

Environmental Considerations in Investment Law of Vietnam in the Context of *Vedan Vietnam* Case

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Abstract

This article is aimed at examining the legal mechanisms and rules in Vietnam in order to ascertain whether there is any significant effort to prevent foreign investment projects which look for “pollution haven.” The main attention will be paid to the normative framework of environmental control over foreign investors. This examination will be conducted in the context of the legal case against *Vedan Vietnam*, a foreign investor who was caught in intentional massive pollution practice conducted during an extensive period of time. The case serves as a good background when examining Vietnamese investment and environmental protection laws.

Introduction

We live in the time where the link between the economic development and the degradation of the environment has become apparent to all stakeholders: the public, international and domestic government officials, and the businesses. One of the studies reports that the destruction of natural ecosystem can cost \$ 5 billion dollars annually, while its prevention would

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require only \$45 milliard dollars.² The same report indicates that most investments coming from the developed countries into the developing countries, by means of subsidies, went largely into the industries with the negative impact on the environment. The pressures to direct foreign investments towards conservation and biodiversity are increasing. Environmental considerations become increasingly important also for potential investors in Vietnam as well as lawyers which provide services in the field of Vietnamese investment law.³

Investment is a very complex phenomenon which embraces diverse economic activities such as direct investment by means of setting up a joint venture, or a wholly owned business. It can also be indirect, for example, through the acquisition of shares or bonds without direct participation in management or economic enterprise. Accordingly, Vietnamese law singles out several forms of investment: foreign capital companies, companies with foreign capital share, Public Limited Company, joint ventures, capital management companies, and subsidiaries of foreign companies.⁴ Each form presents its own

² "Milliarden - Subventionen schaden der Umwelt" 13 November, 2009, *Zeit on Line* - <http://www.zeit.de/wirtschaft/2009-11/unep-studie-umweltschutz>

³ Bernard Ang, Tu Dinh *Making It Easier to Do Business in Vietnam*—Pinsent Masons, 2010 – Available on line: <http://www.pinsentmasons.com/PDF/DoingBusinessInVietnam.pdf>

⁴ Trochu M., Do Thi Thu. "Foreign-Investment Policies in Vietnam: the Example of the Underground in Hanoi." In: *International Business Law Journal* 2009, 3, 293–295.

challenges for ensuring that investment is channeled in an environmentally friendly way.

The Vietnamese law on investment is greatly influenced by the negotiations of joining the World Trade Organization (WTO). Vietnam joined the WTO in 2007 after long negotiations started in 1995. The influence of the WTO and bilateral agreements stretches far beyond investment law. The effort to create a modern legal system with transparency and accountability is undoubtedly a positive contribution of the WTO accession negotiations to the whole development of Vietnamese law. There are serious efforts to reform judicial system. Economic courts exercise jurisdiction over business disputes. Administrative courts are empowered to review government actions. Since many investors continue to mistrust official Vietnamese courts, Vietnam signed the New York Convention on the recognition and enforcement of foreign arbitral awards. Thus, foreign arbitration is possible. The investors can also use foreign contractual law.

It is without doubt, that law reform in Vietnam plus joining the WTO resulted in significant rise of foreign investments. US \$16 billion were reported for 2007. The contribution of foreign direct investments (FDI) to national GDP of Vietnam increased dramatically from 2 percent in 1991 to 17.4 percent in 2007.⁵ As the condition, it had to reform significantly all area of commercial law

⁵ Vu Xuan Nguyet Hong et al. *Sustainable Development Impacts of Investment Incentives: A Case Study of the Mining Industry in Vietnam* - International Institute for Sustainable Development, 2009, 4. Available on line: http://www.iisd.org/TKN/pdf/sd_incentives_vietnam.pdf

including investment. In addition, Vietnam joined the Multilateral Investment Guarantee Agency (MIGA) and entered into a Bilateral Trade Agreement (BTA) with the United States (2001) to provide guarantees for the investors that their investments are safe. There is a concern that opening doors for investment attracts polluting industries. The WTO mechanisms as well as bilateral agreements do not pursue the environmental protection as the supreme goal of investment activities, even though many authors would deny the institutional bias of the WTO against strict environmental protection.⁶

There are several important laws in Vietnam relating to investment:

- Investment Law⁷ is effective since 1 July 2006.
- Law on Enterprises⁸ is effective since 1 July 2006.
- Civil Code⁹ is effective since 1 January 2006.
- Ordinance on Commercial Arbitration¹⁰ is effective since 1 July 2003.

⁶ Kelly T. *The Impact of the WTO: the Environment, Public Health and Sovereignty* - Edward Elgar, 2007.

⁷ English translation is available on line: [http://www.vietnamlaws.com/freelaws/Lw59na29Nov05CIL\[10Apr06\].pdf](http://www.vietnamlaws.com/freelaws/Lw59na29Nov05CIL[10Apr06].pdf)

⁸ English translation is available on line: [http://www.vietnamlaws.com/freelaws/Lw60na29Nov05Enterprises\[10Apr06\].pdf](http://www.vietnamlaws.com/freelaws/Lw60na29Nov05Enterprises[10Apr06].pdf)

⁹ English translation is available on line: <http://www.worldlii.org/vn/legis/cc73/index.html>

¹⁰ English translation is available on line: <http://www.asianlii.org/vn/legis/laws/oca225/>

- Law on Bankruptcy¹¹ is effective since 15 October.
- Securities Law¹² is effective since 1 January 2007.

There are also a significant number of other more detailed statutes and regulations.¹³

Even though those laws are not directly concerned with environmental protection, there are many references to the environment, particularly in the Investment Law, which will be analyzed below. Even such statute as the Enterprise law (which is largely concerned with the various forms of business organization: corporation, limited liability company, partnership, sole proprietorship) refers to the protection of the environment. It says that “business activities adversely affecting national defence, security, social order and safety, historical, cultural and ethical traditions, fine customs and traditions of Vietnam and the people’s health or deteriorating natural resources or destroying the environment shall be prohibited.”¹⁴

It is beyond doubt that the concerns about the deteriorating environment in Vietnam have significantly increased since new investment laws have been enacted.

