Vietnam Legal Update

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We're pleased to announce our Vietnam practice will be moving to join Allens Arthur Robinson as of 1 January 2007 (subject to necessary regulatory approvals). We're delighted to join the very strong regional network of Allens Arthur Robinson, with offices in Bangkok, Beijing, Shanghai, Hong Kong, Singapore, Jakarta, Phnom Penh and Port Moresby.

This will be the last issue of Vietnam Legal Update for 2006.
We look forward to continuing our association with readers in 2007
as part of the Allens Arthur Robinson network.

Part 1 Selected New Legal Instruments

1.1 Representative offices & branches

Circular 11-2006-TT-BTM of the Ministry of Trade ("MoT") dated 28 September 2006 Providing Guidelines for Implementation of Decree 72-2006-ND-CP of the Government dated 25 July 2006 Making Detailed Provisions for Implementation of the Commercial Law With Respect to Representative Offices and Branches of Foreign Business Entities in Vietnam

Effective as of 14 August 2006, Decree 72 introduced a number of reforms with respect to representative offices ("ROs") and branches of foreign business entities in Vietnam. As reviewed in the July 2006 Issue of Vietnam Legal Update (available on www.vietnamlaws.com), some reforms were positive, others were backward steps. In particular, ROs are only available to foreign business entities having been in operation for at least 1 year, which disqualifies foreign start-up companies from testing Vietnam's investment-business waters through a RO. Remarkably, the duration of ROs has been re-capped at 5 years (albeit extendable), after the cap was abolished in 2000.

Generally speaking, Circular 11 repeats many of Decree 72's provisions (a common legislative approach in Vietnam). In addition, appended to Circular 11 are the various standard forms for applications for issuance, re-issuance, amendment, extension and withdrawal of RO and branch licenses, as well as standard forms for commencement notices, operational reports and termination notices.

> Licensing bodies:

The MoT is the body with authority to decide on the issuance, re-issuance, amendment, extension and withdrawal of licenses for establishment of branches of foreign business entities. The MoT's Department of Planning and Investment is the body which carries out actual license issuance, etc. The MoT's Department of Trade is responsible for implementation of a database of information on ROs and branches and for coordinating with Departments of Planning and Investment in updating and disclosing relevant statistic information via the MoT's website www.mot.gov.vn.

The provincial-level Department of Trade or Department of Trade and Tourism is the body with authority to issue, re-issue, amend, extend and withdraw licenses for establishment of ROs of foreign business entities.

> General requirements for applications:

All documents issued or certified by competent foreign authorities for the purpose of applications for RO and branch licenses must be consularized and translated into Vietnamese, with the translation and any copy documents required to be notarized. All copies of documents issued or certified by competent Vietnamese competent must be notarized.

> Application file for RO or branch license:

As well as the standard form application appended to Circular 11, the following documents are required to be submitted:

- copy of business registration certificate or equivalent documents;
- audited financial statements or equivalent document for the preceding fiscal year (equivalent document is defined in Circular 11 to mean document certifying the tax or financial status during the preceding fiscal year issued by the competent authority where the foreign business entity is located or any document certified by a competent authority on the existence and actual operation of the foreign business entity for the preceding fiscal year;
- copy of the charter of the foreign business entity.

The contents of applications for license amendment, re-issuance, extension, etc are also prescribed in Circular 11.

Circular 11 prescribes a 15 day time-limit for processing of licenses. Licensing bodies have no discretion to refuse licenses if all documentation is in order. RO and branch licenses must be delivered directly to the chief representative of the RO or branch or the legal representative of the foreign business entity.

Licensing fees will be as prescribed by the Ministry of Finance.

> Re-registration of existing ROs:

Decree 72 requires any RO of a foreign business entity which was licensed prior to 14 August 2006 (date of effectiveness of Decree 72) to re-register so that its RO license can be re-issued in accordance with the provisions of Decree 72. ROs in special sectors, such as banking, finance, legal services, culture, education, tourism (which are outside the scope of Decree 72), are not subject to this re-registration requirement. The period for re-registration under the new regime is 6 months from the date of effectiveness of Decree 72 - so representative offices have until 14 February 2007 to submit their re-registration documentation.

As well as the standard form application form appended to Circular 11, the following documentation is required to be submitted in a re-registration application file:

- original RO license; and
- copy of business registration certificate or equivalent document of the foreign business entity certified by a competent foreign authority where the foreign business entity is established or registered.

What clarification does Circular 11 offer with respect to the following important issues relating to the apparent imposition on re-registering ROs of new RO restrictions introduced under Decree 72?

- Will the unlimited duration of ROs licensed prior to 14 August 2006 be capped to 5 years during the re-registration process (given that the objective of registration is the re-issuance of licenses in accordance with Decree 72 and Decree 72 caps duration to 5 years)?

  Answer: Yes. The duration of a re-issued RO license will be as stipulated in article 4.3 of Decree 72. That is, a RO license will have a maximum duration of 5 years. Of note, the actual duration may be less than 5 years as it must accord with the remaining duration under foreign law of the business registration certificate of the foreign business entity (or document of equivalent validity).

- Will the scope of operation of existing ROs be affected?

  Answer: Yes and no. Circular 11 stipulates that the operational items in a re-issued RO license will be the original operational items as recorded in the original license. However, it also stipulates that such operational items must not be outside the following: exercise of the function of a liaison office; facilitation of formulation of co-operative projects of the foreign business entity in Vietnam; market research to promote opportunities for purchase and sale of goods and for provision and sale of commercial services of the foreign business entity that it represents; monitoring and activating performance of contracts of the foreign business entity that it represents which have been signed with Vietnamese parties or which relate to Vietnamese markets; other activities permitted by the law of Vietnam.

- Will a change in chief representative of an existing RO be required if such chief representative is also the head of a branch in Vietnam or the legal representative of an enterprise established in Vietnam?

  Answer: No answer. Decree 72 prohibits the chief representative of a RO from acting concurrently as the head of a branch in Vietnam or as the legal representative of an enterprise established in Vietnam. As Circular 11 is silent, it should be assumed that this restriction will be imposed on re-registering ROs.

  It is not 100% clear but it appears that the first part of this restriction extends to prohibit the chief representative of a RO from acting concurrently as the head of a branch of the same company and also of a branch of any other company. To date, there are very few branches of foreign business

entities in Vietnam. But when the import and distribution sector is opened in 2007, the number is likely to increase. At that time, this restriction will become more significant as it will require foreign businesses to employ a separate branch head from its RO head.

More immediately significant is the second part of the above restriction. Either the general director or the chairman of an enterprise must be designated as its legal representative (and must be recorded as such in the charter of an enterprise). So, where the general director of an enterprise is also its legal representative (most common scenario), any person who is the chief representative of a RO is not eligible as general director and the person who is the general director is not eligible as chief representative of a RO. A corresponding scenario applies where the chairman is an enterprise's legal representative.

For foreign businesses looking to expand their operations in Vietnam from RO to (also) establishment of an enterprise in Vietnam, this restriction must be considered. Many foreign companies initially enter the Vietnamese market by way of a RO to manage the import and distribution of their products (which is conducted by local import and distribution companies). Many companies retain their ROs even when they obtain investment licensing to establish Vietnamese companies to manufacture products in Vietnam. Many companies streamline management of their Vietnam operations by appointing a single person as both chief representative of their RO and legal representative of their local company. Now, such companies must bear the additional cost and administrative burden of employing 2 different people - 1 to be chief representative of their RO and 1 to be legal representative of their local company.

Curiously, the head of a branch is not prohibited from acting concurrently as the legal representative of an enterprise established in Vietnam.

Re-registration requirements for already-approved investment projects, businesses and offices are becoming a common feature of the reform of the Vietnamese regulatory landscape (see 2.1 below on re-registration requirements for existing foreign investment projects). Whilst reform of outdated legislation is always welcome, the cost and effort for existing investors to ensure compliance with new statutory requirements detract from the benefits of reform. And the imposition of new limitations on the scope of operation of existing investors is troublesome.

The former guidelines on ROs and branches of foreign trading companies issued under Circular 20-2000-TTLT-BTM-TCDL of the MoT and General Department of Tourism dated 20 October 2000 are repealed by Circular 11, but Circular 20's guidelines on ROs and branches of foreign tourism businesses remain effective.

Circular 11 became effective as of 2 November 2006.

