



Vietnam Legal Update

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Part 1 Selected New Legal Instruments

1.1 Commercial law - origin of goods

Circular 07-2006-TT-BTM of the Ministry of Trade dated 17 April 2006 Providing Guidelines on Procedures for Issuance and Management of Issuance of Certificates of Origin Pursuant to Decree 19-2006-ND-CP of the Government dated 20 February 2006 Making Detailed Provisions for Implementation of the Commercial Law With Respect to Origin of Goods

and

Circular 08-2006-TT-BTM of the Ministry of Trade dated 17 April 2006 Providing Guidelines for Identification of Origin of Import and Export Goods Not Having Unique Origin Pursuant to Decree 19

The new Commercial Law 2005 came into effect as of 1 January 2006, along with the new Law on Customs (As Amended 2005) and the new Law on Export and Import Duties 2005. Together, these new laws reform Vietnam's customs, import-export and commercial law, bringing them into line with international norms in pursuit of WTO accession.

Following on from (and consistent with) these reforms, Decree 19 implements the new Commercial Law's general provision on sale and purchase of goods with respect to origin of goods. Decree 19 regulates how to determine the origin of imported goods and of exported goods and also regulates the process of certification of origin of goods. *Origin of goods* is defined as the country or territory where goods were entirely manufactured or, in the case of goods for which a number of countries or territories participated in the manufacturing process, where the final, fundamental processing stage was implemented. Origin of goods is crucial for entitlement to tax incentives and other preferential treatment under international agreements.

Circular 07 provides detailed guidelines for issuance of certificates of origin ("C/O") with respect to export goods. Various forms of C/O are provided for, including: C/O Form A for Vietnamese products for export to countries and territories reserving the popular tariff preference for Vietnam; garment and textile C/O for Vietnamese garment and textile products for export under international treaties of which Vietnam is a member; handicraft weaving product C/O for Vietnamese handicraft weaving products for export to the EU under the Vietnam - EU Agreement on garment and textile products; coffee C/O for Vietnamese coffee products for export in compliance with regulations of the International Coffee Organization; various kinds of C/O provided for by countries importing Vietnamese products or in other international treaties of which Vietnam is a member. C/O Form B is issued for Vietnamese products for export in cases where the exporter does not request one of the above C/O forms.

Circular 07 provides for C/Os to be issued in hardcopy and also, for the first time, in softcopy. The Ministry of Trade will issue electronic C/Os through its new electronic C/O control and issuance system. Circular 07 also expands the range of bodies with power to issue C/Os to include, amongst others, regional departments for import and export management attached to the Ministry of Trade in Hanoi, Hai Phong, Da Nang, Dong Nai, Binh Duong, Ho Chi Minh City and Vung Tau. The Ministry of Trade will authorize Vietnam Chamber of Commerce and Industry ("VCCI") to issue C/Os and, in turn, VCCI will authorize its subordinate units to carry out issuance.

Under Circular 08, import and export goods not having unique origin will be deemed to originate from the country or territory where the last step in the manufacturing process which gave rise to a basic change in the goods was carried out. The 'basic change' can be identified by three methods: (i) changing codes of commodities, (ii) value percentage and (iii) goods processing stages. Criterion (i) is the principal criterion, and is determined based on the change of HS code of more than 4 digits. Criteria (ii) and (iii) will be considered only where criterion (i) does not reflect a basic change. Criterion (ii) is the most complex. The added value is determined directly through mathematical formula, including parameters such as FOB price, value of materials with origin. The added value must account for at least 30% of the value of the produced goods. Criterion (iii)

is simpler, looking at the major manufacturing processes to create the basic features of goods. Specific regulations apply for particular commodities (as per appendix to Circular 08).

>>> For English translations of Vietnam's new Commercial Law and all implementing legislation, subscribe to [Vietnam Laws Online Database](http://www.vietnamlaws.com) on www.vietnamlaws.com

1.2 Commercial law - cross-border trading

Circular 04-2006-TT-BTM of the Ministry of Trade dated 6 April 2006 Providing Guidelines for Implementation of Decree 12-2006-ND-CP of the Government dated 23 January 2006 Making Detailed Provisions on Implementation of Commercial Law With Respect to International Purchases and Sales of Goods and Agency for Purchases and Sales, Processing and Transit of Goods Involving Foreign Business Entities

Decree 12 was the first of the Government decrees to be issued for implementation of the Commercial Law 2005 (see January-February 2006 Issue of Vietnam Legal Update on www.vietnamlaws.com) and regulates international purchases and sales of goods, including import, export, temporary import for re-export, temporary export for re-import, and transshipment; and regulates activities of principals and authorized dealers in importing and exporting goods and agents for sale and purchase, processing and transit of goods involving foreign business entities, effective as of 1 May 2006.

Under Decree 12, Vietnamese businesses with no foreign invested capital have full trading rights, ie the right to import and export goods irrespective of the lines of business for which they have business registration, except goods on the list of prohibited and restricted imports/exports. In contrast, foreign invested businesses, foreign companies and branches of foreign companies in Vietnam still only have limited trading rights.

Permits from the Ministry of Trade are compulsory for the import or export of garment and textile products for export to the US market, goods for which export control is compulsory in compliance with provisions in international treaties or agreements to which Vietnam is a party, two-wheel motorcycles, three-wheel motorcycles with capacity of 175cm³ and more, sport guns.

Salt, raw tobacco, poultry eggs, refined sugar and raw sugar are subject to tariff quota. Commodities to which apply an import tariff quota with permit are entitled to the import duty rate within the tariff quota; those without a permit are subject to the import duty rate outside the tariff quota. The Ministry of Trade issues import permits according to tariff quota for qualified traders based on the annual tariff quota and on the balance of import results and the demand for tariff quota registration of traders. At the end of each quarter, traders must report their import situation to the Ministry of Trade.

Circular 04 provides guidelines for import of goods under special management, such as petroleum, fuels, used autos; import of cigarettes and cigars, etc; temporary import for re-export, temporary export for re-import; goods processing with foreign traders and transit of goods crossing the territory of Vietnam.

Circular 04 sets out in detail the second-hand consumer goods (eg dishwashers) and medical apparatus (eg dentistry drills) that are prohibited from import. For more on import of second-hand cars, see [1.5 below](#).

Circular 04 provides in detail for applications for import permits and for registration of annual tariff quota allocation; for annual reports by businesses on goods imported pursuant to tariff quota; for application to import temporarily for re-export and for quarterly reporting by businesses on goods temporarily imported for re-export.

Circular 04 will become effective as of 1 May 2006 (the date of effectiveness of Decree 12).

1.3 Commercial law - promotions & advertising

Decree 37-2006-ND-CP of the Government dated 4 April 2006 Providing Detailed Regulations for Implementation of Commercial Law With Respect to a Number of Commercial Enhancement Activities

One of the various facets of commercial life regulated under the new Commercial Law 2005, which came into effect as of 1 January 2006, is commercial enhancement activities. Commercial enhancement activities comprise (a) promotions, (b) commercial advertising, (c) display and introduction of goods and services, and (d) trade fairs and exhibitions. Decree 37 provides in detail for (a), (b) and (d). Decree 37 applies to businesses conducting commercial enhancement activities in respect of their own goods and services (eg a manufacturer promoting its products at one of its sales outlets) and also to businesses providing commercial enhancement services (eg., businesses holding trade fairs).

Promotions

Decree 37 prescribes a number of basic principles for holding promotions, including no direct comparison with the goods and services of another business with the aim of unfair competition.

Decree 37 imposes a maximum limit on the value of goods and services used in promotions. The value of items used to promote any one unit of the promoted goods or service must not exceed 50% of the price of such unit of the promoted goods or service prior to the date of the promotion, except in specified cases. When a business holds any one promotional program, the total value of goods and services used in the promotion must not exceed 50% of the total value of the promoted goods or service, except in specified cases.

