

Making Vietnam's WTO Commitments in Services Relevant to the Filipino Investor: Restrictions, Remedies, and Recommendations in Respect of Structuring Philippine Investments

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I. INTRODUCTION

It has been said that economic globalization is becoming a reality and a matter of intense controversy.¹ With the realization that the Philippine

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market may soon become saturated, Filipino investors have begun investing abroad, particularly in emerging markets. One market in which the Filipino investor has taken a keen interest is Vietnam.² In fact, as of September 2006, there were at least 28 Philippine companies operating in Vietnam.³ Due to Vietnam's accession to the World Trade Organization (WTO) on 11 January 2007,⁴ this figure is expected to grow.

It is in light of the foregoing developments that the author seeks to discuss the investment legal framework in Vietnam, analyze certain legal problems that may be encountered in the course of investment, and propose practical suggestions to the Filipino investor. However, the author will limit his discussions on the restrictions relating to foreign ownership as the discussion of any and all applicable conditions will readily comprise a tome.

II. VIETNAM'S INVESTMENT REGULATORY FRAMEWORK: AN INTERFACE BETWEEN WTO COMMITMENTS AND MUNICIPAL LAW

A. *Superiority of Treaty Law*

Before discussing the investment framework, the author wishes to draw the reader's attention to the interplay between international law and domestic law in Vietnam. As will be shown in Part II (B) and (C), this issue is highly relevant, and not merely academic, as the investment regime in Vietnam is largely a matter of Treaty Law.

Analysis of the interplay between International Law and municipal law usually begins with a determination whether a State's legal system utilizes a monist or dualist approach.⁵ Under the monist approach, there is but one system of law, with International Law as an element "alongside all the various branches of domestic law."⁶ On one hand, for the monists,

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1. Jon M. Van Dyke, *The Role of Customary International Law in Federal and State Court Litigation*, 26 U. HAW. L. REV. 361 (2004).
 2. See President Gloria Macapagal-Arroyo, Speech at a Meeting with the Filipino Community in Hanoi, Vietnam (Nov. 17, 2006).
 3. For the details of such companies, see VIETNAM'S MINISTRY OF PLANNING AND INVESTMENT, LIST OF PHILIPPINE INVESTED PROJECTS IN VIETNAM (2006).
 4. Accessions, Vietnam, available at http://www.wto.org/english/thewto_e/acc_e/ai_vietnam_e.htm (last accessed Oct. 27, 2008). The ratification by Vietnam's National Assembly of membership to the WTO is contained in the National Assembly's Resolution No. 71-2006-QH11 dated November 29, 2006. The General Council approved Vietnam's accession package on November 7, 2006. Vietnam became the WTO's 150th member on January 11, 2007.
 5. Van Dyke, *supra* note 1, at 378.
 6. Justice Michael Kirby, *The Growing Rapprochement Between International Law and National Law*, 25 W. AUSTRALIAN L. REV. 1 (1995).

International Law is simply part of the law of the land, together with the more familiar areas of national law.⁷ Dualists, on the other hand, assert that there are two essentially different legal systems, and they exist “side by side within different spheres of action — the international plane and the domestic plane.”⁸ Some legal systems are considered hybrids of the two.⁹

In Vietnam’s case, it is primarily a monist State, but in an evolved model, as how the eminent Professor Weiler describes the legal system of the European Community:

In light of supremacy the full significance of direct effect becomes transparent. Typically, in monist or quasi-monist states like the United States, although treaty provisions, including self-executing ones, may be received automatically into the municipal legal order, their normative status is equivalent to national legislation. Thus the normal rule of “later in time” (*lex posterior derogat lex anterior*) governs the relationship between the treaty provision and conflicting national legislation. A national legislature unhappy with an internalized treaty norm simply enacts a conflicting national measure and the transposition will have vanished for all internal practical effects. By contrast, in the Community, because of the doctrine of supremacy, the [European Community] norm, which by virtue of the doctrine of direct effect must be regarded as part of the Law of the Land, will prevail even in these circumstances. The combination of the two doctrines means that Community norms that produce direct effects are not merely the Law of the Land but the “Higher Law” of the Land. Parallels to this kind of constitutional architecture may, with very few exceptions, be found only in the internal constitutional order of federal states.¹⁰

In this connection, Vietnam laws recognize the superiority of Treaty Law whether or not the treaty is prior or posterior to a conflicting domestic law. However, this is not the same rule with respect to Customary International Law, which the author will explain below.

As regards Treaty Law, the Law on Promulgation of Legal Instruments¹¹ states that domestic legal instruments shall be applicable to foreign bodies,

7. Vedna Jivan & Christine Forster, *What Would Gandhi Say? Reconciling Universalism, Cultural Relativism and Feminism through Women’s Use of CEDAW*, 9 SINGAPORE Y.B.I.L. 103 (2005).

8. Kirby, *supra* note 6.

9. Jivan & Forster, *supra* note 7.

10. J.H.H. Weiler, *Transformation of Europe*, 100 YALE L.J. 2403, 2415 (1991). See also Henry G. Schermers, *Comment on Weiler’s The Transformation of Europe*, 100 YALE L.J., 2525 (1991).

11. Law on Promulgation of Legal Instruments, Law No. 12 of Nov. 14, 1996, as amended by Law on the Amendment and Addition to the Law on Promulgation of Legal Instruments, Law No. 22/2002/L-CTN of Dec. 27, 2002.

organizations, and individuals in Vietnam, except as otherwise stipulated in international treaties to which Vietnam is a party or signatory.¹² In addition, Article 2 (3) of the Civil Code¹³ states that such Code applies to civil relations involving foreign elements, unless otherwise provided for by treaties to which Vietnam is a contracting party, and Article 759 (2) of the same Code states, “In cases where a treaty to which the Socialist Republic of Vietnam has signed or acceded contains provisions different from the provisions of this Code, the provisions of such treaty shall apply.” This is essentially the same with Article 5 (1) of the Commercial Law¹⁴ which states that where a treaty to which Vietnam is a contracting party contains provisions different from those of the Commercial Law, the provisions of such treaty shall apply. Finally, Article 3 (3) of the Enterprise Law¹⁵ and Article 5 (3) of the Investment Law¹⁶ both state, “[w]here treaties to which the Socialist Republic of Vietnam is a contracting party contain provisions different from those of this Law, the provisions of such treaties shall apply.”

