



## IMPROVING THE QUALITY OF BUSINESS LAWS

A Quickscan of Vietnam's Capacities & Introduction of International Best Practices

Hanoi, 2005



Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH



PRIME MINISTERS RESEARCH COMMISSION



Viet Nam

# Table of Contents

<b>PART 1. REGULATORY POLICIES</b>	<b>9</b>
1. The need for a sound regulatory policy	9
2. Significant progress has been made in Vietnam	9
3. However, there is a long path to travel to reach international norms of regulatory governance	10
<b>PART 2. REGULATORY INSTITUTIONS</b>	<b>13</b>
1. Regulatory institutions are important	13
2. At the core of the system lays the working of the Drafting Committees	13
3. The Ministry of Justice plays a central controlling role	15
4. The Prime Minister office and the PMRC are becoming effective regulatory 'gate keepers'	16
5. The National Assembly is increasingly involved in the quality of the legal environment	16
<b>PART 3. RULE MAKING PROCESS AND QUALITY CONTROL TOOLS</b>	<b>19</b>
1. Enhancing regulatory transparency	19
2. Forward Legislative Plans	20
3. Consultation with the public	20
4. Inter-ministerial consultation	21
5. Justifying and ensuring the proportionality of new laws and regulations	22
6. Implementation, inspection and enforcement	23
7. Access to regulations	24
<b>PART 4. OPTIONS FOR CONSIDERATION</b>	<b>25</b>
1. Adopt an explicit regulatory quality policy	26
2. Improve checks and balances in regulatory processes, and enforce administrative procedures	26
3. Develop and improve regulatory quality tools	27
<b>ANNEX</b>	
THE OECD REFERENCE CHECKLIST FOR REGULATORY DECISION-MAKING	29

# Preface

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The remarkable achievements in economic growth, poverty reduction, private sector development and foreign investment in Vietnam in the last two decades have been a result of the improved business and investment climate. Vietnam has been successful in maintaining a relatively high economic growth rate of 5-7% in more than one decade. New private businesses are currently being established at the rate of 1,600 per month and inflows of FDI increased to \$US 4.2 billion in 2004, a 35% increase over 2003. And it is widely believed that the FDI inflows in to Vietnam will exceed \$US 5 billion in 2005.

Regulatory reform is a key component of the structural reforms needed to support longer-term economic growth in Vietnam. Fully aware of this, the Government of Vietnam has embarked on more important and bolder reforms of the business and investment climate. Most prominent of all are the efforts to introduce a Unified Enterprise Law (UEL) in replacement of the very successful Enterprise Law in 1999 and a Common Investment Law (CIL) in substitution of some other laws related to domestic and foreign investment. Legal reforms in other fields are also taking place in preparation for the adherence of Vietnam to the World Trade Organization (WTO).

To support the bid, the German Technical Cooperation (GTZ) and the United Nations Development Programme (UNDP) are cooperating closely with different Vietnamese ministries and institutions like the Ministry of Planning and Investment (MPI), the Prime Minister's Research Commission (PMRC), the Central Institute of Economic Management (CIEM) and many others to improve the quality of the business laws which are being made and will be made. The overall goal is to create an enabling business and investment climate in Vietnam and to help the country to become more competitive and be well-prepared for its adherence to the WTO.

This report is part of the overall efforts to improve the business environment by PMRC, GTZ and UNDP. The publication is prepared by Cesar Cordova (Jacobs & Associates Inc.) with contribution and inputs from Vu Quoc Tuan, Pham Chi Lan (PMRC) and Le Duy Binh (GTZ).

The authors' views expressed in this report do not necessarily reflect the views of the PMRC, GTZ and UNDP.



# Introduction

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In the past two decades, Vietnam experienced remarkable economic performance propelled by the private sector and foreign direct investment. New private businesses are currently being established at the rate of 1,600 per month. According to the Ministry of Planning and Investment, inflows of FDI increased to US\$ 4.2 billion in 2004 (a 35% increase over 2003) and will probably exceed \$US 5 billion in 2005. These activities suggest that the business environment is becoming more supportive of private investment and growth. The improved business and investment climate is partly a result of several years of regulatory reforms. More importantly, the government is beginning to consider the regulatory instrument as a way to make markets work rather than to control market decisions. Thus, the relationship between the state and the market is slowly shifting as the government "rows" rather than "steers" the economy. The importance of this conceptual shift is difficult to underestimate.

Important challenges lie ahead which are familiar to countries steering their way from socialist economies to market economies. Vietnam requires an enormous deregulatory and re-regulatory effort to abolish old and superfluous laws that undermine economic performance, while at the same time developing a new legal and institutional framework for functioning markets under the rule of law.

To guide the choices ahead and sustain momentum, Vietnam needs to ensure that new laws and regulations contribute to the development of the country and the well-being of its citizens and firms. Poorly designed or anti-market legal and regulatory measures will frustrate development goals, and raise the risks of costly policy failures. To accelerate development while reducing the risks of change, Vietnam should invest in developing a modern regulatory policy that will operate over the next several years, supported by effective implementing mechanisms.

This report analyzes the current rule-making system and proposes recommendations for improving Vietnam's regulatory governance based on international best practices (see Box 1<sup>1</sup>). These recommendations could form the basis for a modern regulatory policy. The report consists of 4 sections. The first section focuses on current policies, the second on major rule-making institutions, and the third on key instruments that are available for law-drafters and the regulated community. The last section describes a series of policy options to improve the quality of rulemaking in Vietnam.

