

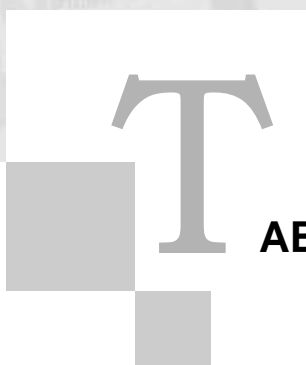


BUSINESS LICENSING

Current Status and the Ways Forwards

Hanoi, 2006





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BBREVIATIONS

ADB	: Asian Development Bank
CIEM	: Central Institute for Economic Management
DONRE	: Department of Natural Resources and Environment
DPI	: Department of Planning and Investment
EL	: Enterprise Law
FDI	: Foreign Direct Investment
GO	: Government Office
GDP	: Gross Domestic Product
GTZ	: German Technical Cooperation
MONRE	: Ministry of Natural Resources and Environment
MPI	: Ministry of Planning and Investment
ODA	: Official Development Aid
OECD	: Organization for Economic Cooperation and Development
PC	: People's Committee
PMRC	: Prime Minister's Research Commission
RIA	: Regulatory Impact Assessment
SME	: Small and Medium Enterprises
SOE	: State-owned Enterprises
UEL	: Unified Enterprise Law
WB	: World Bank
WEF	: World Economic Forum
WTO	: World Trade Organization
VCCI	: Vietnam Chamber of Commerce and Industry
VNCI	: Vietnam Competitiveness Initiative (a USAID funded Project)



A

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Despite our hard work and strenuous efforts, the study is not free of mistakes and shortcomings. We sincerely appreciate your comments and criticism.

The opinions and viewpoints in this report are not necessarily those of PMRC, ADB or GTZ.

The Research Team
Hanoi January 2006.



INTRODUCTION

After two decades of reform, the entire system of business licenses and conditions have been significantly improved, increasing citizens protection and freedom to do business. However, in order to reach the target of half a million formally registered enterprises by 2010 and becoming an industrialized country by 2020 in an increasingly strong competitive environment, Vietnam needs to further improve its business and investment climate, making it more predictable, transparent and more reliable for entrepreneurs and less costly and risky.

This report aims to analyse the nature of business licenses and business conditions in Vietnam and assess the shortcomings and weaknesses in the business licensing mechanism in the context of regulatory reforms. The identification of more than 300 business licenses highlights the problems businesses face and the high level of licensing requirements. Licenses are introduced by a variety of government agencies under highly discretionary procedures. Procedures and conditions for the issue of business licenses are often opaque, complicated and costly. The rights of citizens to appeal for removal of unconstitutional or unlawful regulations which restrict their freedom to do business has not been effectively exercised or established. All of these licensing problems are adversely affecting, rather than assisting, the local business environment and make the life of business people more difficult, producing higher costs and higher risks, and provide a further source of corruption in the system.

In addition to analyzing the shortcomings and constraints of the existing business licensing mechanism and business conditions, this report endeavors to analyze the conflicts of interest and the consensus building mechanism, using them as the basis for reform recommendations. Studies and research on business licenses and business conditions are an important start in improving the current system. However, more important are concrete actions that (i) lead to a change of the attitudes around business license requirements; and (ii) build and strengthen an institutional framework which can appraise existing business licenses and conditions and is able to remove them when necessary and monitor the emergence of new licenses.



I

WHY MONITOR BUSINESS LICENSES AND BUSINESS CONDITIONS IN VIETNAM?

1. The two decades of economic reforms in Vietnam have been characterized by a *continuous and increasing protection of the freedom of individuals in private property, creating businesses and associations, entering into contracts and in a citizen's freedom to make his own decisions*. Thanks to liberalization of the business environment, millions of individual ideas and innovations have been put into practice and competition between the private and the state sector has been fostered. The economy has become more dynamic and competitive. The Enterprise Law (EL) of 1999 has been a breakthrough in securing citizen's freedom to do business. The law succeeded in significantly reducing the administrative procedures in business registration. Additionally, the law refreshed the investment climate and spurred the development of the private sector in Vietnam. The new Unified Enterprise Law of 2005 is expected to maintain this momentum and be more beneficial than the Enterprise Law of 1999.

Box 1: A Profile of Enterprises in Vietnam

By the end of 2005, in addition to 3,200 state-owned enterprises, Vietnam had approximately 200,000 enterprises operating under the Enterprise Law, 3,000 foreign invested firms, 15,000 cooperatives, 2,9 million household businesses operating in services and industry, 10 million farm households. After only 6 years of implementation of the 1999 Enterprise Law, 170,00 enterprises have been registered, compared to only 39,000 enterprises registered between 1990 and 1999.

2. However, new barriers have emerged. Most notably, increased administrative burdens, making entrepreneurs dependent on business conditions and business licenses which are

1. This Law is replaced by the Enterprise Law 2005 which is passed by the National Assembly on 29 November 2005 and becomes effective from 1 July 2006.

2. Approved 25th November 2005

3. MPI - GTZ, Programme Document, GTZ MPI SME Development Project and the Vietnam Development Report 2006: Doing Business (December 2005).



granted by public servants⁴. While the actual period of obtaining a business registration certificate is short, the time spent on obtaining official stamps, tax codes, official visits, advertisement licenses, trade promotion licenses, permits to operate in conditional business areas, is in many cases considerable⁵. Entrepreneurs still spend significant resources, time, money and energy on administrative burdens. Deregulation and the liberalization of the right to business is an important overall trend which can be observed in many countries, particularly those in East Asia who have now successfully weathered the Asian financial crisis. Often, the poorer a country is, the more burdensome the administrative procedures⁶. If regulatory reform does help to reduce the cost of doing business by 3% of GDP, as is the case of a developed country like Australia, it could produce an extra USD 1.2 billion for investors to invest in Vietnam. This is equivalent to the amount of ODA inflow into Vietnam each year.

3. In addition, given the low ranking of Vietnam in terms of competitiveness⁷, the effectiveness and capacity of Government agencies will have direct and immediate impact on the business environment. Despite an encouraging increase in FDI inflow in the last few years and positive forecasts for years to come, the quality and efficiency of investment capital and the sustainability of economic growth has not been significantly improved⁸. As in many countries, Vietnam must accelerate its administrative reforms to improve the nation's competitiveness. There is a strong and widespread consensus on these political needs. Such consensus is manifested in the Master Plan for Administrative Reform to 2010⁹ and through many other

4. The most recent example is the Regulation on Steel Trading, issued by the Ministry of Trade in September 2005. According to the regulation, steel businesses have to organize their distribution system through agents and are responsible for the retail prices between the agents and the consumers. The media has carried the protests of the Steel Business Association against the regulation, particularly in the sense that it unreasonably restricts the freedom to organize the product distribution network of enterprise.