With respect to Customary International Law, the attitude of the law is different. The Commercial Law states that parties to commercial transactions may apply international commercial practices if such practices are not contrary to the fundamental principles of Vietnamese law.¹⁷ This is the same provision found in the Law on Investment which states, “[w]ith regard to foreign investment activities, which have not yet been provided for by Vietnamese law, the concerned parties may agree in contracts on the application of foreign laws and international investment practices if such application does not contravene the fundamental principles of Vietnamese law.”¹⁸ For customary international practices therefore, they may only be applied in Vietnam to the extent that they do not conflict with Vietnam’s domestic legal principles.

B. Sources of Investment Restrictions

Due to the apparent superiority of international treaties over domestic laws, the first step in determining the conditions that apply to foreign investment is to look at the provisions of international treaties to which Vietnam is a party. In the absence of such conditions in any treaties, resort to domestic law must then be had.

12. *Id.* art. 79 (3).

13. The Civil Code of Vietnam, Law No. 33/2005/QH11 of June 14, 2005.

14. The Commercial Law of Vietnam, Law No. 36/2005/QH11 of June 14, 2005.

15. The Enterprise Law of Vietnam, Law No. 60/2005/QH11 of Nov. 29, 2005.

16. The Investment Law of Vietnam, Law No. 59/2005/QH11 of Nov. 29, 2005.

17. The Commercial Law, art. 5 (3).

18. The Investment Law, art. 5 (2).

In case the conditions under domestic law are inconsistent with those under the relevant treaties, the accepted interpretation is that the conditions under the latter should prevail. Nonetheless, in case no such inconsistency exists, the conditions under both sources of law must be reconciled to the extent possible, with the conditions under domestic law being supplementary to the conditions under the treaties.

*C. Investment Restrictions*¹⁹

Foreign organizations and individuals may invest in Vietnam, except where the investment is prohibited.²⁰ In certain sectors, investment is subject to conditions which must be satisfied in order that the investor may be allowed to carry out its activities in Vietnam.²¹ As mentioned in Part II (B), the first document to look at in order to determine the applicable investment restrictions is the relevant international treaty or agreement, *i.e.*, the schedule of Vietnam's commitments in services to the WTO (Vietnam's WTO Commitments in Services).²² Vietnam also has bilateral treaties with certain States, but such treaties are not publicly available in Vietnam. Hence, for purposes of this article, such bilateral treaties will not be discussed.

1. Definition of Investment

Foreign investment is defined under the Law on Investment as the remittance of capital in monies and other lawful assets by a foreign investor into Vietnam in order to carry out an investment activity.²³ The Law on Investment provides for two types of investment: direct and indirect.²⁴

On one hand, direct investment is a form of investment whereby the investor invests its capital and participates in the management of the investment activity.²⁵ This includes the establishment of an enterprise; or entry into contracts for purposes of business cooperation, build-operate,

19. For purposes of this article, the author will only limit the discussion to the limitations on foreign ownership of investments in Vietnam. As will be shown in Part II (D), the level of foreign ownership will necessarily restrict the type of investment vehicle available to the foreign investor.

20. The Investment Law, art. 4 (1).

21. *Id.* art. 29 (1); Decree No. 108 of Sep. 22, 2006, Decree Providing Detailed Provisions and Guidelines for the Implementation of a Number of Articles of the Law on Investment, Appendix III.

22. Working Party on the Accession of Vietnam, Schedule of Specific Commitments in Services, WT/ACC/VNM/48/Add.2 (Oct. 27, 2006) [hereinafter Vietnam's WTO Commitments in Services].

23. The Investment Law, art. 3 (12).

24. *Id.* arts. 21 & 26.

25. *Id.* art. 3 (2).

build-transfer-operate, or build-transfer; investment in business development; purchase of shares or contribution of capital in order to participate in the management of the investment; or investment in carrying out mergers and acquisition of enterprises.²⁶

Indirect investment, on the other hand, is a form of investment by way of purchase of shares, bonds, or other valuable papers [or investment through a securities investment fund or intermediary financial institutions], whereby the investor does not participate directly in the management of the investment.²⁷

It appears, however, that the distinction between direct investment and indirect investment is more apparent than real as both types of investment are covered by the relevant restrictions as will be discussed in the immediately succeeding section.

2. Sectors covered by the WTO

a. Horizontal Commitments

(i) On Existing Vietnamese Enterprises

Vietnam imposed a cap on the permissible shareholding that may be acquired by foreign investors in an existing Vietnamese enterprise. Under Vietnam's WTO Commitments in Services, foreign investors are allowed to acquire a maximum of 30% of the charter capital of an existing Vietnamese enterprise, unless otherwise provided for by Vietnam laws or authorized by Vietnam's competent authority.²⁸ The *unless* clause would seem to be a *renvoi* to Vietnam's domestic law which however provides, as discussed in Part II (A), that treaty provisions prevail over domestic laws. There is, however, one exception. In case a law containing favorable provisions is issued subsequently, the foreign investor will be entitled to choose between the provisions of the domestic law and the relevant treaty.²⁹

From 11 January 2008, the 30% restriction was to be lifted pursuant to Vietnam's WTO Commitments in Services, except for joint-stock commercial banks and sectors not listed in the said Commitments.³⁰ On 5

26. *Id.* art. 21.

27. *Id.* art. 3 (3).

28. Vietnam's WTO Commitments in Services, Part I (3).

29. Decree 108, art. 3 (2).

30. Vietnam's WTO Commitments in Services, Part I (3).

September 2007, Vietnam issued Decree 139,³¹ a decree intended to repeal an old governmental decision³² which previously imposed a 30% cap on the acquisition of shares by foreign investors in certain sectors. While the wording of Decree 139 does not have an express repeal of the old decision, the general interpretation is that the old decision has been repealed pursuant to Article 80 (3) of the Law on Promulgation of the Legal Instruments which states that in case legal instruments make different provisions on the same issue, the legal instrument of higher legal effect — in this case Decree 139 — shall prevail. This, coupled with the fact that Vietnam's WTO Commitments in Services expressly state that such 30% cap will be lifted, should suffice to conclude that the 30% horizontal commitment is no longer applicable. Of course, for specific sectors committed to the WTO, the level of equity held by foreign investors must necessarily comply with the permitted level of foreign ownership provided for such sectors. For sectors not committed by Vietnam to the WTO, the level of ownership shall be governed by Vietnam's domestic laws.