1.2 Tendering

Decree 111-2006-ND-CP of the Government dated 29 September 2006 Providing Guidelines for Implementation of Law on Tendering and Selection of Construction Contractors under Law on Construction

Vietnam's new Law 61 on Tendering was passed on 29 November 2005 and became effective as of 1 April 2006. As has been the case with many of the important new laws passed in November 2005, it has taken many months for the implementing legislation to be issued. Now, 6 months after the Tendering Law became effective, the implementing decree has finally been issued.

> Important clarification:

The most important issue now clarified by the Government is that tendering for construction contractors is also regulated under Law 61, along with tendering for goods procurement and tendering for services. Thanks to Decree 111 and its sister legislation Decree 112-2006-ND-CP of the Government dated 29 September 2006 (which, effective as of 30 October 2006, amends Decree 16-2005-ND-CP of the Government dated 7 February 2005 on management of investment projects involving construction), the confusion over how construction tendering is regulated - confusion that has persisted since early 2005 - has finally come to an end.

In early 2005, Decree 16 was issued to implement the 2003 Law on Construction (which had become effective as of 1 July 2004). Effective as of 5 March 2005, Decree 16 repealed the provisions on tendering for construction contractors in Vietnam's old tendering regulations (issued under Decree 88-1999-ND-CP of the Government dated 1 September 1999, as amended by Decree 14-2000-ND-CP dated 5 May 2000 and Decree 66-2003-ND-CP dated 12 June 2003) to the extent that such provisions were inconsistent with Decree 16. The major inconsistency between Decree 16 and the old tendering regulations was that Decree 16 allowed the parties to joint venture ("JV") and business co-operation contract ("BCC") projects with 30% or more State capital to 'agree' not to conduct tendering for construction projects, whereas the old tendering regulations required them to conduct tendering. This would have been a radical change in Vietnam's approach to tendering regulation and would have led to a confusing two-tiered approach to tendering, where JVs and BCCs with 30% or more State capital would have to conduct tendering for goods procurement and services, but would not be required to do so for construction projects (further complicating matters, what constituted 'construction' was unclear).

Within a matter of weeks, the Ministry of Planning and Investment ("MPI"), which was busy drafting the then-proposed new Ordinance on Tendering (subsequently upgraded to a Law), issued Official Letter 2364-BKH-TD&GSDT on 12 April 2005 purporting to provide guidelines for management of investment in conjunction with the implementation of Decree 16. In Official Letter 2364, the MPI instructed ministries, branches and local authorities, investors and project management units to continue to implement the old tendering regulations with respect to construction tendering. Although such official letter had no legal effect under the Law on Promulgation of Legal Instruments, it was of great practical significance as State partners holding 30% or more capital in JVs and BCCs refused to 'agree' to implement the purported reforms under Decree 16.

The confusion arising from Decree 16, which was not satisfactorily resolved by Official Letter 2364, was exacerbated by the absence of new tendering regulations to implement the new Tendering Law. Of little assistance, the MPI issued Official Letter 2820-BKH-QLDT on 21 April 2006 instructing investors needing to conduct or wishing to participate in tenders in Vietnam to refer to the relevant provisions of the old tendering regulations provided such provisions were not inconsistent with the new Tendering Law - a completely illusory exercise.

At last, under Decree 111 and 112, the whole sorry saga is over. Decree 111 replaces the old tendering regulations and Decree 112 repeals the offending provisions of Decree 16. It is now crystal clear that JVs and BCCs with 30% or more State capital remain subject to the requirement to conduct tendering in accordance with Vietnamese tendering rules for construction projects as well as for goods procurement and services. All other foreign invested projects are exempt from tendering requirements.

Regrettably, for construction tendering, investors must consider the Construction Law and its implementing Decree 112 as well as the Tendering Law and Decree 111, but at least it has been clarified that, in the event of any inconsistency between them, the provisions of the Tendering Law will prevail.

> Welcome concession:

Given the continuing requirement for JVs and BCCs with 30% or more State capital to conduct tendering, it is a welcome reform that the tendering process for such foreign invested projects is no longer subject to "external" State intervention in the form of State consent or approval of any steps of the tendering process. In contrast, the tendering process for 100% State invested projects remains subject to requirements for approval by the authorized person of almost all steps, including approval of the contents of contracts signed with foreign tenderers.

> International tendering (ie where foreign tenderers participate in tenders conducted in Vietnam):

Where foreign tenderers are ranked equally, preference is given to the foreign tenderer with the higher level of domestic costs. Where domestic and foreign tenderers are ranked equally, preference is given to domestic tenderers.

All foreign tenderers must comply with the laws on entry and exit and registration of temporary residence, import and export, accounting, tax and other relevant regulations, unless an international treaty prevails.

In the case of a successful foreign tenderer for a goods procurement and services package, prior to implementation of a signed contract with a project owner in Vietnam, a foreign tenderer must register its operations at the Department of Planning and Investment of the locality where the foreign tenderer will be located. The registration file must contain: standard form registration document (as issued by the MPI), notarized copy of tender result notification; notarized copy of passport or business registration in foreign jurisdiction (enclosing notarized translation). A registration of operation certificate will be issued free-of-charge within 5 working days. If a tender is implemented in multiple provinces, the Department must send written notification to the other relevant provincial Departments of Planning and Investment. A registration of operation certificate is valid until expiry of the duration of the tender package as stated in the certificate, but it will be terminated early if the foreign tenderer suspends its operations, is dissolved, or becomes bankrupt under Vietnamese law or the law of its home jurisdiction. Where a foreign tenderer implements a number of overlapping tender packages, only one registration certificate needs to be obtained to cover the period of implementation of the first package until the end of the last package. If a foreign tenderer possesses a registration certificate that is still valid, when the foreign tenderer implements other tender packages in the same locality, it is only required to update its information with the certificate-issuing body and it will issued with additional certificates.

In the case of a successful foreign tenderer for a construction package, the foreign tenderer is not subject to the above registration requirement. Instead, a foreign construction contractor must satisfy the conditions prescribed in and obtain a foreign construction contractor permit under Decision 87-2004-QD-TTg of the Government dated 19 May 2004.

> Tendering offences and penalties:

Decree 111 prescribes various penalties for breaches of tendering regulations, for example: VND5-20 million fine for preparation of non-compliant tender documents resulting in the cancellation of a tender or for signing of a non-compliant contract; VND20-50 million fine for tender collusion.

Depending on the nature and seriousness of an offence, a prohibition from participation in tenders in Vietnam may also be imposed, for example:

- Prohibition from 6 months to 1 year for preparing or approving tender documents which prescribe requirements for a specific brand name or origin of goods;
- Prohibition from 6 months to 1 year where a project is divided into multiple small projects to avail of the direct appointment option; or in cases of nepotism or obstruction;

- Prohibition from 1-3 years for provision of inaccurate information to distort the tenderer selection result or for dummy tenders aimed at letting another tenderer win;
- Prohibition from 3-5 five years for giving, accepting or requesting a bribe by a participant in the process of selection of a tenderer or during contractual negotiations, resulting in dishonest or biased behaviour when deciding on tenderer selection or the tender package contract; for collaboration or collusion between the party calling for tenders and tenderers, or between the State administrative body and the party calling for tenders and/or tenderers in order to change tenders; for any arrangement or collusion between two or more tenderers participating in tendering for the one tender package so that one of the tenderers will be awarded the contract; between the contractor implementing a tender package and the consultant supervising implementation; or between a contractor implementing a tender package with the body or organization assigned the task of check and acceptance of the results of implementation.

Where warnings are issued to organizations and individuals on 5 successive occasions, they will be prohibited by the MPI from participation in tendering for 6 months. If they commit a subsequent breach of the tendering regulations, they will be prohibited from participation for 1 year (or 2 or 3 years if additional breaches).

> Other news:

Standard forms for tendering will be issued by the MPI.

Presumably to improve tendering efficiency and accountability in the State sector, detailed requirements for training in tendering are imposed under Decree 111.

Tendering costs, such as for State appraisal of tendering results and resolution of disputes, are fixed in Decree 111. In international tendering, the price of tender documents can be set in accordance with international practice (for domestic tenders, the price must not exceed VND1 million).

As well as detailed regulations on tendering plans and pre-qualification, Decree 111 has separate chapters for tendering for consultancy services and for tendering for goods procurement and civil works. Direct appointment of tenderers is also provided for in detail.

The various roles of the Prime Minister, of ministers, heads of ministerial-level bodies, heads of other central bodies and chairmen of provincial-level people's committees, of chairmen of local-level people committees and heads of other local bodies and of boards of directors and directors of domestic invested enterprises, JVs and BCCs are delineated.

