

TONY FOSTER

CORPORATE
ACQUISITIONS
AND MERGERS
IN VIETNAM

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Corporate Acquisitions and Mergers in Vietnam

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Tony Foster

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Corporate Acquisitions and Mergers in Vietnam

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“Tony Foster is the Managing Partner of Freshfields Bruckhaus Deringer’s Hanoi and Ho Chi Minh City offices. Tony established the firm’s Vietnam offices in 1994 and has lived and practiced in Hanoi ever since, giving him an unparalleled experience and knowledge of business in Vietnam. Tony is responsible for the work of the firm’s Vietnamese and foreign lawyers, whose legal and practical knowledge – combined with international quality standards – produces one of the best legal teams in the country. Tony and the team have acted for global companies on many of the most significant corporate, M&A and equitisation transactions in Vietnam. Tony was the first foreign lawyer to be awarded a medal by the Vietnamese Ministry of Justice, has been recognised for many years by numerous legal surveys as being at the top of the profession in Vietnam, and – in the most recent survey – is in his own separate “star” category above the other leading lawyers in the country.”

About the firm:

“Freshfields Bruckhaus Deringer LLP (*Freshfields*) has advised foreign investors in Vietnam since 1987. In 1994, Freshfields was one of the first international law firms to receive branch office licences from the Vietnamese Ministry of Justice to establish its Vietnam offices which are led by Tony Foster from Hanoi. Freshfields team comprises Vietnamese and foreign lawyers who combine local legal and practical knowledge with international quality standards. The senior foreign and Vietnamese members of the team have practiced law together well over a decade, and have successfully assisted foreign clients in many landmark M&A transactions in Vietnam. Freshfields was the first foreign law firm to be awarded a medal by the Vietnamese Minister of Justice for services to the development of Vietnam’s legal system, and has been consistently at the top of all legal surveys since such surveys began in 1997.”

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ECONOMIC, POLITICAL AND CULTURAL BACKGROUND

Overview of Vietnam's Economy

[01] Vietnam's economy has been developing rapidly since the end of the United States (US) embargo in 1994. Over the past twenty-two years, Vietnam has moved from a centrally planned economy to what is now called (at least within official circles in Vietnam) a 'socialist-oriented market economy'. Economic growth between 1991 and 2010 averaged 7.5% a year and, despite the difficulties the country faced between 2011 and 2014, growth was still 5.72% a year and that of 2015 reached 6.68%. The Vietnam Government targets annual economic expansion of between 6.5%-7.0% for the period of 2016-2020. Despite the general lack of lustre, exports recently increased by more than 12%, year-on-year, and the trade figures moved back into better balance.

[02] Since 2009, Government policies have alternated between promoting growth and emphasizing macroeconomic stability. In February 2011, the Government shifted from policies aimed at achieving a high rate of economic growth, which had caused inflation approaching 30%, to those aimed at stabilizing the economy, through tighter monetary and fiscal control. In early 2012, Vietnam unveiled a broad economic reform programme, proposing the restructuring of public investment, state-owned enterprises (SOEs), and the banking sector. Progress was difficult until 2015, when news of a free trade agreement (FTA) with the European Union and signature of the Trans-Pacific Partnership caused a sharp rebound in business confidence. The economy continues to face certain challenges from an undercapitalized banking sector and inefficient SOEs, but the government expects the revived real estate market to alleviate some of the non-performing loans in the banks and thereby to increase credit and economic growth. The country is now also struggling with its public debt, which is approaching the Government's limit of 65% of GDP. In response to this, the Vietnam Government continues to focus on efficiency of public investment, reforms of the state-owned sector and safety of the banking sector.

[03] Between 2008 and 2011, the Vietnamese Dong, which is a managed currency, was devalued around 20%. Its value remained relatively stable between 2011 and 2014. In 2015, the State Bank of Vietnam (SBV) devalued the nation's currency three times by 1% each and tripled the USD/VND trading band to 3%, in a bid to keep local exports competitive following the appreciation of the USD and the depreciation of the Chinese yuan. At the beginning of 2016, the SBV changed the methodology for rate setting. Instead of sporadic adjustments, it now calculates and announces a daily reference rate based on a weighted average of Dong prices in the interbank market the previous trading day.