5. CIEM-GTZ, 2005, From Business Idea to Reality: Still a long and costly journey

6. WB, 2005, Removing Obstacles for Growth: Doing Business in 2005

7. WEF, 2005, Global Competitiveness Index, In 2005 Vietnam ranked 81/117 in this global competitiveness ranking, having fallen 5 places in 2005 and 17 places in 2004.

8. Tran Dinh Thien, 2005, "Should There be a Change of Mindset on Development Objectives?", The Light (Tia Sang), 20 Nov. 2005, p. 12-14.

9. The Government of Vietnam, Master Plan for Administrative Reform until 2010, approved on 17 September 2001.



legislative efforts in the last few years. This is also consistent with an increased focus on good governance, a transparent and effective administrative system which is easily accessible by all citizens, particularly in the context of international integration into the world economy ¹⁰.

4. In business licenses and business conditions, efforts have been made by the Government, business associations, the business community and international donors to provide an overview of current procedures, identifying the problems business licenses are causing to business freedom and to develop an approach to remove them. Most notable have been studies by VCCI, PMRC and the Enterprise Law Implementation Task Force with support from the Asia Foundation, ADB, UNDP and GTZ¹¹.

5. One such study carried out by VCCI in 2002, surveyed 744 enterprises in five provinces to identify the foundation and an approach to improve the licensing system¹². Through the survey VCCI identified the main features of business licenses and business conditions and provided a quick assessment of the effects (both negative and positive) of business licenses on the business environment and provided suggestions. On the basis of such reports and international experience, a team of experts from ADB is working on an overview of business licenses and from a mostly *empirical and policy oriented perspective*¹³.

6. The Enterprise Law Implementation Taskforce, with considerable support from the PMRC and VCCI, has made an effort to take stock of all business licenses applicable to the business community according to all existing Government regulations¹⁴. Based on this the Government has attempted to review unnecessary business licenses which are hampering business activities. In the implementation of the Enterprise Law, the Government has removed


10. For an overview on regulatory reform, please refer to different reports by OECD and on www.regulatoryreform.com

11. For an overview of studies and research, please refer to the reference at the end of the report and ADB-TA-4418-VIE, [2005], Licensing in Vietnam: A General Overview.

12. VCCI- The Asia Foundation, [2002], "Replacing business licenses by a regulatory oversight system"

13. ADB-TA-4418-VIE, [2005], Licensing in Vietnam: A General Overview

14. Enterprise Law Implementation Task Force, Reports on Enterprise Law Implementation of 2002, 2003



159 business licenses of all sorts¹⁵. According to the PMRC and VCCI, there exist 300 further business licenses. They are classified over 20 sectors, according to the management field of different line ministries.

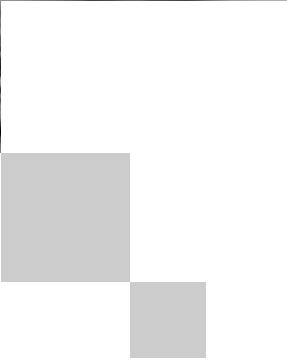
Box 2: Number of Business Licenses by Industry and Sector

- 41 licenses and certificates in culture and information;
- 37 in agriculture and rural development;
- 34 in banking;
- 24 in finance;
- 23 in transportation;
- 20 in post and communications;
- 19 in fisheries;
- 17 in policing;
- 15 in natural resources and the environment;
- 15 in science and technology;
- 15 in pharmacy and healthcare.
- 11 in justice;
- 10 in commerce;
- 8 in security;
- 5 in labour and social affairs;
- 5 in industry;
- 4 in air-transportation;
- 3 in tourism;
- 3 in customs;
- 3 in construction;
- 2 in defence;
- 1 in education.

7. It is worrying that since 2003, efforts to review business licenses and conditions have not intensified. In its latest efforts, the Government, after undergoing a difficult consensus building process with different ministries, removed only 3 business licenses from the 80 business licenses which were proposed to be removed by the Enterprise Law Implementation Taskforce¹⁶. Since then, the Government has failed to initiate strong or dramatic action to monitor the emergence of new business licenses or to remove unnecessary business licenses. The significant differences in approach and concept of business licenses by different ministries has led to a failure to bring about the much needed consensus building for business license reform. Even worse than this is failure, is that some ministries have taken advantage of the many laws being developed in preparation for WTO

15. CIEM-GTZ, [2005], From Business Idea to Reality: Still a Long and Costly Journey

16. Cao Ba Khoat, Discussion Paper, National Workshop on "Business Licences in Vietnam: Current Status and the Ways Forwards", 18 October 2005.



accession, to skilfully strengthen and broaden their licensing powers through administrative regulations. There are several examples of this. The Ministry of Trade has quietly included in the Trade Law of 2005 a number of business licenses. A number of new licenses are now applicable to foreign organizations wishing to engage in trading in Vietnam (Article 23 III, Trade Law), or to launch a sales promotion (Article 92 IX Trade Law), or to register a trade franchising business (Article 291 I Trade Law). The General Department of Tourism had the Tourism Ordinance passed with a stipulation requiring tourist guides to obtain a certificate granted by the General Department of Tourism. In addition to the "red book" required by MONRE in land use right registration, the Ministry of Construction has gained the power to grant a further "pink book" which certifies the ownership of buildings on land according to the Decree No.95/2005/ND-CP. The Ministry of Justice, as a retrogressive in the drafting process, has created an additional "green certificate" which certifies the registration of real estate assets through the Draft Law on Real Asset Registration. Under the strong protests of the media and public opinion, the three ministries sat together and tried to find a solution to this, though no practical or feasible solution has been found so far.

8. On another extreme, a number of interest groups have been trying to lobby for regulations which protect their vested interests, hampering competition from new enterprises and spoiling the business environment¹⁷. The enlargement of troublesome business licenses and business conditions increases the opportunity for corruption to become further widespread¹⁸.

9. After the several *reviews of business licenses and business conditions* implemented before and after the Enterprises Law of 1999, and given the need and the pressure for stronger and more in-depth reform, it is important to analyze further the issue of

17. Tran Phuong, White Collar Criminals, Vietnam Law Newspaper, issue 230, 23/09/2005.

18. WB, Doing Business 2004: Understanding Regulation.



administrative and regulatory reform and regulatory quality control. It is important to put the making of *administrative regulations under effective control* and monitoring to guarantee and protect the freedom to do business. Effective and systemic studies and research are indispensable to the establishment of such a system. This is however, a new field where Vietnam has little experience, especially when compared with international experience, particularly from South Korea. Regulatory reform has not been adequately emphasized as a focus of administrative and legal reform in Vietnam¹⁹. The checks and balances of power in general, and overseeing of administrative power in particular, needs specific solutions which are relevant to the social, political and economic conditions in Vietnam. Several international experiences and practices have been introduced to Vietnam, however, it is important to be selective of such experiences. Many practices simply cannot be transplanted and are not applicable for Vietnam²⁰. It is also important to look at cultural, political and institutional constraints before experiences on regulatory reform can be successfully implemented in Vietnam.