A separate chapter on dispute resolution provides for establishment of Consulting Councils at the central level (for Prime Minister level tenders), at the ministerial-level (for projects approved at the ministerial level or subject to branch management) and at the local level (for projects approved or managed at the local level). Responsibility for oversight of tendering activities (including both regular and random inspections) is vested in the MPI but delegated to the ministerial and local levels in the same manner as dispute resolution.

> Implementation:

Tender packages approved prior to the Tendering Law's effectiveness (1 April 2006) must be implemented in accordance with the old tendering regulations. Implementation of tender packages from 1 April 2006 to Decree 111's effectiveness (3 November 2006) must be implemented in accordance with the Tendering Law and Official Letter 2820. From 3 November, new tender packages are subject to Decree 111.

1.3 Intellectual property regime

Vietnam's first stand-alone Law on Intellectual Property was passed in November 2005 and became effective on 1 July 2006. For a review, see May 2006 Issue of Vietnam Legal Update on www.vietnamlaws.com.

Almost three months after the commencement of the new intellectual property ("IP") regime, the Government has issued a raft of implementing decrees, including:

Decree 100-2006-ND-CP of the Government dated 21 September 2006 Making Detailed Provisions and Guidelines for Implementation of a Number of Articles of the Civil Code and the IP Law With Respect to Copyright and Related Rights

Effective as of 17 October 2006, Decree 100 updates Vietnam's detailed regulations on copyright in literary, artistic and scientific works, encompassing performances, audio and visual fixations (more commonly known as tapes and discs), broadcasts and programme-carrying satellite signals. It replaces Decree 76-CP of the Government dated 29 November 1996.

Decree 103-2006-ND-CP of the Government dated 22 September 2006 Making Detailed Provisions and Guidelines for Implementation of a Number of Articles of the IP Law With Respect to Industrial Property

Effective as of 21 October 2006, Decree 103 updates Vietnam's detailed regulations on industrial property, encompassing inventions, industrial designs, layout designs of semi-conductor integrated circuits, trade secrets, trademarks, trade names and geographical indications. It replaces Decree 63-CP of the Government dated 24 October 1996 (as amended 1 February 2001).

Decree 104-2006-ND-CP of the Government dated 22 September 2006 Making Detailed Provisions and Guidelines for Implementation of a Number of Articles of the IP Law With Respect to Rights to Plant Varieties

Effective as of 2 November 2006, Decree 104 replaces Decree 13-2001-ND-CP of the Government dated 20 April 2001. Of the recent IP reforms, the most extensive reforms have been in the field of rights to plant varieties and reproductive materials.

Decree 105-2006-ND-CP of the Government dated 22 September 2006 Making Detailed Provisions and Guidelines for Implementation of a Number of Articles of the IP Law With Respect to Protection of IP Rights and State Administration of IP

Protection of IP rights was the main aspect of Vietnam's former IP regime which lagged behind international standards. Civil, administrative, customs and criminal remedies are now expressly provided for in the IP Law. Civil remedies are covered in detail in the IP Law. Criminal offences are to be dealt with in accordance with Vietnam's Criminal Code. Effective as of 21 October 2006, Decree 105 provides in detail for protection of IP rights by (primarily) administrative remedies, and includes guidelines on verification of conduct constituting infringement of IP rights, verification of the nature and seriousness of IP infringements, determination of loss and damage, and requests for dealing with IP infringements and resolution of such requests. Decree 105 also provides in detail for measures to control imports and exports suspected of IP infringements.

There is no change from the current organizational structure for State administration of IP rights. The Ministry of Science and Technology ("MoST") is the primary Government body responsible for administration of Vietnam's IP regime. The MoST has jurisdiction over industrial property rights, with its National Office for Industrial Property handling applications for protection of industrial property rights. The Ministry of Culture and Information has jurisdiction over copyright, with its Copyright Office handling copyright and related rights. The Ministry of Agriculture and Rural Development has jurisdiction over rights to plant varieties.

Decree 106-2006-ND-CP of the Government dated 22 September 2006 on Dealing with Administrative Offences in Relation to Industrial Property

Effective as of 21 October 2006, Decree 106 provides in detail for administrative penalties for industrial property offences. Decree 106 identifies types of conduct constituting an administrative breach of industrial property rights; the forms and levels of penalties for such administrative offences; and the authority and procedures for imposition of penalties and measures for remedying consequences. Generally, penalties have increased.

For offences relating to procedures for establishment, exercise and protection of industrial property rights, examples of penalties include: VND1-3 million fine for amending the contents of a certificate of protection of such rights; VND5-10 million fine for supplying false information during procedures for establishment, recognition, certification, etc of such rights; VND10-15 million for falsifying papers during such procedures. Additional penalties, such as confiscation of papers, data and certificates of protection, may apply.

Any person providing false information about the legal status of protection of industrial property rights or the legal ownership of such rights or the goods to which such rights legally attach during manufacture, sale, trading, advertising and marketing of goods will be subject to VND1-3 million fine. Additional penalties, such as compulsory termination of offending conduct or compulsory correction on the mass media, may apply.

Where an offender infringes industrial property rights with respect to an invention, industrial design or layout design (eg manufactures goods infringing such rights or sells, transports, advertises, offers for sale or stores for the purpose of selling such goods) for business purposes:

- a warning or a fine of from 1 to 2 times the value of the offending goods will apply where the offending goods are valued up to VND20 million;
- a fine of from 2 to 3 times the value where the goods are valued at VND20-40 million;
- a fine of from 3 to 4 times the value where the goods are valued at VND40-60 million;
- a fine of from 4 to 5 times the value where the goods are valued at over VND60 million.

For the above infringements, additional penalties, such as 3-6 months suspension of business activities, and measures for remedying consequences, such as compulsory distribution for non-commercial purposes of the offending goods or destruction of low quality offending goods, may be imposed.

Where an offender infringes industrial property rights with respect to marks, geographical indications and trade names (eg attaches symbols which infringe such rights to goods; or sells, transports, advertises, offers for sale or stores for the purpose of selling such goods; or imports goods with any element infringing such rights):

- a warning or a fine of from 1 to 2 times the value of the offending goods will apply where the offending goods are valued up to VND15 million;
- a fine of from 2 to 3 times the value where the goods are valued at VND15-30 million;
- a fine of from 3 to 4 times the value where the goods are valued at VND30-45 million;
- a fine of from 4 to 5 times the value where the goods are valued at over VND45 million.

Where an offender attaches an offending symbol to a means of business or a business document, a VND10-15 million fine will apply. For the above infringements, additional penalties, such as 1-3 months suspension of business activities, and measures for remedying consequences, such as compulsory destruction of offending goods, may be imposed.

Where an offender (either directly or through another assigned entity) manufactures, imports, transports or sells articles bearing the same or a similar mark or geographical indication to a protected one:

- a warning or a fine of from 1 to 2 times the value of the offending goods will apply where the offending goods are valued up to VND20 million;

- a fine of from 2 to 3 times the value where the goods are valued at VND20-40 million;
- a fine of from 3 to 4 times the value where the goods are valued at VND40-60 million;
- a fine of from 4 to 5 times the value where the goods are valued at over VND60 million.

For such infringements, additional penalties, such as 3-6 months suspension of business activities, and measures for remedying consequences, such as compulsory distribution for non-commercial purposes of the offending goods or destruction of low quality offending goods, may be imposed.

Where an offender (either directly or through another assigned entity) manufactures or imports goods and attaches a counterfeit mark or counterfeit geographical indication, or transports or stores such goods, or sells, advertises for sale or offers for sale such goods:

- a warning or a fine of from 1 to 2 times the value of the offending goods will apply where the offending goods are valued up to VND10 million;
- a fine of from 2 to 3 times the value where the goods are valued at VND10-20 million;
- a fine of from 3 to 4 times the value where the goods are valued at VND20-30 million;
- a fine of from 4 to 5 times the value where the goods are valued at over VND30 million.

For the above infringements, additional penalties, such as 1-3 months suspension of business activities, and measures for remedying consequences, such as compulsory destruction of offending goods, may be imposed.

For acts of unfair competition with respect to IP or for breaches of trade secrets relating to IP, administrative penalties will be imposed as applicable in the competition sector (see October 2005 Issue of Vietnam Legal Update on www.vietnamlaws.com).