[04] Vietnam has a population of around 92 million, which is still growing swiftly. Its labour force is one of the country's competitive advantages. Vietnam is known for its young, hard-working and literate labour force, with about 1.5 million people being added annually.

Economic Integration

[05] From an isolated country that was subject to an embargo led by the US until 1994, Vietnam has turned into a country whose economy is well integrated into that of the world.

[06] Vietnam’s first major step after the lifting of the embargo was to become a member of the Association of South East-Asian Nations (ASEAN), and the ASEAN Free Trade Area, in 1995.

[07] The second breakthrough was the ratification of the US-Vietnam Bilateral Trade Agreement in 2001. This agreement covered not only trade in goods, but also trade in services, intellectual property rights and other investment-related issues. It committed Vietnam to a number of trade-related reforms, while the US granted Most Favoured Nation status to Vietnamese imports.

[08] The full integration of Vietnam into the multilateral trade system occurred with its accession to the World Trade Organisation (WTO) on 11 January 2007. Vietnam is now a party to all the major WTO agreements, including the General Agreement on Trade in Services, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the Agreement on Trade-Related Investment Measures.

[09] On 5 May 2015, Vietnam entered into the Trans-Pacific Partnership Agreement (TPPA) with Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and the US. The agreement, if ratified, would deepen Vietnam’s participation in the global production network and promote opportunities for investment in Vietnam to bloom. The elimination and reduction of around 18 000 tariff lines for Vietnam’s export products under TPPA provides reasons for multinational corporations to move into the country, especially in industries in which Vietnam enjoys comparative advantages such as textiles and agriculture. TPPA improves on Vietnam’s current commitments to the WTO in a number of important sectors such as energy, mining, telecommunication and distribution. The TPPA also encourages the SOE reform process. Certain sectors that have traditionally been monopolized by SOEs, such as coal, electricity or petrol, are now opening to competition. Foreign ownership room in equities SOEs has been expanded.

[10] In general, the country is aggressively pursuing other multilateral and bilateral FTAs with various partners. The following table summarizes the recent ones:

<i>FTAs</i>	<i>Status</i>
ASEAN Free Trade Agreement (AFTA)	Effective
ASEAN – China Free Trade Agreement (ACFTA)	Effective
ASEAN – Korea Free Trade Agreement (AKFTA)	Effective
ASEAN – Japan Comprehensive Economic Partnership (AJCEP)	Effective
ASEAN – Australia – New Zealand Free Trade Agreement (AANZFTA)	Effective
ASEAN India Free Trade Agreement (AIFTA)	Effective
Vietnam – Japan Economic Partnership Agreement	Effective
Vietnam – Chile Free Trade Agreement	Effective
Vietnam – Laos Trade Agreement	Signed on 3 March 2015, pending ratification
Vietnam – Korea Free Trade Agreement	Signed on 5 May 2015, pending ratification
Vietnam – Eurasian Economic Union FTA	Signed on 29 May 2015, pending ratification
Vietnam – EU FTA	Signed on 2 December 2015, pending ratification
TPPA	Signed on 4 February 2016, pending ratification
Regional Comprehensive Economic Partnership	Negotiating

Vietnam's Infrastructure: General

[11] Vietnam has made substantial investments to develop its infrastructure. Investment in electricity, water supply, waste treatment, transport and communications in Vietnam amounted to about 12% of GDP from 2006 to 2010, a high percentage by comparison with other regional countries. Since the tightening of monetary and fiscal policies that supported this investment, infrastructure investment has been reduced to around 10% of GDP.

[12] Despite this high level of investment, the quality of Vietnam's infrastructure is still regularly rated by businesses and chambers of commerce in Vietnam as poor and as a constraint on the growth of their businesses.

[13] Officials estimate that in the next ten years Vietnam will need about USD500 bn for its infrastructure development. Meanwhile, the state budget, official development assistance (ODA) funds, and other public financial sources can provide only about USD200 bn for these projects, which means a shortage of nearly USD300 bn. The Government is attempting to harness funds from the private sector and has established a public-private partnership regime to assist in this endeavour.¹

Language

[14] Vietnamese is the official language. In written form, Vietnamese uses the Roman alphabet and accent marks to show sounds and tones.