10. On the basis of past studies on the subject, and in line with recent reforms as mentioned above, it is clear that Vietnam should urgently begin regulatory reform and introduce a mechanism of regulatory quality and performance control in a more comprehensive and systemic manner to further improve the freedom of enterprises, particularly small and micro enterprises. This preliminary report explores further the issue and suggests some solutions to reform and improve the business licensing system in Vietnam.

19. See the Master Plan for Administrative Reforms until 2010 and the Resolution No.48/NQ/TW of the Politburo, Communist Party of Vietnam on the formulation and improvement of legal system until 2010

20. For international best practice, please see ADB-TA-4418-VIE, [2005], International Experience and Best Practices in Licenses Reform in the light of Vietnam's Licenses System.



II

THE NATURE OF BUSINESS LICENSES AND BUSINESS CONDITIONS

11. Business licenses and business conditions exist in different forms in Vietnam such as:

- **Professional certificates**, e.g. private medical practitioner certificates, pharmaceutical small trading certificates according to the Law on People's Health Protection, the Ordinance on Private Medical Practitioners and the Pharmacy Law in 2004,
- **Standard conformity certificate**: e.g. the environmental standard conformity certificate according to the Environment Law in 1993, animal slaughter sanitary condition certificates,
- **Registration certificates**: e.g. franchising registration according to the Trade Law 2005
- **Licenses**: e.g. licenses for the circulation of oversized vehicles according to the Decree No. 36/CP issued in 1995,
- **Written approval**: e.g. written approval by the Ministry of Culture and Information applicable to businesses which trade in direct TV signal reception devices and equipment.
- **Certificates**: e.g. tourist guide certificates according to the Tourism Ordinance 2004.

12. While *business licenses often take the form of written approval* from an administrative body, business conditions and requirements are often unclear in terms of definition. In a broad sense, this could be understood as an intervention by an administrative body into the business freedom of the people. This is reflected in the behaviour of public servants who may accept, restrict or refuse the registration or the implementation of some specific businesses, for example:

- A business may be refused registration due to it not being suitable to the social economic planning of a province. According to the Enterprise Law Implementation Taskforce, as of June 2004, many provincial authorities were still introducing unlawful and groundless licenses which are working against business freedom. For




example, in Ho Chi Minh City, in order to do business in areas such as hotels, restaurants or guesthouses, a business needs to obtain the approval of the district authorities of the district where the hotel or restaurant is located. Authorities in Ho Chi Minh City have also imposed an embargo on business registration in Internet services in District 3 until the end of 2005. While in Ha Tay, business registration documents must be submitted with the curriculum vitae of the owner.

- A business may be refused simply because the registrar feels that the business may be an informal business which could not be monitored by the Government, such as property brokerage services, job brokerage services, labour exports or services for dating with foreigners. A typical case of this was the Ministry of Culture and Education's suggestion to the Prime Minister to discontinue the registration of a number of businesses such as bars, karaoke lounges and discotheques as the Ministry viewed them as "social evils". The Prime Minister then issued a directive on actions and measures to be taken to address social evils in bars, karaoke lounges, discotheques. The directive, which is valid nationwide, also imposes a temporary ban on the registration of businesses which fall into these business lines.
- A business may also be refused if the business line is viewed as either sensitive and potentially harmful for society. This is done due to both a lack of guidelines and instructions or simply because the line ministries or local authorities want to impose restriction on a business lines. This especially affects discotheques, karaoke lounges and massage parlour²¹.

13. Business licenses are granted on an ex-ante basis, to a specific enterprise before it can really start their business. Meanwhile, business conditions are those which the enterprise are required to adhere to throughout the life of their business, while adherence to

21. On June 2004, the People's Committee of Ho Chi Minh City issued a decision in which 8 "sensitive" business lines are not allowed in Go Vap District. These business lines include: discotheques, sale and lease of video discs, sale of audio CD, computer games, massage parlours, cafés, guesthouses and barber services.




these conditions will be monitored by competent authorities on an ex post basis. Business licenses are granted to enterprises after considering the specific conditions of the enterprise and are often valid only for a given time period. However, business conditions are applicable to a sector or a business line, e.g. food or hotel industries. Very often, however, difficult to differentiate between the two in the Vietnamese context.

14. In this report, both business licenses and business conditions are understood as the administrative behaviour of the public authority to intervene into the freedom to do business of the citizen, to protect certain public interests and values. Such administrative behaviour takes different forms, for instance:

- *A legal text (law and regulation)* may impose constraints on businesses. For example, an independent auditing firm can only be established in the form of a partnership (Decree No. 105/2004/ND-CP), businesses with more than 10 employees or having more than 2 business offices must be registered according to the Enterprise Law (Decree No. 109/2004/ND-CP), steel production enterprises can only distribute their products through an agent system (Steel Trading Regulation 2005), restrictions on multi-layer trading networks (Regulation on Multi-layer Trading according to the Decree No.110/2005/ND-CP);
- *The licensing behaviour* of an administrative body which approves or refuses an application as described in paragraph 12.
- *The monitoring of compliance with business licenses and conditions* by relevant authorities.
- *Interpretation of written legal documents*, by words or by actual behaviour of public servants. For example the name and logo of taxi firms must be painted on cars, or the requirement for doctors to work in massage parlours²². These "explanations and verbal directions" are very much different from one province to another²³.

22. CIEM-GTZ, [2005], From Business Idea to Reality: Still a Long and Costly Journey, p. 36-41

23. The Vietnam Law, 31. October 2005, p.10, and The Vietnam Economic Times, 28 October 2005.



15. As business licenses and business conditions are necessary to protect the public interest and public order, it is our view that an overall assessment and removal of unnecessary business licenses is just the start of the regulatory reform process in the field of business licensing. The previous removal of 159 licenses has since been cancelled out by the re-appearance of hundreds of new licenses. These are justified as being needed to meet the more diversified needs of administrative bodies in managing society. In many cases, licenses should be seen as indispensable, necessary and reasonable and should not be assessed negatively as a tool to protect the vested interests of some ministries. In the long run, *there should be a mechanism for the making and enforcement of regulations governing these administrative behaviours to protect the freedom to do business of citizens.* Overall, balancing the freedom to do business and the public interests is the main principle and philosophy in administrative regulation quality control.

16. From this perspective, to ensure the eventual success and effectiveness of business licensing reform, it is important to focus on the following issues:

- *Monitor the law and regulation making procedures* of Government bodies. Particular emphasis should be placed on the making of legal regulations, reviewing the delegated power in the law making of administrative bodies, a mechanism to prevent laws and regulations which impose unreasonable restrictions on the freedom to do business of citizens.
- *Set up regulations which allow citizens to exercise their right to appeal* and to appeal the removal of regulations which limit their freedom to do business unreasonably.
- *Monitor the business licensing procedures* of competent authorities. Public servants are obliged to follow transparent, predictable administrative procedures under the monitoring of the people.