For offences relating to industrial property representation, examples of penalties include: VND3-5 million where an industrial property representative withdraws an application for a certificate of protection without permission from the party authorizing the representation; VND6-10 million for providing business services of industrial property representation without having satisfied the business conditions stipulated by law; VND10-15 million where an industrial property representative discloses information not yet permitted to be announced of a competent State body and relevant to the processing of an application for registration of industrial property rights. Additional penalties, such as suspension or withdrawal of the practising certificate for industrial property representation, may apply.

Fines of VND7-10 million apply for breaching confidentiality of trial data supplied as part of an application for a business license or a license for circulation of pharmaceutical drugs or agricultural chemical products.

Decree 106 replaces Decree 12-1999-ND-CP of the Government dated 6 March 1999 and the provisions on counterfeit goods, trademarks, industrial designs, sources and origins of goods in clauses 2.4 and 4.1 of Section III of Inter-ministerial Circular 10-2000-TTLT-BTM-BTC-BCA-BKHCNMT dated 27 April 2000.

Decree 106 follows after the updating of penalties for copyright offences under the recent Decree 56-2006-ND-CP of the Government dated 6 June 2006 on dealing with administrative offences in the culture-information field. Decree 56 introduced various new copyright offences and provided for higher fines (in most cases) to be imposed on copyright infringements committed for commercial purposes, such as: fines of VND5-10 million for copying TV or radio programs and film tapes or discs, for trading in pirated software (new offence), or for importing-exporting pirated films, tapes, discs, TV or radio programs, written works, computer software, fine art (new offence); fines of VND10-20 million for copying written works and computer software; fines of VND50-70 million for copying films.

A draft of the proposed decree on administrative offences with respect to plant varieties is understood to have been submitted to the Prime Minister in July 2006.

1.4 Finance leasing

Circular 09-2006-TT-NHNN of the State Bank of Vietnam ("SBV") dated 23 October 2006 on Finance Leasing Companies Selling Items Receivable under Finance Leasing Contracts

and

Circular 08-2006-TT-NHNN of the SBV dated 12 October 2006 on Joint Finance Leasing

The 2005-2006 period has seen ongoing development of Vietnam's regulatory framework for finance leasing. Following amendments in mid-2005 to Decree 16 on establishment and operation of finance leasing companies in Vietnam of 2001, the SBV has updated its implementing circulars with respect to authority, order and procedures for registration of financial leasing contracts and provision of information about such contracts. It has also expanded its guidelines to include guidelines on finance leasing by proxy and guidelines on sale and lease back operations (see September 2006 Issue of Vietnam Legal Update on www.vietnamlaws.com). Now, the following new guidelines have been provided by the SBV:

> Guidelines on selling items receivable under finance leasing contracts, under Circular 09:

Article 16 of Decree 16 (as amended by Decree 65) provides: "A finance leasing company may conduct the following activities: … sell items receivable from finance leasing contracts to organizations and individuals in accordance with regulations of the State Bank". Circular 09 now provides those regulations.

Circular 09 defines items receivable from a finance leasing contract as the amount of money that the lessee must pay to the finance leasing company for the remaining duration of the finance leasing contract. After a transaction of sale of items receivable, the finance leasing company continues to recover the leasing fees from the lessee, but pays these monies to the purchaser of items receivable. The party selling items receivable must be a finance leasing company licensed by the SBV. The purpose of selling items receivable is defined as to diversify leasing products and to increase capital sources for operation of finance leasing companies.

The sale of items receivable must be conducted by way of a contract of sale of items receivable ("CSIR") between the seller and the purchaser. Under a CSIR, the seller remains the holder of the ownership rights with respect to the leased asset and continues to recover the leasing fees from the lessee, but pays them to the purchaser. Certain conditions apply for items receivable to be sold:

a) The leased asset must: not be used as security of any other obligations; not be in dispute; be in normal operation use.

b) The lessee must, up to the time that the items receivable are offered for sale, have paid in full and on timely its leasing fees in accordance with the finance leasing contract.

Circular 09 requires the currency used in transactions of selling items receivable to be Vietnamese dong.

Circular 09 contemplates the following process for selling items receivable:

1. The seller chooses items receivable from finance leasing contracts to offer for sale;
2. The purchaser carries out its own assessment of the potential of recovering offered items receivable ; and its own evaluation of the business operation status and financial capacity of the seller and the lessee; then makes its decision on purchase and informs the seller;
3. The seller prepares the CSIR;
4. The CSIR is signed and, at the same time, the lessee is informed;
5. The purchaser makes its purchase payment to the seller;
6. The seller continues to recover the leasing fees but pays them to the purchaser under the CSIR.

The purchaser has the right to terminate the CSIR prior to its full term if: the seller breaches any provisions in the CSIR; or the seller becomes bankrupt or is dissolved and the purchaser does not consent to the assignment of the CSIR to a third party; or the finance leasing contract is terminated prior to its full term and the purchaser does not consent to the substitution of items receivable from another finance leasing contract. The seller has the right to terminate the CSIR if: the purchaser breaches any provisions in the CSIR; or the purchaser requests termination due to objective reasons, such as the purchaser has become bankrupt, has been dissolved, has died without heir, or has lost the capacity for civil acts and is without the guardian; or the purchaser changes the contents of the CSIR without the consent of the seller. Alternatively, the CSIR may be terminated prior to expiry if the purchaser and the seller reach mutual agreement to do so.

Circular 09 also includes provisions on the rights and obligations of sellers and purchasers and how to deal with breaches. Circular 09 will become effective as of 23 November 2006.

> Guidelines on operation of joint finance leasing, under Circular 08:

Article 31.2(b) of Decree 16 (as amended by Decree 65) provides that, in cases where the demand for leasing by a single client exceeds 30% of the equity of the finance leasing company or where a single client wishes to lease from various finance leasing companies, finance leasing companies may jointly conduct finance leasing to the client in accordance with the relevant provisions of the SBV Governor. Circular 08 now makes those provisions.

Under Circular 08, joint finance leasing is permitted in the following cases:

- When a demand for financial leasing exceeds the limit for financial leasing of a single financial leasing company, where a single client's needs exceed 30% of the equity of the financial leasing company or where a group of clients' needs exceed 80% of the equity of the financial leasing company);
- When financial potential, capital and assets of a single financial leasing company is insufficient to meet the demands for financial leasing;
- When a finance leasing company has a demand to distribute the risk; or
- When a lessee wishes to lease from various finance leasing companies.

The currency to be used in joint finance leasing activities must be the Vietnamese dong.

Circular 08 contemplates the following process for joint finance leasing: upon receipt of a request for finance leasing or joint finance leasing, the lead finance leasing company conducts its preliminary evaluation, reviewing the feasibility and other conditions of the project using the finance leased assets; then the lead finance leasing company must consider and invite other finance leasing companies to participate in the joint finance leasing, informing them of the major contents of the project and the operational plan of the lessee. Depending on the nature of the invitation to participate in joint finance leasing, attached documents, financial capacity and current regulations, etc, invitees must notify of their decision in writing within 20 working days. The lead finance leasing company may continue to invite other finance leasing companies to participate until the demand for joint finance leasing is met.

Joint financing contracts (signed between members) must record: members participating; lead finance leasing company; lessee, structure and plan for capital for joint financing; method and result of evaluation of project; form and contents of joint finance; responsibility of each participating member and lead finance leasing company; method of receiving leasing fees, profit payment, fees and tariff for members and the lessee; dealing with risk and conflict among members; and various other matters. Joint finance leasing contracts (signed between the lessor and the lessee) must comply with the standard provisions for finance leasing contracts. Parties may agree to combine all matters relating to joint financing and joint finance leasing into a single contract signed by all parties.

Circular 08 became effective as of 8 November 2006.

1.5 Environment

Circular 08-2006-TT-BTNMT of the Ministry of Natural Resources and Environment ("MoNRE") dated 8 September 2006 Providing Guidelines for Strategic Environmental Assessment, Environmental Impact Assessment and Environmental Protection Undertakings

Vietnam's environmental protection regulatory framework was updated for the first time since 1993 by the new Law 52 on Protection of the Environment of November 2005 and its implementing Decree 80 on Environment of August 2006 (see August 2006 Issue of Vietnam Legal Update on www.vietnamlaws.com). Detailed guidelines on strategic environmental assessment, environmental impact assessment reports ("EIARs") and environmental protection undertakings ("EPUs") have now been issued under Circular 08.

