



Vietnam Legal Update

October 2005

Hanoi Branch Office
Suite 401, Hanoi Tower
49 Hai Ba Trung
Hanoi
Vietnam
Tel +84 4 936 0990
Fax +84 4 936 0984
bill.magennis@phillipsfox.com

Ho Chi Minh City Branch Office
Suite 605, Saigon Tower
29 Le Duan Boulevard
District 1, Ho Chi Minh City
Vietnam
Tel +84 8 822 1717
Fax +84 8 822 1818
nigel.russell@phillipsfox.com

Melbourne Office
Level 21, 140 William Street
Melbourne
Australia
Tel +61 3 9274 5000
Fax +61 3 9274 5111
maureen.mclaughlin@phillipsfox.com

www.vietnamlaws.com
www.phillipsfox.com

Adelaide
Brisbane
Canberra
Melbourne
Perth
Sydney
Auckland
Wellington
Hanoi
Ho Chi Minh City

Part 1 Selected New Legal Instruments

1.1	Foreign exchange	2
1.2	Foreign securities holdings	3
1.3	Goods quality offences	4
1.4	Foreign employees	4
1.5	Tax self-declaration	5
1.6	Minimum wages	6

Part 2 Features

2.1	Competition offences	7
2.2	Investment Law update	18

Part 3 Did You Know?

3.1	National Assembly update	21
3.2	Franchising	22
3.3	Capital gains tax	23
3.4	Foreign currency transactions	23
3.5	Foreign invested enterprises - conversion options	24
>>>	Farewell to Louisa Gibbs, Hanoi Office	24

Part 4 What's New on Vietnam Laws Online Database?

	Vietnam Laws Online Database - see what's new	25
--	---	----

Visit www.vietnamlaws.com:

- >>> to subscribe to (or take a free tour of) Vietnam Laws Online Database - searchable database of 3,000 of our English translations of Vietnamese laws regulating investment and business
- >>> to access free translations of a selection of Vietnamese laws
- >>> to read Vietnam Legal Update from 2005 back to 1997 - complete with index of contents
- >>> to find out more about Phillips Fox's practice in Vietnam

This publication is copyright. Except as permitted under relevant laws, no part of this publication may be reproduced by any process, electronic or otherwise, without the specific written permission of the copyright owner. ©Phillips Fox, Vietnam Laws

The material contained in Vietnam Legal Update is intended to inform you of recent legal developments in Vietnam. It is not intended, and should not be relied upon, as legal advice. Should you wish further information in relation to any legal instrument or matter mentioned in this issue, please do not hesitate to contact one of our offices.

Part 1 Selected New Legal Instruments

1.1 Foreign exchange

Decree 131-2005-ND-CP of the Government dated 18 October 2005 on Amendment of and Addition to Decree 63-1998-ND-CP of the Government dated 17 August 1998 (as amended 17 January 2001) on Foreign Exchange Control

More than 4½ years since the last amendments of Decree 63, the Government has introduced another raft of amendments. But the raft is small - only a few provisions on current transactions have been liberalized. The amendments have been introduced as part of Vietnam's efforts to join the WTO, a requirement of which is that payments and remittances for current transactions must be able to be conducted freely.

Under Decree 131, the scope of payments and remittances for international current transactions has been expanded to include:

- Payments relating to export/import of goods/services, other current transactions, short term loans from banks and on credit;
- Payments for net income from direct and indirect investments, depreciation from direct investment capital (if applicable);
- Payments for interest and gradual repayments of principal from foreign loans;
- One way payments for consumption and other similar purposes.

Main amendments under Decree 131 are as follows:

- > Residents and non-residents are permitted to purchase, transfer or carry personally abroad foreign currency for the purposes of payment of lawful current transactions *without presentation of documentation of satisfaction of tax liabilities to the Vietnamese Government.*
- > Residents and non-residents being foreigners who have foreign currency are permitted to transfer it abroad upon demand. If they receive income in Vietnamese dong, they are permitted to purchase foreign currency from authorized banks to remit abroad.
- > Residents being Vietnamese citizens are permitted to purchase, transfer or carry personally abroad foreign currency for lawful purposes, such as tourism, study, medical treatment, subsidies for difficult situations, inheritance and permanent residency in accordance with regulations of the State Bank of Vietnam.

Decree 131 does not cap the amount of foreign currency permitted to be remitted abroad. However, according to Le Duc Thuy, the State Bank Governor, a maximum limit on foreign currency remittances will be stipulated in a new Ordinance on Foreign Exchange being drafted by the State Bank and will be about USD7,000. The new Ordinance will replace Decree 63 completely. The new Ordinance was added to the National Assembly's 2005 legislative program at the end of 2004 but was scheduled for preparation only - in mid-2005, it was re-scheduled for promulgation (also) in 2005. The new Ordinance was expected to be promulgated this month, but the introduction of the Decree 131 band-aid suggests that promulgation may be delayed.

Decree 131 does not liberalize the restrictions on foreign currency transactions within the territory of Vietnam. Transactions in foreign currency must still be conducted only through banking entities authorized to conduct foreign currency exchange - direct foreign currency transactions remain prohibited (see the recent case on this point in [Part 3.5](#) below).

Decree 131 will be effective as of 8 November 2005.

1.2 Foreign securities holdings

Circular 90-2005-TT-BTC of the Ministry of Finance dated 17 October 2005 Providing Guidelines for Implementation of Decision 238-2005-QD-TTg of the Prime Minister dated 29 September 2005 on Percentage of Participation of Foreign Parties in Securities Market of Vietnam

Effective as of 10 October, Decision 238 lifted the cap on foreign participation in the Vietnamese securities market to 49%. Circular 90 provides in detail for this significant reform.

Specifically, Decision 238 and Circular 90 provide for the following reforms:

- > Foreign investors may hold a maximum of 49% of the total shares of any one company listed at the Securities Trading Centre ("STC") of HCMC or registered for trading at the Hanoi STC. From mid-2003 until Decision 238, the cap was 30%. From mid-1999 until mid-2003, the cap was 20%.
- > Foreign investors may hold a maximum of 49% of the total investment fund certificates which have been listed or registered for trading of a securities investment fund. From mid-2003 until Decision 238, the cap was understood to be 30%, although it was not expressly stipulated in the relevant legislation. From mid-1999 until mid-2003, the cap was 20%.

Of particular note, Decision 238 clarified how the 49% cap applies in the case of a foreign invested enterprise that has converted into a foreign invested shareholding company ("FISC"). Under the FISC regime, foreign investors may hold up to 100% of the shares of a FISC. If a FISC lists at the HCMC STC or registers for trading at the Hanoi STC, Decision 238 provides for the 49% cap to apply only to the total shares offered to the public. So if the founding foreign investors of a FISC retain 90% of shares and offer 10% to the public, the 49% cap will apply only to the 10% - with the result that a maximum of 4.9% of the FISC's shares may be purchased by other (non-founding) foreign investors.

With respect to other securities investments, Decision 238 and Circular 90 maintain the status quo, as follows:

- > Foreign investors may hold an unlimited percentage of bonds issued by any issuing organization. The cap on foreign bond-holdings was abolished in mid-2003. From mid-1999 until mid-2003, the cap was 40%.
- > Foreign investors being foreign securities trading organizations may contribute or purchase shares up to a maximum of 49% of the charter capital of a joint venture securities company or securities investment fund management company. This cap was lifted to 49% in mid-2003. From mid-1999 until mid-2003, the cap was 30%.

Of interest, in our informal discussions with the State Securities Commission and the Ministry of Planning and Investment ("MPI"), we have discovered some disagreement as to whether foreigners may purchase shares in *any* listed Vietnamese company or *only* in listed Vietnamese companies operating in the limited range of sectors prescribed in the MPI's Decision 260 of May 2002. According to one authority, once a company has listed or registered for trading its shares, foreigners are free to purchase up to (now) 49% of those shares, irrespective of the sector in which the company is operating. According to the other authority, Decision 260 limits the range of non-listed *and* listed Vietnamese companies in which foreigners may purchase shares. Our view is that Decision 260 only limits share purchases in non-listed companies. This is supported by the recent purchase by foreigners of shares in a Vietnamese hydroelectric power enterprise traded at the Hanoi STC, as the power sector is not a prescribed sector in Decision 260. (For more on the Decision 260 list of sectors, see the May 2002 Issue of Vietnam Legal Update on www.vietnamlaws.com.)