KEY CONSTRAINTS IN THE CURRENT BUSINESS LICENSING SYSTEM

17. The reports and studies discussed early, as well as public and press opinion have clearly revealed a number of constraints in the business licensing system in Vietnam:

- *Firstly*, there is no comprehensive and accurate list of existing business licenses in Vietnam. Though business registration offices have the obligation to provide guidance on conditional business lines, none can give an exact number on how many business licenses are currently in effective in Vietnam or which business lines need licenses and under which procedures the licenses are granted²⁴;

Box 3 - Business Licenses for selling DVDs and VCDs


On 23 September 2005, inspectors confiscated 844 movies, 175 music disks and imposed a penalty on the Phuong Nam Culture Company in the CO-OP supermarket in Ho Chi Minh City. The company had not obtained a business license from the local government agency in charge of information and culture.

When meeting with the culture and information office of the district, the company was informed that the business license had already been removed according to Decree No.30/2000/DN-CP. However, the inspectors of the Culture and Information Department in Ho Chi Minh City (at city level) insisted that DVDs and VCDs were not the "music disks" detailed under the removed license. Their interpretation was that this applied only to cassettes and CDs and not DVDs and VCDs. The business license applicable for DVDs and VCDs was considered still valid.

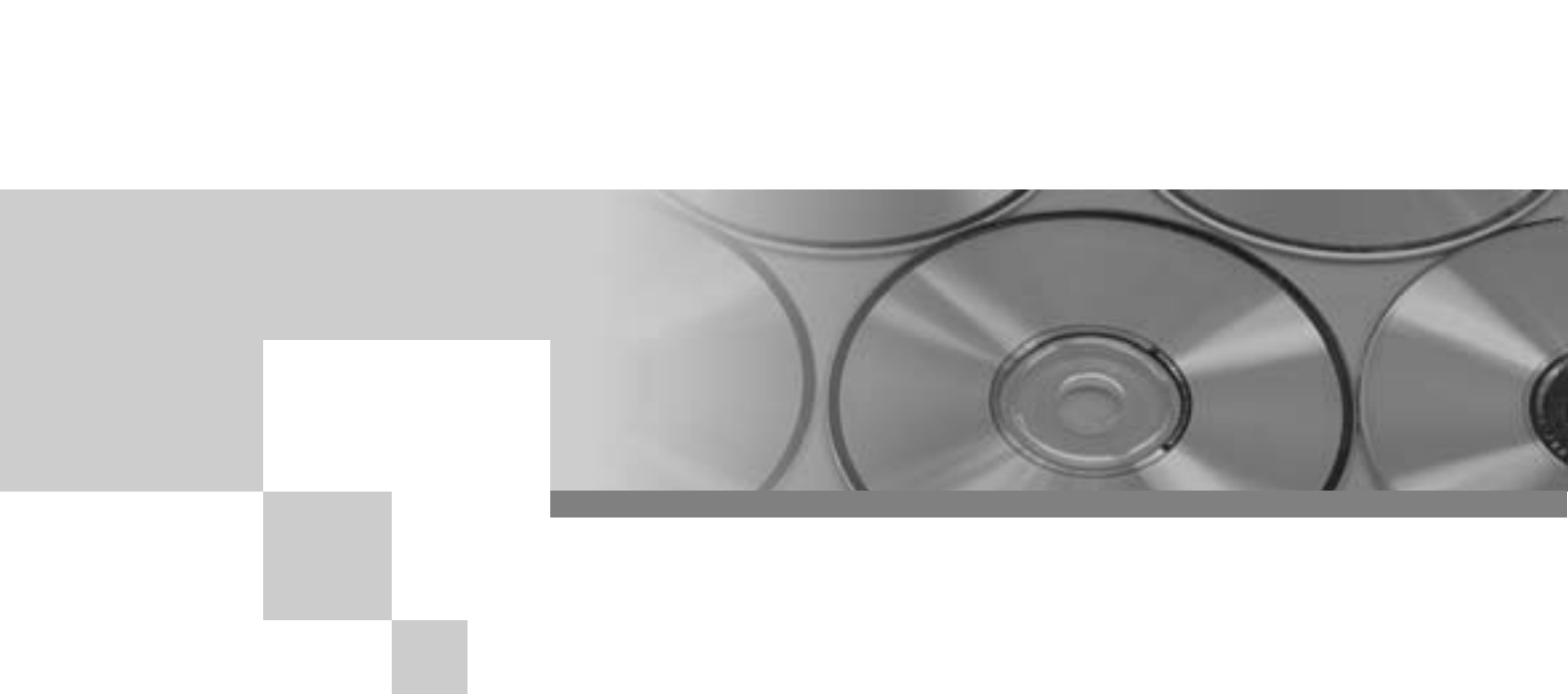
The company was unable to get a firm answer on whether or not they would need a business licence for trading in DVDs and VCDs and requirements continue to be unclear.

Saigon Economic Times, 10 Nov. 2005, p. 19

24. CIEM-GTZ, [2005], From Business Idea to Reality: Still a Long and Costly Journey, p. 37

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- *Secondly*, the objective of and justification for business licenses is often unclear and opaque. It is unclear for what public interest a business license serves. A recent measure taken by the Ho Chi Minh City People's Committee to address crimes along the Trans Asia Express Way, is a good example of this. Pins and nails are often scattered along the road causing cars and motorcycles to puncture their tyres. Car and motorcycle owners are then forced to use the repair services provided by the people living along the road. To combat this the People's Committee issued a decision requiring all tyre repair shops to register their businesses. All shops must have their own signboard and a "registration code label" which cannot be faked. The decision obliged thousands of poor people, who cannot do anything other than small business on the streets, to incur unnecessary costs in terms of money, time and labour²⁵.
 - *Thirdly*, the criteria and procedures for granting business licenses are unclear and opaque. To obtain a license for mining, a mining company must request comments from the relevant national defence and tourism agencies. They must then come to an in-principle agreement with the People's Committee of the commune where the mine is located. The company can then bring the case to the district People's Committee (PC) to obtain their approval on the in-principle agreement made with the commune PC. The concerned district PC will then send an official letter to the Department of Natural Resources and Environment (DONRE) of the province. After receiving the letter, DONRE will send an official from the Mineral Resource Division of the Department to conduct a field survey. On the basis of the field survey, the DONRE will prepare a letter recommending the provincial PC to accept the mining proposal of the company. Depending on the type of mining operation. The Ministry of Natural Resources and Environment (MONRE) will then decide whether approval for the project proposal will be delegated to the province or will be kept under its authority. After MONRE makes a decision, the concerned provincial PC requests the enterprise to develop a mining feasibility study and an environment impact

25. The Labour (Lao Dong), 16 September 2005, p.1,2.



assessment report. The Cadastral Measurement Centre of the DONRE then conducts the measurement of the mine at the cost of VND 1.2 million/ hectare. The Province then issues a decision to approve the project. Travelling costs for a company to receive a license can amount to VND 20 million and it often takes an enterprise at least one year to finalize these licensing procedures²⁶.