Forms of promotion include:

- > Giving free sample goods and providing free sample services to customers for trial use;
- > Giving goods as gifts to customers or providing free services not involving purchase and sale of such goods or services;
- > Selling goods or providing services at prices lower than the previous selling price of goods or service:
Importantly, Decree 37 stipulates that the maximum price reduction of promoted goods or services at any point of time throughout the duration of a promotion must not exceed 50% of the price of such promoted goods or services prior to the date of the promotion. The total duration of a promotional program in the form of a price reduction for any one type of goods or service must not exceed 90 days in any one year, and the duration of any one promotional program must not exceed 45 days. It is strictly prohibited to take advantage of this form of promotion in order to dump goods and services.
- > Selling goods or providing services to customers together with coupons for purchase of goods or use of services (ie coupons either for goods and services of the business holding the promotion or for goods and services of another business): The maximum value of coupons given with any one unit of the goods sold or service provided during the duration of a promotion must comply with the above maximum limit on the value of items used in promotions.
- > Selling goods or providing services together with contest forms for customers, from amongst which winners will be selected in accordance with announced rules and announced prizes: Contests must not be contrary to the historical, cultural and ethical traditions and fine customs of Vietnam. Of note, the opening of prizes must be conducted publicly, must be witnessed by a representative of customers, and must be notified to the Department of Trade of the locality where the contest and opening of prizes is held.
- > Selling goods or providing services together with participation in lucky draw programs: Again, the opening of prizes in this form of promotion must be conducted publicly and must be witnessed by customers. If the value of prizes is VND100 million or more, the competent State administrative body for commerce must be notified. If the winning of prizes is decided on the basis of the participant having a winning coupon amongst the goods it purchased, the business holding the promotion must notify the

competent State administrative body of the time and location where winning coupons will be placed in goods. If the lucky draw program takes the form of issuance of numbered tickets for participation in a draw, prescribed rules apply. The total duration of the promotion of any one type of trademark of goods or service must not exceed 180 days in any one year, and the duration of any one promotional program must not exceed 90 days. If there are no winners of prizes in a lucky draw program within 30 days from the expiry of the time-limit for presentation of prizes, 50% of the value of the announced prizes must be paid into the State Budget.

Lucky draw programs must be registered with the Department of Trade, if the promotional activity is to be held within the area of one province or city under central authority, or the Ministry of Trade, if the promotional activity is to be held within the area of two or more provinces or cities under central authority.

The Ministry of Finance is charged with co-ordinating with the Ministry of Trade to provide specific guidelines on implementation of this type of promotion. This is a sensitive area with authorities. On 18 April 2006, "Youth On-Line" carried an article reporting that the Department of Promotions under the Ministry of Trade plans to fine LG VN Electronics Co. VND40 million for holding a lucky draw without permission and to require the company to re-hold the draw under the supervision of the HCMC Department of Trade.

- > Holding programs for regular customers: Reporting obligations are imposed. Customer loyalty cards or coupons must contain prescribed particulars.

Decree 37's rules also apply to promotions via the internet and other electronic means.

All of the above forms of promotion must, within at least 7 working days prior to holding the promotion, be notified in writing to the Department of Trade in the place where the promotion is to be held. With respect to promotions involving contest forms, obligations to report contest results to the Department of Trade and to make a public announcement apply. Promotional programs in other forms than the above may be held only with written approval from the Ministry of Trade.

Commercial advertising

In addition to complying with the 2001 Ordinance on Advertising and its implementing legislation (which regulate the forms in which advertising business may be conducted and the contents of advertisements, amongst other things), commercial businesses wishing to advertise their goods and services and commercial advertising businesses must comply with the Commercial Law and Decree 37.

Decree 37 makes specific regulations with respect to protection of children in commercial advertising activities, commercial advertising of goods and services relating to health, commercial advertisements of goods and services relating to veterinary drugs, plant protection agents, fertilisers, animal feed, and plant and animal varieties, and commercial advertising of goods subject to quality standards.

Decree 37 makes the commercial advertising business liable for the contents of advertisements it provides; and managers of means of publication liable for contents of any commercial advertising product published. The State administrative body for commerce in co-ordination with the body issuing permits to conduct commercial advertising may suspend a commercial advertisement if its contents breach the law.

Trade fairs and exhibitions

The holding of a trade fair or exhibition in Vietnam must be registered with the Department of Trade in the place where the trade fair or exhibition is to be held prior to 1 October in the year prior to the year in which the trade fair or exhibition is to be held. Decree 37 also regulates overseas trade fairs and exhibitions. Any arrangement for a business entity, organization or individual to participate in an overseas trade fair or exhibition must be registered with the Ministry of Trade prior to 1 October in the year prior.

The temporary importation and re-exportation of goods for participation in a trade fair or exhibition in Vietnam and the temporary exportation and re-importation of goods for participation in an overseas trade fair or exhibition must comply with the law on customs and other relevant law.

Decree 37 regulates the use of names and themes for trade fairs and exhibitions.

Throughout, Decree 37 provides for protection of intellectual property rights in commercial enhancement activities and regulates the advertising/display of counterfeit goods or goods in breach of intellectual property rights in order to make comparison with genuine goods.

1.4 **Franchising**

Decree 35-2006-ND-CP of the Government dated 31 March 2006 Making Detailed Provisions for Implementation of Commercial Law With Respect to Franchising Activities

As of 1 January 2006, franchising is regulated under the new 2005 Commercial Law. Franchising is defined 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: 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; and the franchisor has the right to control and offer assistance to the franchisee in the conduct of the business.

Decree 35 regulates franchising activities involving Vietnamese business entities (in the capacity of franchisor or franchisee) and foreign business entities (apparently, in the capacity of franchisor only, but this is one of many aspects of the new regime yet to be confirmed). The range of Decree 35 captures: inbound franchising (from a foreign country into Vietnam), domestic franchising (within the territory of Vietnam), and outbound franchising (from Vietnam to foreign countries, but only with respect to the Vietnamese franchisor where the franchisee is a foreign business).

Prescribed conditions for businesses to grant franchises include:

- > The franchisor business must be a lawfully established/recognized enterprise (either in Vietnam or foreign country);
- > The franchised business system must have been in operation for at least one year (in the case of a foreign franchisor granting a primary franchise to a Vietnamese business entity, such Vietnamese business entity must operate the franchise business in Vietnam for at least 1 year before sub-franchising);
- > The franchising must be registered (see below); and
- > The goods and services which are the subject of the franchise contract must be allowed to be franchised (ie not be prohibited from circulation in Vietnam or, if circulation is restricted/conditional, the necessary conditions for circulation must be satisfied, eg business license to deal in gold).

Franchisees are subject to the following conditions: (a) must be a lawfully established enterprise in Vietnam (contrast first condition above); and (b) must have business registration appropriate for the franchise business.

All franchising must be implemented on the basis of a written contract or 'other legally equivalent form'. Where Vietnamese law is the governing law of a franchise (ie for inbound and domestic franchising), the main contents of the contract must comply with Decree 35. In the case of outbound franchising, the parties have the option to apply a foreign governing law and the contents of the contract are not restricted (subject to the always troublesome proviso that the foreign governing law must "not be contrary to the provisions of Vietnamese law").

Franchising contracts are required to be in the Vietnamese language, except in the case of outbound franchising (where the parties have the option of a foreign language). The term of a franchise contract will be open to negotiation by the parties (the draft provision for a statutory *minimum* duration of 5 years was not adopted). Franchising fees are also open to negotiation between the franchisor and franchisee.

Franchising *activities* must be registered in advance by the franchisor (not each franchising contract). To register, prescribed documents (not including specific contracts) must be submitted to 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. Applications must include a 'franchise description document'. Although Decree 35 uses the language of 'application' for registration, the registration bodies appear to (only) check the completeness and validity of the documents submitted and to not have any discretion with respect to registration. The licensing of any industrial property rights in a franchise contract must be registered (separately and additionally) in accordance with Vietnamese industrial property laws. Any material changes (yet to be defined) to the franchising arrangements must be notified by the franchisor to the relevant registration body within 30 days.

Of note, any current franchising activities will be required to be registered under Decree 35 within three months of its effectiveness (ie by 26 July 2006).

The Ministry of Trade is understood to be still settling the final draft of its circular implementing Decree 35, which is now expected to be issued in May (last month, the Ministry expected to issue its circular in April). The pro-forma for a "franchise description document" (which appeared as an appendix to the draft of Decree 35) will be issued with the circular.

Decree 35 became effective as of 26 April 2006.