### Box 1

#### **Good practices for improving the capacities of national administration to assure high quality regulation**

International best practice recommends that countries adopt at the political level a broad program of regulatory governance that establishes clear objectives and frameworks for implementation, including clear principles against which the quality of the regulation can be measured. A model strategy was developed in the OECD Report on Regulatory Reform, welcomed by Ministers in May 1997, which was itself based on the 1995 Recommendation of the OECD Council on Improving the Quality of Government Regulation (see Annex). The OECD instruments are the world's most influential standards on good regulatory practice.

These instruments form the basis of the analysis undertaken in this report, and are reproduced below:

##### **A. Building A Regulatory Management System**

1. Adopt regulatory reform policy at the highest political levels
2. Establish explicit standards for regulatory quality and principles of regulatory decision-making
3. Build regulatory management capacities

##### **B. Improving The Quality Of New Regulations**

1. Regulatory Impact Analysis
2. Systematic public consultation procedures with affected interests
3. Using alternatives to regulation
4. Improving regulatory co-ordination

##### **C. Upgrading The Quality Of Existing Regulations**

(In addition to the strategies listed above)

1. Reviewing and updating existing regulations
2. Reducing red tape and government formalities

This report suggests priorities for further reforms of Vietnam's regulatory and administrative environment to improve market functioning, and indicates where international experiences can provide insights into successful reform. In summary, it suggests that the Government should:

- Establish an explicit regulatory quality policy to bring Vietnam's rulemaking procedures and practices up to international standards of transparency and efficiency;
- Improve quality control of legal instruments affecting the private sector by setting up or strengthening the capacity of a central regulatory quality body with training in good regulation;
- Enforce administrative procedures and due process by strengthening the Ministry of Justice and the Drafting Committees;
- Develop and improve regulatory quality tools such as public consultation, regulatory impact analysis, and better access by businesses to laws, regulations and formalities.

<sup>1</sup> OECD (1995), *Recommendation of the OECD Council on Improving the Quality of Government Regulation, incorporating the OECD Reference Checklist for Regulatory Decision-Making*, Paris. OECD (1997), "Regulatory Quality and Public Sector Reform" in *The OECD Report on Regulatory Reform. Volume 2, Chapter 2*, p. 234. OECD (1997) *Report on Regulatory Reform*. Paris; OECD (2002) *Regulatory Policies in OECD Countries. From Interventionism to Regulatory Governance*. Paris.



# Regulatory Policies

## 1. THE NEED FOR A SOUND REGULATORY POLICY

A growing body of evidence over the past 20 years shows that sound regulatory policies, institutions and tools are vital to economic development and positive social outcomes. A regulatory policy is an explicit policy aimed at continuously improving the quality of the regulatory environment through efficient use of the government's regulatory powers. Such a policy contains several strategies: screening laws, regulations and formalities to identify those that are outdated or ineffective; streamlining and simplifying those that are needed; using a wider range of market incentives and more flexible and international regulatory approaches; and introducing greater discipline, co-ordination and transparency within regulatory processes to ensure that all new laws and rules comply with quality standards. A regulatory policy represents a commitment to reform, sets out a roadmap for change, sustains transparency, and promotes consistency and co-ordination between the different components of reform.



## 2. SIGNIFICANT PROGRESS HAS BEEN MADE IN VIETNAM

The first modern initiative to improve the rule-making process in Vietnam was in 1996. At the end of that year, the National Assembly enacted the Law on the Promulgation of Legal Normative Documents (usually known as the "Law Making Law") organizing rulemaking in the country.<sup>2</sup> The Law defines the sources of law (i.e. the different legal measures), clarifies the division of competences between the different powers (legislative, President, Government and Court and Procuracy), and specifies the administrative procedures for their enactment. On the last issue, a 2002 Amendment considerably improved the public consultation procedures.

<sup>2</sup> The Law replaced the Resolution of August 6, 1988 of the State Council on the Regulation on the Elaboration laws and ordinances.

In September 2001, the Government launched a program for Improving the Lawmaking Process as one of the seven key actions of the Government's Comprehensive Strategy 2001 - 2010.<sup>3</sup> The program is organized into three sub-actions:

- Improve the preparation of new laws, in particular through better intergovernmental coordination;
- Mobilize the participation of public and researchers,
- Improve the Law Making Law.

These actions are connected to the WTO accession obligations. Many future trade partners have indicated that Vietnam should make a serious effort to increase the transparency and predictability of its rulemaking process and to make its legal framework more compatible with global trading standards.

Though the Law and the Action plan have not been evaluated (an evaluation of progress could be done by carrying out a diagnostic of where Vietnam stands today), these initiatives seem to be slowly producing results. Over the past three years, businesspersons and academics have indicated that the quality of laws is improving. There are discussions today about replicating the success of the national reforms by enacting a new law on law making at the provincial level.

### 3. HOWEVER, THERE IS A LONG PATH TO TRAVEL TO REACH INTERNATIONAL NORMS OF REGULATORY GOVERNANCE

Despite anecdotal evidence of improvement, enforcement and compliance with the Law Making Law fall well short of expectations. The quality of laws varies enormously across ministries. At the street level, Vietnam's citizens and businesses still confront low-quality laws and regulations that erode innovation, investment, and productivity. The most important challenges to be addressed include the following.

First, the political and administrative cultures still conceptualize drafting a law as a goal in itself. This concept reflects the outdated idea that a law is a diktat or a statement of intent rather than a tool to produce policy results. Laws are very rarely considered as instruments to create incentives - positive and negative - for the behavior of market players. The diktat approach to regulation makes it difficult for Vietnam's ministries to intervene effectively in the

<sup>3</sup> The other six actions are: Review role and functions of public bodies; Reduce staff/personnel; Training; Salary reform action plan; Financial management of public bodies and Modernization of civil service.

market. The result is that "Many laws and regulations are paper tigers" and this has important consequences. For instance, the drafting of a law is usually undertaken without understanding of its potential consequences. The Law Making Law states in Article 22 that a report accompanying a draft law "... must clearly state the necessity to promulgate the document(s)";<sup>4</sup> but these reports rarely include any data or economic assessment. So far, no cost-benefit analysis has been undertaken in Vietnam.

