market access in “mode 3 – commercial presence” for foreign invested companies to engage in wholesale and retail business of all legally imported or produced products. This commitment, however, explicitly excludes cigarettes and cigars.

Full market access commitments were also taken in “mode 3 – commercial presence” for Storage and warehouse services (CPC 742).

As indicated above, licensing under GATS is permitted provided it does not restrict the volume or value of the services supplied in the sectors for which commitments are taken.

In the present case the issuing of a license to import tobacco ingredients and cigarette paper is conditioned by an import quota on tobacco and cigarette paper. This constitutes restriction of the volume of the distribution service regarding these products. This would be acceptable under GATS only if Vietnam's specific commitments expressly covered such a restriction. Such a restriction, however, is not covered by Vietnam's schedule of specific commitments. It is thus inconsistent with GATS.

Furthermore, the obligation imposed in Vietnamese law for the issuing of licenses for tobacco trading to have a distribution system that covers at least 02 provinces with at least 02 tobacco wholesalers in each province (Report 1, page 23) prevents the supply of distribution services by those suppliers that do not meet the requirement and appears to be inconsistent with the commitment taken with respect to distribution services.

Likewise, the requirement imposed for the issuing of licenses for tobacco wholesaling that a “*system of tobacco wholesaling is established in the province where the head office is situated (at least 02 tobacco retailers in the province)*” (Report 1, page 24) appears to be inconsistent with the commitment taken with respect to wholesale services.

12. Sector 12: Commodity exchange

A. Investment treaties

The administrative procedures described in the Vietnamese experts' reports do not raise any particular concern as to their consistency with Vietnam's investment treaties.

B. WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures

The administrative procedures prescribed seem consistent with the WTO TRIMs agreement and the WTO Agreement on Import Licensing Procedures.

C. Vietnam's schedule of commitments under GATS

The administrative procedures described seem consistent with GATS and Vietnam's schedule of services commitments.

13. Sector 13: Electricity

This section concerns administrative procedures related to electricity generation, transmission, distribution, wholesaling, retailing, import and consultancy.

A. Investment treaties

According to the Vietnamese experts' report (Report 3, page 18), the law in Vietnam does not prohibit foreign and domestic investors from investing in the electricity sector. However, in practice the sector is monopolized by a State company.

Therefore foreign investors may not have an easy access to the electricity market and may be subject to discriminatory practices. The protection of investor's legitimate expectations and the transparency of procedures do not seem guaranteed.

B. WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures

The administrative procedures prescribed do not affect trade in electricity and seem consistent with the WTO TRIMs agreement and the WTO Agreement on Import Licensing Procedures

C. Vietnam's schedule of commitments under GATS

Energy services are not included in Vietnam's schedule of specific commitments.

Vietnam however took full commitments in management consultant services (CPC 865) and in engineering services (CPC 8672). Therefore, Vietnam cannot maintain restrictions regarding consultancy and engineering services related to electricity services.

No such restrictions were however observed in Vietnamese law. The electricity licensing procedures are permitted under GATS and Vietnam's schedule of commitments.

14. Sector 14: Food trading

This section concerns the administrative procedures related to trading and advertisement of food products.

Under Vietnamese law, foreign investors are free to do business in this sector, unless limited by Vietnam's international commitments (Report 3, page 23).

A. Investment treaties

The administrative procedures described in the Vietnamese experts' reports do not raise any concerns as to their consistency with Vietnam's investment treaties.

B. WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures

The administrative procedures prescribed, which mostly concern food security issues, seem consistent with the WTO TRIMs agreement and the WTO Agreement on Import Licensing Procedures.

C. Vietnam's schedule of commitments under GATS

Vietnam took full commitments under "mode 3 – Commercial presence" for distribution services in this sector and in advertising services.

Report 2 at page 30 suggests that there might be food products for which advertisement is prohibited, but it does not specify which products are concerned or the reasons of prohibitions.

These reasons would be legal only if they were necessary for morality reasons or to protect the life and health of persons, animals or plants (Article XIV of GATS).