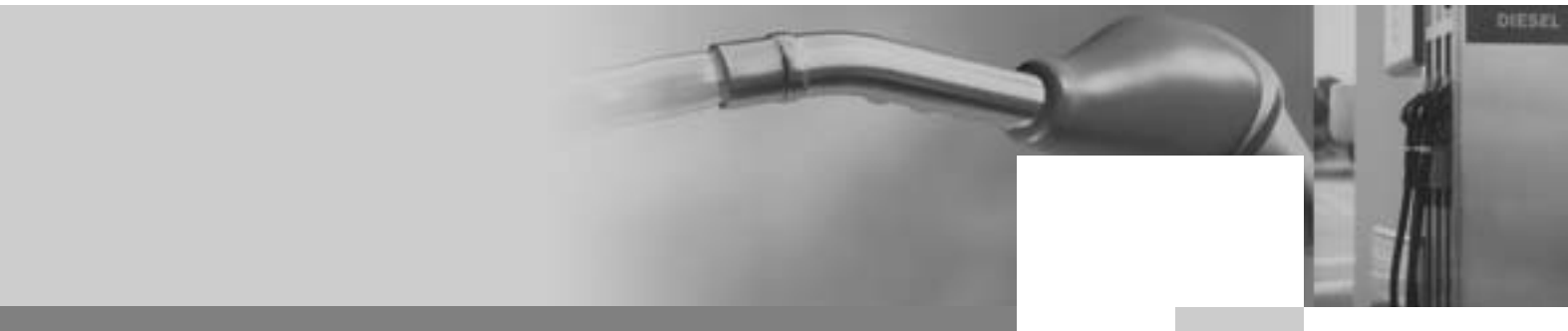
- *Fourthly*, the process lacks the participation of interested stakeholders and the rights of business applicants are unclear. There are no stipulations requiring explanations from competent authorities when they refuse to grant business licenses to enterprise applicants. The Vietnam Truck Transportation Association reported to the Government²⁷ that many of the administrative regulations on speed limits, traffic law violation penalties, driving license seizures or temporary seizures of vehicles were creating large losses to enterprises. Despite investment in roads and vehicles, the regulation on speed limits has remained unchanged over the last 10 years. The business community was never consulted when the regulation was drafted and passed and the act of seizing vehicles when a driver violates the law is considered unreasonable by most²⁸.
- *Fifthly*, the period of validity of business licenses is very short. Procedures for renewal are complicated and can repeat those steps required when an enterprise applies for business licenses the first time. In one case, according to a decree on business conditions applicable to fishery resource exploitation, licenses to exploit fishery resources have a validity period of no more than 12 months²⁹.
- *Sixthly*, the enforcement of business licenses after issuance is weak. There is no system in place to monitor compliance with business licenses.

26. The Vietnam Law (Phap Luat Vietnam), 30 Oct. 2005, p.10.

27. In a meeting with the Government's Inter-ministerial Taskforce on Administrative Procedures Applicable to Enterprises on 23 September 2005,

28. The Vnexpress (www.vnexpress.net), 24 September 2005

29. Decree 59/2005/ND-CP, Article 4



Box 4 - Ineffectiveness and Poor Performance of Business Licenses

Despite the existence of stringent regulations on business licensing and business conditions applicable on petrol stations, Ho Chi Minh City has the highest number of petrol station accidents due to unsafe petrol stations. Of the 500 petrol stations in Ho Chi Minh City, 100 failed to meet requirements in terms of fire-fighting safety, being located too close to roads, schools, main traffic points, hotels and densely populated areas. In the case of a fire, the consequences could be extremely devastating.

The Youth (The Tuoi Tre, 9 September 2005)

18. In reality, many competent authorities have issued regulations imposing different types of business licenses and conditions due mostly to the opaque nature of business license procedures. This opaqueness gives room for public servants to abuse their power, and results in an increase in the cost of doing business for enterprises³⁰. The use of licenses as a tool of governance and control has taken root in the mind of administrative bodies and civil servants. This situation is even worse as Vietnam's economy struggles to convert itself from a command economy to a market economy. In most cases, government and administrative officials have failed to change their mindset and most still believe that citizens freedom to do business should only be broadened if the government and administrative bodies can expand their capacity in management and control. If there is a sign that they can not control or manage, their first action is to restrict or prohibit the rights of the people.

Box 5: Vietnam's Competitiveness Index in Decline

The World Economic Forum's report on the business environment, 2005, ranked Vietnam 81 out of 117 countries in terms of global competitiveness. This is a fall of 4 places compared to 2004. For its business environment, Vietnam ranked 80 out of 117 and for the capacity to take action of government bodies, 92 out of 117³¹.

30. ADB Vietnam, [2005], Licensing in Vietnam: A General Overview; CIEM-GTZ, [2005], From Business Idea to Reality: Still a Long and Costly Journey, p. 37

31. World Economic Forum, 2005. Global Competitiveness Index.




19. *Competent authorities which can issue laws and regulations regulating business licenses:* The Enterprise Law of 1999 makes it clear that only the National Assembly, the Standing Committee of the National Assembly and the Government may issue legal texts regulating business licenses. The freedom to do business can only be limited by *law, ordinance and decree*³². The law has been helpful in building and improving public awareness of their freedom to do business and has helped to create an overall change in attitude that sees a need to limit the power of the State, especially to limit the power of ministries and provincial authorities which try to impose business licenses through regulations at lower levels. In principle, guidelines by Provincial People's Committees, the regulations of a line ministry, a verbal interpretation of laws and regulation or verbal directions of government officials, can not impose business conditions which restrict the freedom to do business of the people. This principle is reiterated in the Enterprise Law of 2005³³. According to the law, ministries, ministerial agencies, people's councils and people's committees at all levels are not allowed to issue regulations on conditional business lines or on business conditions.

20. While this stipulation under the law is welcomed it should be remembered that *while complying with this stipulation, the number of regulations which may impose business licenses are already enormous*. Annually, 10 to 23 different laws are passed by the National Assembly, dozens of ordinance by the Standing Committee of National Assembly and around 200 decrees by the Government. Many of all these regulations affected citizens freedom to do business and it is therefore necessary to have an effective monitoring mechanism to ensure that these regulations do not impose unreasonable constraints on the business freedom of people.

32. Article 6 III Enterprise Law 1999

33. Enterprise Law 2005 Article 7, V




21. According to the 2002 VCCI survey, only 23% of business licenses were imposed by central ministries and the Government while 55% were implemented by provincial or district authorities³⁴. It is therefore important to look further into the following issues: (i) on what legal basis and foundation People's Committees have introduced new licenses; (ii) in terms of licensing procedures, what are the differences between provinces and regions, particularly between those with wide differences in their levels of economic development. Over the last 3 years, since the VCCI study, no further national surveys have been carried out on business licenses and business conditions. These findings have not been further supported with data and figures, especially where local authorities have been given increased autonomy in business and investment decisions and in developing their economy.