> Owners of projects which are subject to compulsory EIARs may themselves prepare the EIARs or they may engage a consulting organization to do so. In either case, the project owner is responsible for the data and results stated in the EIAR.

EIARs must contain the following main information: (i) an introduction of the project and the basis and organization of implementation of EIA, (ii) summary description of the project, (iii) natural, environmental and socio-economic conditions, (iv) assessment of environment impacts, (v) measures to minimize adverse impacts and to prevent and deal with environmental Incidents, (vi) undertakings to take environmental protection measures, (vii) environmental treatment facilities and programs of environmental management and supervision, (viii) estimated budget for environmental facilities, (ix) opinions from communities, (x) reference to sources of figures and data and to methods of assessment, and (xi) conclusion and proposals. Of note, during the preparation of EIARs, written consultations with the people's committee and the Fatherland Front committee at the commune level in the locality where the project is to be implemented is compulsory (and must be reported in (ix) above).

The standard form application for official appraisal of EIARs is enclosed with Circular 08. The MoNRE is responsible for establishing appraisal councils for appraisal of EIARs for projects approved by the National Assembly, the Government or the Prime Minister; and also for inter-branch or inter-provincial projects. Ministries, ministerial equivalent bodies or Government bodies are responsible for establishing appraisal councils for appraisal of EIARs for projects within their respective decision-making authority (excluding inter-branch or inter-provincial projects under the MoNRE). Provincial-level people's committees are responsible for establishing appraisal councils for appraisal of EIARs for projects located in their respective localities and within the decision-making authority of their people's council.

The statutory time-limit for appraisal of EIARs is set at 3 days (or 5 days in the case of a supplementary report)

> Any manufacturing, business or service establishment which is not subject to compulsory EIAR must make a written EPU, indicating: location, form and scale of manufacturing-business-services and raw materials and fuel used, types of wastes produced, and an "undertaking to apply measures aimed at minimizing and treating wastes and to comply strictly with the provisions of the law on environmental protection".

EPUs must be registered at the local people's committee. Where a project is implemented across 2 or more provincial cities, the project owner may choose one locale for registration. Only after issuance of a certificate of registration of EPU may manufacturing-business-services be commenced.

Circular 08 became effective as of 10 October 2006 and replaces Circular 490-1998-TT-BKHCNMT of the MoNRE dated 29 April 1998.

>>> In other environmental news, the Ministry of Natural Resources and Environment has authorized the Director of the Geological and Minerals Office of Vietnam to issue permits for survey and exploration for minerals, effective for one year commencing as of 1 October 2006 until 30 September 2007, under Decision 1259-QD-BTNMT of the MoNRE dated 27 September 2006.

1.6 Cosmetics

Decision 35-2006-QD-BYT of the Ministry of Health ("MoH") dated 10 November 2006 Issuing Regulations on Control of Cosmetics

Decision 35 represents a significant update of Vietnam's regulation of the cosmetics industry. The new regulations on control of cosmetics issued under Decision 35 replace the provisional regulations on registration of imported cosmetics directly affecting people's health issued back in April 2001 under Decision 19 of the Department of Pharmaceutical Control of Vietnam, as well as replace the list of cosmetics subject to compulsory quality registration issued even further back in 1998 under the MoH's Decision 3629.

Decision 35 and its regulations apply to all organizations and individuals engaged in manufacture, trading and importation of cosmetics in Vietnam. Both domestically manufactured cosmetics as well as cosmetics manufactured overseas and imported into Vietnam for circulation in Vietnam are subject to control under Decision 35 and its regulations. The term "cosmetics" encompasses "all substances or manufactured preparations used for direct application to external areas of the human body or to the teeth, gums or lining of the mouth with the sole or main purpose of cleansing, perfuming, changing appearance and body odours, and preserving or maintaining the body in a good condition". Excluded from control under Decision 35 are alloys in raw materials used to manufacture cosmetics; raw materials and additives used to prepare cosmetics but not existing in the final product; and raw materials used at the essential minimum quantity, such as solvents or derivatives for perfume ingredients. Of note, all ingredients used in cosmetics must comply with the ASEAN Agreement on Control of Cosmetics.

Under Decision 35 and its regulations, there are a number of compulsory compliance requirements:

> Registration of circulation with the MoH prior to circulation of cosmetics in the Vietnamese market;

> Announcement of applicable quality standards for all cosmetics;

> Registration of quality with the MoH for the following prescribed cosmetics (listed in an appendix to Decision 35):

- products applied to the skin (hand, face and legs) being creams, liquids, solutions, gels and oils;
- face masks (except for products not containing any chemical substance);
- all substances with a colour foundation (in the form of liquid, paste or powder);
- make-up powders, powder used after showering, hygiene powders;
- hygiene soaps, deodorant soaps;
- perfumes, hygiene scents and fragrances;
- products used when showering and washing (salts, soaps, shampoos, gels);
- hair removal products;
- deodorant products for the body and anti-perspiration deodorants;
- hair care products, such as: hair colouring products, hair colour removal products; hair waving products, products to stretch and set hair; permanent wave products; hair cleansing products (solutions, powders and shampoos); hair nourishing products (solutions, creams and shampoos); hair beauty products (solutions, gels and pomades);
- products used when shaving beards (creams, soaps and solutions);
- beauty products for the face and eyes;
- lipsticks;
- teeth and mouth care products;
- fingernail and feet care products;
- personal hygiene products for ladies;
- sunscreen and sun tanning products;
- anti-ultraviolet ray protection products;

- skin whitening products;
- face care (anti-wrinkling) products.

Decision 35 and its regulations provide in detail for the contents of application files for prior registration of circulation and application files on announcement of cosmetic quality standards, as well as the procedures for processing of such application files. Standard forms for such applications are appended to Decision 35.

Registration for circulation must be kept up-to-date. It is compulsory to register any change in the following: name of the cosmetic; preparation compound; ingredients in the formula; quality standards and testing method; utility or use of the cosmetic; manufacturing establishment (including its address). It is compulsory to supplement registration if there is any change in the following: expiry date; registered entity (including its name and/or address); label of the cosmetic.

Decision 35 also regulates labelling of cosmetics. As well as ensuring compliance with Vietnam's general labelling regulations (due to replaced as of March 2007), manufacturers, traders and importers must ensure that the content and form of labels of cosmetics is consistent with the original nature of the product and does not cause misunderstanding by consumers. Intellectual property rights must be respected. Advertising of cosmetics must not exaggerate the qualities of the product; more broadly, advertising of cosmetics must comply with the MoH's regulations on advertising of cosmetics.

Quality of cosmetics is subject to inspection by the MoH. The MoH has the power to suspend and to withdraw cosmetics from circulation in the Vietnamese market.

1.7 Trade unions

Decree 96-2006-ND-CP of the Government dated 14 September 2006 Providing Guidelines for Implementation of Article 153 of the Labour Code on Provisional Executive Committees of Trade Unions in Enterprises

Vietnam's *Labour Code* requires unions to be established within six months of commencement of operations by new enterprises. Under Decree 96, responsibility for establishment of unions in enterprises is imposed on local or industry trade unions, including provincial or municipal-level confederations of labour under the Vietnam General Confederation of Labour ("VGCL"); central-level industry trade unions, trade unions of corporations under the VGCL; confederations of labour of districts, towns and provincial cities, local-level industry trade unions, trade unions of processing zones, industrial zones, high-tech zones, trade unions of corporations, superior trade unions of other establishments, etc.

Where a union is not established within the prescribed six month period, Decree 96 requires the superior trade union to appoint a provisional executive committee of the trade union (with members from amongst the employees of the enterprise who wish to participate in the trade union) to represent and protect the lawful and legitimate rights and interests of the employees and the labour collective. The term of the provisional executive committee and any extension of that term is subject to regulations of the VGCL, which are yet to be passed.

The principal purpose of the provisional executive committee is to work toward establishment of a trade union of the enterprise in accordance with the Charter of Trade Union of Vietnam. However, during its term, the provisional executive committee may propose and work with the employer on measures to develop production and the enterprise and to ensure employment and look after the material and spiritual conditions of employees' lives. The chairperson of the provisional executive committee is entitled to attend and express his or her opinions in meetings of the enterprise in which issues relating directly to the rights, obligations and interests of the employees are discussed. If the chairperson disagrees with a decision of an employer, he or she may reserve his or her opinion and refer the issue to the superior trade union and other competent bodies for resolution.

Decree 96 became effective as of 11 October 2006.