Whilst the lifting of the cap on foreign securities holdings will pique foreign interest in Vietnam's securities market, fundamental reforms to improve transparency and logistical restrictions in trading and to clarify foreign shareholder management rights are needed to translate interest into investment. Watch this space for news of the lifting of the (still 30%) cap on foreign shareholdings in *non-listed* domestic Vietnamese companies.....

- >>> For English translations of legislation regulating foreign shareholdings in listed and non-listed Vietnamese companies, subscribe to Vietnam Laws Online Database on www.vietnamlaws.com.

1.3 Goods quality and measurement offences

Decree 126-2005-ND-CP of the Government dated 10 October 2005 on Penalties for Administrative Offences in Relation to Measurement and Quality of Goods

Replacing its 1997 predecessor, Decree 126 updates the penalties to be imposed on individuals and organizations when they intentionally or unintentionally commit an administrative offence relating to measurement and quality of goods, where the offence does not amount to a criminal offence. The limitation period for imposing penalties is 1 year from the offence (except in the case of the offence of trading in imports and exports on the list of goods for which a quality test is compulsory, where the limitation period is 2 years).

At a minimum, an offence must be penalized by way of warning or fine. Depending on the circumstances, additional penalties (such as withdrawal of business registration certificate) and a number of compulsory remedial measures may also be imposed.

The penalties prescribed in Decree 126 are higher than under previous legislation in order to deter the commission of offences and to encourage organizations and individuals to comply seriously with goods measurement and quality regulations. One example is the fine for the offence of producing measurement devices without approval of competent authorities which has increased from VND100,000 - 500,000 to VND5 - 7 million!

In addition, a number of new offences are prescribed, such as the offence of failure to apply initial quarantine regime for imported measurement devices before putting them into circulation and the offence of importing measurement devices without permission from State administrative authorities in charge of measurement.

>>> For a review of goods quality obligations under the 1999 Ordinance on Quality of Goods, see the June 2001 Issue of Vietnam Legal Update on www.vietnamlaws.com.

1.4 Foreign employees

Circular 24-2005-TT-BLĐTBXH of the Ministry of Labour, War Invalids and Social Affairs ("MoLISA") dated 26 September 2005 on Amendment of and Addition to a Number of Articles of Circular 04-2004-TT-BLĐTBXH of MoLISA dated 10 March 2004 Providing Guidelines for Implementation of a Number of Articles of Decree 105-2003-ND-CP of the Government dated 17 September 2003 Making Detailed Provisions for Implementation of a Number of Articles of the Labour Code With Respect to Recruitment and Management of Foreign Employees Working in Vietnam

In late 2003, Decree 105 imposed a cap on the number of foreign employees who may be employed by foreign invested enterprises ("FIEs") as well as domestic Vietnamese enterprises and State owned enterprises. No more than 3% of the total number of employees or a maximum of 50 employees, whichever is the lower, could be foreign employees (subject to the proviso that all such employers may employ 1 foreign employee). The cap on foreign employees was widely criticized by the foreign business community. In response, the impact of the cap was softened by the MoLISA in its implementing Circular 04. But nothing else was done, and the cap remained in place (in theory if not in practice).

Finally, in July 2005, Decree 105 was amended by Decree 93. Now, the MoLISA has issued Circular 24 in order to update the Circular 04 guidelines to reflect the reforms under Decree 93. Unfortunately, Decree 93 and Circular 04 have not abolished the 3% cap. However, they do provide for the following reforms:

- > The maximum of 50 foreign employees has been abolished. This is only good news for employers with a very large workforce (around 1,700 or more), who can now employ foreign employees up to the full 3% of total employees. For example, if an employer has a workforce of 2,000, under Decree 105, they could only employ a maximum of 50 foreign employees but under Decree 93 they will be able to employ up to 60 foreign employees (ie the full 3% of 2,000). For all other employers, this reform is of little comfort. An employer with a workforce of 30 can still only employ 1 foreign employee.
- > An enterprise may employ more than 3% of foreign employees (with no maximum limit) if approved in writing by the chairman of the provincial or municipal people's committee where the enterprise's head office is located. Such approval must be based on the "actual needs" of the applicant enterprise. It

appears that only enterprises which are in (undefined) special sectors with a small number of employees or in the early stages of investment with unstable production and which have a need to employ foreign employees in excess of the 3% cap may seek and be granted an exemption.

- > An enterprise may also employ more than 3% of foreign employees (without obtaining an approval from the chairman of the provincial or municipal people's committee) if a higher number of foreign employees is stipulated in the decision to approve the project/investment license of the enterprise (regardless of whether such decision/license has been issued before/after the issuance of Decree 105).
- > As previously, the 3% cap does not apply to employers being (amongst others): foreign contractors; representative offices and branches of foreign companies; representative offices of: economic, trade, financial, banking, insurance, scientific and technological, cultural, sporting, educational, and medical health organizations; offices of foreign or international projects in Vietnam; branches of foreign law firms.

Now also, the 3% cap does not apply to the operating office of the foreign party to a business co-operation contract and Vietnamese law firms (both of which are now permitted to employ foreign employees).

In the above cases where the 3% cap does not apply, the approval of the chairman of the people's committee is still required for the employment of foreigners.

The only significant reform with respect to work permits is a backward step:

- > A foreigner who is the general director or deputy general director of an enterprise (and who had been exempt under Decree 105/Circular 04) no longer enjoys exemption from the work permit requirement.

The MoLISA has confirmed in its Official Letter 2876 dated 5 September 2005 that (1) general directors and deputy general directors who have worked in Vietnam before the effective date of Decree 93 (ie 7 August 2005) must now obtain work permits, and (2) general directors and deputy general directors who are at the same time board members (or members of the members council of domestic limited liability companies) remain exempted from obtaining work permits.

Circular 24 became effective as of 23 October 2005.

- >>> For more details on Decree 105, Circular 04 and Decree 93, see the September 2003, March 2004 and July 2005 Issues respectively of Vietnam Legal Update on www.vietnamlaws.com.
- >>> For English translations of Vietnam's labour laws, subscribe to [Vietnam Laws Online Database](http://www.vietnamlaws.com) on www.vietnamlaws.com.

1.5 Tax self-declaration

Circular 82-2005-TT-BTC of the Ministry of Finance ("MoF") dated 21 September 2005 Providing Guidelines on Pilot Application of Self-declaration and Self-payment of Special Sales Tax by Production and Trading Entities under Decision 161-2005-QD-TTg of the Prime Minister dated 30 June 2005

and

Circular 83-2005-TT-BTC of the MoF dated 22 September 2005 Providing Guidelines on Pilot Application of Self-declaration and Self-payment of Royalty Tax by Production and Trading Entities under Decision 161-2005-QD-TTg of the Prime Minister dated 30 June 2005

On 1 January 2004 (when the last round of substantial tax reforms became effective), by Decision 197, the Prime Minister commenced a pilot test of reforms in declaration and payment of taxes, initially just for VAT and corporate income tax. In mid-2005, by Decision 161, the Prime Minister extended the pilot to cover SST, royalty tax, housing and land tax, personal income tax and business registration tax.

The stated objectives of the pilot test include: to increase the awareness of production and trading establishments of voluntary implementation of tax laws and for them to accept responsibility before the law for discharge of their tax obligations; to reform administrative procedures in the tax sector; to facilitate restructure

of the tax management apparatus so that it operates more intensively, tightly and effectively; and to gradually modernize the work of tax management. A central tenet of the self-declaration policy is that production and trading establishments will bear responsibility before the law for the truthfulness and accuracy of their tax declarations.

The MoF's guidelines provide in detail as follows:

> **Special sales tax ("SST")**

All production and trading establishments which declare and pay VAT by the tax credit method and implement the regimes on accounting, invoices and source documents in accordance with Vietnamese regulations are eligible to participate in the pilot test of self-declaration and self-payment of SST in the domestic production stage.

Pilot participants may use their current tax code issued by the tax office and are not required to register for another tax code.

SST declarations must be made monthly, using the form provided with Circular 82. The time-limit for SST declaration and payment is the 25th of the following month. Production and trading entities are not required to submit a list of goods and services sold. Declarations may be submitted at the post office or directly to the tax office.

After declaration, if taxpayers discover an error in the data declared, they may adjust their declaration. If they are still within the prescribed time-limit for declaration, they may prepare and submit a new declaration to replace the declaration already submitted. If beyond the prescribed time-limit for declaration, they must make adjustments in the declaration for the following month.

As for VAT under Decision 197, no annual tax finalization is required.