Box 6: Business licenses for alcoholic beverages, tourist and liquefied gas trading companies

According to Circular 12/1999/TT-BTM, Departments of Trade and Tourism, under Provincial People's Committees are delegated to issue licenses for alcoholic beverage trading companies. Additionally, the Department of Trade and Tourism is also in charge of some procedures in granting business licenses to domestic and international travel companies. For example in Thai Binh, in order to run a domestic travel business, a company is required to submit a business plan and pay a deposit VND 50 million. If the same company wants to provide international travel services, it has to go to the General Department of Tourism to apply for a license and pay a deposit of VND 250 million. In some cases, the Department of Trade and Tourism delegates this power to district People's Committees. For example, the Director of the Department of Trade and Tourism in Hanoi announced that from 1 October 2005, he would delegate the function of granting certificates certifying the fulfilment of conditions to do business in gas trading to district People's Committees³⁵.

34. VCCI- The Asia Foundation, [2002], "Replacing Business Licenses by a Regulatory Oversight System"

35. Decision No.136/2005/QD-UB dated 6 September 2005 by the Hanoi People's Committee.




22. It is also important to work out a mechanism under which citizens may appeal when their freedom to do businesses is unreasonably restricted by laws and by administrative regulations. There should be practical studies to review existing regulations, the current appeal and complaint system and the operation of the judicial institutions in Vietnam. This could produce a practical view and solutions to protect the right of appeal of citizens, especially when their freedom to do business is violated and jeopardized.

Box 7: Applying for business licenses has become a habit for Vietnamese businesspeople

Mr. Vu Duy Thai, Chairman of the Hanoi Union of Associations of Industry and Commerce (UAIC) revealed that in order for an enterprise to have a lawful advertisement billboard, it must obtain licences from at least 5 government agencies, including departments of culture and information, architecture, construction and the district people's committee. Business licenses are so numerous that it is common for enterprises to employ someone solely to apply for business licenses³⁶. Applying for business licenses has become a habit for Vietnamese businesspeople. Rarely do you find an enterprise using their right to file a lawsuit against the unreasonable interventions of administrative bodies into their business. On the contrary, it is often more widespread for enterprises to bribe officials to obtain business licenses. Moreover, businesses do not feel secure without a business license. When the Securities Law was drafted, the draft law did not require enterprises to obtain a license if they had their shares listed on a foreign stock exchange. However, many enterprises requested the National Securities Commission to provide specific stipulations on the license needed to have stocks listed on foreign stock markets to make it easier for them if they had to obtain this kind of license in the future³⁷.

36. The Youth, 26 July 2005

37. Saigon Economic Times, 20 October 2005, p.15



23. Other studies have only provided an overview of the business licenses and conditions in Vietnam, mostly from a practical perspective. It is extremely important to use the citizens freedom to do business - one that is recognized by the Constitution and one that secures economic growth and poverty reduction - as the foundation or the principle in evaluating business licenses. On the basis of this principle, business licenses are regarded as an intervention by the Government in people's freedom to do business. By using this principle, it is easier to see (i) when an intervention is constitutional and when it is not, (ii) when it is legal and lawful (iii) when it is in public interest and when it is not and (iv) whether it is a reasonable intervention that can balance the cost with desired benefits. In addition, it is important to comprehensively assess the system of checks and balances to protect people's right to do business, especially when such rights are unconstitutionally, unlawfully, and unreasonably violated. Only when these principles are applied, can policy recommendations touch the deep root of issues on a comprehensive basis.




IV

CONFLICT OF INTEREST AND THE CONCENSUS FOR A SYSTEM TO MONITOR BUSINESS LICENSES AND BUSINESS CONDITIONS

24. The conflict of interest in relation to business licenses and business conditions are manifested in the relationship between the State and the market in a transitional economy such as Vietnam's, which remains far from smooth. Overall, there is a fast-growing market economy in Vietnam. However, the institutional set-up and the government has not been adequately reformed to catch up with such fast changes. For example:

- While state-owned enterprises contribute just 40-42% of the gross national product, the public sector still has a dominating role, controlling 70% of nation resources such as land, credit and business opportunities. In such a context, State and government agencies still insist on the right to control the economy, particularly through the system of business licenses and business conditions.
- As a legacy of the command economy as well as Vietnam's conflicts, commanding or permitting, dominant during wartime, remains dominant in the mindset of many officials in the Government. Applying these same principles in such a new context, officials only increase people's freedoms within the extent of their own perceived control and management capacity. Public servants still do not see entrepreneurs as partners or clients whom they have to serve.
- There is a lack of belief in the functioning of the market and in the capacity of enterprises. In many cases, government officials have misleading assumptions of the behaviour of entrepreneurs. The Government sometime penalizes or applies restrictive measures to the whole business community just because of the wrongdoing of a handful of enterprises which are just a small minority of the whole community. "The whole village has to take the medicine just because one or two people are sick".
- Finally, there is a lack of effective policy dialogue mechanisms integrated in the law and rule making process. Many policies and regulations are therefore superficial and impractical.




25. Enterprises are now at an early stage testing the water and exploring their rediscovered freedom. Most enterprises are not fully aware of their freedom to do business and lack the expertise to create and strengthen their power through business associations. It is uncommon for them to use their right of appeal to request for changes, revisions or the removal of administrative regulations which are unconstitutional or illegal. It is not uncommon to find an enterprise which has used their own connections or bribes to obtain business licenses or papers certifying the observation of business conditions from government agencies. In some cases they feel more secure when operating with a business license before launching a new service or product. A monitoring and checks and balance system could be successfully formulated through regulatory and administrative reform in Vietnam. In the long-run this could be effective and fruitful, but only if it is implemented in a prudent manner with due consideration to local conditions in terms of institutional set-ups, culture, politics and society.

26. From an economic perspective, business licenses and conditions may have different impacts on different interest groups in society. There are always winners and losers when a new business license is introduced. For example, the stipulation requiring different colours for taxi firms gives public servants the right to make discretionary decisions. It is also welcomed by existing taxi firms. The losers are new entrants. It is important to analyze the conflict of interests in different stakeholders related to business licenses and to assess the costs and benefits of a regulation and the distributional impacts on different groups. On that basis, the most optimal options can be chosen.

Box 8: The Government's Intervention in the Property Market

In order to put the real estate brokerage business in order, when drafting the Real Estate Business Law the Ministry of Construction tried to tighten administrative controls over property brokerage individuals and firms. Under the draft law they must now obtain a business license to provide the service, become a member of the Real Estate Business Association (managed by the Ministry), and successfully pass



training courses on real estate brokerage. Unlike other countries, Vietnam does not emphasise the collection of taxes on land assets, rather it focuses on collecting taxes from land and house transactions (4% of the transaction price). This regulation gives more opportunity for speculators (who own lots of land without having their assets taxed), and more room for hidden transactions (informal transactions and the wilful incorrect declaration of transaction prices to evade taxes). Only when these conflicts of interests are clarified, can the law effectively intervene in the market.