1.5 Import of used cars

Circular 03-2006-TTLT-BTM-BGTVT-BTC-BCA of the Ministry of Trade, Ministry of Transport and Communications, Ministry of Finance and Ministry of Police dated 31 March 2006 Providing Guidelines on Import of Used Passenger Automobiles of Less than 16 Seats in Accordance With Decree 12-2006-ND-CP of the Government dated 23 January 2006

and

Decision 69-2006-QD-TTg of the Prime Minister dated 28 March 2006 Issuing Absolute Import Duty Rate Applicable to Used Autos

Effective as of 1 May 2006, one of the most notable reforms under Decree 12 implementing the Commercial Law 2005 (see January-February 2006 Issue of Vietnam Legal Update on www.vietnamlaws.com) is that all types of second-hand cars of less than 16 seats (except right-hand-drive cars) may be imported if they are less than 5 years old from the year of manufacture until the year of import.

Circular 03 provides detailed guidelines on import of used cars. In addition to being less than 5 years old from the year of manufacture to the time of arrival at Vietnam's port (eg in 2006, only cars manufactured in 2001 on are permitted to be imported into Vietnam), a used car must have been registered for at least 6 months and have run at least 10,000km prior to arrival at a Vietnamese port.

>>> Our informal discussions with the Ministry of Industry indicate that no cap will be imposed on the number of used cars that may be imported (contrary to rumours).

Circular 03 prohibits the import of various kinds of right-hand-drive cars, including in form of separated parts and in cases where the steering wheel has been changed prior to import into Vietnam; the import of used ambulance vehicles; and the import of various kinds of cars having their structures and use purpose adjusted from the initial design.

With respect to procedures for import and registration, Circular 03 prescribes the contents of customs files. Importers must present one of the following papers to customs: certificate of registration; certificate of circulation; deed abolishing certificate of registration or deed abolishing certificate of circulation issued by competent authorities of the country where the imported cars were registered.

Circular 03 will become effective as of 1 May 2006.

Under Decision 69, imported used cars of less than 16 seats are divided into 3 categories with the import duty rate calculated on the basis of the cylinder capacity of the engine, as follows:

> Cars of 5 seats or less (including driver seat):

<i>Cylinder capacity</i>	<i>Absolute duty rate (per car)</i>
Less than 1,000cc	USD 3,000
From 1,000 to 1,500cc	USD 7,000
From more than 1,500 to 2,000cc	USD 10,000
From 2,000 to 3,000cc	USD 15,000
From more than 3,000 to 4,000cc	USD 18,000
From more than 4,000 to 5,000cc	USD 22,000
More than 5,000cc	USD 25,000

> Cars of 6-9 seats (including driver seat):

<i>Cylinder capacity</i>	<i>Absolute duty rate (per car)</i>
2,000cc and less	USD 9,000
From more than 2,000 to 3,000cc	USD 14,000
From more than 3,000 to 4,000cc	USD 16,000
More than 4,000cc	USD 20,000

> Cars of 10-15 seats (including driver seat):

<i>Cylinder capacity</i>	<i>Absolute duty rate (per car)</i>
2,000cc and less	USD 8,000
From more than 2,000 to 3,000cc	USD 12,000
More than 3,000cc	USD 15,000

In an attempt to control the local car market, prevent commercial fraud and ensure State Budget revenue, the Ministry of Finance has been authorized by the Prime Minister to increase or decrease import duty rates by 20% in comparison with the above absolute ones based on the situation of a specific period. In any case where the import duty fluctuation exceeds 20%, the Ministry of Finance must report to the Prime Minister for consideration and adjustment. Decision 69 will become effective and apply to declaration forms for imported goods registered with customs as of 1 May 2006.

1.6 Technology transfer

Decision 18-2006-QD-BTC of the Ministry of Finance dated 28 March 2006 on Collection, Payment, Management and Use of Fees for Evaluation of Technology Transfer Contracts

Under Decree 11-2005-ND-CP of the Government dated 2 February 2005 Making Detailed Provisions on Technology Transfer and implementing Circular 30-2005-TT-BKHCHN of the Ministry of Science and Technology dated 30 December 2005, technology transfer contracts ("TTCs") relating to the transfer of technology from offshore into Vietnam must be registered. The distinction between "approval" and "registration" is rather blurred when one considers the burdens imposed by registration requirements (eg requiring the parties to submit evidence of their legal status, and other supporting documentation about the transferred technology and minutes of the board meeting approving the TTC if the transferee has foreign owned capital and its charter requires unanimous board approval of its annual financial plan). There appears to be little difference in substance between registration and approval as the registration authority can reject TTCs for registration if such TTCs do not meet the standards for approval.

Under Decision 18, the new scale of fees relating to 'registration' of TTCs is as follows:

- > Fee for evaluation of TTCs: 0.1% of the total value of the technology transfer contract, subject to a fee ceiling of VND10 million (previously VND20 million) and a fee floor of VND3 million (previously VND 2 million).
- > Fee for amendment of TTCs: 0.1% of the total value of the amended technology transfer contract, subject to a fee ceiling of VND5 million (previously VND10 million) and a fee floor of VND2 million (previously VND 1 million).

Of note, Decree 11 is due to be repealed by the upcoming Law on Technology Transfer 2006, see [3.1](#) below.

>>> For more on Decree 11 on technology transfer, see March 2005 Issue of Vietnam Legal Update on www.vietnamlaws.com

>>> For English translations of Vietnam's technology transfer laws and much more, subscribe to [Vietnam Laws Online Database](#) on www.vietnamlaws.com

1.7 Goods quality standards

Decision 03-2006-QD-BKHCN of the Ministry of Science and Technology ("MoST") dated 10 January 2006 on Announcement of Goods Quality Standards

and

Decision 04-2006-QD-BKHCN of the MoST dated 10 January 2006 on Declaration of Compliance of Goods with Announced Standards

Vietnam's goods quality regime dates back to the 1999 Ordinance on Goods Quality. With the objective of goods producers and traders taking responsibility for the quality standards of their goods, the Ordinance introduced a new regime for declaration of goods quality standards. In December 2000, the then Ministry of Science, Technology and Environment (now MoST) issued provisional regulations for implementation of the Ordinance (under Decision 2424 and 2425). Now, nearly 7 years after the Ordinance, the MoST has issued new implementing regulations, replacing the provisional regulations, as part of its first update of the goods quality regime.

Decisions 03 and 04 introduce various reforms with respect to announcement of goods quality standards and declaration of compliance with such standards by goods producers and processors. The most important reform is that the requirement to announce goods quality standards now only applies to entities producing and/or processing goods at an industrial scale, excluding goods subject to compulsory quality standards. Goods subject to compulsory quality standards are subject to declaration of compliance with such standards.

Announcement of quality standards

Previously, under Decision 2425, goods quality standards announcement was compulsory only in respect of specific goods listed in Appendix 1 of Decision 2425. Decision 03 has adjusted this scope - it is now compulsory to carry out quality standards announcement for all goods produced and/or manufactured on an industrial scale, except where goods are on the list of goods subject to compulsory application of Vietnamese Standards ("TCVN") or industrial standards or other standards (including international, regional, foreign and Vietnamese standards) issued by specialized management ministries.

As it was not expressly provided in Decision 03, the MoST has clarified in its Official Letter 675 dated 24 March 2006 that quality standards announcement is also not compulsory in respect of (i) goods prescribed in the list of goods and products subject to compulsory quality control issued with Decision 50-2006-QD-TTg of the Prime Minister dated 7 March 2006 (see March 2006 Issue of Vietnam Legal Update on www.vietnamlaws.com) and (ii) goods being foodstuffs.

In its Official Letter 675, the MoST has clarified that production on an industrial scale means long term stable production that involves industrial machinery and equipment, with stable product quality and quantity.

An enterprise may develop its own standards or accept other standards for the quality standards announcement. Other standards comprise TCVN, industrial standards, international and regional standards, foreign standards.

An enterprise must submit a standard form announcement of goods quality standards and a copy of the applicable standards to the local Department of Standardization, Metrology and Quality Control. Once the quality announcement is completed, the enterprise will be responsible for the quality of its goods and is obliged to ensure that the quality of its goods quality complies with the announced standards.

Official Letter 675 provides that enterprises which have completed the announcement of goods quality under Decision 2425 are not required to carry out the announcement in accordance with the new Decision 03 and their already "announced" standards will continue to apply.

Declaration of compliance with goods quality

While quality standards announcement is a commitment of an enterprise as to its goods quality, a declaration of goods quality standards compliance is a written declaration by the enterprise to the competent State authority and consumers of the actual compliance of its goods quality with certain standards and technical regulations. This entitles the enterprise to affix a standards compliance mark (CS mark) on its products and catalogues as an indication of its goods quality.