Another consequence of the top-down conceptualization of laws in Vietnam is that subordinate regulations (decrees, ordinances, circulars at the ministerial level) and the necessary details for proper implementation, compliance and enforcement are either absent or deficient. In some cases, when the subordinate measures are passed, they are outdated or even contradictory in spirit and text vis-à-vis the law.

A second challenge for high quality laws and regulations in Vietnam is a lack of quality controls in rulemaking, a lack that creates opportunities for abuses and mistakes. A central dimension of good regulatory governance, under international norms, is the existence of systematic and mandatory 'checks and balances' for rulemaking powers. Self-assessment by officials in charge of preparing draft laws and subordinate regulations (i.e. line ministries and agencies) is necessary but is not sufficient. Appraisal of the quality of a draft regulation must be done both by the organ preparing the draft, and also by one or more institutions separate from it (at arms length). This second, independent and broader opinion is important because single-mission regulators usually have great difficulty in assessing the cumulative impacts of a measure within the broader legal, budgetary and economic framework of the government. The absence of a systematic external control also increases the costs of coordination. Vietnam's ministries and drafters rely on weak inter-ministerial discussions and peer pressures, which are not very effective in avoiding low quality, duplicative, conflicting and contradictory regulations.

Vietnam already has a 'check and balance' control on the technical quality of the legal text - this useful check is performed by the Ministry of Justice. However, the government lacks any 'check and balance' assessment of the substance and impacts of new measures (see below).

The situation is more problematic in the case of subordinate regulations. The National Assembly<sup>5</sup> and other government bodies - including the Ministry of Justice - rarely control the

<sup>4</sup> A similar requirement exists in Articles 26 and 34.

<sup>5</sup> Though the National Assembly has the power to control the issuance of subordinate regulations, however it has never used it.

content and quality of Resolutions, Decisions, Directives and Circulars.<sup>6</sup> Consequently, the quality varies widely across policy areas.<sup>7</sup> In some cases, decrees and circulars go beyond what the laws prescribed. In others, they contradict or repeat the law.

The consequences of this are more costly at local level. Without proper enacting regulations, the implementation of laws is frequently vulnerable to the views of local level officials. This increases abuses, contradictions, and regulatory insecurity for businesses, and results in wide variability across provinces and towns, which in turn damages the internal market in Vietnam. The business community indicates that some provinces are more effective and 'clever' than others, noting that officials of HCMC and some other provinces are many years ahead in 'adapting' national regulations for business operation.

Even more problematic in the case of Vietnam, the absence of judicial review reduces incentives for drafters to be more careful in developing new rules.<sup>8</sup> It also reduces the chance of ex post feedback from the regulated population.<sup>9</sup>

Just as important in practical terms, the financing of drafting new laws and subordinate regulations is alarmingly deficient, forcing many drafters to look for the support of donors to carry out even routine drafting tasks and, in particular, the elaboration of a diagnosis and the gathering of international experience. This situation was not resolved by a 2001 Circular issued by the Ministry of Finance regulating the budgeting for drafting laws and regulations. The Circular unfortunately created the wrong incentives: rewarding the size of the measure (i.e. the number of pages) rather the quality of the text, the importance of the results, and the analysis of the impacts. The budget allocation favors marginal activities such as attending workshops and improving translations, rather than assessment of impacts and consultation with stakeholders.<sup>10</sup> Since 2003, the National Assembly has tried to find a more adequate solution to this problem.

<sup>6</sup> *The Government enacts resolutions and decrees, the Prime Minister issues decisions and directives, and Ministers and agencies pass decisions, directives and circulars.*

<sup>7</sup> *Interestingly, some decrees and subordinate regulations are more market-friendly than the enacting law*

<sup>8</sup> *In the past, the Procuracy had some powers to control subordinate regulations and local level decisions.*

<sup>9</sup> *Through judiciary review, a party (individual, moral, public or private) can appeal in Court against the form or the substance of a legal measure.*

<sup>10</sup> *Circular 15/2001/TT-BTC issued on 21 March 2001 guides the management and allocation of budget for lawmaking activities, the budgetary framework of rule makers and relevant activities. For instance, most of the budget goes to organizing workshops and translation rather than studies: a maximum of 170 US dollars (2,400,000 VND) is allocated to the key preparation of the Outline of a new law or Ordinance but 3 US dollars per page is allocated for the translation into a foreign language. For the preparation of workshops or seminars, the circular provides for an allocation of 7 US dollars (100,000 VND) for the Chairman of a workshop.*

# Regulatory Institutions

## 1. REGULATORY INSTITUTIONS ARE IMPORTANT

A law, a policy, and an action plan are certainly necessary to create a national regulatory reform program. However, to keep reform on track and on schedule, and to ensure objectives and targets are reached and standards continue to improve, there is a need for an expert official body, backed up by the highest political levels, to monitor progress, to promote reform, and to hold ministries accountable for their progress. International experience is unanimous on this point: without such an oversight institution, ministries and agencies will find difficulties in reforming themselves, given the countervailing pressures and resistance within the bureaucracy.



## 2. AT THE CORE OF THE SYSTEM LAYS THE WORKING OF THE DRAFTING COMMITTEES

In Vietnam, the central decision-making for a new law is done by a Ministerial Drafting Committee, which takes the decisions and presents the draft to the Government.<sup>11</sup> In general, it is chaired by the minister who has been assigned the task to draft the law by the Prime Minister.<sup>12</sup> The Drafting Committee presents the draft to the Government, who approves the text and solves any discrepancy between ministries, if any, and sends the bill to the National Assembly.