27. A Regulatory Impact Assessment (RIA) could be used to assess the costs and benefits of individual business licenses in Vietnam. With the use of a RIA and other guiding principles for regulatory quality and performance as recommended by OECD³⁸, justification papers can be developed to show that if business licenses and conditions are unreasonably imposed they can only help to increase the possibility of power abuses by public servants, to protect the monopolistic power of some limited enterprises, while reducing opportunities for new entrants. This will do harm rather than good to the whole economy.

28. Unlike other countries, where historical legacy and conditions allow for effective top-down approaches, reforms in Vietnam are successful often mostly thanks to pressures from and the overall consensus of the entire society. The same would hold true for business licensing reform. It is therefore important to work out an approach and mechanism to build the consensus for the reform of business licenses in Vietnam.

Box 9: Regulatory Reform in South Korea

To implement a swift deregulatory process and reduce the administrative burdens for enterprises, South Korea established a Regulatory Reform Committee after the outbreak of the 1997-1998 financial crisis. The Committee was authorized with

38. See OECD [2005], OECD Guiding Principles for Regulatory Quality and Performance.



reviewing, revising and removing existing regulations and monitoring the issuance of new regulations. In using the "guillotine approach", the Committee required all government agencies to prove the need of their regulations, otherwise they would lose them. Thanks to such a strong and profound reform, South Korea could, in only two years, reduce the number of regulations by half (from 11,125 regulations at the beginning of 1998 to only 6,308 regulations by the end of 1999, not to mention the regulations which were revised).

Jong Seok Kim, Saigon Economic Times, 20 October 2005.

29. We can see at this stage that a national consensus on the following issues are of prime importance:

- The establishment of a system and a committee to review existing business licenses and conditions on a nationwide scale. At present, the Vietnam Chamber of Commerce and Industry (VCCI) endeavours to provide regular updates on business licenses and business conditions via one of their websites (www.vibonline.com.vn). However, there is currently no functioning network which links all 64 business registration offices in 64 provinces, economic divisions in districts and other ministries and agencies which are involved in business registration (the State Bank of Vietnam, the Ministry of Planning and Investment, the Ministry of Finance, the Ministry of Trade). To provide better services to enterprises and to create a more transparent policy and regulatory environment, it is strongly advisable that a national agency which can provide information on business licenses and business conditions be established. International experience is available from business licensing authorities in Australia and Singapore, particularly in their efforts to provide good information, streamline procedures and predictable regulations for entrepreneurs.



- Assess the impact of business licenses, with a particular focus on those licenses which the business community appeals for removal. After the People's Procurator was discharged from the function of appraising and monitoring the issuance of legal documents, the Ministry of Justice took over this function. However, the Ministry has not been very efficient in performing its role of monitoring the quality of regulations issued by the Government and local governments in 64 provinces. As a result it is often found that regulations by the Government are unconstitutional and regulations by local governments are against the law. International experience shows that to implement regulatory reforms successfully, it is important to have a concrete and comprehensive strategy and process to review all existing regulations. Government bodies will be given time to prove the need of such regulations. Business communities and interest groups need to be properly consulted before the regulations are submitted to a regulatory oversight body for their decision. Therefore the obligation to prove and justify the need of a legal document is on the shoulders of government bodies. In contrast, the right to counter-argue such a need belongs to business associations and the regulatory oversight body. Currently in Vietnam the MOJ is charged with the function of verifying draft regulations and legal instruments, while different committees of the National Assembly are charged with appraising regulations. Vietnam does not have a regulatory reform committee, as is the case in South Korea, nor does it have strong administrative courts to revoke regulations issued by the central and local governments. Meanwhile, a Constitutional Protection Court is yet to be established in Vietnam.

- Establish mechanisms to (i) reconcile the interests of different groups; and (ii) implement existing regulations in the interest of the business community.

- On the basis of Vietnam's experience and practice, improve the participation of business associations in the process of regulatory reforms as suggested in paragraph 16 above.



Box 10: Policy Advocacy by Business Associations in Ho Chi Minh City

Ho Chi Minh City has initiated a dialogue between the business community and the local government through the city's website. After two years in operation, the website has involved the participation of 18 local government agencies and 555 enterprises and business associations. Through the website the local government has responded to 1,514 queries from the business community, increasing the effectiveness of dialogue with the business community.

Ho Chi Minh City People's Committee, Report on Dialogue between the Local Government and the Business Community in the two Years of 2004-2005.

30. Methods of building consensus should be further studied and analyzed. We feel that consensus should be linked with other programmes, such as:

- (i) strengthening the representative and supervisory capacity of elected bodies,
- (ii) improvement in recruitment, training and assessment of public servants,
- (iii) improvement of the administrative procedures and creation of a transparent and streamlined administrative system,
- (iv) strengthening the judicial supervision and independence of the court,
- (v) strengthening the role of civil societies, interest groups and business associations in the process of rule making, and
- (vi) strengthening the role of the media and other institutions.

These elements are critically important for the sustainable and eventual success of business license reform in Vietnam.



V

POLICY RECOMMENDATIONS TO MONITOR BUSINESS LICENSES AND BUSINESS CONDITIONS

31. The various studies detailed earlier on this area have provided suggestions for the reform of business licenses and business conditions. Some of these suggestions and recommendations, including those in a recent study by the Asian Development Bank, have been reflected to some extent in the Enterprise Law of 2005, which was recently approved by the National Assembly³⁹. In particular, only three supreme organizations, the National Assembly, the Standing Committee of the National Assembly and the Government, are able to issue regulations which impose new licenses or business conditions. The law further stipulates that:

- Business associations are allowed and encouraged to be more proactive in suggesting the Government review and assess all or a part of business conditions and to remove or revise unreasonable business conditions and apply new business conditions which are more appropriate to current practices.
- Even without a request from the business community, the Government shall, on a periodical basis, review all business licenses and conditions and remove those which are no longer appropriate.
- The procedures, conditions, authorities and time-limits related to business licensing shall be simplified and made more transparent.
- The Government shall issue a regulation, possibly in the form of a decree by the Government, to manage business licensing issues⁴⁰.

32. These provisions are extremely valuable but do not represent in themselves a comprehensive solution to the various problems related to business licensing in Vietnam due to the following reasons:

39. See Articles 7 III, IV, V, Enterprise Law 2005


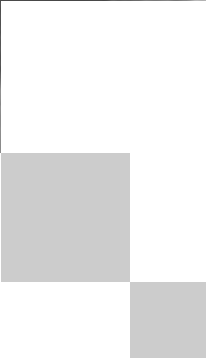
40. See Articles 7 III, IV, V, Enterprise Law 2005



- *Firstly*, in terms of legal competence, the Government can only review and remove business licenses and conditions which are regulated by the Government (or by Government agencies and by provincial people's committees). The Government cannot remove business licenses and conditions which are imposed by laws or ordinances (laws and ordinances are issued by the National Assembly or by the Standing Committee of the National Assembly);
- *Secondly*, in terms of benefits, once an administrative body imposes business licenses or conditions, it is difficult for it to review and counter-argue the benefits and interests which it protects. This also holds true for the Government, which is a team of ministries with different interests and benefits. Internal control (self-control by the Government) is a good tool but might not be efficient where the interests of ministries are too different from those of the business community when discussing business licenses;
- *Thirdly*, if the focus of business license reform and the business conditions are based on: (i) law and the rule making process, (ii) development of institutions and mechanisms to guarantee the right to appeal of business persons, and (iii) development of standards on administrative procedures for business licensing as have been suggested in paragraphs [16] and [29], a Government decree might not be able to address these issues.