According to Decision 04, quality standards compliance declaration is compulsory for goods stipulated in:

- > The list of goods subject to compulsory application of TCVN issued by the MoST;
- > The list of goods subject to compulsory application of industrial standards or other standards issued by specialized management ministries;
- > The list of goods the quality of which must be certified as complying with TCVN issued by the MoST;
- > The list of goods the quality of which must be certified as complying with industrial standards or other standards issued by specialized management ministries.

Enterprises producing and/or manufacturing goods which are not provided for in the above lists are encouraged to make voluntary quality standards compliance declaration.

Quality standards compliance declaration comprises 2 steps:

- (i) Evaluation of goods quality compliance with standards, which can be performed by (a) specialized organizations registered with the MoST and designated by specialized management ministries or (b) by the enterprise itself;
- (ii) Written declaration of compliance by the enterprise based on the results of the evaluation.

Decision 04 no longer allows an enterprise to declare its goods quality standards compliance on the basis of self-evaluation in respect of goods the quality of which must be certified as complying with TCVN or industrial or other standards. In this case, evaluation of goods quality standards compliance must be performed by a certifying organization registered with the MoST and designated by specialized management ministries.

For the compliance declaration, an enterprise must submit a file to the local Department of Standardization, Metrology and Quality Control or the body authorized by specialized management ministries.

Enterprises are responsible to maintain the compliance of goods quality with the standards. If the goods quality fails to comply with the standards, the enterprise must notify the relevant authorities and suspend the distribution of such goods, recover the distributed goods and take measures to remedy the non-compliance.

Part 2 Feature

Vietnam's new investment law

>>> *We are pleased to reproduce below extracts from a recent paper discussing Law 59-2005-QH11 on Investment dated 29 November 2005, which becomes effective as of 1 July 2006. This paper was prepared by Bill Magennis, managing partner of Phillips Fox Hanoi, for the Investment and Enterprises Law Conference held at the Hilton Hanoi Opera on 5 April 2006. The full version of this paper is available on www.vietnamlaws.com*

Life as we know it began on 29 December 1987, when Vietnam enacted the Law on Foreign Investment in Vietnam. From 1 July 2006, a new life begins: a new Law on Investment ("New LI") sweeps away the old foreign investment regime 1 ("Old LI") and will impact, if not govern, the livelihood of many of us for the foreseeable future.

The New LI has been widely touted in the local press as wonderful and of benefit to Vietnam and investors. For example the Vietnam News Agency on 14 February 2006 reported:

"With regard to the investment environment, the [New IL] makes an important contribution by forming a common playground for all investors on the basis of WTO principles such as the most-favoured nation, and publicity and transparency principles."

This paper examines the extent to which the Old LI will really vanish and the extent to which the New LI might fulfill the positive hype surrounding its advent.

Work of the Chambers of Commerce

I want to acknowledge the role of the combined efforts of the chairmen of the Australian, European and American Chambers of Commerce in relation to the New LI. The New LI passed through 18 drafts, which, to Vietnam's credit, were widely circulated for comment. As the time for the final draft approached, there were many disturbing features in the publicly circulated draft 16. Some of these features would likely have caused some investors and financiers of the more important projects currently under various stages of negotiation to re-assess and possibly lose their current interest in Vietnam. The chairmen wrote a widely publicized letter which resulted in the Ministry of Planning and Investment ("MPI") convening a meeting directly with key officials who took the main points on board and 'remedied' the draft. This was the best example to date of the true value of the business chambers and what can be achieved with Vietnamese officials who are increasingly keen to learn and make laws optimal.

Functions of Vietnam's investment law

The Old LI served four principal functions:

- (i) It stated that all foreign direct investment ("FDI") must have an investment license, and it created the procedures for obtaining such a license.
- (ii) It provided a regime of corporate law for FDI investment vehicles.
- (iii) It provided or pointed to applicable regimes for tax, accounting, land, labour, environment, and the like.
- (iv) It provided the machinery for State administration of FDI.

The New LI does not deal with function (ii) - corporate law. This is now regulated by the new Law on Enterprises, also under discussion today.

1 The Old IL consists principally of the Law on Foreign Investment dated 12 November 1996 (as amended 9 June 2000); Decree 24-2000-ND-CP of the Government dated 31 July 2000 Providing Detailed Regulations on Implementation of the Law on Foreign Investment in Vietnam; and Circular 12-2000-TT-BKH of the Ministry of Planning and Investment dated 15 September 2000 Providing Guidelines for Foreign Investment Activities in Vietnam.

Over the years, applicable regimes for tax, accounting, land, labour, environment, and the like - function (iii) - have been become regulated by dedicated laws and decrees as they have developed.

Function (iv) relating to State machinery remains, but is not relevant to our discussion. Nothing is being abolished or replaced, but the opportunity has been taken to pave the way for creation of the State Capital Investment Corporation which will hold all State investments in vehicles established under the Law on Enterprises. This will sensibly centralize the shareholder function of the State in corporations where the State owns an interest.

So we are left to concentrate on function (i) - investment licenses.

Investment license and investment certificate

For 17 years we have known and loved *giấy phép đầu tư*, meaning literally 'investment permit', and commonly translated as 'investment license'. (I will confine myself to use of the term 'investment license' in this paper.) Before any foreign investor can lawfully commence an FDI project, an investment license is required. From 30 June 2006, the word *phép* will be replaced by *chứng nhận* which means 'certify', to be compared with 'permit' or 'license'. Hence, the New LI ushers in investment certificates in place of investment licenses. Under the New LI, a foreign investor requires an investment certificate before it can lawfully commence an FDI project. An investment certificate will also serve as the business registration certificate of the investment vehicle.

Additionally, under the Old LI, an investment license serves as a 'certificate of registration of the charter' of the relevant investment vehicle. Thus, the investment license amounts to a 'certificate of incorporation' in international terminology. What is not yet clear is whether the New LI's investment certificate will serve the dual function of business registration and certificate of incorporation. In my view, it is the MPI's intention that it will. The MPI is very much wedded to a one-stop-shop policy and is aware of plenty of speculation about, and criticism of, a feared two-step regime for foreign investors (which would be a step backwards). No State authority has made a clear statement, but I expect that Vietnam will issue one-stop-shop regulations, in which case the investment certificate will serve the same key functions of an investment license, in particular it will amount to a certificate of incorporation. That is, the old goes but returns with a different name. All that happens is a change to softer terminology: 'certificate' being less authoritarian than 'permit'/'license'. However there will be no change in key functions performed.

Taxation and other incentives

While on the nature of investment certificates, the OLD IL provides that the income tax regime for a FDI project is stated in the investment license, including incentives in the form of tax holidays and reduced tax rates for certain periods. In the final drafts of the New LI, it was proposed to stop this practice and leave investors to their separate negotiations with the tax office. On this point, investors made an appeal under the stated one-stop-shop policy and related banners and, pleasingly, the New LI enshrines in article 38.3 that the tax regime (or at least the incentive part of it) and other incentives will be enshrined in the investment certificate.

Terminology

The change of terminology without change of substance is not confined to an investment license. I will mention one other example of semantics. The Old LI refers to applications (*đơn*) for investment licenses. The New LI instead refers to requests (*giấy đề nghị*) for investment certificates.

Machine of cogs: discretion

The core is discretion

I have always maintained and explained to new investors, and it is not a clever point, that from 1987 to date, the Vietnamese economy should be seen as a giant machine driven by interconnected cogs, each cog being an actual or yet to be formed business or project. At all times, Vietnam retains a discretion to permit any given cog to be partially, wholly or not at all funded by FDI.

Some cogs have temporary pre-approval for 100% FDI, eg manufacturing kitchen utensils for export in an industrial zone, and a license can therefore be obtained quickly, sometimes in hours. Whilst other cogs, eg FDI in power plants (for which there have been many interested potential investors, but no licenses issued since 2001), require deliberation and decision over a long time, sometimes years, in an expensive environment of constant uncertainty.

Under the New LI, I highlight three changes in the stated law that go to the issue of discretion to issue investment certificates.

Three significant general changes in the New LI

1. *Reduced paperwork perhaps means more automatic registration and less discretion*

The first change is that the paperwork to obtain an investment certificate is reduced where the investment is for less than VND 300 billion (USD18.75 million). The material reduction is that no 'economic-technical statement' is required for these investments. All other Old LI requirements, such as a land file (providing some evidence of some right to land somewhere with at least a letter of support from the people's committee where the land is located), remain, but relief from the burden of the problematic and overly technical 'economic-technical statement' is welcomed by investors.