(ii) Listed enterprises

At this juncture, the author wishes to stress that listed enterprises continue to be governed by Vietnam's domestic laws. Decision 238³³ in conjunction with Circular 90³⁴ provides that foreign organization and individuals selling and purchasing securities or investment fund certificates at securities trading centers may hold a maximum of 49% of the total number of shares or investment fund certificates of any one organization listed or registered for trading, or of any one securities investment fund.

(iii) Foreign Participation, in general

In addition, Vietnam's horizontal commitments provide that foreign organizations and individuals are allowed to participate in the establishment of enterprises in Vietnam. Vietnam's WTO Commitments in Services

31. Decree No.139 of Sep. 5, 2007, Decree Providing Detailed Providing Detailed Provisions and Guidelines for the Implementation of a Number of Articles of the Law on Enterprises.

32. Decision No. 36 of Mar. 11, 2003, Issuing Regulations on Capital Contribution and Purchase of Shares by Foreign Investors in Vietnamese Enterprises.

33. Decision No. 238 of Sep. 29, 2005, Decision on the Percentage of Participation of Foreign Parties in Securities Market of Vietnam.

34. Circular No. 90-2005-TT-BTC of Oct. 17, 2005, Circular Promulgating the Guidelines for the Implementation of Decision No. 238 on the Allowable Equity Participation of Foreign Organizations and Individuals on the Securities Market of Vietnam.

provide that, unless otherwise specified therein, foreign enterprises are allowed to establish commercial presence in Vietnam in the form of a business cooperation contract, joint venture enterprise, and 100% foreign-invested enterprise. Representative offices of foreign service suppliers are permitted to be established in Vietnam provided that they shall not engage in any direct profit-making activities. The establishment of branches is not permitted, unless otherwise indicated in the sector specific commitments.

b. Sector Specific Commitments

Vietnam has committed certain sectors to the WTO. These sectors may be classified in three categories: sectors where a wholly foreign owned enterprise (WFOE) is permitted to be established by foreign investors; sectors where only a joint venture enterprise with a Vietnamese party or parties (JVE) is permitted to be established at the time of accession with the possibility of a WFOE being established on a delayed basis; and sectors where only a JVE is permitted to be established with the establishment of a WFOE barred. For sectors not included in Vietnam's WTO Commitments in Services, their non-inclusion does not mean that no foreign ownership restrictions apply to them. This only means that foreign ownership restrictions will be those provided for in Vietnam's domestic laws.

(i) WFOE

Vietnam's WTO Commitments in Services allow the establishment of a WFOE in Vietnam in the following services sectors:

- Insurance³⁵
- Securities³⁶

35. Vietnam's WTO Commitments in Services provide that 100% foreign-invested insurance enterprises shall not be allowed to engage in statutory insurance business, including motor vehicle third party liability, insurance in construction and installation, insurance for oil and gas projects, and insurance for projects and construction works of high danger to public security and the environment. As of January 1, 2008, this limitation will be abolished. Five years after accession (or by January 11, 2012), non-life branches of foreign insurance enterprises will be permitted to be established.

36. Vietnam's WTO Commitments in Services provide that upon accession, foreign securities service suppliers shall be permitted to establish a representative office and enter into joint venture with a Vietnamese partner with foreign capital contribution not exceeding 49%. By January 11, 2012, securities services supplier with 100% foreign-invested capital shall be permitted and a branch of foreign service supplier may also be permitted to be established for the following activities: asset management; settlement and clearing services for securities, derivative products and other securities-related instruments; provision and transfer of financial information and related software by suppliers of

- Hotel and Restaurant Business³⁷
- Banking and other Financial Services³⁸
- Accounting, auditing, and bookkeeping services,
- Research and development services
- Legal services³⁹
- Taxation services⁴⁰
- Architectural services, engineering services, integrated engineering services⁴¹

securities services and advisory, intermediation and other auxiliary securities-related activities except securities trading.

37. There is currently no foreign ownership restriction in respect of investment in the development and operation of a hotel. The Law on Tourism, however, does provide that both foreign and local organizations and individuals must comply with certain conditions, which conditions do not relate to foreign ownership. As to the restaurant business, including catering food and drinking services, Vietnam's Commitments to the WTO state that except for a period of eight years from the accession date (or by January 11, 2015), investment in such services should be in parallel with investment in hotel construction, renovation, restoration or acquisition.

38. Under Vietnam's Commitments to the WTO, 100% foreign owned banks are allowed to be established in Vietnam. Decree 26 provides that foreign banks shall be permitted to operate in Vietnam either as a foreign bank branch, joint venture bank, or bank with 100% foreign owned capital provided the conditions laid down by Decree 26 in relation to the Law on Credit Institutions as amended are met.

Under Vietnam's Commitments to the WTO, foreign credit institutions are permitted to establish certain forms of finance companies. For instance, foreign commercial banks are allowed to establish a representative office, branch, commercial joint venture bank with foreign capital contribution not exceeding 50% of chartered capital, joint venture financial leasing company, 100% foreign invested financial leasing company, joint venture finance company, and 100% foreign invested finance company.

Foreign finance companies meanwhile are permitted to establish a representative office, joint venture finance company, 100% foreign-invested finance company, joint venture financial leasing company, and 100% foreign-invested financial leasing company. Finally, foreign leasing companies can establish a representative office, joint venture financial leasing company, and 100% foreign-invested financial leasing company.

39. Branching is also permitted.

40. The establishment of WFOEs for the purpose of carrying out these activities is now permitted. However, until January 11, 2008, licensing shall be made on a case to case basis and WFOEs may provide services only to foreign-invested and foreign-funded enterprises.