¹¹ English translation is available on line: http://www.dncustoms.gov.vn/web_English/english/luat_pl/BANKRUPTCY%20LAW%202004.htm

¹² English translation is available on line: http://www.vbf.org.vn/downloads/Securities%20Law_no_70-2006-OG_ENG.pdf

¹³ Some of them are translated and can be found at: <http://www.dpi.hochiminhcity.gov.vn/invest/html/law3.html>

¹⁴ Law on Enterprises (2006). Article 7.

The first significant change took place on the constitutional level. In 2013, the right to live in a healthy environment has been incorporated into the Constitution of Vietnam.¹⁵ The next important change took in the general environmental legislation of the country.

Environmental legislation and investment in Vietnam

The Environmental Protection Law 2005 has been rewritten significantly in 2014.¹⁶ This law is remarkable by its special attention to the issues of the climate change. Article 48 of the new legislation links climate change with investment policies: “The State shall introduce policies on international cooperation in attracting more investments, financial aids, develop and transfer technologies, and enhance its competence in taking measures to respond to the climate change with the aim of building a green economy in the future.”¹⁷

¹⁵ See: Hoang Van Nghia, Le Thi Thu Mai, “Development of fundamental rights and freedoms of citizens in the constitutional history of Vietnam” (02/07/2014) *Vietnam Law and Legal Forum*, Available at: <http://vietnamlawmagazine.vn/development-of-fundamental-rights-and-freedoms-of-citizens-in-the-constitutional-history-of-vietnam-3369.html>

¹⁶ Law on Environmental Protection 2014, No. 55/2014/HQ13 English translation available at http://www.ilo.org/dyn/legosh/en/?p=14100:503:15284832653628:NO:503:P503_REFERENCE_FILE_ID:172934:NO

For a summary see: Environmental Protection Law 2014: Improving Sustainability of Environment Protection, *Vietnam Chamber of Commerce and Industry*, March 16, 2015, http://vccinews.com/news_detail.asp?news_id=31850

¹⁷ Law on Environmental Protection 2014. Article 48.

One of the key elements of environmental regulation of investment is environmental impact assessment. It is defined in new legislation as “the analysis and prediction of environmental impacts of specific investment projects in order to take preventive measures to protect the environment during the implementation of such projects.”¹⁸ Article 22 spells out the required content for such analysis and prediction. Investors must carry out assessment of current status of natural and socio-economic environment at adjacent areas and demonstrate the suitability of the selected project site. Further, they must conduct assessment and forecast of waste sources, and the impact of the project on the environment and community health. They must specify measures for managing the environmental risks of the project, waste disposal measures, and measures for minimizing the impact of the project on the environment and community health.

All big projects need to go through the process of environmental impact assessment.¹⁹ The burden of preparing environmental assessment report lies on the investors.²⁰ Before submitting the report, investors are obliged to conduct appropriate consultations “with regulatory agencies, organizations and communities that are directly affected by the project.”²¹ The process culminates in a report which is then verified by the Ministry of Natural

¹⁸ Law on Environmental Protection 2014. Article 3.

¹⁹ Law on Environmental Protection 2014. Article 18.

²⁰ Law on Environmental Protection 2014. Article 19.

²¹ Law on Environmental Protection 2014. Article 21.

Resources and Environment.²² For smaller projects, local governments (Provincial People's Committees) make appropriate arrangements to verify the report on environmental impact assessment. Only after the verification is completed, can an authorized organ issue a permit for an investment project.²³ This permit is commonly issued in a form of investment certificate.

The burden of environmental assessment lies not only on the investors, but more generally on the government itself. New legislation promotes the idea of the strategic environment assessment.²⁴ The government must analyze existing or potential impacts on the environment. It must come up with offering specific measures to control and reduce adverse impacts on the environment. Those measures must be incorporated in governmental "development strategy, planning and proposal with the objective of ensuring the sustainable development."²⁵

In a socialist country, a greater share of investment comes not so much from foreign or domestic business, as from the state. In this respect, Article 5 of the new legislation requires from the government to "diversify investment funds for the environmental protection; reserve a specified amount of expenditures allocated from the government budget for the environmental protection, which equals to a gradual increase in the growth rate; perform the consistent management of funds for the environmental protection and prioritize

²² Law on Environmental Protection 2014. Article 23.

²³ Law on Environmental Protection 2014. Article 25.

²⁴ Law on Environmental Protection 2014. Article 13.

²⁵ Law on Environmental Protection 2014. Article 3.

the utilization of these funds for key industries in the environmental protection.” Article 6 obliges the government to invest in plants which produce devices and equipment used for the environmental protection.

For smaller investment projects which do not require environmental impact assessment procedure, the new law prescribes the formulation of environmental protection plan.²⁶ The investor must provide a competent environment protection organ with the information on technical details of the project, the use of materials and fuels, along with projected amount of waste and intended measures of its disposal and mitigation of the environmental impact of the project.²⁷

Getting approval for investment projects after conducting environmental impact assessment or presenting environmental protection plan is the most important requirement for initiating investment in Vietnam. After investment projects are launched, inspections must be conducted by the environment protection authorities.²⁸ Investors are also obliged to continue their investment in building environmental protection capacity of the project, and carry out environmental monitoring.²⁹

Even this brief survey of Vietnamese environmental law pertaining to investment activities shows a very advanced level of environmental legislation in Vietnam. The issue of protecting the environment from polluting investors is

²⁶ Law on Environmental Protection 2014. Article 29.

²⁷ Law on Environmental Protection 2014. Article 30.

²⁸ See for example Article 66 of Law on Environmental Protection 2014.

²⁹ See for example Article 67 of Law on Environmental Protection 2014.

taking seriously. One reason for rigorous environmental legislation lies in a case of Vedan Vietnam investing company, which received enormous publicity in the country lasting for several years.