[15] English is the most popular foreign language and widely spoken, at least to a basic level, in some urban areas. English study is common. Often for historical reasons, it is not uncommon to meet officials speaking fluent French, Russian, German, Czech and other East European languages.

Government and Political System

[16] The Socialist Republic of Vietnam is a single-party socialist republic. The President of Vietnam is the head of the State, and the Prime Minister of Vietnam is the head of Government, in a one-party system led by the Communist Party of Vietnam. The country is politically stable.

[17] Assisting the Government in the management of the country are various line ministries. Each ministry is in charge of a specific sector:

¹ On 14 February 2015 the Vietnamese Government issued Decree 15 regulating investment in public-private partnerships. Decree 15 replaced the pilot PPP regulations in Decision 71 dated 9 November 2010 as well as the BOT regulations in Decree 108.

<i>Ministries</i>	<i>Sectors of responsibility</i>
Ministry of Planning and Investment	Investment strategies, master plans and plans, development investment, domestic and foreign investment, Vietnam's overseas investment, overseas development assistance, enterprise establishment and management, and statistics.
Ministry of Industry and Trade	Industry, electricity, oil and gas, chemicals, food and drink, commerce, distribution, protection of consumer interests and competition.
Ministry of Finance	State budget, tax, State assets and loans, State capital used in State enterprises, securities market, customs, accounting and auditing.
Ministry of Information and Communications	Press, publishing, posts, telecommunications, internet, broadcasting and television, information technology and electronics.
Ministry of Construction	Construction, architecture, development of urban areas, and real estate.
Ministry of Culture, Sports and Tourism	Culture, sports, advertising, art and tourism.
Ministry of Health	Health, medicine, drugs, cosmetics, and food safety.
Ministry of Agriculture and Rural Development	Agriculture, forestry, fisheries, rural development, animal breeds and medicine.
Ministry of Education and Training	Education and training.
Ministry of Labour, War Invalid and Social Affairs	Employment, salaries, social insurance, Vietnamese workers working overseas and foreigners working in Vietnam.
Ministry of National Defence	National defence.
Ministry of Police	Public security, management of entrance/exit visas and residence of population.

<i>Ministries</i>	<i>Sectors of responsibility</i>
Ministry of Home Affairs	Management of State workforce, NGOs, State administrative reform.
Ministry of Foreign Affairs	Foreign affairs, international relations, consular affairs, management of Vietnamese people outside of Vietnam.
Ministry of Justice	Development, implementation and review of laws.
Ministry of Transport	Roads, railways, waterways, maritime, air and transport infrastructure.
Ministry of Science and Technology	Science and technology, intellectual property, standards, quality control, atomic energy and nuclear safety.
Ministry of Natural Resources and Environment	Land, water and mineral resources, environment.
State Bank of Vietnam	Finance and banking, monetary and foreign exchange management.
Government Office	Assisting the Government in its management and operations.
Government Inspectorate	Inspection, settlement of civil complaints and denunciations, anti-corruption.

Legal System

[18] Conceptually, Vietnam is a civil law country. Court judgments are not officially considered a source of law, judges do not have the power to interpret the law and court judgments are not binding in subsequent cases.²

[19] The Law on Promulgation of Legal Instruments organizes law into a hierarchy. The higher-ranking legal instruments set out general rules; the lower-ranking legal instruments provide the details. The Constitution stands at the top of the hierarchy, which is as follows:

² From 1 January 2017, this will in theory change, at least in part, as under the new Civil Code 2015, court precedents and equity principles (Lẽ công bằng) can be used in respect of civil relations if there is no law or custom governing the same. Court precedents are those judgments that have been selected and announced by the Supreme Court for application by lower courts. Under the new Civil Procedure Code 2015, 'equity principles' are those that are based on rightful principles accepted by society, and consistent with principles of humanity and principles of impartiality and equality of rights and obligations of parties to a dispute.