- Computer and related services⁴²
- Management consultant services⁴³
- Technical testing and analysis services⁴⁴
- Health related and social services⁴⁵
- Construction and related engineering works⁴⁶
- Rental/leasing services without operators
- Urban planning and urban landscape architectural services⁴⁷

(ii) JVE with delayed establishment of WFOE

After a transitional period, a WFOE will be permitted (although at present only JVEs are allowed) to be established in the following sectors:

- Securities⁴⁸

-
41. The establishment of WFOEs for the purpose of carrying out these activities is now permitted. However, until January 11, 2009, WFOEs may only provide services to foreign-invested enterprises in Vietnam.
 42. The establishment of WFOEs for the purpose of carrying out these activities is now permitted. However, until January 11, 2009, WFOEs may only provide services to foreign-invested enterprises in Vietnam. By January 11, 2010, setting up of a branch shall be allowed.
 43. The establishment of WFOEs for the purpose of carrying out these activities is now permitted. By January 11, 2010, setting up of a branch shall also be allowed.
 44. The establishment of WFOEs for the purpose of carrying out these activities is permitted except where Vietnam allows private suppliers access to a sector previously closed to private sector competition on the grounds that the service had been supplied in the exercise of governmental authority. In such case, the following restrictions apply:
 - (a) within a period of three years from opening to the private sector: only joint ventures with Vietnamese enterprise; and
 - (b) after five years, 100% ownership will be permitted.
 45. The establishment of WFOEs for the purpose of carrying out these activities is permitted subject to some minimum legal capital.
 46. The establishment of WFOEs for the purpose of carrying out these activities is now permitted. However, until January 11, 2009, WFOEs may only provide services to foreign-invested enterprises and foreign-funded projects in Vietnam. By January 11, 2010, setting up of a branch shall also be allowed.
 47. However, until January 11, 2009, 100% foreign-invested enterprises may only provide services to foreign-invested enterprises in Vietnam.

- Market research activities⁴⁹
- Services related to management consulting⁵⁰
- Services incidental to mining⁵¹
- Services incidental to manufacturing⁵²
- Related scientific and technical consulting services⁵³
- Maintenance and repair of equipment (not including maritime vessels, aircraft, or other transport equipment)⁵⁴

48. Joint venture with a Vietnamese partner; foreign capital not exceeding 49%. By January 11, 2012, 100% foreign ownership shall be permitted. Also, branches shall be permitted to be established for the following activities: asset management; settlement and clearing services for securities, derivative products and other securities-related instruments; provision and transfer of financial information and related software by suppliers of securities services; and advisory, intermediation and other auxiliary securities-related activities except securities trading.

49. Joint venture with a Vietnamese partner; foreign capital not exceeding 51%. By January 1, 2009, 100% ownership will be permitted.

50. From January 11, 2008, 100% ownership was permitted except for arbitration and conciliation services. For arbitration and conciliation services, 100% ownership will be permitted beginning January 11, 2010.

51. Joint ventures with foreign capital contribution not exceeding 49% shall be permitted. By January 11, 2010, this limitation shall be 51%. By January 11, 2012, 100% ownership will be permitted.

The commitments are not understood to cover the following activities: supply of equipment, materials and chemicals, supply base services, offshore/marine support vessels, accommodation and catering, helicopter services. The commitments for this sector are also made without prejudice to the rights of the Government of Vietnam to set out the necessary regulations and procedures to regulate the oil and gas related activities carried out within the territory or jurisdiction of Vietnam in full conformity with the rights and obligations in Vietnam's WTO Commitments in Services.

52. By January 11, 2010, joint venture with a Vietnamese partner; foreign capital not exceeding 50%. By January 11, 2012, 100% foreign ownership will be permitted.

53. Joint venture with a Vietnamese partner; foreign capital not exceeding 49%. By January 11, 2009, 51% foreign ownership will be permitted. By January 11, 2011, 100% foreign ownership will be permitted.

Please note that the supply of services related to prospecting, surveying, exploration and exploitation is subject to the applicable laws and regulations of Vietnam.

- Courier services⁵⁵
- Distribution and trading services⁵⁶
- Franchising services⁵⁷
- Higher education services, adult education, other education services⁵⁸
- Environmental services (sewage, refuse disposal, cleaning of exhaust gas and noise abatement, and environmental impact assessment services)⁵⁹
- Supply of international maritime transport services⁶⁰

54. Joint venture with a Vietnamese partner; foreign capital not exceeding 49%. By January 11, 2010, 51% foreign ownership will be permitted. By January 11, 2012, 100% foreign ownership will be permitted.

55. Vietnam has discretion to limit foreign ownership to 51% until January 11, 2012. By January 11, 2012, 100% foreign ownership shall be permitted.

56. Vietnam did not commit the distribution of cigarettes, cigars, books, newspapers, magazines, video records on whatever medium, precious metals and stones, pharmaceutical products and drugs, explosives, processed and crude oil, rice, and cane and beet sugar.

From January 1, 2008, joint venture with no cap on foreign ownership (this essentially means 99%). From January 1, 2009, 100% foreign ownership will be permitted.

In addition, Vietnam imposes special rules on the following products: cement and cement clinkers, tires (excluding airplane tires), papers, tractors, motor vehicles, cars, motorcycles, iron, steel, audiovisual devices, wines and spirits, and fertilizers. Foreign-invested enterprises may only distribute motor vehicles, cars and motorcycles from January 1, 2009 (but following the foreign ownership schedule). Within three years from January 11, 2007, foreign-invested enterprises may be permitted by Vietnam to distribute all the other aforementioned products.

The opening of an outlet (in addition to the first one) will be based on the Economic Needs Test.

57. From January 1, 2008, joint venture with no cap on foreign ownership (this essentially means 99%). From January 1, 2009, 100% foreign ownership will be permitted. From January 11, 2010, branches will be allowed.

58. Majority foreign ownership is allowed (no exact cap). By January 1, 2009, 100% foreign ownership will be permitted.

59. Joint venture with a Vietnamese partner; foreign capital not exceeding 51%. From January 11, 2011, 100% foreign ownership will be permitted.

60. For purposes of operating a fleet under Vietnam flag:

- (a) From January 11, 2009, joint venture with a Vietnamese partner; foreign capital not exceeding 49%.