The other administrative procedures affecting trade and distribution of food products seem consistent with Vietnam's commitments under GATS.

15. Sector 15: Export of rice

A. Investment treaties

The administrative procedures described in the Vietnamese experts' reports do not raise any concerns as to their consistency with Vietnam's investment treaties.

B. WTO TRIMs agreement

The issuance of an export license for rice is conditioned by having at least 1 (one) warehouse which can store at least 5,000 (five thousand) tons of paddies and having at least 1 (one) rice mill with an hourly capacity of at least 10 tons of paddies which meets general regulations promulgated by the Ministry of Agriculture and Rural Development. These are burdensome requirements which can restrict in practice the exportation of rice in a manner that is not consistent with Article XI of the GATT.

C. WTO Agreement on Import Licensing Procedures

This agreement is not applicable here, since rules affect export of rice and not its importation.

D. Vietnam's schedule of commitments under GATS

Rice is excluded from Vietnam's commitments on distribution services.

No inconsistency is observed between described administrative procedures and Vietnam's GATS commitments.

16. Sector 16: Temporary import and re-export of goods subject to excise tax

A. Investment treaties

The administrative procedures described in the Vietnamese experts' reports do not raise concerns as to their consistency with Vietnam's investment treaties.

B. WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures

The administrative procedures prescribed seem consistent with the WTO TRIMs agreement and the WTO Agreement on Import Licensing Procedures.

C. Vietnam's schedule of commitments under GATS

There is no inconsistency with Vietnam's GATS commitments.

17. Sector 17: Temporary import and re-export of frozen foods

A. Investment treaties

The administrative procedures described in the Vietnamese experts' reports do not raise concerns as to their consistency with Vietnam's investment treaties.

B. WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures

The administrative procedures prescribed, which mostly concern food security issues and requirements related to the infrastructure needed to conduct business, seem consistent with the WTO TRIMs agreement and the WTO Agreement on Import Licensing Procedures.

C. Vietnam's schedule of commitments under GATS

No inconsistency has been observed in relation to Vietnam's GATS commitments. The rather stringent licensing requirements are not related to the volume or value of the products traded.

18. Sector 18: Temporary import and re-export of used goods

A. Investment treaties

The administrative procedures described in the Vietnamese experts' reports do not raise concerns as to their consistency with Vietnam's investment treaties.

B. WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures

The administrative procedures prescribed seem consistent with the WTO TRIMs agreement and the WTO Agreement on Import Licensing Procedures.

C. Vietnam's schedule of commitments under GATS

Despite the restriction included in Vietnamese law that the business of temporary import and re-export of used goods is limited to companies which have been established for two years, the conditions and administrative procedures affecting this sector do not seem to be inconsistent with Vietnam's commitments under the GATS.

19. Sector 19: Franchising

A. Investment treaties

The Vietnamese law restricts goods and services permitted for franchising business to those not on the list of goods and services banned from business. Hence this suggests that certain goods and services are banned from business. However, the law does not specify which are those goods and services, thus raising transparency concerns.

B. WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures

As indicated above, the law suggest that certain goods are prohibited from business. This can be associated with an import restriction, which is contrary to Article XI of the GATT unless justified by a valid non-trade policy objective (Articles XX and XXI of GATT).

Otherwise, the administrative procedures prescribed seem consistent with the WTO TRIMs agreement and the WTO Agreement on Import Licensing Procedures.

C. Vietnam's schedule of commitments under GATS

Vietnam took full market access commitments regarding “mode 3 – Commercial presence for franchising”. The only limitation in Vietnam's commitment for franchising concerns the national treatment principle. Vietnam reserves the possibility to impose to foreign service suppliers a condition that a chief of the branch must be a Vietnamese resident.