Vedan Vietnam Case: the facts

Vedan Vietnam case is one of the most outstanding in the recent history of Vietnamese law. It involves a 100% owned Taiwanese company, "Vedan Vietnam."³⁰ This company produces glutamate, starch, and soda. It started its operation in Vietnam since 1993. It employed almost 2.000 people. The company attained ISO 9001:2000 certification, and it was proud of being awarded on several occasions by the Vietnamese government in recognition of the company's contribution to the economy, "for its outstanding achievement of product export and its contribution to the Vietnamese government's revenue," "for their important contribution to agriculture and rural development in Vietnam," and as "Distinguished Tax Payer." The company was "dedicated to the building of schools, reduce poverty and sponsor charitable events."³¹

This bright image of the company was seriously tarnished by the fact that in 2008, the personal of the company was caught at the very moment of illegal discharge of significant amount of untreated water in Thi Vai River in the

³⁰ Giang Phuong *Pollution : Vedan Vietnam sera punie* - 18/09/2008

<http://lecourrier.vnagency.com.vn/default.asp?xt=xt36&page=newsdetail&newsid=4565>

5 The website of the company is <http://vedan.com.vn/en/index.htm>

³¹ Information obtained at the official website of the company:

www.vedan.com.vn/en/ab_vedanvn.htm

south of Vietnam. The company had installed equipment which allowed it to discharge secretly untreated waste water into the river. It was discovered that this was done largely at night and in a regular manner. The Vietnamese environmental police conducted a special operation to catch the offender at the time of the illegal discharge. Scientists from National University of Ho Chi Min City concluded that 2.700 hectares of land along the river was severely damaged by the illegal discharges.

This case received high publicity in Vietnam. There was a mass condemnation of the company. Farmers, NGOs, politicians, a local catholic bishop, and even business partners such as BigC and Sai Gon Co.op denounced the company. The businesses refused to conduct commercial transactions until the due restitution is made. The Prime Minister Nguyen Tang Dung demanded the closure of the factory and severe punishment of the offenders according to criminal law.

However, no criminal charges were brought against the pollutor. "Vedan finally only had to pay VND200 million for its behavior of discharging untreated waste water to the environment and pay the arrears of VND120 billion in environment fee."³² Major General Nguyen Xuan Ly, Head of the Environment Crime Prevention Police Department, blamed legal loopholes in criminal code.³³

³² Thien Nhien, "Criminal law helpless in treating environment crimes", 03/02/2014 <http://english.vietnamnet.vn/fms/environment/93863/criminal-law-helpless-in-treating-environment-crimes.html>

³³ Ibid.

Thus, the issue of liability, and particularly criminal liability, of polluters becomes an important issue for the public. There is a general perception among experts in waste management, that generation of waste is widespread in the range of industries such as electrical mechanics, chemicals, metallurgy and food processing as in the present case, is very significant, particularly in the south.³⁴ It is very likely that environmental litigation against foreign investors will increasingly continue in Vietnam after this case.

Liability issues in Vedan Vietnam Case

In Vedan Vietnam case, the company was not brought before criminal justice³⁵ despite the calls of the Prime Minister to apply criminal measures. Anyone familiar with the social and cultural system in the South-Eastern Asia would have little doubt that rich businesses can exert tremendous influence on the process of justice by means of political or personal connections. Whatever is happening at the background of this case, it appears also that there are some serious institutional limitations on filing criminal procedures against polluters generally. Even though there are several provisions of criminal law

³⁴ Nguyen Thi Kim Thai, "Hazardous industrial waste management in Vietnam: current status and future direction" in: *J Mater Cycles Waste Manag* (2009), 11, 258-262.

³⁵ Thien Nhien, "Criminal law helpless in treating environment crimes", 03/02/2014 <http://english.vietnamnet.vn/fms/environment/93863/criminal-law-helpless-in-treating-environment-crimes.html>

which can be used against environmental polluters, their scope is rather limited. Section 183 of Penal Code states the following:

1. Those who discharge into water sources oil, grease, toxic chemicals, radioactive substances in excess of prescribed criteria, wastes, animal and plant residues, bacteria, micro bacteria, harmful and epidemical parasites or other harmful elements, have already been administratively sanctioned but deliberately refuse to apply remedial measures under decisions of the competent agencies, thus causing serious consequences, shall be subject to a fine of between ten million dong and one hundred million dong, non-custodial reform for up to three years or a prison term of between six months and three years.

2. Committing the crime and causing very serious consequences, the offenders shall be sentenced to between two years and seven years of imprisonment.

3. Committing the crime and causing particularly serious consequences, the offenders shall be sentenced to between five years and ten years of imprisonment.

4. The offenders may also be subject to a fine of between five million dong and fifty million dong, a ban from holding certain posts, practicing certain occupations or doing certain jobs for one to five years.³⁶

³⁶ English translation of the Code is available on line: <http://www.worldlii.org/vn/>

The text of Section 183 quoted above suggests that criminal sanction can be applied to polluters only in cases where there was a failure to comply with specific administrative decisions. If such interpretation is correct, then the applicability of criminal law to environmental offences would be very restricted. In order to apply criminal law, the offender must first of all be already administratively sanctioned, and secondly, deliberately refuse to apply remedial measures under decisions of the competent agencies.

It is difficult to imagine that any effective prosecution of environmental polluters is possible under such construction of the law. However, one report, without specifying the dates, says that criminal penalties had been applied to hundreds of companies, and more than 2.000 companies had to pay compensation.³⁷ Another report stated³⁸ that in the period of 2000 – 2005, 26.540 all environmental offences including criminal offences have been discovered by the police. Out of them, 25.314 cases were dealt with administrative fines. The total size of the fines reached 49.644 billion Vietnamese dong. However, Major General Nguyen Xuan Ly, Head of the Environment Crime Prevention Police Department, complained that in some 5,000-6,000 cases of environment law violations discovered by Environment Crime Prevention Police Department every year, only in some 100 cases were polluters prosecuted. “Ly said the legal loopholes were the main reason which

³⁷ Giang Phuong. *Pollution : Vedan Vietnam sera punie* - 18/09/2008

<http://lecourrier.vnagency.com.vn/default.asp?xt=xt36&page=newsdetail&newsid=45655>