- Container station and depot services, storage and warehouse services, and freight transport agency services⁶¹
- Maintenance and repair of aircraft⁶²
- Other services auxiliary to all modes of transport (bill auditing; freight brokerage, inspection, weighing and sampling, receiving and acceptance, and transportation document preparation)⁶³

(iii) JVE only and WFOE barred

Notwithstanding Vietnam's WTO Commitments in Services, only a JVE may be established, and no transitional period for the establishment of WFOEs is provided for, in the following sectors:

- Advertising services⁶⁴
- Services incidental to agriculture, hunting, and forestry⁶⁵
- Basic telecommunication services⁶⁶

(b) Otherwise:

foreign investors can establish joint venture; foreign capital not exceeding 51%; and

from January 11, 2012, 100% foreign ownership will be permitted.

Only five foreign-invested companies will be licensed for the first two years (from January 11, 2007) and three additional companies will be allowed two years thereafter. From January 11, 2012, the limitation on the number of companies will be lifted.

61. Joint venture with a Vietnamese partner; foreign capital not exceeding 51%. From January 11, 2014, 100% foreign ownership will be permitted.
62. Joint venture with a Vietnamese partner; foreign capital not exceeding 51%. From January 11, 2012, 100% foreign ownership will be permitted.
63. Joint venture with a Vietnamese partner; foreign capital not exceeding 49%. From January 11, 2010, 51% foreign ownership will be permitted. From January 11, 2014, 100% foreign ownership will be permitted.
64. Joint venture with licensed Vietnamese advertising companies; foreign capital not exceeding 51%.
From January 1, 2009, the limitation will be abolished but the vehicle must still remain a joint venture (this is interpreted to mean 99% foreign ownership).
65. Joint venture with a Vietnamese partner; foreign capital not exceeding 51%
66. If non-facilities based:

Joint venture with a licensed Vietnamese telecom company; foreign capital not exceeding 51%;

- Virtual Private Network⁶⁷
- Value-added telecommunication services⁶⁸
- Internet Access Services⁶⁹
- Audio-visual services (motion picture production, distribution, or projection service)⁷⁰
- Travel agencies and tour operator services⁷¹
- Entertainment services (including theatre, live bands, and circus services)⁷²

From January 11, 2010, no more limitation as to the nature of the joint venture partner and foreign capital should not exceed 65%.

If facilities-based:

Joint venture with a licensed Vietnamese telecom company; foreign capital not exceeding 49%.

67. If non-facilities based:

Joint venture (no limitation as to the nature of the Vietnamese partner); foreign capital not exceeding 70%;

If facilities-based:

Joint venture with a licensed Vietnamese telecom company; foreign capital not exceeding 49%.

68. If non-facilities based:

Joint venture (no limitation as to the nature of the Vietnamese partner); foreign capital not exceeding 51%;

From January 11, 2010, foreign capital may not exceed 65%.

If facilities-based:

Joint venture with a licensed Vietnamese partner; foreign capital not exceeding 50%.

69. If non-facilities based:

Joint venture with a licensed Vietnamese partner; foreign capital not exceeding 51%;

From January 11, 2010, foreign capital may not exceed 65% with no limitation as to the nature of the Vietnamese partner.

If facilities-based:

Joint venture with a licensed Vietnamese partner; foreign capital not exceeding 50%.

70. Joint venture with a licensed Vietnamese partner; foreign capital not exceeding 51%.

71. Joint venture with a Vietnamese partner with no limitation on foreign ownership (this is interpreted to mean 99%).

- Electronic games business⁷³
- Container handling services⁷⁴
- Customs clearance services⁷⁵
- Internal waterways transport⁷⁶
- Freight transport services by rail⁷⁷
- Road transport services (passenger and freight)⁷⁸
- Container handling services, except services provided at airports⁷⁹

The foregoing commitments, however, are subject to certain Most Favored Nation (MFN) exemptions as set out in Table 1.

3. Sectors not covered by WTO

Article 30 of the Law on Investment provides for a list of sectors in which foreign and domestic investment is prohibited:

- Projects which are detrimental to national defense, security, and public interests;
- Projects which are prejudicial to historical or cultural relics, Vietnamese culture, morals, or fine customs;
- Projects which may cause harm to people's health, destroy natural resources, or the environment; and
- Projects on the treatment of hazardous wastes brought from outside into Vietnam or production of toxic chemicals or use of toxic agents banned under treaties.

72. From January 11, 2012, joint venture with a Vietnamese partner; foreign capital not exceeding 49%.

73. Joint venture with a licensed Vietnamese partner; foreign capital not exceeding 49%.

74. Joint venture with a Vietnamese partner; foreign capital not exceeding 50%.

75. Joint venture with a Vietnamese partner; foreign capital not exceeding 51%. From January 11, 2012, joint venture with no foreign ownership limitation (this is interpreted to mean 99%).

76. Joint venture with a Vietnamese partner; foreign capital not exceeding 49%.

77. Joint venture with a Vietnamese partner; foreign capital not exceeding 49%.

78. Joint venture with a Vietnamese partner; foreign capital not exceeding 49%. For freight, from January 11, 2010, joint venture; foreign capital not exceeding 51%.

79. Joint venture with Vietnamese partner, foreign capital not exceeding 50%.

Further, Article 29 of the Law on Investment enumerates the following sectors where both foreign and domestic investments are subject to conditions:

- Sectors impacting national defense and security, social order and safety;
- Banking and finance sector;
- Sectors impacting public health;
- Culture, information, the press, and publishing;
- Entertainment services;
- Real estate business;
- Survey, prospecting, exploration and mining of natural resources; the ecological environment;
- Development of education and training; and
- A number of other sectors in accordance with law.

Likewise, Appendix III of Decree 108 provides the following list of investment sectors in which foreign investment is subject to conditions:

- Broadcasting and television;
- Production, publishing, and distribution of cultural products;
- Exploitation and processing of minerals;
- Establishment of infrastructures for telecommunications networks, transmission and provision of internet and telecommunications services;
- Establishment of public postal networks and provision of postal services and delivery services;
- Construction and operation of river ports, sea ports, airports and airfields;
- Transportation of goods and passengers by rail, air, land, sea, and inland waterways;
- Catching of marine resources;
- Production of cigarettes;
- Real estate business;
- Investment in import, export and distribution;
 - Education and training;
 - Hospitals and clinics; and

- Other investment sectors in international treaties of which Vietnam is a member and which restrict the opening of the market to foreign investors.