According to Article 60 of the Law Making Law, the Minister in charge selects the members of the Drafting Committee after consulting with the concerned Ministries and branches. Unfortunately, the Law is silent about any selection criteria for the Drafting Committee members. Traditionally, this has meant that participants belong to government bodies. This variability in the membership is perhaps the most crucial factor explaining the wide range in the quality of new laws in Vietnam. However, the narrow membership is changing. More and more often, new Drafting Committees include academics and in some circumstances representative of the business sector, e.g. the Vietnam Chamber of Commerce and Industry

<sup>11</sup> The Government initiates more than 95 % of laws.

<sup>12</sup> In some cases, the Prime Minister assigns more than one minister to chair and lead the Steering Committee.

(VCCI) or the nascent Vietnamese civil society.

There are discussions to formalize this latter practice. Some high officials advocate making more transparent the selection process, to mandate that members represent a more diversified background, and that the Drafting Committees include members of society and business. This change would be very useful, and would raise new questions about the governance and operation of the Drafting Committees. As membership expands to include a broader set of views, it will be important to provide ways to build consensual solutions and permit the publication of minority positions. In other words, law drafting should be a public process rather than hidden behind closed doors.

## Box 2

### A good example of transparency: the making of the Enterprise Law

In 1996, the government established a Drafting Committee to prepare a new Enterprise Law that would replace the 1990 Company Law and the Law on Private Enterprises as well as other minor laws. During the four years that the exercise needed, the Drafting Committee prepared and consulted on more than 32 versions of the text. The capacity and openness of its work is still considered a breakthrough in rulemaking practices in Vietnam. The hard work of the Drafting Committee members permitted them to overcome the huge opposition to shifting the basic philosophy in market entry. As a result of their work, all activities are permitted except those specifically regulated. The Drafting Committee also needed to confront the widespread skepticism of senior officials about the lack of ex ante controls on hundreds of thousands of private businesses.

As a result of the care taken in drafting and consultation, the quality of the 1999 law is considered to be significantly higher than other laws prepared during the same period. It is important to underline that the drafting permitted close collaboration between the government and the donor community.

Another important innovation linked to the Law was the transformation of the Drafting Committee into an Implementation Task Force to monitor the application of the law and ensure its proper enforcement (i.e. in particular through adequate subordinate regulations). Consequently, the Task Force drafted the implementing decrees, advocated changes to existing laws in conflict with the spirit of the Enterprise Law, and ensured that new draft laws being prepared did not contradict it. For instance, thanks to its work, the government was able to reduce the number of entry licenses from 400 to 130.

Based on a schedule and occasionally "concept papers" describing the mission, the Drafting Committee prepares the draft text and other background documents. It is entitled to conduct public consultations, including with the donor community.<sup>13</sup> A good example was the development of the Enterprise Law at the end of the 1990s (see Box 2).

### 3. THE MINISTRY OF JUSTICE PLAYS A CENTRAL CONTROLLING ROLE

The Ministry of Justice performs four main roles. First, it is in charge of preparing the Five Year and Annual Legislative Programs (see below). In this capacity it performs a consultative and monitoring role about the allocation of the Government's legal efforts.

Second, as in most countries, the Ministry of Justice has the mandate to review all draft laws and regulations in terms of their constitutionality, consistency with laws already in force and technical legal quality. According to the Law Making Law, before a measure is submitted to the Government, the Ministry of Justice must prepare a report evaluating such aspects.<sup>14</sup> In the case of discrepancy between ministries, the Ministry of Justice mediates and prepares a summary of the differing views for the Cabinet if such mediation efforts fail. In practice, the Ministry of Justice has become a powerful 'gate keeper' that is feared by many drafters. Unfortunately, its key role focuses only on technical legal quality and involves only draft laws. Its legal advice tends to be very formal and in some cases inconsistent. Its reviews are ineffective in weeding out faulty texts, which often need to be amended, deleted or replaced only months after being enacted. Its limited resources and staff, and personnel capacity has meant that it controls very few subordinate regulations.

From the Ministry of Justice's perspective, the quality of its review is affected by time pressures and poor quality standards in the other ministries. For instance, drafting ministries tend to ask for comments in two days. The draft text usually lacks any conceptual or justification document providing options. Inevitably, the legal text is long and drafted by non-lawyers. But the primary reason for problems in the Justice review is that the Ministry, until recently, lacked staff and capacities to cope with the flood of new measures accompanying the development of a modern regulatory framework.

<sup>13</sup> *The donor community has been involved in helping the government and different drafting committees write new laws and regulations. In some cases, the donors have funded specific studies by consultants, international experts or national research centers. This was the case during preparation of the Enterprise Law, where GTZ, UNDP and others funded CIEM experts to visit America, Germany, Australia.*

<sup>14</sup> *See article 29 for the laws and 63 and 64 for the subordinate regulations.*

To carry out its review task, the Ministry has a department that has recently been reinforced and now includes 70 - 80 lawyers, some whom have economic training. These additional resources should reduce other ministries' complaints about the Ministry of Justice procedures being too burdensome and becoming an obstacle to fast rulemaking. The new capacities should help improve the quality of the review.

The recent strengthening of the review department, including an expansion of its staff and improvement of the legal expertise of the officials, is beginning to solve some of the most pressing problems of lack of time. This should reinforce the development of the rule of law in Vietnam.

The other two key roles of the Ministry of Justice are, first, to verify the quality of other ministries' legal documents, such as concessions, contracts, in some cases bylaws, and, second, to prepare specific laws involving the Judiciary, such as drafting laws on Arbitration centers, enforcement by civil courts etc.