> **Royalty tax**

All production and trading establishments which declare and pay VAT by the tax credit method and implement the regimes on accounting, invoices and source documents in accordance with Vietnamese regulations are eligible to participate in the pilot test of self-declaration and self-payment of royalty tax.

Pilot participants may use their current tax code issued by the tax office and are not required to register for another tax code.

Declarations must be made monthly. The time-limit for declaration and payment is the 25th of the following month.

As for VAT under Decision 197, no annual tax finalization is required. However, pilot participants must prepare a self-finalization of royalty tax, using the form provided with Circular 83. This declaration must be submitted to the tax office to determine the actual royalty tax arising during the year. The deadline for submission of the self-finalization form is 60 days from the end of the calendar or other fiscal year.

1.6 **Minimum wage**

Decree 118-2005-ND-CP of the Government dated 15 September 2005 on Adjustment of General Minimum Wage Level

As of 1 October 2005, Decree 118 increases the minimum wage to VND350,000 per month (up from VND290,000, applicable as of 1 October 2004) for employees of State owned enterprises, enterprises operating under the 1999 Law on Enterprises, co-operatives, family households, and other individuals and organizations recruiting employees.

The minimum wages for Vietnamese employees of foreign invested enterprises remain unchanged (as they have since 1999).

>>> For our latest discussion of minimum wages for Vietnamese employees of foreign invested enterprises, see the July 2005 Issue of Vietnam Legal Update on www.vietnamlaws.com.

Part 2 Features

2.1 Competition offences

Effective as of 1 July 2005, Vietnam's new Law on Competition¹ governs two broad categories of practice:

- > Practices in restraint of competition:
 - [Agreements in restraint of competition](#) (such as price-fixing cartels);
 - [Abuse of dominant market position or monopoly position](#) (such as predatory pricing);
 - [Economic concentrations](#) (such as mergers and acquisitions);

and

- > [Unfair competitive practices](#) (such as misleading advertising).

Belatedly, Decree 120-2005-ND-CP of the Government dated 30 September 2005 on Dealing with Breaches in the Competition Sector now prescribes the penalties which apply to the various competition offences. In addition, Decree 120 provides some insight into the types of market behaviour which will be deemed to amount to agreements in restraint of competition and abuse of dominant market position prohibited under the Competition Law. Decree 120 became effective as of 25 October 2005.

Decree 120 follows closely on the heels of Decree 116-2005-ND-CP of the Government dated 15 September 2005 Providing Detailed Regulations for Implementation of a Number of Articles of the Law on Competition. Decree 116 is the principal legislation implementing the Competition Law and became effective as of 10 October 2005.

To date, the only infrastructure for implementation of the Competition Law is the Competition Administration Department under the Ministry of Trade. Implementing legislation to establish a Competition Commission (to consider exemption applications and to investigate competitive practices) and a permanent Competition Council (to deal with competition cases concerning practices in restraint of competition, after completion of investigations by the Competition Commission) has not yet been issued.

It is understood that this implementing legislation will be issued in the form of a Decision and is currently being finalized by the Ministry of Trade. It must be submitted to the Government for review by the Ministry of Justice and the Ministry of Interior, so it is not expected to be issued before mid-November 2005.

Who does Decree 120 apply to?

Decree 120 applies (more broadly than the Competition Law) to:

- > organizations and individuals conducting business (defined as 'enterprises' in the Competition Law);
- > industry associations in Vietnam (also subject to the Competition Law);
- > 'other organizations and individuals' committing [acts in breach of other provisions of the laws on competition](#), such as failure to supply information requested by competition authorities (such organizations and individuals' may not otherwise be subject to the Competition Law).

Decree 120 provides for administrative penalties to be imposed on the above entities when they intentionally or unintentionally commit a competition offence which does not amount to a criminal offence. Where there are indications of a criminal offence, the matter must be transferred to the criminal authorities for investigation and prosecution.

1 Law 27-2004-QH11 on Competition dated 3 December 2004.

How are penalties for competition offences determined?

Decree 120 enshrines a number of principles for determination of penalties for competition offences. A competition offence will be penalized once only. Where an enterprise commits multiple offences, it will be penalized for each offence.

Decree 120 provides for consideration of various matters when penalties are being determined, including: level of restraint on competition caused by the offence; amount of loss caused; duration of offending practice; profits gained from offence; any aggravating or extenuating circumstances (eg voluntary disclosure of offence before being discovered by the competent authority is an extenuating circumstance).

At a minimum, a competition offence will be penalized by way of warning or fine. Depending on the circumstances, additional penalties (such as withdrawal of business registration certificate) and compulsory remedial measures (such as corporate restructure) may also be imposed.

Compensation is payable where a competition offence causes loss to the interests of the State or to the lawful rights and interests of other organizations and individuals.

Which entities are subject to penalties for competition offences?

Penalties are imposed on each enterprise participating in an offence. The maximum penalties stipulated in Decree 120 may be imposed on each participant (ie the maximum does not cap the aggregate penalties imposed on all participants).

Officers and employees of an enterprise do not appear to be liable personally for breaches of the Competition Law by that enterprise. However, it appears that officers and employees may be:

- > subject to [administrative preventive measures](#) during investigations into the competitive conduct of an enterprise and during the hearing of an enterprise's competition case;
- > subject to criminal prosecution if any individual criminal conduct is identified during investigations into the competitive conduct of an enterprise;
- > subject to administrative penalty for any individual 'acts in breach of other provisions of the laws on competition', such as failure to supply information requested by competition authorities.

We are currently seeking confirmation of the personal liability of officers and employees for competition offences and will follow up on this important aspect as soon as possible.

Limitation period for competition offences

The limitation period for complaint about or commencement of an investigation into a competition offence is 2 years from the date of the offence. If an offender commits a new competition offence or deliberately evades or hinders the imposition of a penalty within the limitation period, the above limitation period will be re-calculated as from the date of the new offence or the date on which the evasion or hindrance ceases.

Penalties for practices in restraint of competition

Generally, a fine of up to 5% of the total turnover in the financial year preceding the year in which the offence is committed will be imposed on each party participating in the following prohibited practices in restraint of competition:

- [Agreements in restraint of competition](#);
- [Abuse of dominant market position or monopoly position](#);
- [Economic concentrations](#).

Of note, the maximum fine for first-level offences with respect to practices in restraint of competition was lowered from 7% (in the June 2005 draft of Decree 120) to 5% (in the final version of Decree 120). Similarly, for second-level offences, the band of fines has been widened from 7-10% (in the draft) to 5-10% (in the final Decree 120).

A higher fine of between 5-10% will be imposed in a number of prescribed circumstances, noted below. One or more additional penalties and remedial measures may also be imposed. A fine of up to 10% will be imposed for abuses of monopoly market position.

> *Agreements in restraint of competition*

Generally, agreements in restraint of competition are prohibited only where the participating parties have a combined market share of 30% or more of the relevant market. Where the parties' have less than 30% combined market share, such agreements are not prohibited even if the agreements have the effect of substantially restraining competition.

Exemptions are available if a prohibited agreement satisfies any of six very broad criteria (eg. increase in business efficiency) where the economic benefits to consumers outweigh the restriction on competition. Exemptions are decided by the Minister of Trade, upon recommendation by the Competition Commission. A prohibited agreement may be performed only after an exemption has been obtained and only for the duration prescribed in it.

In contrast, agreements in restraint of competition such as boycotts and tender collusion are *strictly* prohibited under the Competition Law. No exemptions are available.