2. *Conditional investments becomes an entrenched concept*

The second change is that some so-called *conditional investments* have been expressly stated in the New LI, whereas previously they were only set out in Decree 24. This means that now conditional investments are significantly more difficult to change, because amendment of a Law requires National Assembly action, whereas amendment of a Decree requires only Government action.

So far, we only know some of the conditional sectors. They are:

- > Banking and finance
- > Sectors impacting on public health
- > Culture, information, press and publishing
- > Entertainment services
- > Anything to do with mining or environment
- > Development of education and training
- > The usual, "other sectors in accordance with law"

Query how some of these classifications apply or do not apply, for example, to restaurants.

It will be interesting to see:

- > If the list remains relatively small or whether "other sectors in accordance with law" will, by the [New LI's implementing decree](#), follow the Decree 24 list which includes as conditional investments travel industry investments and all consultancy investment other than 'technical' consultancy.
- > If the 'common playground theory' will extend to permitting foreigners to set up the legion of small businesses, such as restaurants, that they currently operate through local persons because they cannot get (discretionary) investment licenses.

3. *Not on a Master Plan: no investment certificate*

The third change relates to the concept of master plans. This concept is, as we all know, ubiquitous in Vietnam.

Under the Old LI, there are several references to master plans at Decree level and above, in the context of State planning and delegation of power to people's committees but not with respect to issuance of investment licenses. 'Planning' in evaluation is referred to, but Circular 12 (article 10) makes it clear that there is extensive discretion irrespective of what a plan says or does not say. The Old LI allows for a project to be licensed despite it not being within a master plan.

By way of negation of this flexibility, buried in article 82 of the New LI (ie at the end of the Law) is the following provision:

"Investment projects must comply with master plans: master plans for the technical infrastructure, land use zoning, construction master plans, and master plans for use of minerals and other natural resources."

If a project is not on a master plan, then there is no discretion. It may be that I am stretching application of this provision, but the following from article 82 makes it clear:

"With respect to projects for which there is as yet no master plan as stipulated in this article, the State administrative body for investment shall be responsible to act as co-ordinator with the State [administrative] bodies responsible for master planning for the purpose of responding to investors within a time-limit of thirty (30) days from the date of a request from an investor."

The response time (no nature of response is mentioned) is 30 days but, if a project must, as a condition precedent to approval, be incorporated within a master plan, it is unclear how long that will take given multiple participants in all such decisions.

Perhaps the change to the law is made in the name of transparency, but I imagine that rather than have master plan compliance embedded as an apparent removal of discretion in the law, investors would have preferred (and Vietnam would have benefited more) from the old more flexible system in this regard.

Equal rights and domestic investors

Until 30 June 2006, domestic investors have it much easier than their foreign counterparts in terms of paperwork and approvals to get an investment off the ground. No general investment approval (as distinct from corporate registration under the Law on Enterprises) is required.

From 1 July, all domestic investments above VND 15 billion (USD937,500) but below VND 300 billion (USD18.75 million) will require registration under a regime akin to that currently imposed only on foreign investment and which foreign investors find costly and burdensome.

An investment certificate is said to be optional for these domestic investments between VND 15-300 billion, but presumably there will be some kind of paper certifying registration or rejecting the request for registration: what happens if the mandatory 'request' (not application) file is defective?

For domestic investments above VND 300 billion (USD18.75 million) or in conditional sectors, evaluation will be required for an investment certificate.

Foreign investors have argued for equal rights for many years in the hope that the rights and obligations of foreign investors would be changed to reflect the current domestic investment regime. Rather than attempting to reflect this aspiration, the New LI imposes to a substantial extent an OLD LI-type regime on domestic investors.

The 'level playing field'/'common playground' assertion referred to at the start of this paper is therefore correct (although sticklers for precision would point out that domestic investors have an advantage - not a real advantage in my view) in that no investment registration at all is required for projects up to VND 15 billion for domestic investors.

Direct and indirect investment

Most definitions in the New LI (article 3) need not concern readers. Mostly they provide definitions that are self explanatory to a reader in the text without having to refer back to article 3. Indeed Vietnamese law drafting methodology is to define terms, but in the body of the relevant laws not to provide any indication of the use of the defined terms in the text by for example use of capital letters or other devices.

But two definitions in the New LI (article 3) must be critically examined. They are:

- "2. *Direct investment* means a form of investment whereby the investor invests its invested capital and participates in the management of the investment activity.
- 3. *Indirect investment* means a form of investment through the purchase of shares, share certificates, bonds, other valuable papers or [investment through] a securities investment fund and through other intermediary financial institutions and whereby the investor does not participate directly in the management of the investment activity."

Direct investment is covered by the New LI and an investor needs an investment certificate for it. Indirect investment is not covered by the New LI and an investor does NOT need an investment certificate for it. So what is the dividing line?

The dividing line is clear enough: participation directly in the management of the investment activity. The plain meaning is also clear enough. If Dragon Capital or any other investment fund buys 5% of a local shareholding company and gets a seat on the board, that would qualify the investment as direct. Perhaps even attending a general meeting and exercising the right to vote might (at a stretch) qualify. Such outcomes cannot have been intended and require appropriate clarification in the [New LI's implementing decree](#).

One can easily see a raft of issues arising out of the normal investment process of buying shares in existing local companies. Suppose I (a foreign investor), as permitted by law, intend to take over 49% of a (currently) local company which has 100% of its shares listed on the stock exchange. I will do this by offering a 100 times current value so at least 49% will accept my offer. Can it be that I need no investment certificate if I do not seek a seat on the board, but will need one if I intend to put myself up for election at the next general meeting? What happens if I change my mind later?

This tangle of issues is very important and should be promptly untangled because so many investors are out there cashed up and ready to invest if they can.

The New IL

Having roamed over some important general issues arising in the New LI, I will now take you on a more detailed tour of it article by article by way of reference to the summary/cut down version of the New LI in Appendix A. Appendix A is prepared from the point of view of what a potential foreign investor and his/her adviser 'needs to know'. If no material appears in relation to an article, then it means that the content is unexceptional, or not different from the current regime, or not relevant to an investor.

From a survey of the New LI - more particularly Appendix A - and by making comparison with the Old LI, one may draw the following 18 conclusions on issues that are important to investors:

	Conclusion	Evaluation of conclusion on status quo
1	The New LI does not deal with corporate matters which are in the new Law on Enterprises.	Fundamental change, but of neutral impact as of itself (however, there are impacts under the Law on Enterprises)
2	For foreign investors, the New LI deals with granting the right to embark on FDI by way of issuance of an investment certificate.	No change
3	The New LI does not deal with granting the right to invest where such right is governed by the Law on Insurance, the Law on Credit Institutions, Decree 144 on Securities and Securities Markets or any other licensing procedure applying to a specific industry.	No change.
4	The New LI does not deal with granting the right to invest in cases of indirect investment, but the boundary between direct and indirect is blurred and requires clarification.	No change in philosophy but confusion created

5	The investment application procedure is rendered slightly less burdensome in that, for investments under VND 300 billion (USD18.75 million), no 'economic-technical' statement is required.	Positive change
6	The list of conditional investment areas is incomplete and conditions are yet to be specified.	No change
7	The abolition of 'economic-technical' statements in many cases, the softer terminology of 'request', 'registration' and 'certificate' (instead of 'application' and 'license') and the shorter time periods for issuance creates an impression that getting an investment certificate in some cases will be easier and quicker. But, upon examination, the discretion vested in the license-issuer remains and, where flexibility existed and could be applied beneficially, such discretion has been removed in the important case of 'master plans'.	Positive change but not of the magnitude asserted by some
8	Critical provisions in relation to Government guarantees are retained.	No change
9	The important matter of dispute resolution has become more flexible in that any contract to which a foreign invested enterprise is a party may have international arbitration.	Positive change
10	The important matter of governing law is equivocal and perpetuates confusion between mandatory law and the law governing a contract.	No change - possibly backwards
11	Investment can more easily be revoked: previously, a serious breach of law was required; now any breach can trigger cancellation of the investment certificate.	Negative change
12	The role of arbitral bodies has expanded to include jurisdiction over cancellation of investment certificates. This seems an inappropriate yielding of sovereignty usually reserved to states and their courts.	Possible a mistaken change
13	There is established a new and most useful institution the State Capital Investment Corporation.	Positive change
14	There is a most helpful list of license conditions - some of those conditions imposed in the past will no longer be applied.	Positive change
15	Change in law consequences have been modified slightly.	Positive change
16	The ban on mortgage of lands use right to foreign bank branches licensed in Vietnam remains.	No change - unfortunate
17	Land issues remain in status quo and a source for many troublesome issues to arise.	No change - unfortunate
18	Foreign bank account issues remain within State Bank discretion.	No change

The above list does not deal with the transition issue or the corporate law issues.