³⁸ *Rapport de la Cour populaire suprême du Vietnam sur le droit pénal de l'environnement* 2008. – Available on line: <http://www.ahjucaf.org/spip.php?article6787>

made it impossible to punish the violators in accordance with the criminal law. Since the concepts of “serious,” “very serious,” or “causing serious consequences” have not been clarified in legal documents, thus making executors confused.”³⁹

The second report indicates that it is easier to impose administrative sanction on polluters rather than to use criminal law proceedings. Much of the administrative legislation is contained not in statutes but in governmental decrees. The most important one is Decree N0 81/2006/ND-CP which was issued on the 9th of August, 2006.⁴⁰ This decree contains important provisions defining environmental offences as well as specifying the powers of administrative organs to impose various sanctions on offenders. There are also other decrees covering administrative liability for environmental offences in specific areas such as forestry, aquatic resources, etc. In *Vedan Vietnam* case, the administrative mechanisms have been actively used. There have been various reports on the amount of administrative fines imposed on the company. One report stated that the company paid a fine of 267 million dong (\$16,000).

³⁹ Thien Nhien, “Criminal law helpless in treating environment crimes”, 03/02/2014 <http://english.vietnamnet.vn/fms/environment/93863/criminal-law-helpless-in-treating-environment-crimes.html>

⁴⁰ *Rapport de la Cour populaire suprême du Vietnam sur le droit pénal de l'environnement* 2008. – Available on line: <http://www.ahjucaf.org/spip.php?article6787> (Accessed on 21.10.2010)

The English translation of the decree can be found at: <http://vea.gov.vn/en/laws/LegalDocument/Pages/DecreeNo812006ND-CP.aspx>

And there was additional environmental fee of 127 billion dong to be paid by installment in the following year.⁴¹ In addition, it was reported that the company was told to compensate the farmers affected by the illegal discharges in civil law proceedings.

Thus, even though criminal charges have not been so far brought against the company, *Vedan Vietnam* faces huge amount of civil law damages and administrative fines. In 2009, approximately 6 thousands of farmers filed law suits against the company.⁴² These cases, however, are something different from private law suits. The governmental agencies, particularly the Ministry of natural Resources and Environment, were actively lobbying the interests of the farmers. The company gave promises to the government to negotiate compensations with the representatives of the farmers. In August, 2010, it was reported that the company agreed to pay indemnities amounting all together to more than 200 billion of VND (more than 10 million USD).⁴³

⁴¹ Van Nguyen "Vedan's Vietnam Unit Aids River Cleanup, May Operate (Update1)" in *"Bloomberg Businessweek"* - November 6, 2008 – Available on line: <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ayZBA.Q9y0dg>

⁴² My Anh *Pollueuse, Vedan Vietnam va enfin payer* – News Report. 13/03/2009 at: <http://lecourrier.vnagency.com.vn/default.asp?page=newsdetail&newsid=50497>

⁴³ Vedan Vietnam accepte d'indemniser les paysans - News Report. 11/08/2010 at: <http://fr.vietnamplus.vn/Home/Pollution-Vedan-Vietnam-accepte-dindemniser-les-paysans/20108/10205.vnplus>

In other words, one can observe a certain fusion of civil and administrative legal mechanisms in pollution cases. Administrative laws require that the offenders must pay damages. In case of failure, criminal sanctions can be added. The peculiarity of *Vedan Vietnam* case is that if the company refuses to settle down civil disputes with the farmers under the directions of administrative organs, the criminal sanctions will apply.

From the point of view of foreign investment regulation, liability in cases of environmental pollution caused by foreign company cannot be different from the pollution caused by domestic business. This national treatment regime is the cornerstone of the WTO rules.⁴⁴ The complexity of the negotiations to join the WTO was largely caused by the fact that Vietnam has a great number of state owned enterprises, whose status remains different from private companies. Therefore, Vietnam was obliged to provide additional guarantees for non-discriminatory treatment of both foreign and domestic private investors. That has been reflected in the major law on investment which was passed in 2005.⁴⁵

Thus, imposing a heavier sanction on a foreign business for polluting the environment than on a domestic business in a similar case would go against Vietnamese law. This law, however, can be used very flexibly to

⁴⁴ Verhoosel G. *National Treatment and WTO Dispute Settlement: Adjudicating the Boundaries of Regulatory Autonomy* - Hart, 2002.

⁴⁵ Trochu M., Do Thi Thu. "Foreign-Investment Policies in Vietnam: the Example of the Underground in Hanoi." In: *International Business Law Journal* 2009, 3, 293.

channel both foreign and domestic investments in the environmentally friendly way. Ensuring that foreign investments go along with the idea of sustainable development has become the predominant model for a foreign investment law around the globe.⁴⁶ In this aspect, the Vietnamese legislation contains a developed model of pro-environmental foreign investment regulation.

Environmental issues in Vietnamese Investment Law

In the context of *Vedan Vietnam* case, it is appropriate to ask the question: apart from general legal sanctions in case of environmental pollution, are there any additional mechanisms which could prevent investors from polluting Vietnamese environment? As in other developing countries, the investment policy of the Vietnamese government is largely motivated by economic and national interests, facing competition from China. At first, the interests of the environment and social justice were not sufficiently reflected in Vietnamese policies. The situation, however, began to change.