Vietnamese law requires as a condition to grant a license *“that the business system intended for franchise has been in operation for at least one year”* and that *“where a Vietnamese trader is the primary franchisee of a foreign franchisor, such Vietnamese trader must conduct business by mode of franchising for at least one year in Vietnam before sub-franchising”*. These could be considered as restrictions regarding specific types of legal entity through which a service supplier may supply a service, which are not indicated as limitation in Vietnam's GATS's schedule of commitments. Hence, these restrictions could raise a concern in this regard.

20. Sector 20: Trading in coal

The Reports of the Vietnamese experts do not provide enough information on the administrative procedures in the coal sector to enable a preliminary assessment of their compliance with Vietnam's investment treaties, WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures and Vietnam's schedule of commitments under GATS.

21. Sector 21: Logistics services

The Reports of the Vietnamese experts do not provide enough information on the administrative procedures in the logistics services sector to enable a preliminary assessment of their compliance with Vietnam's investment treaties, WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures and Vietnam's schedule of commitments under GATS.

22. Sector 22: Trading in minerals

No administrative procedures have been defined by the MOIT.

A. Investment treaties

No inconsistencies have been identified based on the Vietnamese experts' reports. In some circumstances, however, the lack of the administrative procedures may hamper foreign investment as it does not provide for a legal framework, transparency and investment predictability.

Furthermore, the Vietnamese experts' report 2 (page 56) indicates that trade in minerals is managed by specific conditions, without however specifying which these conditions are. This

also raises concerns regarding the transparency provisions contained in Vietnam's investment treaties.

B. WTO

The Reports of the Vietnamese experts do not provide enough information on the administrative procedures in the minerals' sector to enable a preliminary assessment of their compliance with the WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures and Vietnam's schedule of commitments under GATS.

23. Sector 23: Import and exports of industrial precursor chemicals

This section concerns the procedures for the import and export of industrial precursors, which are the only procedures managed by the MOIT in this sector. There are also other conditions imposed by Vietnamese law related to the production of industrial precursors and business in industrial precursors, which are not covered in this report.

A. Investment treaties

According to Vietnamese law, import of narcotics, pre-substances, addictive drugs and psychotropic medicines are reserved to enterprises which obtain authorization of the Ministry of health and MOIT under certain conditions (Report 1 pages 33 and 34). These conditions are not clarified in the Vietnamese experts' report, thus raising possible transparency concerns.

B. WTO TRIMs agreement

Imports of import of narcotics, pre-substances, addictive drugs and psychotropic medicines may be prohibited. This could constitute a violation of Article XI of GATT, unless justified by a health or national security reason, in accordance with Articles XX or XXI of the GATT.

C. WTO Agreement on Import Licensing Procedures

The administrative procedures described in Report 2, pages 56 and 57, seem consistent with the WTO Agreement on Import Licensing Procedures.

D. Vietnam's schedule of commitments under GATS

Vietnam took full commitments for distribution services under "*mode 3 – Commercial presence*". However, the commitment explicitly excludes "*pharmaceutical products and drugs*", with the exception of "*non-pharmaceutical nutritional supplements in tablet, capsule or powdered form*".

Therefore, the possible above-mentioned prohibition to invest in a business for the import and export of narcotics, pre-substances, addictive drugs and psychotropic medicines does not seem to be inconsistent with Vietnam's schedule of commitments under GATS.

24. Sector 24: Trading goods and directly related trading goods of foreign investor

This sector mainly concerns distribution services and authorizations granted to foreign invested enterprises to purchase and sell products in Vietnam.

This sector is restricted to foreign companies, unless the international agreements, which prevail, state otherwise.

A. Investment treaties

Generally speaking, there seems to be in this sector, more than in others, a strong confusion between the administrative procedures based on the former law, which considered that business licenses are the same as investment licenses, and the new investment law which separates the two licenses (Report 3 pages 24 and 25)¹⁷. This generates confusion and raises transparency concerns going against the principles contained in major investment treaties concluded by Vietnam.