#### **4. THE PRIME MINISTER OFFICE AND THE PMRC ARE BECOMING EFFECTIVE REGULATORY 'GATE KEEPERS'**

The Prime Minister's Office (PMO) and its subordinate bodies, such as the Prime Minister's Research Commission (PMRC), do not have a legal mandate to participate in the rulemaking process.<sup>15</sup> However, they can play a very significant role in practice. Recently, the PMRC has enjoyed an increasingly active role thanks to its hosting of the Enterprise Law Task Force (see Box 2), and to its mandate to review and modernize the law by 2006. On the other hand, neither body has the capacity or trained secretariat to perform regulatory quality tasks. They must select with care where their attention and skills can best add value to the regulatory environment. In the case of the PMRC, its 'informal' but substantial power is derived from the active engagement of its president and the 20 commissioners.

#### **5. THE NATIONAL ASSEMBLY IS INCREASINGLY INVOLVED IN THE QUALITY OF THE LEGAL ENVIRONMENT**

As in other countries, the National Assembly is the source and guardian of the legal

<sup>15</sup> The Prime minister appoints members to the PMRC in their own capacity. They often are experienced officials who used to hold senior positions in different Government agencies.

framework. It is sovereign in enacting and amending laws as well as verifying subordinate regulations. However, nearly 95 % of the laws are prepared by the government. The main role of the Assembly has thus been to review and discuss bills from the government.

Until very recently, its capacities to improve laws were impaired by two circumstances. First, the Assembly met one month twice a year, leaving the Standing Committee of the Assembly in the main role of reviewer. This is a difficult task for such a small organ considering that the Assembly has enacted roughly 150 laws in the past 5 years. Second, the Assembly and its members have confronted serious shortages in law drafting skills.

The situation has improved significantly. Since 2003, the Assembly meets twice every year and 1/3 of the deputies work full time. Donors have also helped to increase the capacities of Assembly members to use of IT resources and improve their command of English.<sup>16</sup>

Furthermore, the National Assembly recently set up a legal commission to strengthen the consistency of laws. The resources of the National Assembly Secretariat have expanded, permitting for instance the publication of a CD with all the laws and regulations in force.

<sup>16</sup> See different projects financed by UNDP, Danida and SIDA. An important result has been the development of procedural manuals together with Minister of Justice.



# Rule Making Process & Quality Control Tools

In parallel with sound policies and institutions, governments need to develop adequate and efficient quality tools to improve the regulatory framework. A large variety of quality tools is now available and can be adapted to the local environments and capacities. In the past few years, Vietnam has expanded the range and quality of regulatory quality tools, though some require significant improvement and enforcement to reach international standards. In the following section, the main quality tools are assessed.



## 1. ENHANCING REGULATORY TRANSPARENCY

Transparency of a regulatory system is essential to establish a stable and accessible regulatory environment that promotes competition, trade, and investment, and helps ensure against undue influences by special interests. Transparency reinforces the legitimacy and fairness of regulatory processes, and reduces risks faced by investors. Transparency is a multi-faceted concept that is not always easy to establish in practice. It involves a wide range of practices, including standardized processes for making and changing regulations; consultation with interested parties; inter-ministerial discussion, publication of enacted laws and other ways of making rules easy to find and understand; and appeal processes that are predictable and consistent.

In Vietnam, a growing awareness of the need for more transparent, open, and consultative procedures for making regulations is emerging, as the drafting and revision of the Enterprise Law testifies (see Box 2 above). At the same time, long-standing practices and continued constraints hinder openness and participation by the regulated community. The main mechanisms now being used in Vietnam are forward-looking legislative plans, consultation with the public on regulations being drafted and inter-ministerial consultation.

## 2. FORWARD LEGISLATIVE PLANS

A central element to ensure coherence and transparency in the rule making is the preparation of forward legislative plans. The Law Making Law stipulates two sorts: a Five Year Plan and Annual Plans (Articles 22, 23 and 24). In addition to its political accountability role (i.e. they are viewed as the main vehicle for political commitments for the period), the intent of these plans is to help the public administration and the public in general prepare themselves for the reform. The Ministry of Justice is in charge of the coordination and preparation of both plans, and importantly, in cooperation with the National Assembly Office, their publication in the Official Gazette.

However, reality is not always consistent with intent, and the legal activity of the Government frequently goes beyond what was planned and announced: in general terms, the yearly plans are only 70 % accurate. Some laws take longer to prepare and laws are prepared even if not programmed. In many cases, laws are enacted under emergency provisions. As well, the list of laws rarely states the priority and sequence.

## 3. CONSULTATION WITH THE PUBLIC

In the area of public consultation, Vietnam has made important strides, increasingly recognizing that public consultation gives citizens and businesses the opportunity to provide active input in regulatory decisions and thus contribute to increasing the quality of laws and regulations.

The Law Making Law makes public consultation mandatory (Articles 37 for laws and 62 for subordinate regulations); a mandate reinforced by the Amendments of 2002. Furthermore, a 1999 Prime Minister Decree has stressed the obligation to consult with the international business communities.<sup>17</sup>

The Drafting Committees are in charge of organizing public consultation. For instance, a wide consultation process was organized when preparing the Enterprise Law. This was considered an important contributor to its success, and drafters are now building a broader and growing pool of experience, for instance, using the Internet or the media.

<sup>17</sup> Decree No.28/CT-TTg dated 28 November 2001 concerning the creation of an enabling business environment, and Decision No.310/TTg by the Prime Minister on the Relations between Administrative Bodies with the Vietnam Chamber of Commerce and Industry. Commentators have indicated that this decree may provide a better than national treatment to foreign firms.