Table 1:

Types of agreement subject to up to 5% fine:
<p><i>Price-fixing (direct or indirect) agreement:</i></p> <ul style="list-style-type: none"> > Agreement to apply a uniform price to a number of or all customers > Agreement to increase or reduce a price by a fixed amount > Agreement to adopt a common price-calculation formula > Agreement to maintain a fixed ratio for the prices of relevant products > Agreement not to discount > Agreement to use uniform discounted price > Agreement on credit limits for customers > Agreement not to reduce prices if other parties to the agreement have not been notified thereof > Agreement to use a uniform price level at the beginning of negotiations
<p><i>Agreement to divide markets or sources of supply of goods and services:</i></p> <ul style="list-style-type: none"> > Agreement on quantity or locations for purchase/sales of goods or services or on group of customers for each of the parties to agreement > Agreement that all parties to agreement will only purchase goods and services from one or a number of specified sources of supply
<p><i>Agreement to restrain or control quantity or volume of production, purchase or sale of goods or supply of services:</i></p> <ul style="list-style-type: none"> > Agreement to stop or reduce the quantity/volume of production, purchase or sale of goods/services in the relevant market as compared to previously > Agreement to fix the quantity/volume of production, purchase or sale of goods/services at a level sufficient to create a shortage in the market
<p><i>Agreement to restrain technical or technological development or restrain investment:</i></p> <ul style="list-style-type: none"> > Agreement to purchase an invention, utility solution or industrial design in order to destroy it or keep it from being used > Agreement not to provide additional capital for expansion of production, for improvement of quality of goods and services, or for other development and expansion
<p><i>Agreement to impose on other enterprises conditions for entering into contract for purchase/sale of goods or services or to force other enterprises to accept unrelated obligations:</i></p> <ul style="list-style-type: none"> > Agreement to impose on other enterprises conditions precedent prior to signing contract for purchase/sale of goods or services: <ul style="list-style-type: none"> - restrictions on production and distribution of other goods/purchase or supply of other services, which restrictions are not directly related to undertakings of a party accepting to act as an agent in accordance with the law on agency - restrictions on locations for re-sale of goods (except goods subject to conditions on or restricted from circulation) - restrictions on customers which may purchase goods for re-sale(except goods subject to conditions on or restricted from circulation) - restrictions on form and quantity of goods which may be supplied > Agreement to force other enterprises, when conducting purchase/sale of goods and services with any of the

enterprises participating in the agreement, to purchase other goods and services from previously appointed distributors or other persons or to discharge one or more obligations outside the essential scope of performance of the contract
<p><i>Agreement which prevents, impedes or does not allow other enterprises to participate in a market or to develop business (strictly prohibited):</i></p> <ul style="list-style-type: none"> > Agreement not to trade with enterprises not being parties to agreement > Agreement to act together in requiring, persuading or coercing one's customers not to conduct purchase/sale of goods/services of enterprises not being parties to agreement > Agreement to act together to conduct purchase/sale of goods/services at prices sufficient to ensure that enterprises not being parties to agreement will not be able to participate in the relevant market; > Agreement to act together in requiring, persuading or coercing one's distributors and retail sellers to discriminate when purchasing from and selling goods/services to enterprises not being parties to agreement by causing difficulty for such enterprises to sell their goods > Agreement to act together to conduct purchase/sale of goods/services at prices sufficient to ensure that enterprises not being parties to agreement will not be able to expand their business scale
<p><i>Agreement which excludes from a market other enterprises not being parties to the agreement (strictly prohibited):</i></p> <ul style="list-style-type: none"> > Agreement not to trade with enterprises not being parties to agreement and to act together in requiring, persuading or coercing one's customers not to conduct purchase/sale of goods/services of enterprises not being parties to agreement > Agreement not to trade with enterprises not being parties to agreement and to act together in purchasing/selling goods at prices which will force enterprises not being parties to agreement to withdraw from the relevant market
<p><i>Collusion to allow one or more parties to win a tender for supply of goods or services (strictly prohibited):</i></p> <ul style="list-style-type: none"> > Agreement for one or more parties to agreement to withdraw a tender or an application to participate in a tender in order for one or more other parties to agreement to win the tender > Agreement for one or more parties to agreement to cause difficulties to enterprises not being parties to agreement when the latter participate in a tender by refusing to supply raw materials/enter ancillary contracts or by causing other difficulties > Agreement for all parties to agreement to propose a uniform non-competitive price or a competitive price with conditions attached that the party calling for tenders will not be able to accept in order for one or more of the parties to win the tender > Agreement to set in advance the number of times each party to agreement may win a tender in a certain period of time
5-10% fine will apply:
<ul style="list-style-type: none"> > Where concerned goods and services are food, medical apparatus, drugs for human and animals, fertilizer, animal food, plant protection drugs, seeds or domestic animals, and medical and healthcare services > To an offender which has organized and/or induced others to participate in the offence
Additional penalties/remedial measures (optional and in addition to fines):
<ul style="list-style-type: none"> > Confiscation of all material evidence and facilities for commission of offence, including profits gained from offending practice > Compulsory preclusion of offending terms from contract or business transaction

For implementation of agreements in restraint of competition before an exemption decision is rendered (where entitled to exemption, ie not prohibited), a fine of VND30-50 million will be imposed on each party, subject to a cap on the maximum fine of 3% (see 'other breaches' below).

> *Abuse of dominant market position or monopoly position*

Market dominance itself is not prohibited. Nor are monopolies. It is *abuse* of that position that is unlawful. And such abuse is *strictly* prohibited. No exemptions are available.

An individual enterprise will be deemed to be in a dominant market position if it has a market share of 30% or more in the relevant market *or* is capable of substantially restraining competition. The following groups of enterprises will be deemed to be in a dominant market position if they act together in order to restrain competition and:

- Two enterprises with a market share of 50% or more in the relevant market;
- Three enterprises with a market share of 65% or more in the relevant market;
- Four enterprises with a market share of 75% or more in the relevant market.

Table 2:

Abuses of dominant market position subject to up to 5% fine:
<ul style="list-style-type: none"> > Selling goods or providing services below total prime cost of the goods aimed at excluding competitors (commonly known as predatory pricing) > Fixing an unreasonable selling/purchasing price or fixing a minimum reselling price for goods/services, thereby causing loss to customers (commonly known as price-rigging or minimum resale-price fixing) > Restraining production or distribution of goods and services, limiting the market, or impeding technical or technological development, thereby causing loss to customers: <ul style="list-style-type: none"> - ceasing or reducing the quantity of goods/services supplied on the relevant market as compared to previously in conditions where there are not large fluctuations in the supply and demand relationship, there is not any economic crisis, natural disaster or calamity, and there is no major technical breakdown or emergency situation - fixing the quantity of goods/services supplied at a level sufficient to create a shortage in the market - hoarding and not selling goods in order to create instability in the market - supplying goods/services in only one or some specific geographical areas - purchasing goods/services only from one or some specified sources of supply (unless other sources of supply fail to satisfy conditions set by purchaser, which conditions are both reasonable and consistent with normal commercial practice - purchasing invention, utility solution or industrial design in order to destroy it or keep it from being used; - threatening or compelling a person engaged in research on technical or technological development to stop or abandon such research > Discrimination between enterprises regarding conditions for purchase/sale, price, time for payment, or volumes of transactions of purchase/sale of goods/services similar in value and characteristics in order to place one or more enterprises in a better competitive position than other enterprises > Imposing on other enterprises conditions precedent prior to signing contract for purchase/sale of goods or services: <ul style="list-style-type: none"> - restrictions on production and distribution of other goods/purchase or supply of other services, which restrictions are not directly related to undertakings of a party accepting to act as an agent in accordance with the law on agency - restrictions on locations for re-sale of goods (except goods prohibited from or subject to conditions on circulation) - restrictions on customers which may purchase goods for re-sale(except goods prohibited from or subject to conditions on circulation) - restrictions on form and quantity of goods which may be supplied > Agreement to force other enterprises, when conducting purchase/sale of goods and services with any of the enterprises participating in the agreement, to purchase other goods and services from previously appointed distributors (commonly known as product tying or bundling) or other persons or to discharge one or more obligations outside the essential scope of performance of the contract

<ul style="list-style-type: none"> > Preventing market participation by new competitors by: <ul style="list-style-type: none"> - requiring one's customers not to trade with a new competitor; - threatening or coercing distributors and retail sales stores not to agree to distribution of the goods of a new competitor; - selling goods at prices which results in a new competitor not being able to access the market (other than cases of price-rigging or minimum resale-price fixing above)
<p>5-10% fine will apply:</p> <ul style="list-style-type: none"> > Where concerned goods and services are food, medical apparatus, drugs for human and animals, fertilizer, animal food, plant protection drugs, seeds or domestic animals, and medical and healthcare services > In the case of a single enterprise, if it has a market share of 50% or more in the relevant market > In the case of a group of enterprises: <ul style="list-style-type: none"> - to the enterprise having the biggest market share in the dominant group - to the enterprise which organized and/or induced others to participate in offence
<p>Additional penalties/remedial measures (optional and in addition to fines):</p> <p>In all cases:</p> <ul style="list-style-type: none"> > Confiscation of all material evidence and facilities for commission of offence, including profits gained from offending practice > Compulsory preclusion of offending terms from contract or business transaction > Compulsory restructure of a dominant enterprise <p>In case of restraining production or distribution of goods and services, limiting the market, or impeding technical or technological development, thereby causing loss to customers:</p> <ul style="list-style-type: none"> > Compulsory restoration of technical, technological development conditions that the enterprise impeded > Compulsory use or re-sale of invention, utility solution or industrial design which was purchased but not used > Compulsory removal of measures which prevent or impede other enterprises from participating in the market or from developing business

An enterprise will be deemed to be in a monopoly position in the relevant market if there are no other enterprises competing in the goods and services in which that enterprise conducts business (ie. it is a single seller).