Furthermore, one of the conditions for investment in the sector requires prior approval from a competent authority (Report 1, page 35 and report 2, page 58). Further details are not specified. There seem to be conditions related to the financial capacity and experience of the investor in import / export activities. The formulation suggests the investor may face a refusal. The criteria of the approval are not clearly specified. This raises transparency concerns and thus consistency issues with Vietnam's investment treaties.

Finally, an investor may face a prohibition to trade and distribute prohibited goods (Report 1, pages 35 and 36). The list of such goods, however, is not provided, hence also raising transparency concerns.

B. WTO TRIMs agreement

Licenses may be refused for imports or exports of prohibited goods. The list of such goods is not specified. Report 1 at page 35 indicates that these goods are also those covered by export bans under existing treaties. It would be important to verify the goods concerned and check all justifications of the bans and their consistency with Articles XX and XXI of the GATT.

C. WTO Agreement on Import Licensing Procedures

To the extent conditions to obtain an authorization to import goods are unclear, the import licensing procedure is unpredictable and is thus inconsistent with the WTO Agreement on Import Licensing Procedures. There would thus be a need to clarify those conditions and the list of prohibited goods as indicated above.

D. Vietnam's schedule of commitments under GATS

Vietnam took full commitments for distribution services under "*mode 3 – Commercial presence*". These services include Commission agents' services (CPC 621, 61111, 6113, 6121), wholesale trade services (CPC 622, 61111, 6113, 6121) and retailing services (CPC 631 + 632, 61112, 6113, 6121). The commitments do not apply to the following products: cigarettes and cigars, books, newspapers and magazines, video records on whatever medium precious metals and stones, pharmaceutical products and drugs, explosives, processed oil and crude oil, rice, cane and beet sugar. Furthermore, the commitment does not cover the establishment of outlets for retail services beyond the first one, which is subject to an economic needs test.

As indicated above, there are restrictions to the right to distribute and trade prohibited products, the list of which is not provided. It would be important to verify the list of products and whether they are covered by the above-mentioned exclusion list of products in Vietnam's GATS

¹⁷ This is a general problem that is encountered in several other sectors as well (see Report 3, page 32).

commitments or can be justified by one of the reasons provided in the exceptions provisions of Articles XIV and XIV bis of the GATS. If that is not the case, the restrictions would be inconsistent with Vietnam's commitments under the GATS.

Furthermore, Vietnamese law subjects investment in the distribution sector, through the setting up of retail establishment in Vietnam, to conditions of consistency with the related master plans of central-affiliated cities and provinces (Report 1, page 36). This could represent an economic needs test. Such test is permitted in Vietnam's schedule of services commitments only for the second retail establishment. Thus, if a first retail establishment is refused due to an economic needs test in a master plan of a central-affiliated city and province, this would constitute a violation of Vietnam's commitments under the GATS.

25. Sector 25: E-commerce

This section concerns the conditions and procedures for the setting-up of sales e-commerce websites and credit rating e-commerce websites.

Generally speaking, e-commerce is not restricted for foreign investors in Vietnam.

A. Investment treaties

Operators of e-commerce websites must register with MOIT to provide e-commerce services and MOIT must certify the registration. If such registration is automatic when the conditions listed in the Vietnamese experts' reports (Report 1, page 38 and Report 2, pages 59-61) are met, then, the administrative procedures described in the Vietnamese experts' reports do not raise concerns as to their consistency with Vietnam's investment treaties. However, if MOIT maintains discretion to refuse authorization, this would raise transparency concerns.

B. WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures

The administrative procedures prescribed seem consistent with the WTO TRIMs agreement and the WTO Agreement on Import Licensing Procedures. They do not contain restrictive provisions affecting trade in goods.

C. Vietnam's schedule of commitments under GATS

Vietnam took liberalization commitments under "Mode 3 – commercial presence" in the sectors of on-line information and database retrieval (CPC 7523), Electronic data interchange (EDI) (CPC 7523) and Internet Access Services IAS, which are defined as Services providing internet access to the end users. Vietnam, however, limited its commitments to only allow participation of foreign investors in Joint ventures with Vietnamese service suppliers. Vietnam does not seem to have taken commitments on credit - rating of companies.