More often, consultation has involved the circulation of a version of the legal text to an association or chamber of commerce and asking for written comments under a tight deadline. Almost no experience exists with 'active' consultation mechanisms such as setting up expert consultative, focus and target groups. 'Notice and Comment'<sup>18</sup> mechanisms - an international best practice - are rarely used.

Despite good experience in a few cases, the Drafting Committees still ignore and distort the consultation obligation for many laws. In some cases, consultation involves very narrow and unrepresentative interests (in some cases, only public officials, in other cases only corporatist interests). In other cases, consultation is organized too late in the drafting process when structural changes to the measures become extremely costly and impractical. Often the consultation is too formalistic and is too brief (two days to assess hundred of pages of text). Most subordinate regulations, in particular important circulars, guidelines and forms, are not consulted before being enacted. Very exceptionally, the Drafting Committee reports on the results of the consultation process. As a result, the quality of the consultation varies enormously in Vietnam, but is generally inadequate to meet international norms of good practice.

#### 4. INTER-MINISTERIAL CONSULTATION

Consultation with ministries and other authorities is crucial to ensure the coherence and coordination of the regulatory intervention and avoid duplication and contradiction in the legal framework. Vietnam carries out ministerial coordination through two main approaches. First, all laws are discussed at Cabinet level and, second, the Government encourages the appointment of other ministries' members to the Drafting Committees. Even when a ministry is not represented at the Drafting Committees, senior officials and agency representatives are often invited to ad hoc hearings. At its best, the Drafting Committee model is considered as an inter-agency exercise.

In practice, the coordination system confronts administrative and cultural difficulties. As in many countries, ministries find it problematic to work collectively. The traditional sense of reservation between officials (sometimes including self-censorship), linked to seniority principles, makes difficult a frank debate of contentious points. More problematic, the lack of

<sup>18</sup> Notice to the public that a new legal normative document is proposed and give a period during which the public has the opportunity to comment on the draft.

clear parameters and mediation mechanisms means that differences are not discussed until too late in the process.

## 5. JUSTIFYING AND ENSURING THE PROPORTIONALITY OF NEW LAWS AND REGULATIONS

Understanding the future impacts of regulatory decisions on the private and social sectors is perhaps the most crucial dimension for creating and sustaining a high quality regulatory environment. In most OECD countries, the tool employed to examine the costs and benefits of decisions is regulatory impact analysis (RIA). RIA is a method of systematically and consistently examining selected potential impacts arising from government action or non-action, and of communicating the information to decision-makers and the public. In essence, RIA attempts to widen and clarify the relevant factors for decision-making. It implicitly broadens the mission of regulators from highly focused problem-solving to balanced decisions that trade off problems against wider economic and distributional goals. RIA has several internal and external objectives:

- Improve understanding of real-world impacts of government action, including both benefits and costs of action
- Integrate multiple policy objectives
- Improve transparency and consultation
- Improve government accountability

Currently, Vietnam does not have such a tool. As discussed above, its quality controls focus mainly on technical legality. Undesired impacts are only detected through ministerial peer discussions at the end of the process.

As indicated above, this unsatisfactory situation occurs despite the formal requirement of the Law Making Law that drafters justify future measures (Articles 22, 26 and 34). This requirement is almost always fulfilled in a formalistic way, as a paperwork exercise. The justification of a new measure tends to validate and explain the final decision than to objectively analyze impacts and options.

Many reasons explain the failure to enforce the justification prescribed by the Law. From a systemic and structural viewpoint, the Law Making Law does not provide enough details, parameters, incentives, and criteria to help drafters prepare the justification report. There is

little agreement on what the justification should incorporate and what should be its level of quality. Vietnam also lacks an independent 'monitor' to ensure and enforce the quality of the justification reports in order to avoid the traps inherent in self-assessment.

From a capacity point of view, the training, qualification and skills, as well as the size of the legal units, in the ministries in charge of drafting and helping the Drafting Committees are extremely under-developed. This reflects the many broader challenges facing the public administration in Vietnam in terms of salaries, accountability, selections and promotion. It is also linked to the low status such positions have in the hierarchy of ministries.

## 6. IMPLEMENTATION, INSPECTION AND ENFORCEMENT

As indicated above, implementation and enforcement are major structural weaknesses in the rulemaking process in Vietnam. Often, laws do not contemplate the means needed to implement, inspect and enforce new obligations. They often assume that existing mechanisms and resources (in particular from local government) will automatically be adequate. The fact that many subordinate regulations are not drafted in time (or are just not contemplated)<sup>19</sup> and that many laws and subordinate regulations provide ample margins of discretion for enforcers, means that implementation varies widely and unpredictably across the country and in many cases create corruption opportunities.

This situation is particularly damaging in the case of inspections and enforcement of laws and regulations. Though these processes are getting better, thanks in part to the role of the media and the society at large, inspections are still vulnerable to abuse and corruption. As happens in many countries, such effects tend to impose disproportionate costs on small and medium enterprises.

## 7. ACCESS TO REGULATIONS

In improving access to regulations by the affected community, Vietnam shows encouraging progress and initiatives. Some actions have been motivated in part by pressure from foreign investors and donors stressing the difficulty in accessing laws and subordinate regulations and unambiguously interpreting them.

<sup>19</sup> For instance, in the case of business registration, a Decree exists, however, it does not establish clear parameters for the information requirements that need to be submitted by firms and is unclear about the right and obligations of the inspectors and inspected firm.

The basic instrument of access consists of publication of all laws and decrees in the official gazette. In most cases, circulars are also published now. Unfortunately, this is not the case for other important instruments such as instructions, policy guidelines and formats, and measures enacted by local governments (i.e. provincial and city authorities). Another tool developed with help from the UNDP is a database of all legal instruments that has been published by the National Assembly in a CD format.