Part 2 Feature: Vietnam's new investment-enterprise regime

In our feature on the long-awaited Decree 108-2006-ND-CP of the Government dated 22 September 2006 implementing the 2005 Law on Investment in the September 2006 Issue of Vietnam Legal Update (available on www.vietnamlaws.com), we looked at various significant changes in Vietnam's policy for State administration of investment, including the new hierarchy for investment approval and certificate-issuing authority, the various sectors in which investment is subject to conditions and the distinction between investment registration and investment evaluation procedures, under this most important decree implementing the new investment regime introduced as of 1 July 2006. In the September 2006 Issue, we also featured the options for existing foreign investors to transition to the new investment-enterprise regime under Decree 101-2006-ND-CP of the Government dated 21 September 2006 on Re-Registration and/or Conversion of Enterprises with Foreign Owned Capital and Business Co-operation Contracts Pursuant to the Law on Enterprises and the Law on Investment.

Since the September 2006 Issue, the official texts of Decree 108 and Decree 101 have been published in Vietnam's Official Gazette. Decree 108 became effective as of 25 October 2006 (so the provisional investment guidelines of the Ministry of Planning and Investment are no longer effective, see July 2006 Issue of Vietnam Legal Update). Decree 101 became effective as of 21 October 2006.

On 19 October 2006, Decision 1088-2006-QD-BKH of the Ministry of Planning and Investment ("MPI") on Standard Forms for Conducting Investment Procedures in Vietnam appeared. Decision 1088 was a very welcome item of legislation as local press reports around that time had suggested that the MPI did not intend to follow its longstanding practice of issuing implementing legislation to provide detailed investment guidelines. One of the benefits of the MPI's implementing legislation under previous investment regimes was the standardization of application forms and other investment documentation. Whilst the possibility of investors being allowed to draft their own style of application for investment registration or evaluation under the new regime was appealing, the spectre of each provincial and municipal level people's committee or zone management committee (which have taken over the investment certificate-issuing role) issuing its own standard format for documentation was a more likely outcome, and a haunting one. That is all behind us now. Investors must comply with the standard forms for investment documentation issued with Decision 1088 when applying for investment registration or evaluation and business registration under the new investment-enterprise regime. Although there appear to be some notable omissions in Decision 1088, the official standardized investment forms should assist efficiency and transparency in the investment-business environment.

> New foreign investment projects:

Decree 108 on Investment sets out the types of documentation that must be submitted as part of a file for a new investment project. The types of documentation vary according to the category of project, as follows:

(a) For all foreign invested projects subject to investment registration, the investment project file must contain:

- request for investment registration (standard form issued with Decision 1088);
- report on financial capability of investor (no standard form).

(b) For all foreign invested projects subject to investment evaluation below VND300 billion and in a conditional sector, the project file must contain the same contents as (a) and also:

- explanatory statement on ability to satisfy relevant conditions (no standard form).

(c) For all foreign invested projects subject to investment evaluation of VND300 billion or more and not in a conditional sector, the project file must contain:

- request for investment evaluation (standard form issued with Decision 1088);
- report on financial capability of investor (no standard form);
- written certification of legal status of investor (eg business registration certificate or passport);
- feasibility study (no standard form, but contents prescribed in Decree 108).

(d) For all foreign invested projects subject to investment evaluation of VND300 billion or more and in a conditional sector, the project file must contain the same contents as (c) and also:

- explanatory statement on ability to satisfy relevant conditions (no standard form).

In addition to the above, if the investment is in the form of a business co-operation or joint venture between a domestic investor and a foreign investor, the relevant contract must also be submitted (no standard form, but mandatory contents of such contracts are prescribed in Decree 108).

Of note, under Decision 1088, there are multiple standard forms for a request for investment registration and a request for investment evaluation, depending on whether an investment project is associated with establishment of a new enterprise or with establishment of a new branch or is not associated with either.

If the investment involves the establishment of a corporate body, the investor must also submit the necessary corporate documents corresponding to the corporate form (eg charter) as prescribed in the 2005 Law on Enterprises and its implementing Decree 88-2006-ND-CP of the Government dated 29 August 2006 on Business Registration, and the details for business registration must be included in the standard form request for investment registration or investment evaluation.

As Decision 1088 does not include standard forms for report on financial capability of investor, explanatory statement on ability to satisfy relevant conditions or feasibility study, it is presumed that investors are free to draft these types of documents in their own style provided that the mandatory contents prescribed in Decree 108 are included. This is a significant departure from previous investment regimes, under which the MPI prescribed the contents *and* issued detailed guidelines on the form of all documents relating to investment projects, including contracts, charters, feasibility studies, etc.

Decision 1088 prescribes the standard form for investment certificates for new projects. For projects associated with establishment of a corporate body, the investment certificate records:

- business registration details: name and type of corporate body, address of head office and any branch or representative office, lines of business, capital, and legal representative; and
- investment project details: name of investment project, its objectives and scale, location for implementation, area of land to be used, total investment capital and capital contribution details, duration of project, schedule for implementation, any applicable incentives.

Of note, there is no distinction between investment certificates for foreign invested projects and those for domestic investment projects (however, only a limited range of domestic investment projects are issued with an investment certificate).

> Existing foreign investment projects:

Foreign invested enterprises and business co-operation projects established prior to 1 July 2006 have the option to transition to become 'new investment-enterprise regime' projects under Decree 101. Under Decision 1088, the following standard forms have been issued:

- Re-registration of enterprise and investment project (for foreign invested enterprises wishing to re-register under the new investment-enterprise regime but not to change their corporate form from the corresponding corporate form prescribed in Decree 101);
- Registration for replacement with investment certificate (for business co-operation projects wishing to register for replacement of their investment licenses with new investment certificates);
- Registration of conversion of form of enterprise ((for foreign invested enterprises wishing to re-register under the new investment-enterprise regime *and at the same time* change their corporate form).

The 'new' investment certificates issued to the above existing foreign invested enterprises and business co-operation project are the same as for new foreign investment projects.

For existing foreign invested projects that opt not to transition, Decision 1088 includes the standard form to request the limited range of amendments of their investment licenses which are permitted under Decree 101. Decision 1088 provides for a distinct 'certificate of amendment of investment license' to be issued to such projects if they apply for any of the limited range of amendments.

> Domestic investment projects:

Decision 1088 also prescribes the standard forms for request for simple investment registration of domestic investment projects between VND15-300 billion and not in conditional sectors (business registration must also be carried out, separately). Such projects are not automatically issued with an investment certificate. For issuance of an investment certificate, such domestic projects must carry out the more detailed registration procedures and use the standard forms noted above as applicable to foreign investment projects. Any domestic investment projects of less than VND15 billion and not in conditional sectors are not required to conduct even simple investment registration (only business registration) but, if they wish to be issued with an investment certificate, they must also conduct the more detailed registration procedures. Domestic investment projects over VND300 billion or in conditional sectors must conduct the investment evaluation procedures and use the standard forms noted above as applicable to foreign investment projects. There is no distinction between investment certificates for foreign invested projects and those for domestic investment projects.

> More on Decision 1088:

Implementing the 2005 Law on Enterprises and Decree 88, Decision 1088 includes the standard forms for: list of members of a limited liability company with two or more members, list of founding shareholders of a shareholding company, and list of founding members of a partnership. These forms are applicable to foreign invested and domestic invested projects alike.

As well as standardizing documentation and providing guidelines on completion of forms by investors, Decision 1088 provides guidelines on completion of investment certificates etc by investment authorities (including instructions on certificate codes, fonts and formats) so, of comfort, provincial and municipal level people's committees and zone management committees *do* remain subject to central control…

> Other guidelines to come?

The status of Decree 108 as the most important decree to implement Vietnam's new investment regime may be even higher if it stands as the only source of detailed guidance for investors. As noted above, under previous regimes, detailed guidelines were issued under a MPI circular, along with the various standard forms for documentation. Under the new regime, Decision 1088 only provides standard forms, not also guidelines on other matters, such as voting control or necessary qualifications of general directors (eg, whether requirement that legal representative must be a permanent resident of Vietnam, see 3.3 below, also applies to foreign invested enterprises). At the time of issuance of Decision 1088, the MPI informed us that it would not be issuing any such guideline circular.

One guideline circular that is being drafted (at the direction of the Prime Minister) is a joint circular on 'one door' procedures for co-ordination of business registration procedures, procedures for issuance of tax code number and procedures for engraving of seals, with the aim of the establishment of new enterprises being processed within a 15 day time frame.