The foreign ownership restrictions applicable to the sectors mentioned above are found in various domestic laws.

D. Investment Vehicles

The type of economic vehicle that the foreign investor will set up in Vietnam will necessarily be affected by the foreign ownership restrictions discussed above. For instance, for sectors where 100% foreign ownership is permitted, a single foreign investor may set up a one-member limited liability company (LLC), or two or more foreign investors may set up an LLC with Two or More Members, or at least three foreign investors may set up a joint stock company. This may be better understood by briefly discussing each investment vehicle.

1. One-Member LLC

A One-Member LLC is an enterprise which is owned by only one individual or organization⁸⁰ and has a separate and distinct legal personality from the investor.⁸¹ Under the Law, the investor is liable for all debts and other property obligations of the One-Member LLC to the extent of the charter capital of the One-Member LLC.⁸²

2. LLC with Two or More Members

A LLC with Two or More Members is an enterprise with two to 50 members, which members may be individuals or organizations.⁸³ It also has a separate legal personality from its members.⁸⁴ Members are liable for debts and other obligations of the enterprise within the amount of capital they have committed to contribute.⁸⁵

3. Joint Stock Company

A joint stock company is an enterprise whose charter capital is divided into equal portions known as shares.⁸⁶ It must have at least three shareholders,

80. The Enterprise Law, art. 63 (1).

81. *Id.* art. 63 (2).

82. *Id.* art. 63 (1).

83. *Id.* art. 38 (1) (A).

84. *Id.* art. 38 (2).

85. *Id.* art. 38 (1) (B).

86. The Enterprise Law, art. 77 (1) (A).

which may be organizations or individuals.⁸⁷ Shareholders shall be liable for debts and other property obligations of the enterprise within the value of their respective capital contributions.⁸⁸ Like an LLC, a joint stock company has a legal personality separate and distinct from its shareholders.⁸⁹

A joint stock company is similar to a corporation in the Philippines.

4. Partnership

A partnership is an enterprise created by at least two unlimited liability partners who are co-owners of the company jointly conducting their business under one name.⁹⁰ There may also be limited partners who are liable for the debts of the partnership only to the extent of their capital contribution⁹¹ unlike unlimited liability partners who are liable for all obligations of the partnership to the extent of all their assets.⁹² Nonetheless, a partnership has a separate legal personality from its partners.⁹³

5. Private Enterprise

A private enterprise is an enterprise owned solely by an individual.⁹⁴ It is similar to a One-Member LLC in the context of such sole ownership (although a One-Member LLC may be owned by an organization), but a private enterprise does not have a separate legal personality from that of the owner. Unlike the investor in a One-Member LLC which is liable only to the extent of the charter capital, the owner of a private enterprise is liable to the extent of all his assets.⁹⁵ An individual may only establish one private enterprise.⁹⁶

6. Branch

A foreign company may establish a branch in Vietnam in accordance with Vietnam's undertakings in international treaties. In particular, with respect to commercial activities involving the purchase and sale of goods, the Commercial Law states that a branch may:

87. *Id.* art. 77 (1) (B).

88. *Id.* art. 77 (1) (C).

89. *Id.* art. 77 (2).

90. *Id.* art. 130 (1) (A).

91. *Id.* art. 130 (1) (C).

92. The Enterprise Law, art. 130 (1) (B).

93. *Id.* art. 130 (2).

94. *Id.* art. 141 (1).

95. *Id.*

96. *Id.* art. 141 (3).

- lease office premises and residential accommodation;
- hire local and foreign staff;
- enter into contracts in Vietnam (in accordance with the activities stated in its license);
- open bank accounts in Vietnam strictly for its own day to day administrative operational expenses;
- remit profits abroad; and
- conduct activities being the purchase of goods and other commercial activities consistent with its license.⁹⁷

7. Representative Office

A representative office is permitted to be established in all investment sectors, and under Vietnam law, is entitled to:

- act as a contact or liaison office;
- accelerate the formulation of projects of the parent company;
- conduct market research to promote opportunities for purchase and sale of goods and services of the parent company; and
- monitor and activate performance of contracts between the parent company and Vietnamese parties, or those relating to Vietnamese markets.⁹⁸

In its operations, a representative office may:

- employ local and foreign staff;
- rent office premises and residential accommodation;
- open bank accounts in Vietnam strictly for its own day to day administrative operational expenses; and
- import into Vietnam assets needed for the office operation of the representative office and re-export the same at the termination of its operations.⁹⁹

97. The Commercial Law, arts. 19 & 20.

98. Decree No. 72 of July 25, 2006, Decree Providing Detailed Regulations for the Implementation of the Commercial Law with respect to Representative Office and Branches of Foreign Business Entities in Vietnam, art. 16.

99. The Commercial Law, art. 17.

III. SOME ISSUES IN STRUCTURING PHILIPPINE INVESTMENTS

A. Establishment of an SPC for Purposes of Investment

As the Philippines is a WTO member-State, Philippine investors are entitled to invoke Vietnam's WTO Commitments in Services when they apply for a license to do business in Vietnam. However, in cross-border investments, it is not uncommon for foreign investors, including Filipino investors, to structure the investment in the most tax efficient manner. Accordingly, investors set up a special purpose company (SPC) in the form of an offshore company in certain territories which are considered to be tax havens.¹⁰⁰

The author pays special attention to this issue as this may be a source of a potential problem to the Filipino investor where the tax haven chosen is not entitled to the WTO provisions. For purposes of illustration, let us take the case of the British Virgin Islands (BVI). The BVI is an overseas territory of the United Kingdom¹⁰¹ and Her Majesty's Government (HMG) is responsible for BVI's external relations.¹⁰²

There are two schools of thought on whether the BVI is entitled to invoke the WTO commitments of a member of the WTO.