Table 3:

Abuses of monopoly position subject to up to 10% fine	Additional penalties/remedial measures (optional)
<ul style="list-style-type: none"> > Abuses in Table 2 above > Imposing disadvantageous conditions on customers > Changing or cancelling unilaterally a signed contract without prior notice to the customer and without having to bear any sanction > Changing or cancelling unilaterally a signed contract based on one or more grounds not directly related to conditions essential for continued complete performance of the contract and without having to bear any sanction 	<ul style="list-style-type: none"> > Confiscation of all material evidence and facilities for commission of offence, including profits gained from offending practice > Compulsory preclusion of offending terms from contract or business transaction > Compulsory restoration of technical, technological development conditions that the enterprise impeded > Compulsory removal of disadvantageous conditions imposed on customers > Compulsory restoration of contract provisions which have been changed without legitimate reason > Compulsory restoration of contract which has been cancelled without legitimate reason

> *Economic concentrations*

Any merger, consolidation, acquisition, joint venture or other (undefined) form of economic concentration where the participating parties have a combined market share above 50% is prohibited under the Competition Law, unless the economic concentration results in a small or medium sized enterprise ("SME") or an exemption is granted. Exemptions are available where one or more of the participating parties is at risk of being dissolved or becoming insolvent (as decided by the Minister of Trade) or where the economic concentration enhances export, socio-economic development or technical progress (as decided by the Prime Minister).

Any economic concentration where the participating parties have a combined market share of 30%-50% must be notified to the Competition Commission, unless the economic concentration results in a SME. The Commission must confirm in writing whether the proposed economic concentration can proceed without exemption or requires prior exemption.

Procedures to implement economic concentrations may be conducted at the relevant State licensing or business registration body *only after* an exemption is granted or written confirmation that no exemption is required has been issued.

Table 4:

Prohibited economic concentration subject to up to 5% fine	Circumstances for 5-10% fine	Additional penalties/remedial measures (optional)
> Merger (Note: Penalties imposed on the merging enterprises and the merged enterprise.)	> The merged enterprise coerced directly or indirectly the merging enterprise(s) to merge	> Compulsory demerger of merging enterprises and compulsory split of merged enterprise to pre-merger status
> Consolidation (Note: Fines imposed on each consolidating enterprise.)	> The consolidation results in a significant increase in the price of goods and services in the relevant market	> Withdrawal of business registration certificate of consolidated enterprise > Compulsory division/split of consolidated enterprise to pre-consolidation status
> Acquisition (Note: Penalties imposed on acquiring enterprise only.)	> The acquiring enterprise coerced directly or indirectly the acquired enterprise to sell	> Compulsory sale of assets acquired
> Joint venture (Note: Penalties is imposed on each joint venture party.)	> The joint venture results in a significant increase in the price of goods and services in the relevant market	> Withdrawal of business registration certificate of each party to the joint venture and of joint venture enterprise

For failure to notify of a proposed economic concentration, a fine of 1% to 3% will be imposed on each party.

For implementation of economic concentrations before an exemption decision is rendered (where entitled to exemption, ie not prohibited), a fine of VND30-50 million will be imposed on each party, subject to a cap on the maximum fine of 3% (see 'other breaches' below).

Penalties for unfair competitive practices

For unfair competitive practices, fines are not based on % of revenue, but rather are based on the type of offending practice and the corresponding fixed band of monetary fines. Within each band, higher monetary fines will be imposed in a number of prescribed circumstances, noted below. One or more additional penalties may also be imposed.

Table 5:

Band 1: Types of unfair competitive practices subject to VND5-10 million fine	Circumstances for VND10-20 million fine	Additional penalties (optional)
<p><i>Misleading instructions:</i></p> <ul style="list-style-type: none"> > Using instructions containing misleading information re. trade names, business slogans, business logos, packaging, geographical indications of the offending enterprise in order to mislead customers in their understanding of goods/services for competitive purposes > Conducting business in goods/services which use misleading instructions 	<ul style="list-style-type: none"> > Where concerned goods and services are food, medical apparatus, drugs for human and animals, fertilizer, animal food, plant protection drugs, seeds or domestic animals, and medical and healthcare services > Where goods and services are circulated/supplied in two or more cities/provinces under central authority 	<ul style="list-style-type: none"> > Confiscation of all material evidence and facilities for commission of offence, including profits gained from offending practice > Public retraction
<p><i>Infringing business secrets:</i></p> <ul style="list-style-type: none"> > Accessing or collecting information constituting business secrets by countering the security measures taken by the lawful owner of such business secrets > Disclosing or using information constituting business secrets without permission from the lawful owner of such business secrets > Breaching a confidentiality contract or cheating/abusing the confidence of a person under a confidentiality obligation, aimed at accessing, collecting or disclosing business secrets > Accessing or collecting business secrets of another person when such person is conducting business-related procedures or procedures to circulate products by countering security measures taken by State bodies, or using such information for business objectives or for the objective of applying for issuance of a business-related permit or a permit to circulate products 	<ul style="list-style-type: none"> > Business secrets are used to produce/circulate goods or supply services in two or more cities/provinces under central authority > Business secrets are provided or disclosed to competitor(s) of lawful owner of business secret 	<ul style="list-style-type: none"> > Confiscation
<p><i>Coercion in business:</i></p> <ul style="list-style-type: none"> > Coercing customers or business partners of another enterprise by threatening or coercive conduct in order to compel them not to transact or to cease a transaction with such other enterprise 	<ul style="list-style-type: none"> > Coercion is of the largest customer or business partner of competitors 	<ul style="list-style-type: none"> > Confiscation

<p><i>Disruption of competitors' businesses:</i></p> <ul style="list-style-type: none"> > Disrupting the lawful business activities of another enterprise by any direct or indirect act which hinders or interrupts the business activities of another enterprise 	<ul style="list-style-type: none"> > Where now impossible for the disrupted enterprise to conduct business 	<ul style="list-style-type: none"> > Confiscation > Public retraction
<p><i>Defamation:</i></p> <ul style="list-style-type: none"> > Any indirect act of providing false information which adversely impacts upon the reputation, financial status or business activities of another enterprise 	<ul style="list-style-type: none"> > Any direct act of providing false information which adversely impacts upon the reputation, financial status or business activities of another enterprise 	<ul style="list-style-type: none"> > Confiscation > Public retraction
<p>Band 2: Types of unfair competitive practices subject to VND15-25 million fine</p>	<p>Circumstances for VND30-50 million fine</p>	<p>Additional penalties (optional)</p>
<p><i>Advertisement aimed at unfair competition:</i></p> <ul style="list-style-type: none"> > Comparing directly ones own goods and services with those of the same type of another enterprise > Imitating another advertising product in order to mislead customers > Providing false or misleading information to customers about one of the following matters: price, quantity, quality, usage, design, type, packaging, date of manufacture, use expiry, origin of goods, manufacturer, place of manufacture, processor or place of processing; manner of use, method of service, warranty period; other false or misleading information 	<ul style="list-style-type: none"> > Where concerned goods and services are food, medical apparatus, drugs for human and animals, fertilizer, animal food, plant protection drugs, seeds or domestic animals, and medical and healthcare services > Scale of advertisement covered two or more cities/provinces under central authority 	<ul style="list-style-type: none"> > Confiscation > Public retraction
<p><i>Promotion aimed at unfair competition:</i></p> <ul style="list-style-type: none"> > Conducting promotion with false information about prizes > Conducting promotion which is dishonest or misleading about goods and services in order to deceive customers > Discriminating between similar customers in different promotion areas within the same promotional campaign > Offering free goods to customers for trial use but requiring exchange of goods of the same type manufactured by another enterprise which the customer is currently using so that the customer will use the goods of the promoting entity 	<ul style="list-style-type: none"> > Where concerned goods and services are food, medical apparatus, drugs for human and animals, fertilizer, animal food, plant protection drugs, seeds or domestic animals, and medical and healthcare services > Promotion is conducted in two or more cities/ provinces under central authority 	<ul style="list-style-type: none"> > Confiscation > Public retraction
<p><i>Discrimination by an association:</i></p> <ul style="list-style-type: none"> > Refusing admission to or refusing withdrawal from the association by any organization or individual which satisfies the conditions for entry or withdrawal, if such refusal constitutes discriminatory treatment and gives such organization or 	<ul style="list-style-type: none"> > Multiple offences against one enterprise > Offence against multiple enterprises at the same time 	<p>Not applicable</p>

individual a competitive disadvantage > Unreasonably restricting the business activities or other activities involving a business objective of a member enterprise	> Unreasonable restrictions in order to force a member enterprise to withdraw	
Band 3: Types of unfair competitive practices subject to VND50-70 million fine	Circumstances for VND70-100 million fine	Additional penalties (optional)
<i>Illegal multi-level selling</i>	> Illegal multi-level selling is conducted in two or more cities/provinces under central authority	> Confiscation of all profits gained as a result of the offence (imposed on enterprise engaging in multi-level selling) > Public retraction

Penalties for 'other acts in breach of the laws on competition'

For 'other acts in breach of the laws on competition', fines are not based on % of revenue, but rather are based on the type of offending practice and the corresponding fixed band of monetary fines. Within each band, higher monetary fines will be imposed in a number of prescribed circumstances, noted below. One or more additional penalties may also be imposed.