Overall, one would have to conclude that there has been a positive change in the matters covered in this paper. Of course, this overall positive change may well be counter-balanced by other changes reported on by my colleagues in their presentations today.

To re-register or not to re-register?

>>> *Since our feature in the March 2006 Issue of Vietnam Legal Update on Draft 7 of the MPI's proposed Decree on Re-registration of Enterprises with Foreign Owned Capital Pursuant to the Law on Enterprises and the Law on Investment, the MPI has released its next draft (Draft 8, available on 24 April 2006) taking into account many of the comments of foreign investors. Below we take a brief look at Draft 8.*

For existing foreign investors in Vietnam, the Re-registration Decree will be one of the most important decrees implementing the New LI and (its twin) the Law on Enterprises 2005. In a snapshot, the Re-registration Decree gives existing foreign investors the option to re-register for an investment certificate under the New LI (in replacement of their current investment license issued under the Old LI). The Law on Enterprises 2005 provides for a 2 year transition period until 30 June 2008 in which existing foreign invested enterprises ("FIEs") may exercise this option.

The main changes introduced in Draft 8 of the Re-registration Decree include:

- > Draft 8 provides clarification on whether the Re-registration Decree will regulate the conversion of existing FIEs into other organizational forms during the process of re-registration. Draft 8 clearly states that the Re-registration Decree will *not* regulate conversion of FIEs from their Old LI organizational form into (one of) the New LI organizational forms during the process of re-registration. Conversion is a separate step from re-registration. The conversion step will be dealt in another decree implementing the Law on Enterprises 2005 and the New LI.

MPI's reasoning is that, under Article 170.2 of the Law on Enterprises 2005, a FIE which has not re-registered only has the right to operate in accordance with its issued investment license and does not have the right to convert to an organizational form available under the Law on Enterprises 2005. According to the MPI, to allow a non-re-registered FIE to convert its organizational form *could be contrary* to the Law on Enterprises 2005.

So, it appears that, if a FIE wants to convert its organizational form, it must re-register prior to such conversion.

- > Draft 8 now expressly deals with re-registration of Business Co-operation Contracts ("BCCs"). Draft 7 had provided that BCCs were regulated by the Re-registration Decree, but had contained only one provision on BCCs. That sole provision was for the MPI to provide guidelines on applicability of the Re-registration Decree to existing BCCs! In response to calls to ensure consistency of re-registration of BCCs with the re-registration process applicable to FIEs, the MPI has expressly provided that re-registration is available to BCCs in the same manner as other FIEs.
- > Under Draft 8, a re-registered enterprise will have the right to retain its name, seal, accounts, tax and custom code. Further, Draft 8 abolishes the Draft 7 provision for termination of a FIE's existence upon re-registration. It is understood that the above changes are aimed at making the process of re-registration as convenient as possible for re-registering FIEs. With no change in name of the re-registering FIE, it will not have to amend its commercial agreements, labor contracts, letterhead, etc. It will simply register to operate under the provisions of the New LI and Law on Enterprises 2005. However, if no change in name is required by the Re-Registration Decree, the situation may arise where a re-registering FIE's name is contrary to the requirements in the Law on Enterprises 2005 with respect to the names of Vietnamese enterprises.
- > Draft 8 requires a re-registering enterprise to submit an amended charter in its application file for re-registration in addition to its investment license (and any amendment thereof) issued under the Old LI and, in the case of a joint venture enterprise, a decision on re-registration by the board of management. This amendment is understood to have resulted from investors' comments that as the charter regulates operation of an enterprise, it must be revised in accordance with the New LI and Law on Enterprises 2005.

So, although a FIE may only conduct conversion of its organizational form *after* re-registration, it must have already amended its charter *before* re-registration. The distinction between and separation of re-registration and conversion is starting to appear very artificial and unnecessarily confusing...

(Another amendment is that Draft 8 no longer requires submission of a decision on re-registration by the owner of a 100% FIE or of the general meeting of shareholders of a shareholding company with foreign owned capital.)

- > One of the most significant changes in Draft 8 is that it no longer makes it compulsory for FIEs which do not re-register to nevertheless adjust their organizational structure to conform with the requirements of the Law on Enterprises 2005. Under Draft 8, non-re-registering FIEs are entitled to *choose* (i) to retain the organizational structure provided for in their OLD LI charters *or* (ii) to adjust the organizational structure in accordance with the Law on Enterprises 2005. In the case of (ii), the enterprise must amend its charter and re-register with the State administrative body for investment. Unfortunately, Draft 8 fails to clarify whether re-registration under (ii) is any different from or the same as re-registration as otherwise regulated by the Re-registration Decree (discussed above). It would be unnecessarily confusing to create 2 different types of re-registration.

So, in effect, the choice for existing FIEs (and BCCs) appears to be between (a) not re-registering and continuing to operate with their Old LI organizational structure *or* (b) re-registering and then converting into an organizational form available under the Law on Enterprises 2005.

An improvement for non-re-registering FIEs introduced by Draft 8 is that such FIEs have been given the explicit right to continue to enjoy the investment incentives as stipulated in their investment license.

However, Draft 8 (like previous drafts) severely curtails the right of non-re-registering FIEs to apply for amendment of Old LI investment licenses (as discussed in March 2006 Issue of Vietnam Legal Update). It looks like non-re-registering FIEs will indeed become dinosaurs in the New LI environment.

Investment decree

- >>> *On 17 April 2006, the MPI released for public comment its draft Decree Making Detailed Provisions for Implementation of the Law on Investment. Below we take a very brief look at the MPI's draft investment decree.*

Foreign investors have been keenly awaiting this main decree implementing the New LI. Not surprisingly (as it was how things were handled under the Old LI), the main investment decree covers direct investment only. Yet to come are separate investment decrees regulating offshore investment and BOT investment. Indirect investment in the form of purchases of shares, bonds and other valuable papers; and through securities investment funds and other intermediary financial institutions is regulated under Vietnam's securities regulations.

Notable aspects of the main investment decree include:

- > As of 1 July 2006, the term "foreign invested enterprise" signifies (not just) enterprises established by foreign investors to carry out investment activities in Vietnam but (now also) Vietnamese enterprises in which foreign investors hold more than 50% of the chartered capital.
- > In principle, investors are free to choose their form of investment. However, the main investment decree provides that foreign investors in the sectors of health care, education and training, or scientific research in Vietnam are limited in their choice to the following forms of investment: limited liability company, shareholding company or partnership. And all foreign investors are limited in their choice of form of investment, scale of investment, sector of investment and ratio of capital investment, etc, by any relevant international treaties of which Vietnam is a member.
- > Investment activities regulated under specialized legislation, such as banks, insurance companies and (the new kid on the block) securities houses, are not subject to the New IL and do not require an investment certificate. It is explicitly stated that indirect investment does not require an investment certificate.
- > To carry out investment activities, domestic investors must obtain business registration for an economic organization. If the investment scale is over VND 15 billion (USD937,500) but below VND 300 billion (USD18.75 million), domestic investors must carry out investment registration as a second step; if above VND 300 billion or in conditional sectors, the second step will be investment evaluation.

First-time foreign investors must register/apply for an investment certificate, which serves concurrently as a business registration certificate. So foreign investors do not need to carry out any second step to establish their desired economic organization.

For second-time (and thereafter) investors with an extant investment certificate, (i) if they don't wish/need to establish a new economic organization for their next investment project, they simply register/apply for an investment certificate; (ii) if they do wish/need to establish a new economic organization for their next investment project, they must register/apply for an investment certificate and carry out procedures for establishment of economic organizations. Unfortunately, it is not clear whether (ii) is a one or two step process.