These efforts should be continued and expanded. Two issues may require more prompt action: first, a centralized and public registry of all licenses and permits should be accessible on line; second, improvement in the quality of the English translation of measures is needed for foreign investors.

# Options for Consideration

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In the past 15 years, Vietnam has made significant efforts to improve the quality of its regulatory environment. From enacting and amending the Law Making Law to improving consultation and access to information, Vietnam now has a working legal and regulatory framework, increasingly sophisticated administrative and institutional arrangements and more efficient, transparent and accountable regulatory practices. Many of its initiatives parallel good international practices. Evidence of results is given by academics, domestic and foreign businesses as well as the donor community.

However, serious gaps and problems still exist, as expected in a multiyear reform program of the scale needed in Vietnam.

Implementation of current policy directions has not yet produced the concrete benefits expected, and the reforms are still mostly on paper, that is, they have not yet been transformed into upgraded skills and cultural changes in the functioning of ministries and drafting committees. Vietnam's regulatory quality is still below that of competing countries. The regulatory environment for doing business is not significantly improved, and is still a major constraint on growth. Significant efforts are required if Vietnam is to create a investment-friendly regulatory environment that is WTO compatible.

The challenges ahead lie in improving policy coherence, quality, and coordination across a multi-layered governance system. In the next few years, new efforts and investments will be required to permit the country to continue experience its outstanding economic success. They could pay off substantially if reform efforts proceed steadily, if more attention is paid to implementation, enforcement and accountability for results, and if politicians are able to sustain support in the face of continued opposition from conservative bureaucracies at all levels.

This section identifies actions that, based on international consensus on good regulatory practices and on concrete experiences in other countries, will improve the Government's rulemaking capacities. These recommendations focus on regulatory management. Other actions not addressed in this report should be pursued in parallel, including a renewed effort to deregulate the existing regulatory framework, the application and enforcement of a



competition law<sup>20</sup>, and uninterrupted efforts to improve the working of the public administration and the major overhaul of the judiciary branch.

## 1. ADOPT AN EXPLICIT REGULATORY QUALITY POLICY

So far, Vietnam has relied on the Government's Comprehensive Strategy 2001 - 2010 and on the Law Making Law to drive its efforts toward a better regulatory environment. These are important steps, but to accelerate reform, ensure compliance, and raise the political profile of the endeavor, the Government needs to adopt a national regulatory policy based on explicit principles of good economic, social, and administrative regulation.

An important element will be to anchor the policy in the fundamental principle that regulatory costs should be justified by benefits. This well recognized benchmark can stimulate and guide the efforts of all ministries, and build on the efforts on regulatory reform of ministries. It would provide a basis for the appraisal of the performance of these efforts. It would also create greater accountability within ministries for their the quality and results of their regulatory systems. In developing and adapting the policy to its national needs, the government could draw from the experiences of the European Union, USA, UK, Canada, Australia and particularly Korea.<sup>21</sup>

## 2. IMPROVE CHECKS AND BALANCES IN REGULATORY PROCESSES, AND ENFORCE ADMINISTRATIVE PROCEDURES

The policy, the Government Strategy and the Law are necessary but not sufficient if an effective institution does not ensure their enforcement. For this, the Government should designate a ministry-level senior official to promote and implement the regulatory reform policy. Based on its experience in monitoring the Enterprise Law, a potential candidate could be the head of the PMRC, supported by a well-resourced secretariat.

To assure accountability, this central oversight body should report publicly and annually on achievements and challenges of the ministries. A ministerial committee could assist the entity. It should comprise senior officials from the Ministry of Justice, Economy, and Finance. The

<sup>20</sup> Many failures addressed by economic regulations can be attenuated or solved through the proper functioning of competitive markets.

<sup>21</sup> Australia: <http://www.pc.gov.au/orr/>; Canada: <http://www.pco-bcp.gc.ca/raoics-srdc/>; European Union: [http://europa.eu.int/comm/enterprise/regulation/better\\_regulation/](http://europa.eu.int/comm/enterprise/regulation/better_regulation/); Korea: <http://www.rrc.go.kr/>; UK: <http://www.cabinet-office.gov.uk/regulation>

committee could be a forum to resolve controversies between policies. As in Korea, the minister and the ministerial committee should be complemented with a high level advisory body in which businesses and NGO representatives could participate in the design and implementation of the policy.

This institution-building effort should be combined with a strengthening of the Ministry of Justice review. The quality of the rule of law in Vietnam still requires strong oversight and coordination of the legality, the technical legal quality of the text, and access to the law. In particular, the Ministry of Justice needs additional capacity to ensure the quality of subordinate regulations and to support their implementation and enforcement by local authorities.

As well, the National Assembly and the Government should improve the governance of the Drafting Committees by issuing more detailed parameters and criteria for the selection and appointment of their members, the publication of minority positions together with the final text and ensuring an adequate financing of their work.

### **3. DEVELOP AND IMPROVE REGULATORY QUALITY TOOLS**

#### **3.1 Public consultation**

Currently, the mandatory public consultation of legal and regulatory proposals is done informally and in an ad hoc way. Low levels of consultation reduce regulatory quality, and leave drafters and regulators vulnerable to organized interest groups, which often represent "insiders" opposed to real change. It is important that the Government provide the means and objective criteria for drafters and reviewers to assess the quality and transparency of the process. An effective mechanism to improve transparency and accountability would be to adopt an across-the-board 'notice and comment' process for all laws and regulations, to complement other consultation mechanisms and work as a safeguard against capture by special interests. Notice and comment processes are based on clear rights to access and response, are systematic and non-discretionary and are open to the general public as well as organized interests. Requiring that all regulatory projects be published together with the regulatory impact analysis (see next recommendation) could also strengthen the system.