> Prime Ministerial Working Team

Under Decision 1267-2006-QD-TTg dated 25 September 2006, the Prim Minister authorized the establishment of a Working Team to oversee the implementation of the new investment-enterprise regime. Under the leadership of the Minister of Planning and Investment, Vo Hung Phuc, the Working Team comprises 19 members from the MPI, the Ministry of Justice, the Office of Government and the Vietnam Chamber of Commerce and Industry ("VCCI"). The Working Team is responsible for supervising and guiding the implementation of the new regime within ministries and departments as well as at the provincial people's committee level; and must co-ordinate with relevant State bodies, the VCCI and business associations to ensure appropriate business licensing regulations. Given various queries that persist in relation to the new investment-enterprise regime, we hope the Working Team will re-consider the need for specific detailed guidelines.

Part 3 Did You Know?

3.1 National Assembly update

The 10th Session of the National Assembly's Legislature XI opened on 17 October and will run until the end of November 2006.

14 Laws are scheduled for second reading and to be passed at this October-November Session (having been considered for the first time at the May-June 2006 Session), comprising:

- Law on Technology Transfer — Of note, the need for a specific law on technology transfer has been questioned by foreign commentators due to its overlap with (and risk of inconsistency with) relevant provisions of the *Civil Code 2005* (effective 1 January 2006) and *Law on Intellectual Property 2005* (effective 1 July 2006).
- Law on Residence
- Law on Notarization
- Law amending the Law on Organization of the National Assembly
- Law on Amendment of and Addition to the Labour Code (in relation to strikes and resolution of strikes)
- Law on Labour Export
- Law on Occupational Training
- Law on Tax Administration
- Law on Dykes
- Law on Human Organ Donation
- Law on Gender Equality
- Law on Physical Education and Sports
- Law on Associations
- Code on Enforcement of Judgments — An uncommon occurrence, this law will be considered for the first time *and passed* at this October-November Session.

10 Laws are scheduled to be considered for the first time at this October-November Session (and will then be re-drafted for final approval at the May-June 2007 Session):

- Law on Personal Income Tax
- Law on Prevention of Domestic Violence
- Law on Health Insurance
- Law on Prevention of Infectious Diseases
- Law on Complaints & Resolution of Complaints
- Law on Territorial Waters of Vietnam
- Law on Quality
- Law on Referendums
- Law on Public Service
- Law on Denunciations & Resolution of Denunciations

(Currently, complaints and denunciations are regulated under a single Law.)

3.2 WTO accession and APEC, but no US PNTR

The WTO General Council formally adopted Vietnam's accession package on 7 November. Vietnam's National Assembly has scheduled a special meeting on 28 November (at the close of its October-November Session) to ratify its accession to the WTO Agreement on the terms and conditions set out in its WTO Protocol and to pass legislation enacting its 'upon accession' commitments. Immediately following, Vietnam will notify the WTO Secretariat of its ratification. 30 days after such notification, Vietnam will become the 150th full member of the WTO, subject to a broad set of commitments to accept international trade rules, reduce tariffs, eliminate non-tariff barriers, and open market access for services, amongst other things. To read Vietnam's WTO Working Party Report (260 page report of Vietnam's WTO journey, its legal and institutional framework for trade, and its various trade reforms and commitments), Vietnam's Schedule of Concessions and Commitments on Goods (560 page schedule of tariffs, quotas, subsidy ceilings, and phase-in timetable for reductions) and Vietnam's Schedule of Specific Commitments on Trade in Services (a 60 page schedule of market sectors to be opened to foreign access, timetable for opening, and conditions on market access), go to http://www.wto.org/english/thewto_e/gcounc_e/meet_nov06_e.htm. In the next issue of Vietnam Legal Update, we will review Vietnam's specific commitments and schedule for opening various market sectors under the General Agreement on Trade in Services.

Coming right on the heels of approval of Vietnam's WTO accession, the Asia-Pacific Economic Cooperation ("APEC") summit on 18-19 November was the perfect celebration of Vietnam's integration into the global economy. The only surprise (and somewhat of a spoiler) was the failure of the PNTR vote before the US Congress on 13 November. All President Bush had to bring with him to the APEC meetings in Hanoi was news that Congress had dropped Vietnam off its list of 'serious religious freedom violation' nations.

All WTO member countries are obliged to extend permanent normal trade relations ("PNTR") status on a reciprocal basis to other WTO member countries. The US does not currently extend PNTR status to Vietnam, only conditional normal trade relations status which has been renewed annually. The US has extended PNTR status to almost all WTO member countries. To do so for Vietnam, the US Congress must enact a statute authorizing the US President to terminate the application of Title IV of the Trade Act of 1974 with respect to Vietnam. The bill for PNTR for Vietnam was introduced in June 2006 and was expected to be passed before the Congress adjourned for the recent mid-term elections. However, objections by the US textile industry and objections by human rights campaigners stalled the passage of the PNTR bill. Upon re-convening, the bill was defeated, despite the pleas of the 150+ companies of the US-Vietnam WTO Coalition.

In anticipation of the WTO General Council's approval of Vietnam's WTO accession in advance of the US Congress' approval of the PNTR bill, the US commenced measures to ensure compliance with its own WTO obligations. On 3 November, the US notified the WTO of its invocation of Article XIII of the WTO Agreement, which provides for the non-application of the WTO Agreement between a WTO Member and an acceding country, pending the PNTR bill. So the US will not extend to Vietnam the trade concessions that WTO membership would normally bring. And the US will not enjoy the benefits of Vietnam's WTO accession commitments (ie those commitments that are more favourable than under the BTA) that all other WTO member countries will enjoy. Not until the US grants PNTR status to Vietnam…

3.3 Who can be general director, legal representative or controller of a Vietnamese company?

In the August 2006 Issue of Vietnam Legal Update (available on www.vietnamlaws.com), we highlighted various restrictions on who can be a general director under the Law on Enterprises 2005, effective as of 1 July 2006.

One restriction is that, if the general director is also the legal representative of a limited liability company ("LLC") or shareholding company ("SC"), the general director must be a permanent resident in Vietnam. This is a lesser requirement than being a Vietnamese citizen, but exactly who is a "permanent resident" is confusing. It is not defined under the new Law on Enterprises (or Law on Investment). Under Vietnam's immigration law, a permanent foreign resident is "a foreigner residing, working and living for a long period in Vietnam", falling into one of the following categories:

- A person who fights for the freedom and independence of the Vietnamese race, for socialism, for democracy and peace, and for science, but who is suppressed;
- A person with distinguished services contributing to the work of building and protecting the Vietnamese Fatherland;
- A person being the spouse, child or parent of a Vietnamese citizen permanently residing in Vietnam.

The above criteria severely limit the range of candidates for legal representative. As either the general director on one hand or the chairman of a LLC's Members' Council or chairman of a SC's Board of Management on the other hand must be the legal representative, by extension, the range of candidates for one of those positions will be restricted. For foreign invested enterprises, this is a significant limitation.

Of note, foreign banks, insurance companies, securities companies, law firms and other foreign companies established under industry-specific legislation are not subject to the Law on Enterprises and, therefore, not limited by this 'permanent resident' restriction.

Another restriction is that a general director of a SC cannot act concurrently as a member of the Board of Controllers of the same SC. The Law on Enterprises expressly restricts all managerial personnel of a SC (and their spouses, children, parents and siblings) from being appointed to the Board of Controllers. As the Board of Controllers is responsible for overseeing the management of the company by the Board of Management and the general director, the restriction is understandable.

However, whether this restriction applies to LLCs is not clear. Only LLCs with more than 11 members are required by law to have a Board of Controllers; other LCCs have a choice in the matter. There is no express restriction on a general director of a LLC acting concurrently as a member of the Board of Controllers of the same LLC. And an examination of the conditions for being a member of a LLC's Board of Controllers reveals that a lesser restriction appears to apply to LLCs than to SCs. The Law on Enterprises restricts a member of a Board of Controllers only from being a 'related person' of any managerial personnel, such as a spouse, child, parent or sibling. The rationale for what would appear to be different rules applicable to SCs and LLCs is unknown. Of note, the State Bank has held that, in the case of a 100% foreign owned finance company (which is established as a LLC, but under industry-specific legislation), the general director cannot act as a member of its Board of Controllers.