- > Contents of joint venture contracts and charters as well as contents of charters for 100%FIEs and contents of BCCs are prescribed in the investment decree (with little change from the Old LI regime).
- > Mergers and acquisitions are dealt with, with express reference to compliance with Vietnam's competition law. Of note, the investment decree imposes on merging or acquiring companies the obligation to continue to employ 60% of the current employees currently for at least 3 years from the time of the merger or acquisition.
- > For the first time, the investment decree provides for establishment of foreign invested holding companies and subsidiaries, but leaves the Government to make detailed provisions thereon in separate legislation.
- > Preferential tax treatment and other incentives are set out in the investment decree. Appended to the investment decree are the various lists of projects entitled to preferential treatment (eg sectors/industries in which investment is especially encouraged).
- > The list of sectors in which investment is subject to conditions is appended to the investment decree and includes:
 - Sectors in which both foreign and domestic investment is subject to conditions, such as explosives manufacture, advertising, telecommunications, horseracing, real estate business.
 - Sectors in which just foreign investment is subject to conditions, such as transportation, tourism, trading and distribution, and other prescribed sectors in international treaties.
- > Investment approval authority is vested in the Prime Minister for a wide range of projects irrespective of capital level (from sea ports to telecommunications - and almost everything in between) and others with capital over VND800 billion (from car manufacturing to real estate). The MPI issues the necessary investment certificate. For all other projects, investment approval authority is vested in provincial-level people's committees, with the local Department of Planning and Investment issuing the necessary investment certificate. Investment registration and approval procedures are set out in detail.
- > There is no proposed reform of the current restrictions on offshore bank accounts and mortgages of land use rights.
- > Implementation of investment projects is regulated in detail. Projects may be liquidated at the same time as or separately from the economic organization carrying out such projects.

>>> For more on the 2005 Law on Enterprises and Law on Investment, see recent issues of Vietnam Legal Update on www.vietnamlaws.com

>>> For English translations of Law on Enterprises, Law on Investment, Re-registration Decree, and more, subscribe to [Vietnam Laws Online Database](http://www.vietnamlaws.com) on www.vietnamlaws.com

Part 3 Did You Know?

3.1 National Assembly update

The National Assembly's 9th Session is scheduled to open on 16 May and run until 27 June 2006. 11 Laws are scheduled to be passed, including:

> Law on Securities:

Yet another arm of Vietnam's efforts to join the WTO, this Law is aimed at stimulating the securities market of Vietnam. Maybe its greatest reform is the simplification of paperwork and procedures for participation in the securities market. The Law is proposed to become effective as of 1 January 2007 (and repeal the current Decree 144 on Securities and Securities Market).

Draft 14 of the Law on Securities covers many subjects currently regulated under Decree 144 and its implementing legislation, but it also covers some new concepts:

- The concept of a public company is introduced. A public company is defined as a shareholding company with: shares issued to the public; shares listed at a Securities Trading Centre; shares owned by 100 or more investors. The Law sets out the documents required in the application file to establish/list a public company, the rights and obligations of a public company, the reporting requirements, etc.
- Public securities offer means an offer to sell securities to at least 100 investors (up from 50 in Decree 144).
- The draft Law sets out the conditions for: offering shares to the public (the minimum required level of paid-up charter capital for an issuing organization is VND10 billion - up from the current VND5 billion); offering bonds to the public (the minimum required level of paid-up charter capital remains VND10 billion); offering certificates of securities management fund to the public (the minimum total value of issued investment fund certificates is VND50 billion - 10 times higher than the current requirement - and the requirement for a minimum number of certificate holders of 50 has been abolished). Of note, the draft Law no longer distinguishes whether the issue of shares or bonds is initial or not.
- Examples of the simplification of paperwork: 3 less documents are required as part of an application for registration of a public share offer (copy business registration certificate of the issuing organization, list and CVs of the members of its board(s), and financial reports for latest 2 years); and 5 less documents are required as part of an application for registration of a public bond offer. (The draft Law now specifies the documents required for a public offer of investment fund certificates, which is not regulated under Decree 144).
- Foreign invested securities companies may be established in the form of (as now) joint ventures or (new) 100% foreign owned companies and may be either limited liability companies or shareholding companies. (The wording of draft 14 could do with some re-drafting to clarify these reforms.)
- For the first time, the draft Law introduces a new form of securities investment company, being a legal entity established purely for the purpose of investment in securities.
- Also for the first time, the draft Law prescribes the main contents of a prospectus.
- The State Securities Commission will be able to suspend operations of the Stock Exchange or Securities Trading Centres where necessary in order to protect interests of the investors.

>>> Integral to development of Vietnam's securities market, the Government is pressing to accelerate the equitization process of State owned enterprises. Most recently, the Ministry of Finance issued Official Letter 5053 dated 17 April 2006 aimed at reviewing equitized State owned enterprises carrying out sale of shares and/or listed/registered for trading at Securities Trading Centres.

As consideration of the proposed Law on Registration of Real Estate has been deferred, only 12 Laws will be considered, including:

> Labour Code amendments:

Chapter 14 of the Labour Code is proposed to be amended in relation to strikes and resolution of strikes. The Ministry of Labour's current draft of its proposed amendments has been criticized as not providing any workable solution to the problem of illegal strikes. It attempts to distinguish between 'rights' and 'benefits'. 'Rights' are as stipulated by law or as agreed in collective labour agreements and internal labour rules registered with labour authorities. Employees do not have to go on strike for these rights; employers which fail to honour these rights will be penalized. 'Benefits' are 'higher' and not prescribed in such documents. The draft entitles employees to go on strike to request 'benefits' even during the life of an applicable collective labour agreement.

> Law on Technology Transfer:

The first draft was released in late February. The Vietnam Business Forum's Manufacturing and Distribution Working Group (IP and Technology Sub-Group) has pointed out that the proposed Law is in fact now unnecessary and redundant. Many aspects of the proposed Law are already regulated under more sophisticated laws: Law on Intellectual Property 2005 (eg copyright in software), Commercial Law 2005 (eg franchising) and Competition Law 2004. Overlapping (and in some cases, inconsistency) with other laws creates unnecessary confusion. Amongst other things, the proposed Law fails to distinguish between outright transfers of technology and limited-duration licenses to use technology. The aim of the proposed Law appears clearly to be to perpetuate the State's tight control over technology imported from abroad into Vietnam. The restrictions on technology transfer fees and contents of contracts were abolished in early 2005. But this Law retains the current requirement for registration (quasi-approval) of technology transfer contracts. It appears the State has not recognized (and certainly not learnt from) the link between these technical barriers and the fact that only around 20 technology transfer contracts were approved by the Ministry of Science and Technology in the 15 years since the first Ordinance on Technology Transfer until 2005. To make things worse, the proposed Law introduces sub-licenses for technology service providers (eg technology appraisal services) at a time when the trend is to abolish sub-licenses (see [3.3](#) below), and may well exclude foreign technology service providers from the Vietnamese market at a time when the trend is to break down barriers for foreign service providers. Of concern, the Law suggests that the use of a technology service provider will be compulsory to obtain registration/approval of contracts.

>>> Law 61 on Tendering became effective as of 1 April 2006. Regrettably it does little to improve the previous tendering regime. A draft decree on tendering (implementing Law 61) has been submitted to the Government for approval but has still not been issued. The draft decree expressly requires foreign invested projects with 30%+ State capital to conduct tendering in accordance with Vietnamese tendering rules. For more details, see March 2006 Issue of Vietnam Legal Update on www.vietnamlaws.com.

3.2 **10th Party Congress concludes**

The conclusion of the 10th National Congress of the Communist Party of Vietnam (which ran from 18-25 April) heralds a changing of the guards. The 1,176 Congress delegates voted on membership of the 10th Communist Party of Vietnam's Central Committee ("CPVCC"). The CPVCC has been expanded to 185 members, with 160 official voting members and 25 non-voting alternate members.

Eight incumbent members of CPVCC's Politbureau did not stand or were not nominated for membership, including Prime Minister Phan Van Khai, State President Tran Duc Luong, National Assembly Chairman Nguyen Van An, and Deputy Prime Minister Vu Khoan.

Six incumbent members of CPVCC's Politbureau are ingoing members of CPVCC, including General Secretary Nong Duc Manh, Secretary of Communist Party Committee of Ho Chi Minh City Nguyen Minh Triet, Deputy Prime Minister Nguyen Tan Dung, and Secretary of Communist Party Committee of Hanoi Nguyen Phu Trong.