Table 6:

Types of offence subject to VND500,000 to VND1 million fine	Circumstances for VND1-3 million fine	Additional penalties (optional)
<i>Breaches of provisions on supply of information and materials:</i> > Failure to supply information and data, at all or adequately or on time, upon request of competent body > Deliberate supply of false or misleading information and data or falsifying information and data > Coercing others to supply false information and data > Concealing or destroying information and data relevant to a competition case	> Information and data requested was particularly important for proper resolution of competition case	> Compulsory supply of complete information and data
<i>Breaches of provisions on investigations and dealing with competition cases:</i> > Deliberately or negligently disclosing information and data the subject of a secret investigation > Disrupting an investigative hearing	As above	> Confiscation of material evidence/facilities used to commit offence
Types of offence subject to VND30 million to VND50 million fine		
<i>Implementation of agreements in restraint of competition or of economic concentrations before an exemption decision is rendered (where exemption is subsequently granted)</i> Note: Maximum fine not to exceed 3% of total turnover of enterprise in preceding year, applicable to each party to exempt agreement in restraint of competition or economic concentration		

Administrative preventive measures

To prevent a breach of the laws on competition or to ensure a competition case is dealt with, the following administrative preventive measures may be applied during investigations and while dealing with a competition case:

- temporary detention of a person pursuant to administrative procedures (when essential to collect and verify important elements as the basis for a decision dealing with a competition case);
- temporary detention of evidence and facilities used to commit a breach of the laws on competition (when essential to verify important elements as the basis for a decision dealing with a competition case or in order to halt immediately a practice in breach) for up to 10 days, or 60 days in complex cases;
- body searches (when there are grounds for believing an individual is hiding on his or her person things, data and facilities in breach of the laws on competition);
- searches of vehicles and other objects;
- searches of places which could be used to hide evidence and facilities used to commit a breach of the laws on competition (if place is a residence, the written agreement of the chairman of the district people's committee is required).

Administrative preventive measures may be imposed (during the investigation stage) by the head of the Competition Commission on his/her own initiative, on the recommendation of the investigator or at the request of the complainant and (during the hearing stage) by the chairman of the Competition Council on his/her own initiative, on the recommendation of the chairman of the case-specific panel or at the request of the complainant. Administrative preventive measures may also be imposed by other competent persons under the 2002 Ordinance on Administrative Offences, such as the heads of ward and district police, of border guard offices, of market control teams, or the captains of aeroplanes.

Complaints and appeals

Any concerned party having grounds for believing a part or all of a penalty decision is contrary to law or infringes the complainant's lawful rights and interests may lodge a complaint, but only within 30 days of signing of the decision.

Any concerned party disagreeing with a part or the whole of a decision resolving such complaint has the right to institute administrative appeal proceedings at the provincial-level people's court.

>>> For more information on Vietnam's new Competition Law and competition offences, go to http://www.vietnamlaws.com/other_legal_updates.aspx

>>> For English translations of Vietnam's competition laws, subscribe to [Vietnam Laws Online Database](http://www.vietnamlaws.com) on www.vietnamlaws.com

2.2 Law on Investment update

The new Law on Investment (now up to Draft 16) is due to be debated by the National Assembly in the first week of November during the National Assembly's current Session.

Draft 16 has drawn a lot of attention from local and foreign investors alike. Such attention has manifested itself in recent increased press coverage, seminars and sessions facilitated by various State and private organizations. Not all attention has been favourable. We, along with a number of experts, legal commentators and foreign investors, believe the Law on Investment in its current form fails to live up to its promises and may deter future inflows of foreign investment.

Informally referred to as the 'Common Investment Law' - to reflect its objective of unifying the current dual investment regime (under the Law on Foreign Investment and Law on Domestic Investment) into a single investment regime applicable to both foreign and domestic investors - it's now time to 'call a spade a spade'. As the Law in its current form fails to achieve its above objective, we'll drop the misnomer and call it by its correct title of 'Law on Investment' from now on!

Below we highlight some of our main concerns with Draft 16. VNExpress 29 October 2005 reports that the chairman of the National Assembly's Committee on Economy and Budget has confirmed that the Law on Investment will be passed at the current Session as planned. So now, the only hope is that the National Assembly delegates consider closely the issues below.

> New registration and licensing system

One of the main aims of the Law on Investment is to modernize and simplify establishment procedures for investment. Instead, Draft 16 introduces a complicated three-tier, two-step system:

	Who is entitled?	What investment process applies?	What investment document is issued?
Investment registration article 46	Domestic investment projects with invested capital below VND15 billion (USD943,990) ** Excluding projects in investment sectors subject to conditions ("conditional projects")	Registration of investment on sample form at provincial State administrative body for investment	No "investment" document issued - projects may be implemented in accordance with registered items in the business registration certificate issued under the (new) Law on Enterprises
Investment certification article 47	> Domestic investment projects with invested capital from VND15 billion to below VND300 billion > Foreign invested projects with invested capital below VND300 billion (USD18,880,000) ** Excluding conditional projects	Registration of investment on sample form at provincial State administrative body for investment. (Draft 16 expressly states that investors will not be required to supplement their application with any other documents - but it still uses the language of "application"!)	Investment certification in "investment - business registration certificate" which will contain investment project registration items and business registration items (a two-step process)
Investment evaluation article 48	> Conditional projects (see list below)	Evaluation of project file, comprising: - Letter registering investment; - Explanatory statement of conditions which project must satisfy.	Investment certification in "investment - business registration certificate" which will contain investment project registration items and business registration items (a two-step process)

	<p>> Projects with invested capital of VND300 billion (USD18,880,000) or more</p>	<ul style="list-style-type: none"> - Letter registering investment; - Eco-technical explanatory statement (particularizing any conditions for investment which project must satisfy; legal entity status or personal details; objectives of investment, location and land use requirement; output capacity; main technological and technical solutions; invested capital and capital sources; implementation schedule, and environmental standards) <p>** Applicable to all projects subject to investment evaluation which are foreign invested or based on BCC, BOT, BTO or BT contract: relevant contract and charter of enterprise must be included in project file</p>
--	--	---

It was hoped that Vietnam would adopt simple 'enterprise registration' procedures, whereby investors (whether domestic or foreign) only have to register the establishment of an enterprise and, once established, enterprises may be active in many sectors at once without the need to get a registration or certification for every project (unless of course, the project falls within a conditional or prohibited area of investment). Under this framework, the activities of investors could still be monitored, but through specific laws such as environmental, health and safety and tax laws. It is unattractive to investors to have to register each project that their enterprises undertake.

> Evaluation criteria

Draft 16 provides for the Government to stipulate *separately* from the Law on Investment the criteria for evaluation of investment projects. This lack of transparency is a backward step. Investors will have to wait for implementing regulations to know the true investment environment.

> List of conditional sectors

Under Draft 16 (article 29), "conditional projects" comprise projects in the following broad and vague range of sectors: sectors impacting on social order and safety; sectors impacting on financial policy and the national currency; sectors impacting on public health; culture, information, the press and publishing; entertainment services; real estate business; survey and mining of natural resources; the ecological environment; education and training; a number of other sectors in accordance with law.

For foreign investors, the range of "conditional projects" is wider still. Any foreign invested project in a sector which is subject to conditions on market access under an international treaty of which Vietnam is a "conditional project", and those conditions on market access (including the schedule for opening of the sector) will apply.