To the extent the MOIT does not have discretion to simply accept or refuse certification of registration of e-commerce services, the conditions and administrative procedures affecting e-commerce in Vietnam do not seem to be inconsistent with Vietnam's commitments under the GATS.

26. Sector 26: Multi-level marketing

A. Investment treaties

Generally speaking, multi-level marketing of goods is not restricted for foreign investors in Vietnam. However, since multilevel marketing is a form of distribution services, it is subject to the same restrictions as other distribution services, related to prohibited goods (Report 2, page 40). The list of prohibited goods (other than Medicines; medical equipment; veterinary drugs (including aquatic veterinary drugs), plant protection drugs; chemicals, insecticidal and germicidal preparations for domestic and medical use; dangerous chemicals and products containing dangerous chemicals) is not available in the Vietnamese experts' reports. This may raise transparency concerns in Vietnam's investment treaties.

Multilevel marketing of services is in principle prohibited, unless specified by the law. The Vietnamese experts' reports do not specify under which law multilevel marketing of services could be authorized. It would be useful to quickly review such law to ensure that investments in this sector are fully informed on the conditions for their investment.

B. WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures

Licenses may be refused for multilevel marketing of prohibited goods. The list of such goods is not specified. It would be important to verify the goods concerned and check all justifications of the bans and their consistency with Articles XX and XXI of the GATT.

Otherwise, the administrative procedures prescribed seem consistent with the WTO TRIMs agreement and the WTO Agreement on Import Licensing Procedures.

C. Vietnam's schedule of commitments under GATS

Vietnam took full commitments for distribution services under "*mode 3 – Commercial presence*". These services include Commission agents' services (CPC 621, 61111, 6113, 6121), and retailing services (CPC 631 + 632, 61112, 6113, 6121). The commitments do not apply to the following products: cigarettes and cigars, books, newspapers and magazines, video records on whatever medium precious metals and stones, pharmaceutical products and drugs, explosives, processed oil and crude oil, rice, cane and beet sugar.

As indicated above, there are restrictions to the right to carry out multi-level marketing activities with respect to prohibited products, including medicines; medical equipment; veterinary drugs (including aquatic veterinary drugs), plant protection drugs; chemicals, insecticidal and germicidal preparations for domestic and medical use; dangerous chemicals and products containing dangerous chemicals. Some of these goods are not included in the limitation to Vietnam's market access commitments in distribution services. The goods concerned are medical equipment; chemicals, dangerous chemicals and products containing dangerous chemicals. However, a restriction to carry out multi-level marketing activities for these products can be justified by health or security reasons covered by the exception provisions included in Article XIV of the GATS.

There are other products than the ones above for which multi-level marketing activities can be prohibited. It would be important to verify the complete list of prohibited products and whether they are covered by the above-mentioned exclusion list of products in Vietnam's GATS commitments or can be justified by one of the reasons provided in the exceptions provisions of Articles XIV and XIV bis of the GATS. If that is not the case, the restrictions would be inconsistent with Vietnam's commitments under the GATS.

Besides the above, the administrative procedures, including registration and certificates requirements (trainers' certificate and procedure for escrow money), seem permitted under GATS.

27. Sector 27: Industrial Pressure Machine

It is unclear whether this sector concerns production and trading in industrial pressure machine or if it also concerns conformity assessment of such machine with technical regulations.

In any event, in both cases, the Reports of the Vietnamese experts do not provide enough information on the administrative procedures in the sector to enable a preliminary assessment of their compliance with Vietnam's investment treaties, WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures and Vietnam's schedule of commitments under GATS.

28. Sector 28: Petroleum activities

The Vietnamese experts' reports do not clarify the scope of this sector in relation to the first sector listed in the list of 28 sensitive sectors. It seems such sector concerns petrol extraction activities, but this should be clarified. Indeed, the issues discussed in page 39 of Report 1 and page 63 of Report 2 are not the same. Report 1 seems to address petrol exploration and extraction activities, while Report 2 seems to address conditions related to the quality of the material used for petroleum activities.