#### **3.2. Regulatory Impact Assessment (RIA)**

At the heart of the new regulatory policy, the Government could improve the quality of new laws and regulations by implementing a program for regulatory impact analysis (RIA), based

on international best practice recommendations, for all new and revised regulations. Experience in many countries shows that RIA can be a powerful tool to boost regulatory quality. The Secretariat of the Oversight Unit recommended above should be in charge of implementing and enforcing RIA. The introduction of RIA should be gradual and accompanied by supporting mechanisms for the Drafting Committee's members. Budgetary support for drafting tasks should include funds for drafters as well as for the Oversight Unit's review to reduce the risk that RIA would become just one more paperwork hurdle in the administrative procedure. In particular, Circular 15/2001/TT-BTC should be reformed and adapted to a national budgetary effort and approach focusing on investing in improving the quality laws and regulations.

The long-term goal should be to organize the RIA around the benefit-cost principle. However, current administrative skills should be enhanced progressively over several years before a complete RIA system is in place. A first and immediate step could be for the Government to incorporate in the justification report required by the Law Making Law the ten quality dimensions of the 1995 OECD checklist (see Annex). The checklist could be made mandatory for subordinate legislation, decree laws and circulars as well. Transparency and accountability would be increased if the checklist responses were published on the Internet.

In the absence of ex ante studies, Vietnam may also rely on empirical and experimental methods to assess the performance of a future law. This technique, followed in particular by China, enables local level jurisdictions to experiment with new rules. After ex post analysis, the experiment could be generalized gradually or entirely to the country.

### ■ 3.3. Access to law

Access to law has improved significantly with enhancement of the Official Gazette mechanism. However, many subordinate regulations are not published and are hard to locate. A stronger effort is required in this field together with a stricter enforcement of the principle no subordinate regulation is enforceable unless published in the Official Gazette.

Though publication is necessary, it is on the other hand insufficient. De facto transparency requires creating means for citizens and businesses (particularly micro, small and medium ones) to acknowledge their legal and regulatory obligations. For this, the government should establish a central registry of administrative procedures and business licenses and permits, and initiate a comprehensive review to determine how to reduce burdens.

# Annex

## THE OECD REFERENCE CHECKLIST FOR REGULATORY DECISION-MAKING

Government performance is under pressure. Systems of governance are adapting to global transformation involving more co-operation between countries, intensified economic competition, and new technologies. Budget deficits and economic constraints must be managed even as citizens demand more action to deal with emerging social and environmental issues. As a result, public sectors must learn to do more with less, differently and better, as the OECD Public Management Committee has noted. Governments must find effective ways to make responsive policy decisions and to identify the right mix of instruments and incentives to implement them.

The OECD Reference Checklist for Regulatory Decision-making responds to the need to develop and implement better regulations. It contains ten questions about regulatory decisions that can be applied at all levels of decision- and policy-making. These questions reflect principles of good decision-making that are used in OECD countries to improve the effectiveness, and efficiency of government regulation by upgrading the legal and factual basis for regulations, clarifying options, assisting officials in reaching better decisions, establishing more orderly and predictable decision processes, identifying existing regulations that are outdated or unnecessary, and making government actions more transparent. The Checklist, however, cannot stand alone and it must be applied within a broader regulatory management system that includes elements such as information collection and analysis, consultation processes, and systematic evaluation of existing regulations.

<sup>22</sup> Organization for Economic Cooperation and Development

### **Question No. 1 - Is the problem correctly defined?**

The problem to be solved should be precisely stated, giving clear evidence of its nature and magnitude, and explaining why it has arisen (identifying the incentives of affected entities).

### **Question No. 2- Is government action justified?**

Government intervention should be based on clear evidence that government action is justified, given the nature of the problem, the likely benefits and costs of action (based on a realistic assessment of government effectiveness), and alternative mechanisms for addressing the problem.

### **Question No. 3- Is regulation the best form of government action?**

Regulators should carry out, early in the regulatory process, an informed comparison of a variety of regulatory and non-regulatory policy instruments, considering relevant issues such as costs, benefits, distributional effects, and administrative requirements.

### **Question No. 4- Is there a legal basis for regulation?**

Regulatory processes should be structured so that all regulatory decisions rigorously respect the "rule of law"; that is, responsibility should be explicit for ensuring that all regulations are authorised by higher-level regulations and consistent with treaty obligations, and comply with relevant legal principles such as certainty, proportionality, and applicable procedural requirements.

### **Question No. 5- What is the appropriate level (or levels) of government for this action?**

Regulators should choose the most appropriate level of government to take action, or, if multiple levels are involved, should design effective systems of co-ordination between levels of government.

#### **Question No. 6 - Do the benefits of regulation justify the costs?**

Regulators should estimate the total expected costs and benefits of each regulatory proposal and of feasible alternatives, and should make the estimates available in accessible format to decision-makers. The costs of government action should be justified by its benefits before action is taken.

#### **Question No. 7- Is the distribution of effects across society transparent?**

To the extent that distributive and equity values are affected by government intervention, regulators should make transparent the distribution of regulatory costs and benefits across social groups.

#### **Question No. 8 - Is the regulation clear, consistent, comprehensible, and accessible to users?**

Regulators should assess whether rules will be understood by likely users, and to that end should take steps to ensure that the text and structure of rules are as clear as possible.

#### **Question No. 9 - Have all interested parties had the opportunity to present their views?**

Regulations should be developed in an open and transparent fashion, with appropriate procedures for effective and timely input from interested parties such as affected businesses and trade unions, other interest groups, or other levels of government.

#### **Question No. 10 - How will compliance be achieved?**

Regulators should assess the incentives and institutions through which the regulation will take effect, and should design responsive implementation strategies that make the best use of them.



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