The changes began before the pollution caused by *Vedan Vietnam* was uncovered. In 2005, Vietnam enacted new Environmental Protection Law

⁴⁶ Gallagher K., et al. *Rethinking Foreign Investment for Sustainable Development: Lessons from Latin America* - Anthem Press, 2009. Puvimanasinghe Sh. F. *Foreign Investment, Human Rights and the Environment: a Perspective from South Asia on the Role of Public International Law for Development* - Martinus Nijhoff Publishers, 2007. Stalley Ph. *Foreign Firms, Investment, and Environmental Regulation in the People's Republic of China* - Stanford University Press, 2010.

which imposes a better control mechanism on investment activities.⁴⁷ The investment law refers directly to the duty of the investors to “implement the provisions of law on protection of the environment.”⁴⁸ Reducing environmental pollution is also mentioned in Article 24 of Investment Law as a distinct legitimate form of investment besides establishing economic organizations or investments in accordance with such contracts as BCC (business cooperation contract without the right of economic establishment).⁴⁹

The increased sensitivity of Vietnamese government towards environmental issues can be seen in the policy of “prioritization of investment projects” which is done by means of investment incentives and support.⁵⁰ It is carried out largely through taxation incentives: reduction or even complete immunity in some cases. The fields of investment are divided in sectors in which the investments are particularly encouraged, (incentive investment sector: List A), sectors with less promotion (List B), and finally, sectors where there are additional conditions for investment such as telecommunications, and sectors, where foreign investments are forbidden, such as national defence.⁵¹

⁴⁷ English translation of the statute is available on line:

<http://www.vr.org.vn/VRE/images/vanban/VEPC.pdf>

⁴⁸ Investment Law, 2006. Article 20

⁴⁹ Investment Law, 2006. Articles 21–24

⁵⁰ Investment Law, 2006. Article 27

⁵¹ Trochu M., Do Thi Thu. “Foreign-Investment Policies in Vietnam: the

Example of the Underground in Hanoi.” In: *International Business Law Journal* 2009, 3, 293–295.

The last sector has been gradually decreasing as Vietnam made its accession to the WTO.⁵²

One of the complexities of Vietnamese investment law is that ecological environment is mentioned in several sectors. “Protection of ecological environment” is included in incentive investment sector.⁵³ “Ecological environment” (without the word “protection”) is included in the sector with additional conditions.⁵⁴ Finally, the projects which destroy natural resources and the environment are included in the sector in which the investments are prohibited.⁵⁵ There is a certain ambiguity of Vietnamese legislation terms concerning the way how the authorities should classify the project within a particular sector. It is apparent that the officials who issue investment permits must evaluate the investment projects with the purpose of correct identification of the degree of their prioritization. The process of issuing such permits, however, indicate that the investor himself, in order to initiate the process, must determine whether, for example, his project falls within the sector with attached conditions or not. If not, then his project can be classified as List

⁵² Vu Xuan Nguyet Hong et al. *Sustainable Development Impacts of Investment Incentives: A Case Study of the Mining Industry in Vietnam* - International Institute for Sustainable Development, 2009. – P. 7. Available on line: http://www.tradeknowledgenetwork.net/pdf/sd_incentives_vietnam.pdf (Accessed on 21.10.2010)

⁵³ Investment Law, 2006. Article 27

⁵⁴ Investment Law, 2006. Article 29

⁵⁵ Investment Law, 2006. Article 30

B, or even List A. The term: ecological environment is not defined in this piece of Vietnamese legislation. Prioritization is also based on the geographical areas. Investments in the areas with difficult socio-economic conditions are additionally stimulated. The Investment Law, however, in describing preferential geographical areas, does not refer to ecological environment.⁵⁶

Originally, the Vietnamese government facilitated investment projects in the areas such as new technologies, industrial sectors manufacturing products for export, sectors generating employment. They particularly included projects such as oil and gas exploitation, electronics, chemicals, mechanics, software technologies.⁵⁷ Lately, there is an increasing trend in the governmental policies to channel investment projects into the pro-environmental programmes⁵⁸ and to encourage environmentally-friendly products.⁵⁹ The encouragement consists of the variety of the governmental measures: tax incentives, capital funding, and provision of land for construction of manufacturing premises.⁶⁰

⁵⁶ Investment Law, 2006. Article 28

⁵⁷ Trochu M., Do Thi Thu. "Foreign-Investment Policies in Vietnam: the Example of the Underground in Hanoi." In: *International Business Law Journal* 2009, 3, 293–297.

⁵⁸ Law on Protection of the Environment, 2005. Article 5

⁵⁹ Law on Protection of the Environment, 2005. Article 6

⁶⁰ Law on Protection of the Environment, 2005. Article 33

Taxation

The case of *Vedan Vietnam* raises serious doubts on the efficiency of taxation mechanisms in Vietnam to prevent environmental pollution. From the information provided by the company, prior to the pollution scandal, *Vedan Vietnam* was praised by the Vietnamese government as a “Distinguished Tax Payer.”⁶¹ It paid billions of dong to charities, but it seems to be very unwilling to spend on environmental protection measures. One of the reasons could lie in the way Vietnamese taxation was structured.

All foreign investors have to pay corporate income tax, value added tax, special sales tax, import and export duties and personal income tax. The whole system of taxation is set up to make investments into Vietnamese economy attractive. For example, corporate tax was set at the level of 28 percent, and it was planned to reduce it further.⁶² Agreements are concluded with some countries (such as France in 1993) to avoid double taxation. In addition, some foreign investors are subject to environmental tax and environmental protection fees.

An old Law on Protection of the Environment first mentioned the environmental tax and environmental protection fees when dealing with utilization of natural resources.⁶³ Article 112 of the old Law on Protection of the

⁶¹ www.vedan.com.vn/en/ab_vedanvn.htm (Accessed on 21.10.2010)

⁶² Trochu M., Do Thi Thu. “Foreign-Investment Policies in Vietnam: the Example of the Underground in Hanoi.” In: *International Business Law Journal* 2009, 3, 293–296.

⁶³ Law on Protection of the Environment, 2005. Article 28, 35.

Environment stipulated that all “organizations, individuals and households producing and trading in a number of types of products which exert a long-term adverse impact on the environment and human health shall be liable to pay environment tax.” New legislation does not mention environmental tax, although it specifies in details the practice of imposing environmental protection fee.⁶⁴

However, in 2010, a separate legislation was passed on introduction of environmental tax.⁶⁵ Environmental tax is different from environmental fees. The tax is applied against a range of products, while the fee is imposed for a specific type of activity: discharging waste into the environment or engaging in “activities causing adverse impact on the environment.”⁶⁶ The amount of environmental fees can be as big as hundreds of billion dong as in the case of *Vedan Vietnam*.⁶⁷

At the same time, foreign investors with environmentally friendly projects can receive substantial reductions in traditional taxes. For example,

⁶⁴ Law on Protection of the Environment, 2014. Article 35, 82, 148-149.