On one hand, one school of thought espouses the view that BVI companies are entitled to such commitments because it is a mere extension of the United Kingdom. The 1947 General Agreement on Tariffs and Trade, for instance, became applicable to BVI through ratification by extension made by the Queen.¹⁰³ It bears stressing that some trade representatives, notably that of the United States,¹⁰⁴ take the position that British overseas territories are automatically subject to the United Kingdom's WTO commitments. Conversely, such territories should be entitled to the

100. There are several territories considered as tax havens. The more popular tax havens include the Cayman Islands, Mauritius, Seychelles, Saint Kitts and Nevis, and the most common, the British Virgin Islands.

101. British Overseas Territories Act, 2002, c.8, Schedule 6.

102. 6 Halsbury, Laws of England ¶ 983, 471 (4th ed. 1991). See Country Profile for The British Virgin Islands, Official Website of the United Kingdom Foreign & Commonwealth Office, available at <http://www.fco.gov.uk/servlet/Front?Pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1013618138295> (last accessed Oct. 12, 2008).

103. The extension to the British Virgin Islands of the GATT was made on July 28, 1948.

104. Cable & Wireless USA, Inc., Order, Authorization & Certificate, 15 FCC Rcd. 3050, 3052 n. 14 (Int'l Bur. 2000). See also Letter from Robert E. Dalton, Assistant Legal Adviser for Treaty Affairs, U.S. Department of State, to Rebecca Arbogast, Chief Telecommunications Division, International Bureau, FCC (Feb. 16, 2000) (File No. ITC-214-19990709-00412) at 1.

commitments of other WTO members. In *JP Morgan Chase Bank v. Traffic Stream (BVI) Infrastructure*,¹⁰⁵ the United States Supreme Court recognized that a corporation organized under the laws of the BVI is a citizen of the United Kingdom, to wit:

In a very practical sense, then, the statutes that permit incorporation in the BVI, see BVI Companies Act (CAP. 285); BVI International Business Companies Act (CAP. 291), are laws enacted in the exercise of the political authority of the United Kingdom, and it seems fair to regard a BVI company as a citizen or subject of this ultimate political authority. This view of the relationship seems especially reasonable when such a corporation is engaged in an international transaction, since the United Kingdom acts on the BVI's behalf in the international arena. See 6 Halsbury, *Laws of England* ¶ 983, p. 471 (4th ed. 1991) ("Her Majesty's government in the United Kingdom is internationally responsible for the external affairs of United Kingdom dependent territories"); see also United Nations Act, 1946, c. 45 (empowering the Crown to bring "His Majesty's dominions" into compliance with directives of the United Nations Security Council).

...

Because our opinion accords with the positions taken by the Governments of the United Kingdom, the BVI, and the United States, the case presents no issue of deference that may be due to the various interested governments. It is enough to hold that the United Kingdom's retention and exercise of authority over the BVI renders BVI citizens, both natural and juridical, "citizens or subjects" of the United Kingdom under 28 U. S. C. § 1332 (a).¹⁰⁶

The other school of thought, on the other hand, adheres to the view that BVI companies are not entitled to the WTO commitments of other WTO members by virtue of the fact that the BVI is not a member of the WTO. It would appear that this school of thought is more supported under International Law and the WTO system. First, those who espouse the first school of thought recognize that the HMG conducts the external affairs of the BVI. Accordingly, HMG could have easily extended the BVI WTO membership, but it has not.¹⁰⁷ Second, the WTO, as an organization, is not

105. *JP Morgan Chase Bank v. Traffic Stream (BVI) Infrastructure*, 536 U.S. 88 (2002).

106. *Id.* at 93-94, 100.

107. In the Official List of Members and Accession Candidates of the WTO, it states that the WTO Agreement does not apply to any of the following British Overseas Territories: Anguilla, Bermuda, the Cayman Islands, the Falkland Islands, South Georgia and the South Sandwich Islands, Turks and Caicos Islands, British Virgin Islands, Montserrat, Pitcairn, St Helena and Dependencies, British Indian Ocean Territory and British Antarctic Territory. See List of Members and Accession Candidates of the WTO, *available at*

only limited to States but may include other non-State members.¹⁰⁸ As regards *JP Morgan Chase Bank v. Traffic Stream (BVI) Infrastructure*, the author notes that such pronouncement was made only for the purpose of determining the district court's jurisdiction over a BVI company under the Alienage Diversity Statute¹⁰⁹ and the same does not squarely address the issue whether, at present, BVI companies are entitled to WTO Commitments.

On this point, the Vietnamese authorities provide conflicting positions. While Vietnam's Ministry of Planning and Investment opines that BVI companies established by investors from a WTO-member country are entitled to Vietnam's WTO Commitments in Services in accordance with the grandfather rule, Vietnam's Ministry of Trade however refuses to adhere to such rule.¹¹⁰ Nonetheless, this poses a problem for WTO-based investments as the opinion of the Ministry of Trade is generally required in the approval of investments in sectors committed to the WTO, being conditional sectors.¹¹¹

Following from the foregoing, where the Filipino investor seeks to use an SPC for purposes of tax efficiency, such investor should establish its SPC in a tax haven which is a member of the WTO¹¹² in order that the investment application may avoid hitting the foregoing snag.

B. Maximizing the Foreign Ownership Cap

Based on the author's experience, foreign (including Philippine) investors wish to invest in a sector to the maximum extent allowed for foreign participation as they would want to take the larger piece of the pie in both profitability and decision-making aspects. However, investors do not have the luxury of time to wait until the relevant sector is entirely open to foreign investors.

http://www.wto.org/english/thewto_e/acc_e/acc_e.htm (last accessed on Oct. 27, 2008).

108. Sun Zhichao, International Legal Personality of the Hong Kong Special Administrative Region, 7 CHINESE J. INT'L L. 339, 341-42 (2008).

109. Alienage Diversity Statute, 28 U. S. C. § 1332 (a) (2). This statute gives district courts jurisdiction over civil actions where the controversy, inter alia, is "between citizens of a State and citizens or subjects of a foreign state."

110. Allens Arthur Robinson, VIETNAM LEGAL UPDATE, available at http://www.vietnamlaws.com/vlu/feb_2008.pdf (last accessed Oct. 29, 2008).