The list of conditional sectors will be regulated by the Government "based on the requirements for socio-economic development in each period and consistent with the undertakings in international treaties of which Vietnam is a member". The Government will also stipulate separately the conditions applicable to the establishment of economic organizations, the forms of investment, and the opening of sectors to foreign investors.

For investor certainty, it is essential that the exact range of conditional sectors is clear in the Law and that the conditions that will be imposed are published in advance of the Law's effective date.

> Investment incentives

Draft 16 does not provide for incentives to be expressly stipulated in all investment documentation. As a result, the burden of establishing a right to incentives will rest with the investor. In light of investors' experience with the tax authorities to date, to require investors to justify their right to entitlements (not just struggle to implement incentives already granted to them, as currently) is a step backwards.

> Government guarantees

Article 66 of the current Law on Foreign Investment permits the Government to enter into agreements with foreign investors to provide guarantees regarding investment. Such guarantees have been essential to attract large infrastructure projects to Vietnam and have been provided in relation to Phu My 2.2, Phu My 3 and the Nam Con Son gas project.

Now, under the current draft 16, the power of the Government to provide guarantees of obligations has been limited to (only) guarantees for foreign loans. Such a move may prove disastrous to attracting future big infrastructure projects to Vietnam.

> Resolution of private party disputes

Under Draft 16, private party disputes can only be resolved by international arbitration if the dispute involves a "foreign element". This is not defined in Draft 16, but this term is narrowly defined in the Ordinance on Commercial Arbitration to mean only cases where at least one party to the dispute is established overseas. Therefore disputes between 2 enterprises in Vietnam, even when one is or both of them are a foreign invested enterprise, must be arbitrated in Vietnam. The consequence is that large projects will face difficulties obtaining finance on the international markets. International lenders to such large projects require common international arbitration clauses in project documents. If this is not allowed, the risk of the project is deemed higher and the cost of the credit goes up, which renders large infrastructure projects unfeasible or expensive. This ultimately affects the cost of public utilities, such as electricity, water, roads and other transport.

> Resolution of State-investor disputes

Draft 16 provides that, absent an international treaty, disputes with the Government of Vietnam must be resolved via Vietnamese courts or Vietnamese arbitration. We are informed by the drafting committee that the reference to an international treaty is intended to mean the ICSID convention, an arbitration and conciliation service under the World Bank. (Vietnam has committed to allow ICSID arbitration under the BTA, and this should apply vis-à-vis all foreign investors from WTO member countries upon Vietnam's WTO accession.) It is questionable whether this drafting is sufficient to incorporate the international treaties into domestic law. A wholesale reexamination of investment treaties may be necessary. An ambiguous provision such as that proposed in Draft 16 is unattractive for foreign participants in Vietnamese projects as the value of any State guarantee will be reduced. Again, this uncertainty is potentially damaging in the context of major infrastructure projects.

Part 3 Did You Know?

3.1 National Assembly update

The 8th Session of Legislature XI of the National Assembly ("NA") commenced on 18 October and is expected to run until 30 November. 14 Laws are scheduled to be passed. In order to achieve this ambitious target, the NA will run two halls concurrently to debate the draft laws (delegates will register to attend meetings on those draft laws in which they are especially interested).

- > The following 9 Laws have already been considered at the NA's May-June 2005 Session and will be passed at this Session:
 - Law on Tendering;
 - Anti-Corruption Law
 - Law on Bills of Exchange
 - Law on Intellectual Property
 - Law on Protection of the Environment (Amended)
 - Law on Electronic Transactions
 - Law on Youth
 - Law on Residential Housing
 - Law on the People's Police
- > The following 5 Laws will be *considered and passed* at this Session:
 - Law on Enterprises
 - Law on Investment (discussed in [Part 2.2](#) above)
 - Law on Amendment of the Law on VAT and Law on SST (a single law to cover amendments to two existing laws - a first in Vietnam)
 - Law on Amendment of the Law on Complaints and Denunciations
 - Law on Practising Thrift to Reduce Expenditure.
- > The following Laws will be *considered only* at this Session (and are expected to be passed in May-June 2006):
 - Law on Lawyers
 - Law on Prevention of HIV/AIDS
 - Law on Social Insurance
 - Law on Real Estate
 - Law on Information Technology
 - Law on Registration of Real Estate
 - Law on Cinematography
 - Law on Civil Aviation of Vietnam (Amended)
 - Law on Securities

National Assembly Laws effective as of 1 October 2005:

- > Law on Pharmacy dated 14 June 2005
- > Law on Amendment of 1996 Mineral Law dated 14 June 2005

Other National Assembly Laws passed on 14 June 2005 will become effective as of 1 January 2006.

3.2 **Franchising**

Franchising has become increasingly popular in Vietnam in recent years - see KFC, Lotteria, Trung Nguyen Coffee, Pho24, Highlands Coffee, Kinh Do Bakeries. But it was not expressly regulated by law until earlier this year.

Under Decree 11-2005-ND-CP of the Government dated 2 February 2005 on Technology Transfer, a "grant of special commercial right", by which the transferee may use the commercial name, trademark and know-how of the transferor in order to conduct business activities (akin to franchising), was treated as a form of technology transfer. Amongst other things, Decree 11 sets out the essential principles and contents of technology transfer contracts and requires them to be registered at the Ministry of Science and Technology. The maximum duration of such contracts is capped at 7 years (10 years in prescribed circumstances).

Effective as of 1 January 2006, franchising will be regulated under the new Commercial Law 14 June 2005. Franchising is defined (more widely than under Decree 11) as a commercial activity whereby a franchisor authorizes and requires a franchisee to conduct on its own behalf the purchase and sale of goods or provision of services in accordance with the following conditions: (i) the purchase and sale of goods or provision of services must be conducted according to the method of business organization specified by the franchisor and be associated with the trademark, trade name, business know-how, business mission statements, business logo and advertising of the franchisor; (ii) the franchisor has the right to control and offer assistance to the franchisee in the conduct of the business.

Detailed provisions implementing the 2005 Commercial Law with respect to franchising are expected to be issued by the Government in this last quarter of 2005. According to the Ministry of Trade's second draft of the proposed implementing decree, the franchising provisions of Decree 11 will be repealed as of 1 January 2006.

The draft implementing decree regulates: inbound franchising (from a foreign country into Vietnam); domestic franchising (within the territory of Vietnam); outbound franchising (from Vietnam to foreign countries). All franchising must be implemented on the basis of a written franchise contract, the contents of which are regulated in detail in the decree. The duration of a franchise contract will be open to negotiation by the parties, subject to a *minimum* duration of 5 years (in contrast to Decree 11's maximum duration). All franchising activities must be registered by the franchisor within 15 days of signing the franchise contract; and the relevant registration body (the Ministry of Trade for inbound and outbound franchising and the Department of Trade of the province or city under central authority in which the franchisee is located for domestic franchising) must complete registration within 5 days. Any provisions for transfer of the right to use industrial property rights in a franchise contract must be registered (separately and additionally) in accordance with Vietnamese industrial property laws.

Prescribed conditions for organizations and individuals to become franchisors include: (i) being lawfully established, (ii) having been in operation for two years, (iii) being the legal owner of the relevant commercial rights, and (iv) the goods and services which are the object of the commercial rights granted under the franchise contract are allowed to be franchised (as prescribed in the decree). Condition (ii) may well protect potential franchisees against unscrupulous and unsound franchisors, but it also has the effect of preventing start-up companies from franchising innovative new business concepts in the first 2 years of operations. Franchisees are subject to condition (i) and, also, must have business registration for the business line in conformity with the object of commercial rights.

Happily, the draft decree does not cap franchising fees, but leaves them to negotiation between the franchisor and franchisee.

Of note, any current franchising activities will be required to be registered in accordance with the 2005 Commercial Law and its implementing decree within three months of their effectiveness, ie by the start of April 2006.

3.3 Capital gains tax

During the implementation of Circular 128 of the Ministry of Finance dated 22 December 2003 (as amended 1 September 2004) providing detailed guidelines on corporate income tax ("CIT"), a number of inconsistencies have been uncovered in relation to, amongst others, the CIT rate applicable to income from an assignment of capital or shares in domestic enterprises. On 16 September 2005, the Ministry of Finance issued Official Letter 11684 to provide the following clarification:

- > Taxable income earned from an assignment is calculated as follows:
 - Taxable income = income earned from the assignment – the initial value of assigned capital
- > The CIT rate applicable to an assignment is the CIT rate applicable to the *main* business activity of the domestic enterprise the capital or shares of which are assigned.