A. Investment treaties

Report 1 (page 39) indicates that "*Organizations and/or individuals wishing to sign petroleum contracts must go through biddings under the specific regulations on bidding for projects on petroleum prospection, exploration and exploitation, promulgated by the Vietnamese Government*" and that "*in special cases, the Prime Minister may appoint bidders in order to select partners for signing petroleum contracts*".

None of the conditions and bidding procedures are described. Hence it is not possible to assess their consistency with Vietnam's international commitments.

As to the conditions and procedures described in the Vietnamese experts' reports, attention should be drawn to a need for a clear set of criteria for verification procedures. Lack of such clear criteria may raise concern in terms of transparency and predictability. Thus, unclear or absent criteria may go against Vietnam's commitments contained in its investment treaties.

B. WTO TRIMs agreement and WTO Agreement on Import Licensing Procedures

The administrative conditions and procedures described in the Vietnamese experts' reports seem consistent with the WTO TRIMs agreement and the WTO Agreement on Import Licensing Procedures.

C. Vietnam's schedule of commitments under GATS

The conditions and administrative procedures affecting this sector, which are described in page 39 of Report 1 and page 63 of Report 3 seem consistent with Vietnam's commitments under the GATS.

III.3 Summary of areas of concern and recommendations

This section briefly summarizes the major areas of concern and the areas which require further clarification which have been identified in the general analysis and in the sector by sector analysis above. Where relevant, this section also includes recommendations regarding the way to address the areas of concern identified.

1. Create a simple and accessible database of all legal acts and procedures;
2. Ensure sufficient training and capacity of all authorities participating in the granting of licenses and reviewing the procedures conducted in case of complaint;
3. Ensure that the supervision over law enforcement is strong enough;
4. Avoid less favorable treatment of foreign invested enterprises in relation to Vietnamese enterprises in which there is foreign direct investment;
5. Specify the administrative procedures related to business and investment for the following sectors:
 - Services to lease ports and depots for receiving petrol and oil;
 - Petrol and oil transport services,
 - Petrol and oil processing,
 - Petrol and oil distribution,
 - Petrol and oil retail franchising,
 - Petrol exploration and extraction,
 - LPG import and export,
 - grade I LPG distribution,
 - LPG trading general agents and trading agents,
 - leasing of storehouses and port for LPG exportation and importation,
 - LPG transport services,
 - LPG bottle producing and repairing,

- Sectors using explosive material, in particular specify the sectors concerned,
 - Trading in coal,
 - Logistic services,
 - Trading in minerals.
6. Review conditions for the importation and exportation of petroleum products, especially those related to the distribution of such products. They must be necessary to achieve either public security or environmental concerns. Some of them might be too burdensome, such as the condition to have *“its own petrol and oil distribution network in at least two (2) provinces or centrally run cities and with at least five (5) petrol and oil retail stations under its ownership or co-ownership and at least ten (10) stations of petrol and oil retail agents which are granted petrol and oil retail eligibility certificates under Article 25 of this Decree”*.
 7. Withdraw the minimum petrol and oil import quota based on *“the total demand for petrol and oil for domestic sale and the total quantity of petrol and oil for domestic production and processing”* (Report 2, page 5).
 8. Specify the criteria and procedure for the Prime Minister approval in the sector of explosive precursors.
 9. Specify the time span for the decision of the Prime Minister and, where applicable, line ministries, to enable import and export activities of schedule 1, 2 and 3 chemicals
 10. Consider to repeal or seriously alleviate the obligation imposed in Vietnamese law for the issuing of licenses for alcohol trading to have *“a system of wine distribution on at least 06 provinces (there must be at least 03 wine wholesalers in each province)”*.
 11. Consider removing the conditions imposed on investments in manufacturing and processing tobacco, which restrict possibilities for new investments and expansion of scale or capacity of the factories (report 2 page 28).
 12. Remove the obligation imposed on foreign investors to ensure that tobacco ingredients used for tobacco manufacturing are those planted in Vietnam in order to obtain a license to manufacture tobacco.
 13. Remove the obligation that import licenses for tobacco ingredients and cigarettes must state an import quota on tobacco ingredients and cigar paper.
 14. Clarify the condition of “legal origin” of the machinery and equipment used for tobacco manufacturing for the issuance of a license to manufacture tobacco (Report 2 page 22) and to process tobacco ingredients (Report 2 page 25). Avoid that this condition constitutes a prohibited restriction to trade.
 15. Specify the conditions for the refusal of the import of machinery and equipment for tobacco manufacturing and check their compliance with Articles XX or XXI of the GATT.