The ingoing CPVCC elects the ingoing Politbureau, which is expected to have 15, possibly 17, members. From the Politbureau members, the General Secretary of the CPVCC is elected.

The new State president, new National Assembly Chairman, new Prime Minister and other cabinet members will be elected by the National Assembly Legislature XI, either at its next Session in May-June 2006 or at its 10th Session in November 2006. According to local press reports, current First Deputy Prime Minister Nguyen Tan Dung (former State Bank Governor) is tipped to become the next Prime Minister; and current Secretary of Communist Party Committee of Ho Chi Minh City Nguyen Minh Triet is tipped to become the next State President. Of note, both men are from southern Vietnam.

As well as electing the CPVCC, the 10th Party Congress passed its next five-year plan, which aims to increase exports, combat corruption and continue along the path of global economic integration and sets the targets of maintaining a growth rate of about 8% and creating eight million new jobs. Public anger at the recent Ministry of Transport embezzlement scandal also gave cause for considerable self-criticism at the Congress.

3.3 Trend against business licenses

A draft Decree on Management of Business License System was the subject of a VCCI seminar in early April. Aimed at limiting the number of business licenses and simplifying licensing procedures, the draft decree requires draftspersons of legislation to assess the impact of any proposed license, in particular to assess the extent to which the proposed license would restrict the right to conduct business freely and would impose extra costs on businesses. Also, it would be mandatory for draftspersons to obtain comments from businesses and other entities affected by the proposed license and from professional associations and other such bodies. Of note, the draft decree would require such comments to be made public. The draft decree envisages the establishment by the Prime minister of a National Council for Business Licenses to evaluate the lawfulness of and necessity for any proposed license. To simplify licensing procedures, the draft decree proposes that an applicant should only have to deal with one person or one section on all issues, including issuance, amendment and extension. According to VCCI, at present, Vietnam has 300 different types of business licenses in 22 lines of business (4 April VNExpress). This is recognised as one of the fundamental impediments in business and investment in Vietnam.

3.4 Social evils - are they what they used to be?

Vietnam has issued new regulations on cultural activities and services under Decree 11-2006-ND-CP of the Government dated 18 January 2006, replacing Decree 87-CP of the Government dated 12 December 1995 on intensification of management over cultural activities and services. The fight against social evils continues under Decree 11, but less blatantly than under Decree 87. Decree 87 classified social evils into 3 categories: prostitution, drugs and gambling; with a separate section dealing with the fight against social evils in restaurants, guest-houses, hotels, etc. Decree 11 only makes one mention of social evils. Article 4 provides a list of activities which are prohibited. In the list, alongside prohibited acts such as crimes or superstition, "social evils" are included. However, Decree 11 does not define what constitutes "social evils". Prostitution, drugs and gambling are not specifically dealt with anywhere else in Decree 11 (except that online games with a 'gambling nature' are expressly prohibited), so should we presume they are still social evils or not?

3.5 'Vietnam-speak' - the meaning behind official language

Every now and then, foreigners doing business in Vietnam will hear a peculiar Vietnamese phrase used in official language, and wonder as to its deeper meaning. By way of examples, here are four expressions that are very 'Vietnamese' together with our take on their meaning and significance:

- > *Cổ phần hóa* Literally "share-ization", but officially "equitization". Most common in the context of equitization of State owned enterprises. One explanation for the official translation "equitization" is that it reflects more accurately the process in Vietnam by which the State divests its interests in State owned enterprises. In Vietnam, the focus is said to be on ensuring that employees receive shares in the State owned enterprise, which is "equitable". The more obvious and internationally used term "privatization" may also be considered inappropriate for other reasons.

- > *Văn minh thương mại* Literally "commercial civilization". This curious term, used occasionally in official contexts, seems intended to describe the process by which the Government hopes to "civilize" the conduct of commerce in Vietnam. It captures improvement of supply chains, concentration of retailing, and payment of taxes.
- > *Xã hội hóa giáo dục* Literally "socialization of education". Also used in official contexts, this phrase seems to refer to the opening up of the education sector to investment by "society", particularly domestic private investors, but also foreigners.
- > *Hình sự hóa các quan hệ kinh tế và dân sự* Literally "criminalization of economic and civil relations". This phrase is occasionally used in official contexts and widely used by local press. It refers to a broad tendency for economic and civil disputes to be resolved by recourse to criminal procedures, instead of by the proper procedures to resolve civil cases. The result of this trend is that people see defendants to civil cases as "criminals".

3.6 Foreign investment in Vietnamese banks

In our summary of new Decree 22 on foreign banks in Vietnam in the March 2006 Issue of Vietnam Legal Update, we noted the State Bank's reluctant attitude towards 100% foreign invested banks and we suspected that high capital requirements might be imposed as a backhanded way to discourage them. The latest news supports our theory that the State Bank favours foreign investment in the form of shareholding in existing Vietnamese banks. On 20 April, "Youth On-Line" and "Vietnam Economy" both reported that the proposed legislation to regulate foreign shareholding in Vietnamese banks had been re-drafted (and elevated to Decree status, rather than Decision status as previously). Of particular note, the maximum ratio of ownership of shares by any one foreign credit institution in a Vietnamese bank has been increased to 20% of the charter capital of the bank. In the 2005 draft, this cap was 10%, with only (undefined) strategic investors being permitted to own a maximum shareholding of 20%. There is no change from the 2005 draft in the 30% cap on the aggregate value of shareholdings of all foreign investors in any one Vietnamese bank.

Also of note, the first of the three conditions that a foreign credit institution must satisfy to be permitted to purchase shareholding in a Vietnamese bank has been modified to the following: being within the top/leading 500 banks throughout the world *or having assets worth USD20 billion* (our italics indicate new insertion).

3.7 Foreign bank branches can now take saving deposits, maybe...

Previously, under Decree 13, a foreign bank branch ("FBB") was specifically *not* allowed to take "savings deposits" (undefined) in any form. This prohibition is no longer contained in the new Decree 22 on foreign banks in Vietnam, which became effective as of 24 March 2006 (for our summary, see March 2006 Issue of Vietnam Legal Update). We understand that this was a deliberate omission from Decree 22 and that the State Bank's intention is that FBBs are now permitted to take savings deposits, but in limited circumstances only. It is not clear what these limited circumstances are. We are told by the State Bank that its circular providing guidelines for implementation of Decree 22 will not provide any more information on this issue. Instead, the taking of savings deposits by a FBB will be decided on a case-by-case basis (and stipulated in its license).

3.8 WTO accession - latest news

Moving ever closer to WTO accession, Vietnam has concluded its bilateral negotiations with 27 of its 28 WTO-member trading partners. Having concluded talks with New Zealand in January and with Australia in February, Vietnam wrapped up its negotiations with Mexico on 27 April, leaving just the US to go. Reportedly, negotiations with the US are progressing well and should be concluded soon (Vietnam News Agency, 28 April 2006). Having commenced its WTO negotiations in 1995, Vietnam is confident of achieving WTO accession in 2006.

Part 4 What's new on www.vietnamlaws.com?

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Vietnam Laws Online Database on www.vietnamlaws.com is an online searchable database of English translations of close to 3,000 Vietnamese laws relating to foreign investment and far beyond - it's the most extensive online Vietnamese law library in the world. Our new keyword search option allows subscribers to search for keywords in our descriptions of legislation - as well as searches by subject category, date, issuing body, official number, legislation type, or an advanced search, combining two or more of these search options. Translations can be viewed online, printed and downloaded (subject to terms & conditions).

Updated on 25 April 2006, Vietnam Laws Online Database includes:

- > Decree on promotions & advertising ([1.3](#) above)
- > Decree on franchising ([1.4](#) above)
- > Legislation on import of used cars (implementing Decree 12 & Commercial Law) ([1.5](#) above)
- > Draft decrees (*so you can be prepared*):
 - re-registration of foreign invested enterprises ([2.1](#) above)
 - foreign trading and distribution rights
 - foreign representative office & branch offices
 - foreign credit institutions buying shares in Vietnamese banks
- > Law on Tendering 2005, effective 1 April 2006
- > Law on Enterprises 2005, effective 1 July 2006 ([2.2](#) above)
- > Law on Investment 2005, effective 1 July 2006 ([2.1](#) above)
- > New Civil Code, Commercial Law, Maritime Code & more, effective 1 Jan 2006



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**.

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

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