33. Due to this, it is important to analyze further the issue of business licensing in Vietnam in order to develop a more comprehensive and practical approach. At this stage, we suggest the following:

- *Firstly*, remove or restrict business licenses which are issued before an enterprise can go into operation in a conditional business line (ex ante licensing); Convert these licenses into business conditions which enterprises are required to comply




with during their whole life (ex post business conditions). Administrative bodies will focus on the compliance with business conditions rather than on issuing business licenses which allow enterprises to enter the market (monitoring ex post business conditions versus ex ante licensing);

- *Secondly*, build a consensus that business licenses and business conditions are an intervention to restrict people's freedom to do business and can not be promulgated recklessly by executive bodies. Freedom can only be restricted by the Constitution and the laws or ordinances which are issued by the National Assembly - a body which represents the rights of the citizen. On that basis, it should be stipulated that *business licenses and business conditions can only be regulated through laws passed by the National Assembly*. Only in very specific cases, should the Government issue regulations imposing business licenses and conditions which limit the people's freedom to do business and under a clear delegation of power from the National Assembly.

Box 11: Laws and Regulations should be Readily Implementable

At the National Assembly session of the 23rd November 2005 , the Chairman Mr. Nguyen Van An, announced an important decision by the Standing Committee of the NA. The decision tries to limit law-implementation guidelines to a minimal level. According to the decision, laws, once they are passed, should be clear enough for them to be implemented immediately. The Chairman also suggested that laws should be applicable to people and administrative regulations be effective only internally in administrative bodies.

The Vietnam Law (The Phap Luat Vietnam), 24 Nov. 2005

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- *Thirdly*, institutions to protect the Constitution should be gradually established with a focus on people's freedom to do business. These institutions should have enough competence and power to revoke laws, ordinances and decrees which unreasonably restrict a citizen's freedom to do business. Similarly, judicial institutions should be strengthened. These institutions and their judges should be given the power and the freedom to monitor the behaviour of government bodies. They should be competent enough to repeal and penalize unconstitutional behaviour when needed or to force public servants to fulfil their obligations;

33. In addition to these three recommendations on a shift in thinking, we strongly suggest four policy recommendations as follow:

- *Establish a regulatory reform committee under the Prime Minister:* The establishment of constitution-protection bodies and administrative courts often takes time. Therefore, if the Government is committed to administrative reforms to improve the nation's competitiveness, it should submit to the National Assembly a law which allows the establishment of an ad hoc committee specialising on regulatory reform. The Committee should consist of law-making and administrative reform experts from the Office of Government, Ministry of Internal Affairs, relevant ministries and central government agencies, representative from the business community, and independent experts and economists. **The Committee will help the Government to take stock and review all existing business licenses and conditions.** The precondition for success is that the Committee will not only have the advisory role but also the power to make decisions. However, in the context of Vietnam, such a committee will only have real power if it is backed by the whole political system, particularly the Communist Party.





Box 12: The Committee on Regulatory Reform in South Korea

In 1998, the Parliament of South Korea promulgated an act to allow the establishment of a 20 member regulatory reform committee. Among the 20 members, 6 are Government ministers, 12 are well-known experts from the lawyer community, business associations and the media, and one representing the American business community. The committee is empowered with removing all business conditions and licenses. All new regulations which are related to business conditions and licenses must be accepted by the Committee before they are promulgated. The Committee played an important role in reducing nearly 12,000 regulations in half, over 2 years. The deregulation effort enabled South Korea to regain the economic power of the country after the Asian Financial Crisis, which wrecked devastating havoc on its economy at the end of the 20th century.

- *Monitoring, on a regular basis, the promulgation of new administrative regulations:* Depending on the commitment and political will of the Government, the regulatory reform committee may make suggestions to the Prime Minister to remove unnecessary or groundless business licenses and conditions (top-down approach) or to accept regulations by ministries which impose new licenses. To do this, in addition to political support, the regulatory reform committee should have adequate financial and human resources and should be able to mobilize the expertise and contributions of different ministries, the business community and external experts. The committee should be authorized to advise ministries and local governments in the making of administrative regulations. Emphasis should be placed on the use of a *regulatory impact assessment* (RIA), which requires administrative bodies and the government to justify the need and prove the net benefit of proposed business licenses or conditions. It is highly advisable that a checklist be developed and officials responsible for regulation drafting use the checklist before proposing regulations which impose new business conditions or licenses.



- *Taking stock of all currently valid business conditions and licenses, making them transparent and highly accessible to the business community:* To do this, it is indispensable to develop a database of all laws and regulations imposing business conditions and business licenses. The database should be linked with and highly accessible by business registration bureaus in all 64 provinces and by other agencies which are involved in business registration. Websites, with information of use to entrepreneurs, should also be developed, giving the business community quick access to regulations related to business conditions and licences, business licensing procedures and the status of their application to see whether or not their request for a business license is approved or rejected by administrative bodies.
- *Strengthening the monitoring role of the media and business associations:* Media and business associations should be encouraged and given more favourable conditions to play a more proactive role in policy advocacy and in reviewing unreasonable and unjustifiable business licenses and conditions. In support of this, in addition to encouraging business associations to become more active in policy advocacy, more policy dialogue forums should be held in order to create better relations between the business community and administrative authorities. All draft regulations and laws which propose new business licenses and conditions should be counter-argued or commented on by the business community and from independent experts before they can be submitted to the National Assembly. The Government should also alter the way regulations are being made. On a pilot basis and only in the case of some regulations, the Government could announce the requirements and objectives of a policy and tender the drafting of the regulation to civil societies, business associations and expert groups. Another option is that the Government allows these groups to submit an independent draft law in parallel with the drafts prepared by line ministries.



34. For business licenses and conditions which are imposed by local authorities (either under delegation of the law or as required by the local context), it is important to raise the awareness of local authorities of the factors which can help their locality to have a cutting-edge over other provinces in terms of investment attraction and enterprise development. As provincial authorities are becoming increasingly autonomous in economic policies, competition between provinces for investment has emerged and is increasing. Sound competition between provinces should be seen as a good measure to force provincial authorities to reduce administrative burdens and to deregulate more in order to create more incentives for entrepreneurs and investors operating in their provinces. In addition to decentralization measures, the regular announcement of provincial competitiveness index standings recently carried out by VCCI, the Asia Foundation and VNCI, will be extremely important in fostering competition between local administrative bodies and accelerating regulatory reform efforts at provincial level.



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