⁶⁵ For general information see: Sina Johannes, Axel Olearius, “Environmental Taxation in Viet Nam” 2011, *Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH*, <https://www.giz.de/fachexpertise/downloads/giz2011-en-factsheet-efr-vietnam.pdf> Implication of Nguyen Anh Minh “Vietnam’s environmental tax law in the green economy transition

Process” January, 2015, *Green Growth Knowledge Platform (GGKP)*

http://www.greengrowthknowledge.org/sites/default/files/NguyenAnh_Implication_of_Vietnam's_environmental_tax_law_in_the_green_economy_transition.pdf

⁶⁶ Law on Protection of the Environment, 2014. Article 148

⁶⁷ Van Nguyen “Vedan’s Vietnam Unit Aids River Cleanup, May Operate (Update1)” in “*Bloomberg Businessweek*” - November 6, 2008 – Available on line: <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ayZBA.Q9y0dg> (Accessed on 21.10.2010)

Article 32 of Investment Law stipulates that any investment project aiming at reduction of pollution is eligible for tax incentives. It is true, however, that tax reductions are applied not only to “green” investment projects. According to investment law, “machines and equipment integrated into a technological unit which cannot yet be manufactured within the country and which constitute the capital assets of the company or which contribute directly to the scientific and technological research are not liable to pay the VAT in Vietnam.”⁶⁸ Some imported goods are not taxed, particularly if they “serve as the fixed elements of the investment projects.”⁶⁹ It is likely, that with the development of Vietnamese economy the share of tax incentives for “non-green” investment projects will decrease, while the share for “green” investment projects correspondingly increase.

Thus, Vietnamese law offers a developed tax mechanism by means of which a polluting investor has to pay more tax, while an environmentally friendly investment project can receive substantial financial benefits.

In this context, one can pose the question whether *Vedan Vietnam* could benefit from tax incentives by investing in environmental protection technology. One problem is that the system of illegal discharge of the company

⁶⁸ Trochu M., Do Thi Thu. “Foreign-Investment Policies in Vietnam: the Example of the Underground in Hanoi.” In: *International Business Law Journal* 2009, 3, 293–296.

⁶⁹ Trochu M., Do Thi Thu. “Foreign-Investment Policies in Vietnam: the Example of the Underground in Hanoi.” In: *International Business Law Journal* 2009, 3, 293–296.

was set up long before the new law was enacted. Secondly, the discharge of polluted waters was already illegal and therefore it would be quite problematic to apply for a tax incentive to stop the illegal activity. Thus, the weakness of offering tax incentives is that they are largely proactive and do not sufficiently cover the technologies and industrial processes which are already in use. The decision of granting governmental incentives for a pro-environmental investment project is taking place largely at the initial stage of the investment project. That tends to occur at the time of issuing investment certificates.

Obtaining investment certificate and environmental impact assessment

According to new Vietnamese law, foreign investors are required to obtain investment certificates if the investment capital exceeds 15 billion Vietnamese dong,⁷⁰ or if the sectors for investment are subject to conditions.⁷¹ In addition to the certificate, there are other permits to be obtained: work permit for a foreigner, various licences depending on the type of business: such as licence for a foreign law firm, etc. Vietnamese government significantly simplified the procedure of obtaining the investment certificates by applying “one-stop” mechanism.⁷² The certificates are issued by Departments of

⁷⁰ Roughly equivalent to 0, 77 million US dollars.

⁷¹ Investment Law, 2006. Article 45(1)

⁷² Trochu M., Do Thi Thu. “Foreign-Investment Policies in Vietnam: the Example of the Underground in Hanoi.” In: *International Business Law Journal* 2009, 3, 293–298.

planning and Investment at local government committees, except banking and insurance sectors.⁷³

The Investment Law stipulates that where the investment registration is required, undertakings on environmental protection must comprise the content of such registration.⁷⁴ The Investment Law does not provide any further details. However, from the Law on Protection of the Environment, it may follow that the investors must go through the mechanism of “environmental impact assessment” described briefly above. The Investment Law statute itself does not refer to EIA directly. However, in the investments below 300 billion Vietnamese dong,⁷⁵ the investor is required to submit documents concerning undertakings on environmental protection.⁷⁶ Gaining approval for this type of projects is rather unproblematic. If the project involves a more expensive investment or investment with conditions, then the investor must offer “environmental solutions.”⁷⁷ The language difference may indicate that the amount of information and the proposed measures to protect the environment are expected to be higher for the second category of investment projects.

As a principle, the process of obtaining an investment certificate depends much on the financial amount of the investment. If it is above 300

⁷³ Odell A., Castillo M. “Vietnam in a Nutshell: An Historical, Political and Commercial Overview” in: *International Law Practicum* Autumn, 2008, 82–88

⁷⁴ Investment Law, 2006. Article 45

⁷⁵ Slightly more than 15 million US dollars.

⁷⁶ Investment Law, 2006. Article 46

⁷⁷ Investment Law, 2006. Article 48

billion Vietnamese dong, a more complex procedure is required.⁷⁸ The projects with less than 300 billion Vietnamese dong, providing that there are no additional conditions for investment, are dealt with by a local authority on the provincial level within 15 days. The more expensive projects, or the projects with the attached conditions, are processed by a designated administrative agency within 30 days.⁷⁹ It is obvious that such speed is determined by the desire to facilitate investments often at the expense of careful examination of their environmental consequences. Even though there are reports that some local governments refused to grant their approval to foreign investment projects after considering their impact on the environment,⁸⁰ it is more likely that the financial flows from the investment projects will be treated with a greater favor than unprofitable nature conservation projects.