None of these matters were clarified in the recent Decree 88 implementing the Law on Enterprises 2005 nor the recent Decision 1088, and we are not aware that the Ministry of Planning and Investment or the Government is planning to issue any detailed guidelines to clarify matters like these. Maybe the working team (see our feature above) will compile all these queries about the new investment-enterprise regime and the need for guidelines will be re-considered.

3.4 Foreign distribution rights - latest news

Effective as of 1 January 2006, the new Commercial Law 2005 provided for the establishment of foreign invested distribution companies. Interested investors are still waiting for the necessary legislation to breathe life into the new reforms. The latest news from the Ministry of Trade ("MoT") is that the decree on foreign invested commercial enterprises ("FICEs") specializing in trading and distribution is still in draft stage, but is planned to be submitted to the Government in mid-December, when the Government is expected to give priority to consideration and promulgation of the decree. That is as it should be given that Vietnam's commitment in its WTO accession package is to open the distribution sector "upon accession" (which is expected shortly, see 3.2 above for more on WTO). A gradual opening of the sector has been negotiated, as follows:

- As of WTO accession, a joint venture company with a Vietnamese partner(s) will be required, with no more than 40% foreign capital contribution. Such joint ventures will be permitted to engage in (commission, wholesale or retail) distribution of all legally imported and domestically produced products, except for: cement and clinker; tyres (excluding tyres of airplanes); paper; tractors, motor vehicles, cars and motorcycles; iron and steel; audiovisual devices; wine and spirits; and fertilizers.
- As of 1 January 2008, the 49% cap on foreign capital contribution will be abolished (so up to 99% foreign capital contribution will be permissible).
- As of 1 January 2009, a 100% foreign owned company will be permitted. As of that date, all foreign-invested distribution companies will be permitted to engage in distribution of tractors, motor vehicles, cars and motorcycles.
- Within 3 years of WTO accession, all foreign-invested distribution companies will be permitted to engage in distribution of *all* legally imported and domestically produced products.

Cigarettes and cigars, books, newspapers and magazines, video records on whatever medium, precious metals and stones, pharmaceutical products and drugs (not including non-pharmaceutical nutritional supplements in tablet, capsule or powdered form), explosives, processed oil and crude oil, rice, cane and beet sugar are excluded from the above commitments.

Of note, the establishment of more than one retail outlet will be permitted on the basis of an economic needs test, the main criteria of which include the number of existing service suppliers in a particular geographic area, the stability of the market and the proposed geographic scale. Promisingly, Vietnam has committed to pre-established publicly available procedures for applications to establish more than one retail outlet and has committed that approval will be based on objective criteria.

The above commitments are consistent with Vietnam's undertakings in the US-Vietnam Bilateral Trade Agreement.

The MoT's draft 8 of the proposed decree, which was released in September, makes a number of changes from its earlier draft 5 (see January-February 2006 Issue of Vietnam Legal Update on www.vietnamlaws.com), including: the provisions on fees for registration with the MoT have been removed; and the application file for establishment of a FICE has been updated so that it is consistent with the application file required under Decree 108 on Investment for a project in a conditional sector (see our feature above).

The most recent player approved to enter the Vietnamese retail market is a joint venture between Korea's Lotte Shopping Co. Ltd and HCMC-based Minh Van Trading and Manufacturing Company. The joint venture Lotte Vina Shopping will construct and operate initially one department store in HCMC, but aims to establish a chain of 15 stores. Four international retailers are already operating in Vietnam to date, including Germany's Metro Cash & Carry, France's Big C, Malaysia's Parkson, and Singapore's Giant South Asia Investment.

3.5 Equitization - strategic foreign investors to be recognized

In October 2006, the Government released its draft Decree on Conversion of Enterprises with One Hundred Percent State Owned Capital into Shareholding Companies. In Vietnam, this conversion process is referred to as *equitization*. It is similar but not identical to the concept of *privatization* in other jurisdictions. When passed, the new decree on equitization will replace the current Decree 187-2004-ND-CP of the Government dated 16 November 2004 on Conversion of State Owned Enterprises into Shareholding Companies. This will represent the Government's fourth attempt to kick-start the equitization of State owned enterprises ("SOEs") since it introduced the first law regulating equitization in a serious, detailed manner under Decree 44 in mid-1998. For an overview of the current equitization regime, see October 2004 and November 2004 Issues of Vietnam Legal Update on www.vietnamlaws.com.

One of the biggest changes under the October 2006 draft decree on equitization - and of great importance to foreign investors - is the treatment of strategic investors. Under the new draft provisions on strategic investors:

> The definition of strategic investors is expanded to include foreign investors.

> The description of strategic investor is broad. Types of entities qualifying as strategic investor include:

- producers and regular suppliers of raw materials to the SOE undergoing equitization;
- persons undertaking to purchase the products of the SOE on a long-term basis; and
- persons closely connected to the long-term strategic business interests of the SOE and having finance potential and management capability.

> Subject to the particular equitization decision and equitization plan of the enterprise, strategic investors are entitled to purchase up to 30% of shares in the SOE undergoing equitization (up from 20% under Decree 187).

> The discount to strategic investors of 20% off the average auction price of shares that is available under Decree 187 no longer applies. Instead, under the draft decree on equitization, strategic investors can carry out a separate auction or negotiate directly an agreement on price with the Steering Committee of the SOE undergoing equitization provided that the share price paid by the strategic investor is not lower than the successful auction bid at the first public auction of shares.

> The strategic investor path will be important to foreign investors wishing to lock in, prior to the initial auction of shares, up to a 30% shareholding in an equitizing SOE. To achieve this, potential strategic investors should not be tardy as the draft decree requires the selection of strategic investors to be nominated in the equitization plan of the SOE. Once a SOE's equitization plan is submitted and approved, the opportunity to be a strategic investor is lost (strictly speaking).

> A strategic investor cannot transfer its strategic shares for 3 years from the date of the business registration certificate of the equitized SOE, unless it obtains the approval of the board of management.

Like Decree 187, the draft decree on equitization also deals with issues relating to dealing with the finances of equitizing SOEs, the valuation of SOEs (including valuation methods), the process of selling shares (including initial share auction), the policies applicable to enterprises after equitization, and the rights of employees.

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

Vietnam Laws Online Database on www.vietnamlaws.com is an online searchable database of English translations of over 3,000 Vietnamese laws relating to foreign investment and far beyond. Translations can be viewed online, printed and downloaded (subject to terms & conditions).

>>> NEW multi-user subscription option for Vietnam Laws Online Database

Now in our third year of operation, we're pleased to launch our new multi-user subscription option. Discounts are available for 5 or more users within the same organization. Whatever your multi-user needs, we can tailor a subscription for you.

>>> NEW subject categories in Vietnam Laws Online Database

With the introduction of Vietnam's new investment-enterprise regime on 1 July 2006, we've taken the opportunity to adjust various existing subject categories and to add some new ones. In particular, we've merged investment and corporate legislation into *Investment-Corporate*. All new investment-enterprise laws can be found in *Investment-Enterprise Regime (Post-July 2006)*. All old laws on investment and enterprises can be found in *Investment-Enterprise Regime (Pre-July 2006)*. Other new categories identify legislation relating to *WTO & Other Treaties*, *Anti-Dumping & Other Safeguards*, *Anti-Corruption*, *Franchising*, *Mergers & Acquisitions*, and more. Have a browse and let us know what you think - we welcome your **feedback** at any time.

>>> UPDATED on 20 November 2006, Vietnam Laws Online Database includes:

- *Latest investment legislation:* Decree 108 on investment regulations, Decree 101 on transition options, Decision 1088 on standard forms (see feature)
- Decree 111 on tendering, effective 3 November 2006 (see 1.2)
- Circular 11 on representative offices & branches, effective 2 November (see 1.1)
- IP decrees: 100, 103, 105 & 106 *translation in progress* (see 1.3)
- Decree 89 on labelling, effective March 2007
- Law on Investment & Law on Enterprises, effective 1 July 2006
- Laws on Securities, Cinematography, Real Estate & more, passed 29 June 2006
- New Civil Code, Commercial Law, Maritime Code & more, effective 1 Jan 2006
- Draft laws on foreign trading rights, banks, & more - *so you can be well prepared*

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.

>>> NEW search function for Vietnam Legal Update

All issues of Vietnam Legal Update from 1997 to date are available on www.vietnamlaws.com. For your convenience, there's an index of contents of all issues of Vietnam Legal Update. To make it easier for you to find articles in Vietnam Legal Update on topics of interest to you, you can now search for keywords in our index.

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