Unfortunately, it is still unclear what the CIT rate will be if the domestic enterprise engages in several main business activities subject to different CIT rates.

3.4 Foreign currency transactions

Another case where the validity of a contract has been challenged because it provided for payment in foreign currency has recently been heard by the Court of Appeal of the Supreme Court in HCMC.

Facts: In October 2004, the plaintiff (a famous Vietnamese actress) and the defendant entered into a contract for purchase of a house from the defendant for the sum of USD280,000, with a deposit of USD28,000 payable by the plaintiff to the defendant. At a later date, the plaintiff discovered that the contract was invalid because (i) the transaction was carried out in foreign currency and (ii) it is illegal for the defendant's husband being a foreigner to own the house. The plaintiff wanted to cancel the contract, but the defendant would not return the deposit.

Preliminary decision: At first instance, it was ordered that the defendant's husband is entitled to co-own the house with the consent of the defendant. Therefore, it is legal for the husband of the defendant to be a party to the contract. With respect to transactions in foreign currency, it was held that a contract which provides for the sum payable to be "the equivalent of USD280,000" is legal because the word "equivalent of" does not mean that the transaction is carried out in foreign currency. In all, the contract was found to be valid and the plaintiff was not entitled to receive back the deposit of USD28,000.

Before the Court of Appeal:

The Court of Appeal of the Supreme Court in HCMC held that, based on the phrase in the contract "the equivalent of USD..." alone, it was impossible to conclude that the payment transaction was made in VND. For certainty, the parties should have stated that payment was required in "VND equivalent of USD280,000". Further, the defendant recorded clearly "I confirm the receipt of USD28,000 from [the plaintiff]". The Court concluded that the payment transaction had been performed in USD. As such, the contract had contravened the law on foreign exchange control and was held invalid. The defendant was ordered to return the deposit.

Although the Court of Appeal's reasoning is not very compelling, the lesson is that contracts must not provide for transactions to be conducted in foreign currency and should be expressed clearly to avoid any ambiguity about the currency in which transactions are to be conducted. Decree 63-1998-ND-CP of the Government dated 17 August 1998 on Foreign Exchange Control (as amended 17 January 2001) prohibits any transactions in foreign currency except through banking entities authorized to conduct foreign currency exchange. A contravention of the law on foreign currency control will render a contract wholly invalid.

A similar case was reported in the March 2003 Issue of Vietnam Legal Update, where a court found that a contract including a provision for cash payments in foreign currency was wholly invalid by virtue of that provision which contravened the above Decree 63 prohibition.

Of note, the Civil Code acknowledges that only part of a contract, such as an offending payment clause, may be invalid. However, notwithstanding the recognition under Vietnamese law that contracts may be partially invalid and that illegal clauses may be severed, Vietnamese courts typically take the view that if there is any element of illegality in contract, the whole contract fails.

3.5 Foreign invested enterprises - conversion options under new investment regime

The Ministry of Planning and Investment has recently issued a draft of the proposed decree which will regulate the conversion of foreign invested enterprises ("FIEs") when the new Law on Enterprises and Law on Investment regime is introduced (expected in mid-2006, see [Part 2.2](#) above). The draft decree also regulates amendment of the activities of FIEs which do not convert. For existing foreign investors, this will be one of the most important decrees on implementation of the new investment/enterprise regime.

A welcome feature is that the draft decree does not make it compulsory for FIEs to convert their form - conversion of FIEs is at the discretion of investors. But, of note, FIEs that do not convert will nevertheless become subject to and must comply with the provisions of the new Law on Enterprises and the Law on Investment (as the existing Law on Foreign Investment will be replaced).

Some of the issues arising under the draft decree:

- > The decree applies to joint ventures enterprises ("JVEs"), 100% foreign owned enterprises ("100% FOEs") and foreign invested shareholding companies ("FISCs"). It does not appear to apply to business co-operation contracts.
- > Applications for conversion must include: new charter of the enterprise (which must conform with the new Law on Enterprises); resolution on conversion from the JVE board or consent of owners of the 100% FOE or FISC (as applicable); original investment license. If there is a new investor in the enterprise, documentation of the identity of the new investor must also be provided. Documents must be "certified" (it is not clear whether certification means notarization, consularization and legalization, and we hope this matter will be clarified in future drafts).
- > The decree requires conversion to be conducted within 2 years of the effective date of the decree. This obligation is perplexing in the context that conversion is not compulsory, and we hope that it will be removed from, or at least clarified in, future drafts.
- > It is contemplated that, upon conversion, a new legal entity will be formed and will assume the rights and obligations of the FIE. However, it is not clear whether the right to carry forward tax losses will still apply (and without a specific provision, foreign investors will face difficulty getting this benefit recognized by tax offices). We understand that the intention is that the right to carry forward tax losses will still apply, and a specific provision will be included in future drafts.
- > It is not yet clear whether the decree will apply to FIEs established under other laws than the Law on Foreign Investment, eg credit institutions and insurance companies.
- > It seems that FIEs that have committed to transfer assets to the Vietnamese Government upon expiry of their investment licenses may convert and exist in perpetuity, but (not surprisingly) the obligation to transfer assets upon winding-up will remain.

>>> Farewell to Louisa Gibbs, Hanoi Office



Louisa Gibbs will be leaving Phillips Fox in early November. After 3 years in our Hanoi office and on assignment in South Korea - during which her initiative, enthusiasm and creative problem-solving skills have been well-tested and proven - Louisa is returning to Australia. Showing her great flexibility of mind and manner, Louisa is 'swapping' from corporate law to community law. All of us in the Vietnam team in Phillips Fox's Ho Chi Minh City, Hanoi and Melbourne offices will miss Louisa's smile and warm happy personality, and wish her a fond farewell and all the best with her return to Australia and next challenges.

Part 4 What's New on Vietnam Laws Online Database?

Vietnam Laws Online Database on www.vietnamlaws.com celebrated its 1st anniversary on 1 July 2005.

Vietnam Laws Online Database is an online searchable database of English translations of close to 3,000 Vietnamese laws relating to foreign investment and far beyond - the most extensive online Vietnamese law library in the world. Various search options are available. Translations can be viewed online, printed and downloaded (subject to terms & conditions).

>>> NEW keyword search option >>>

On 6 October, we launched our new keyword search option. This allows subscribers to search keywords in our descriptions of legislation. So, now, subscribers can search by subject category, date, issuing body, official number, legislation type, and keyword - or do an advanced search, combining two or more of these search options.

Feedback: So we can continue to improve Vietnam Laws Online Database, we would appreciate if subscribers could spend a few minutes completing the feedback form available on the Vietnam Laws Online Database Welcome Page. But, always keep in mind, we welcome all feedback at any time.

>>> What's new on Vietnam Laws Online Database?

In October 2005, Vietnam Laws Online Database has been updated with translations of, amongst others:

- > Decree 120 on competition offences
- > Decree 116 on competition
- > Decree 110 on multi-level selling
- > Draft 16 of the Law on Investment (currently before the National Assembly)
- > Decision 238 on foreign securities holdings
- > Decree 109 on deposit insurance
- > Decision 1247 on USD deposit interest rates
- > Draft decree on franchising
- > Decree 93 on foreign employee restrictions
- > Civil Code 14 June 2005 (complete translation now available)

Above is just a snapshot of the wide range of legislation available.



Phillips Fox was proud to accept the **Business Innovation Award** at the Australian Business Awards in Vietnam 2004, in recognition of our innovative work in developing www.vietnamlaws.com and our **Vietnam Laws Online Database**.

Hanoi Branch Office
Suite 401, Hanoi Tower
49 Hai Ba Trung
Hanoi
Vietnam
Tel +84 4 936 0990
Fax +84 4 936 0984
bill.magennis@phillipsfox.com

Ho Chi Minh City Branch Office
Suite 605, Saigon Tower
29 Le Duan Boulevard
District 1, Ho Chi Minh City
Vietnam
Tel +84 8 822 1717
Fax +84 8 822 1818
nigel.russell@phillipsfox.com

Melbourne Office
Level 21, 140 William Street
Melbourne
Australia
Tel +61 3 9274 5000
Fax +61 3 9274 5111
maureen.mclaughlin@phillipsfox.com

Adelaide Brisbane Canberra Melbourne Perth Sydney Auckland Wellington Hanoi Ho Chi Minh City