To conclude, the effectiveness of law in protecting the environment from polluting investment projects will largely depend on the abilities and discretion of the authorities which are empowered to grant investment permits. The easiness of obtaining such permits for small projects may potentially create a situation where a huge amount of small processing factories with minimum of expenses for pollution eliminating technology cause substantial cumulative

⁷⁸ Investment Law, 2006. Article 47

⁷⁹ Investment Law, 2006. Article 47

⁸⁰ Vu Xuan Nguyet Hong et al. *Sustainable Development Impacts of*

Investment Incentives: A Case Study of the Mining Industry in Vietnam - International

Institute for Sustainable Development, 2009, 7. Available on line:

http://www.tradeknowledgenetwork.net/pdf/sd_incentives_vietnam.pdf

harm to the environment. As for the big investment projects such as *Vedan Vietnam*, a longer process of granting permit (30 days) will unlikely be sufficient to identify all possible environmental risks from the use of very complex industrial processes and technologies.

In the case of *Vedan Vietnam*, it is not clear whether any EIA procedure was complied with at the time of granting the investment certificate. The present regulations have been passed after *Vedan Vietnam* began its operation. In this respect, Vietnamese law contains a weakness that it does not have the comprehensive rule of continuous environmental assessment for the exception of few areas.⁸¹ Its lack can partly be addressed by the land use regulations and by the practice of inspections which provide additional mechanisms of pollution control.

Compliance with Land Law regulations

Foreign investors need land in order to carry out investment projects. Vietnamese land law gives the State almost an unlimited power to control the land use for the purpose of environmental protection. Land law in Vietnam remains socialist in its nature.⁸² Private ownership of land is excluded. However,

⁸¹ 2014 Law on Protection of Environment, however, has some provisions which reflect the idea of continuous environmental impact assessment. For example: continuous wastewater monitoring mentioned in Article 66.

⁸² English translation of Land Law is available on line:
<http://www.dpi.hochiminhcity.gov.vn/invest/html/Laws-Policies/LawonLand.pdf>
(Accessed on 21.10.2010)

the State can grant so called “land use rights” (LUR Certificates). “There are four different types of LUR Certificates: (i) allocation of land use with payment of a fee; (ii) allocation of land use without payment of a fee; (iii) lease with an annual payment; and (iv) lease with one payment for the entire term.”⁸³

According to Article 9 of Land Law (2003), foreign investors are listed among those whom the rights to use land can be granted. In practice, it is done through a lease of land.⁸⁴ People’s committees of provinces have the authority to negotiate lease agreements with foreign investors.⁸⁵ The Land Law contains many provisions which deal specifically with the uses of land by foreign organizations. Section 4 of Chapter 4 of the Land Law describes the rights and obligations of foreigners in using land. The provisions, however, have very little direct relevance to the environmental protection. They mostly concerned with the rights of foreign leaseholders to grant a mortgage on the assets located on the land and on the value of use of such land as a guarantee to the borrowing of capital,⁸⁶ or the rights to assign, donate or sub-lease the LUR. The lease contract is normally limited to 50 years with the right of extension, but in some exceptions, the government can grant a 70 years lease.⁸⁷ However, there are general provisions according to which the lease may be rescinded. Some of

⁸³ Odell A., Castillo M. “Vietnam in a Nutshell: An Historical, Political and Commercial Overview” in: *International Law Practicum* Autumn, 2008, 82, 88

⁸⁴ Land Law 2003. Article 35

⁸⁵ Land Law 2003. Article 37

⁸⁶ Land Law 2003. Article 119

⁸⁷ Land Law 2003. Article 67

them, for example, when the land is not used for the purpose, can be used for environmental protection.

Vietnamese law is very specific describing the types of the permitted uses of land depending on the lease categories and the type of economic activity. The Land Law allows foreign businesses to rent land for extracting mineral resources⁸⁸ as well as forest land for the purpose of forestry production.⁸⁹ The concept of forest production is rather broad and includes any kind of commercial benefit which can be obtained from forest resources. The government reserves the broad discretion to issues regulations to control any such use of forest land.⁹⁰ The law particularly mentions the use of forest for ecological tourism.⁹¹ The same applies to lakes, ponds, and marshes.⁹² The foreign investors are allowed to rent land containing rivers and other water streams.⁹³

Even though when regulating the use of land by foreign investors the Land Law (2003) does not impose additional requirements pertaining to the environment, it does maintain principles of environmental protection applicable to both foreign and domestic investors.⁹⁴ All uses of land must comply with

⁸⁸ Land Law 2003. Article 94

⁸⁹ Land Law 2003. Article 75

⁹⁰ Land Law 2003. Article 77

⁹¹ Land Law 2003 Article 75 (3).

⁹² Land Law 2003. Article 78

⁹³ Land Law 2003. Article 102

⁹⁴ Land Law 2003. Article 11 and Article 21

official regulations aiming at environmental protection.⁹⁵ It is repeated many times when dealing with specific uses of land, often by adding more specific requirements. Real estate development, which is considered as one of the most lucrative areas for foreign investors, is one example. The law imposes stricter environment protection requirements for an investment project in urban or residential development, such as ensuring the means of treating garbage, sewage drainage system, etc.⁹⁶ There are also requirements “to ensure hygienic environment” in modernization of rural areas.⁹⁷ Despite the greater burden of compliance with the land regulations, more than a half of foreign capital investment went into the area of real estate development.⁹⁸

Generally, land law empowers administrative agencies of the State to issue various regulations in relation to the use of land which potentially can restrict the dangers of pollution. As in the case of granting investment permits, much depends on the discretion and the will of the administrative officers to ensure that a particular use of land does not harm the environment. As the case of *Vedan Vietnam* indicates, the broad administrative discretion in itself remained powerless to prevent the massive pollution occurring during

⁹⁵ Land Law 2003. Article 107

⁹⁶ Land Law, 2003 Article 84, Law on Protection of the Environment, 2005.