16. Consider removing the obligation imposed in Vietnamese law for the issuing of licenses for tobacco trading to have a distribution system that covers at least 02 provinces with at least 02 tobacco wholesalers in each province.
17. Consider removing the requirement imposed for the issuing of licenses for tobacco wholesaling that a *“system of tobacco wholesaling is established in the province where the head office is situated (at least 02 tobacco retailers in the province)”*.
18. Clarify conditions for access of foreign investors in the electricity market.
19. Verify food products for which advertisement is prohibited and check the consistency of the reasons of such prohibition with the conditions of Article XIV of the GATS.
20. Consider removing the condition of the issuance of an export license for rice to have at least 1 (one) warehouse which can store at least 5,000 (five thousand) tons of paddies and having at least 1 (one) rice mill with an hourly capacity of at least 10 tons of paddies which meets general regulations promulgated by the Ministry of Agriculture and Rural Development.
21. Specify the the list of goods and services banned from business for which franchising and multi-level marketing are not authorized. Check the reasons for the banning and their consistency with the exception provisions of the GATT and the GATS.
22. Consider removing the condition to grant a license for franchising *“that the business system intended for franchise has been in operation for at least one year”* and that *“where a Vietnamese trader is the primary franchisee of a foreign franchisor, such Vietnamese trader must conduct business by mode of franchising for at least one year in Vietnam before sub-franchising”*.
23. Specify the specific conditions affecting trade in minerals. Their existence is suggested in the Vietnamese experts’ report 2 (page 56).
24. Clarify the conditions to obtain authorization to import of narcotics, pre-substances, addictive drugs and psychotropic medicines. Check the justification of these conditions and their compliance with Articles XX or XXI of the GATT.
25. Clarify, in the rules applicable to the authorizations granted to foreign invested enterprises to purchase and sell products in Vietnam, the different licensing procedures which are relevant to business licenses and those which are relevant to investment licenses (this is also a recommendation provided in Report 4, page 20).
26. Clarify in the same rules the conditions to obtain an authorization to import goods and the list of prohibited goods. Check the consistency of the reasons of the import prohibitions with the conditions of Articles XX and XXI of the GATT. Check the consistency of the list of prohibited goods with the exclusion list in Vietnam’s GATS Schedule of commitments for distribution services and with Articles XIV and XIV bis of the GATS.

27. Verify that master plans of central-affiliated cities and provinces do not provide for economic needs test. If they do, remove the condition that first retail establishments must comply with these master plans.
28. Verify that MOIT does not have discretion to accept or refuse certification of registration of e-commerce services outside clearly established criteria. If that is the case, define objective criteria.
29. Review the law that would authorize under certain conditions multilevel marketing of services to ensure that investments in this sector are fully informed on the conditions for their investment.
30. Clarify the conditions and bidding procedures applicable to petroleum activities.

The list above is the outcome of the succinct analysis that was performed based on the information provided in the four reports of the Vietnamese experts. The analysis is preliminary by essence and the list above cannot be considered as an exhaustive list of all possible areas of concern. To provide a final legal opinion would require to review the original text of all laws and regulations affecting investment in the 28 sensitive sectors. It would also require an analysis of the practical application of these laws and regulations. The list above, however, already provides a good indication of the most obvious areas of concern which would need to be addressed.