111. Decree 108, arts. 46 & 47.

112. See Alienage Diversity Statute, *supra* note 109. See, e.g. Saint Kitts and Nevis and the WTO, available at http://www.wto.org/english/thewto_e/countries_e/st_kitts_nevis_e.htm (last accessed Oct. 29, 2008). Saint Kitts and Nevis is a member of the WTO. Similar to a BVI company, a Nevis offshore company is tax exempt on all income earned worldwide outside of Nevis.

Is there a way to structure the investment in light of such considerations? Indeed, there is, but this would depend on the investment vehicle that the Philippine investor utilizes.

1. For LLC¹¹³

Article 41 (1) (F) of the Enterprise Law states that members of a LLC with two or more members have the right to be given priority in contributing additional capital when the company increases its charter capital. There is therefore a pre-emptive right granted to existing members of LLCs. To trigger the increase in capital, a straightforward provision requiring the enterprise to increase the capital of the LLC in parallel with the transitional period in Vietnam's WTO Commitments in Services may be included in the parties' joint venture agreement (which agreement establishes the LLC). Further, a waiver of the pre-emptive right must also be obtained from the Vietnamese party. This procedure allows the foreign investor to increase its shareholding to the maximum extent possible under Vietnam's WTO Commitments in Services.

If the foreign investor desires to wholly own such LLC, further structuring must be made. As and when Vietnam's WTO Commitments in Services allow 100% foreign ownership in the relevant investment sector, the LLC may be converted into a WFOE pursuant to Decree 101.¹¹⁴ This conversion could be made possible by inserting an exit mechanism provision in the joint venture agreement exercisable at the time when Vietnam's WTO Commitments in Services permit 100% foreign ownership in the relevant sector. Once triggered, the Vietnamese party will not be able to avoid this obligation by transferring its interest to a third party as a right of first refusal is also granted by the Law on Enterprises to the other member of the LLC.¹¹⁵

2. For Joint Stock Company

In terms of granting the foreign investor the right to subscribe to additional shares, this will not be problematic. Article 79 of the Law on Enterprises grants shareholders the pre-emptive right to any additional issuance of shares. Also, the Law on Securities permits the issuance of "share purchase rights"

113. The author is referring to LLCs with Two or More Members as the discussion will not apply to a One-Member LLC.

114. Decree No. 101 of Sep. 21, 2006, Decree on Re-registration, Conversion and Replacement with Investment Certificates by Enterprises with Foreign Owned Capital Pursuant to the Law on Enterprises and Law on Investment.

115. The Enterprise Law, arts. 41 (f) & 44(1).

(similar to call option and warrants) to ensure that existing shareholders will be entitled to subscribe to additional shares.¹¹⁶

An issue, however, results from compelling the Vietnamese shareholders to transfer their shares to the foreign investor. The Law on Enterprises provides that shareholders may freely assign their shares¹¹⁷ except that: (a) voting preference shareholders may not assign such shares to other persons¹¹⁸ and (b) ordinary shares of founding shareholders may only assign their shares to persons who are not founding shareholders if the same is approved by the General Meeting of Shareholders.¹¹⁹ Unlike members of LLCs, the law does not expressly give the right of first refusal to shareholders in a joint stock company.

It is however telling that Article 8 (1) of the Model Charter for Joint Stock Companies Listing on the Stock Exchange (Model Charter) is phrased in the following manner, “[a]ll shares may be assigned freely except where this Charter or any relevant law provides otherwise.” This seems to allow a joint stock company to provide for other restrictions in the charter of the joint stock company, including the right of first refusal. In practice, founding shareholders of joint stock companies have invariably provided for the right of first refusal and other restrictions in the charter following Article 8 (1) of the Model Charter. To date, and to the author's knowledge, such practice has not received any objections from the authorities although it remains to be seen how the courts will rule upon this issue in the future.

C. Representative Office as an Interim Measure

From experience, most Philippine investors do not wish to deal with Vietnamese parties, and would prefer to set up a WFOE. One way to address this concern is to establish a representative office while awaiting the opening of the relevant sector to 100% foreign ownership.

A representative office is, however, not permitted to directly conduct profit-making activities.¹²⁰ Hence, it will not, without prejudice to tax treaty stipulations, be liable to pay taxes. The author wishes to note that unlike in the Philippines,¹²¹ a representative office in Vietnam is not required to

116. The Law on Securities of Vietnam, Law No. 70/2006/QH11 of June 29, 2006, art. 6 (5).

117. The Enterprise Law, art. 77 (1).

118. *Id.* art. 81 (3).

119. *Id.* art. 84 (4).

120. The Commercial Law, art. 18 (1).

121. In the Philippines, a representative office is still required to register with the Bureau of Internal Revenue as it is considered a foreign corporation licensed to do business in the Philippines.

register for tax purposes although the chief of the representative office is required to register for purposes of personal income taxation. There is one exception (aside from the case where the representative office conducts revenue-generating activities such as delivery of goods or services) where the representative office will be subject to tax in Vietnam. This is the case where the chief of the representative office is authorized to sign contracts on behalf of the foreign investor.¹²² In such case, the Enterprise Tax Law states that the representative office will be subject to tax in Vietnam. Such tax consequence must be taken into account in the event that the Philippine parent company wishes to authorize the chief of the representative to sign contracts on its behalf.

IV. CONCLUSION

The world is increasingly becoming smaller due to the willingness of States to open their investment borders. This is essentially a product of what has been coined as an “integration of economic activities across borders through markets.”¹²³ With the Philippine investors slowly coming to terms with this reality, it will only be a matter of time before we see the Philippines’ largest companies expand their operation, and hopefully achieve market domination, in Asia and the rest of the world. From investment prey to predator, the Filipino investor should be wary that cross-border investment is not only a matter of profit and control, but is circumscribed by certain implications under the invested State’s commitments to international organizations; hence the relevance of Vietnam’s WTO Commitments in Services to the Filipino investor.

122. The Law on Corporate Income Tax of Vietnam, Law No. 9 of June 17, 2003, art. 3 (3) (e).

123. MARTIN WOLF, *WHY GLOBALIZATION WORKS: THE CASE FOR GLOBAL MARKET ECONOMY* CH. 6-8 (2005).