Article 51

⁹⁷ Land Law 2003. Article 83

⁹⁸ Trochu M., Do Thi Thu. “Foreign-Investment Policies in Vietnam: the

Example of the Underground in Hanoi.” In: *International Business Law Journal* 2009, 3, 293–294.

extensive period of time. It will be likely even less effective in dealing with smaller polluters. In order to fulfill their task, the administrative officers must have sufficient knowledge and skills to assess potential environmental risks, and the good will to prevent them. This is exactly where all developing countries face significant difficulties. The problem lies often not only in the lack of expertise, but also in the level of corruption. Significantly, Vietnam is placed at the rank 116 among 178 countries at the Corruption Perception Index composed by the Transparency International in 2010. It indicates a comparatively high level of corruption among Vietnamese officials with the score of 2.7.⁹⁹ Even though this index has limitations in measuring the level of corruption in a particular country, it is still a better indicator of the problem than official criminological statistics. It is clear that the lack of education and corruption present a significant obstacle for enforcing land regulations to prevent the cases such as *Vedan Vietnam*. The same applies to environmental inspections.

Inspections

The governmental control on the use of land in order to protect the environment and the fiscal interests to collect environmental protection fees present in themselves the sufficient grounds for a close supervision of the business activities potentially harmful for the environment. One of the forms of

⁹⁹ Corruption Perception Index - Transparency International, 2010 – Available on line: http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results

such supervision is inspections.¹⁰⁰ Investment Law does not speak about the duty of investors to comply with environmental inspections, even though it maintains that the investors are responsible for protection of the environment.¹⁰¹

It is the Law on Protection of the Environment which imposes a general duty on businesses to comply with the regime of checks and inspection of environmental protection.¹⁰² The power to inspect is first of all granted to the local government: the people's committee of the locality.¹⁰³ The investor must provide the committee with all relevant technical information such as types of wastes and treatment technology, parameters of standards on wastes and environmental protection solutions. One can doubt that local committees are qualified enough to assess properly such information.

The organ which conducted EIA has the responsibility to direct and organize inspection of the implementation of the items in the approved environmental impact assessment report. In the investment projects, where EIA was not conducted, but which involves implementation of an environmental protection undertaking, the local committees on the district or commune level has the authority to inspect its implementation.

Many organs are empowered to conduct them. In this respect, one can doubt whether the existence of so many organs will promote efficiency of environmental inspections. Such system can also create an unreasonable

¹⁰⁰ Law on Protection of the Environment, 2014. Article 11, 35

¹⁰¹ See as an example Article 58 of Investment Law, 2006.

¹⁰² Law on Protection of the Environment, 2014. Article 33

¹⁰³ Law on Protection of the Environment, 2014. Article 76

burden on investors to provide information to, and to deal with, every empowered organ of the State. The Ministry of Natural Resources and Environment should provide specific guidelines for inspection and supervision of dealing with manufacturing, business and services establishments causing pollution.

Even before new legislation, Vietnamese law had a very complex mechanism of environmental inspections set in place.¹⁰⁴ In the *Vedan Vietnam* case, the fact of massive pollution carried out during many years by a foreign investor was not uncovered by any official inspection. In the end, it was a police operation conducted at night which provided evidence of the non-compliance with environmental law. The case casts doubt on the efficiency of environmental inspections mechanism outlined above. It appears that Vietnam as any other developing country needs a single but efficient organ to prevent pollution. This organ must have sufficient power, expertise, and moral integrity.

Conclusion

This brief survey of Vietnamese investment law shows that general perception of the developing countries as neglecting environmental issues and offering “pollution haven”¹⁰⁵ cannot be unequivocally applied to Vietnam. Vietnamese law contains mechanisms which encourage “green” investment,

¹⁰⁴ Law on Protection of the Environment, 2005.

¹⁰⁵ *Unraveling the Worldwide Pollution Haven Effect* - World Bank

Publications, 2006. Siebert H. *Economics of the Environment: Theory and Policy* - Springer, 2008, 185.

and discourage polluting industries. The presented analysis of Vietnamese law also rejects the view suggested in some writings that “the legal system on environmental protection is lacking.”¹⁰⁶ Such view is largely brought about by the expectations that environmental law can provide clear technical standards and procedures to deal with pollution. Instead, the environmental law task is not so ambitious: it is about creating the mechanism of environmental control over polluting industries and the way environmental harm is addressed. In this respect, Vietnam has a developed environmental law which can be applied to foreign investors such as *Vedan Vietnam*.

However, those legal mechanisms may not work effectively. One research indicated that the financial incentives offered by the government to encourage environmental protection have not so far seriously affected investors' decisions at least in one economic area.¹⁰⁷ The problem is not only with the foreign investors. Vietnamese culture is lacking the important element of the rule of law which affects the enforcement of investment law. Historically, it was influenced by Confucianism with its emphasis of personal relationships based on seniority and gratitude. Vietnam used to be a French colony for almost a hundred years, but the French law, was not instilled in Vietnamese

¹⁰⁶ Nguyen Thi Kim Thai “Hazardous industrial waste management in Vietnam: current status and future direction” in: *J Mater Cycles Waste Manag* (2009) 11, 258-262.

¹⁰⁷ Vu Xuan Nguyet Hong et al. *Sustainable Development Impacts of Investment Incentives: A Case Study of the Mining Industry in Vietnam* - International Institute for Sustainable Development, 2009. Available on line: http://www.tradeknowledgenetwork.net/pdf/sd_incentives_vietnam.pdf

culture. It was used only among French people. The Vietnamese were governed by their own law.¹⁰⁸ After the French period, Vietnamese law was largely influenced by communist ideas, which emphasized the superiority of ideology over legal norms. The reform towards the rule of law began in 1992 with the revision of the constitution. It is apparent, that the short historical period of the advancement of the rule of law is not sufficient to bring about the legal environment where people are used to abide by legal norms.

In this context, the public reaction to *Vedan Vietnam* case is very significant, This case shows that Vietnamese society has realized the importance of protecting the environment, and that it is not prepared any more to tolerate extensive pollution as the cost of economic development. It creates the precedent for the future environmental litigation. It will likely lead to the reform of environmental criminal law in the nearest future, and what is more significant, it will motivate a better implementation of the new mechanism of environmental protection described above.

¹⁰⁸ Odell A., Castillo M. "Vietnam in a Nutshell: An Historical, Political and Commercial Overview" in: *International Law Practicum* Autumn, 2008, 82.