

Vietnam Legal Update

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Part 1 Selected New Legal Instruments

1.1	APEC arrangements	2
1.2	Minimum wages	2
1.3	Goods labelling	3
1.4	Business registration	4
1.5	Finance leasing	5

Part 2 Features

2.1	New investment decree	6
2.2	Transition options for existing foreign investors	9

Part 3 Did You Know?

3.1	First investment certificate under new regime	14
3.2	Final WTO negotiations, but no US PNTR vote	14
3.3	When will Vietnam be "globalized"?	15
3.4	Representative offices - re-registration alert	15
3.5	VND deposits - who can accept what?	16
3.6	Securities taxation - is the holiday over?	16
3.7	Labour Code reform on strikes	17
3.8	Who can resolve investor disputes?	17
3.9	Gripes against Government allowed?	18
3.10	Conferences:	
	> Austcham regional business conference 2006	18
	> Infrastructure investment conference	

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

>>>	Infrastructure conference - tendering slideshow	
>>>	NEW laws in Vietnam Laws Online Database	
>>>	NEW search function for Vietnam Legal update	19

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Part 1 Selected New Legal Instruments

1.1 APEC arrangements

Circular 10-2006-TT-BCA of the Ministry of Public Security dated 18 September 2006 Providing Guidelines for Implementation of Regulations on Issuance and Control of APEC Businessperson Travelling Cards under Decision 45-2006-QD-TTg of the Prime Minister dated 28 February 2006

With the aim of assisting businesspersons who are members of the APEC Businessperson Travelling Card Program, Circular 10 provides guidelines for the issuance of APEC Businessperson Travelling Cards to APEC businesspersons as well as staff and for exit, entry and residence of other foreign businesspersons. An APEC Businessperson Travelling Card replaces any visa requirements for destination countries specified in the APEC Businessperson Travelling Card. APEC Businessperson Travelling Cards for Vietnamese businesspersons will be valid for 3 years (or remaining period of validity of passport); applications are processed by the Immigration Department of the Ministry of Public Security. APEC Businessperson Travelling Cards entitle foreign businesspersons visiting Vietnam to a certificate of temporary residence for a maximum 90 days (for each entry).

1.2 Minimum wages

Decree 94-2006-ND-CP of the Government dated 7 September 2006 on Adjustment of General Minimum Wage Level

Minimum wages for work by Vietnamese employees doing the most basic work in normal working conditions for foreign invested enterprises were increased as of 1 February 2006, for the first time since 1 July 1999 (see January-February 2006 Issue of Vietnam Legal Update on www.vietnamlaws.com). Now, minimum wages for employees of domestic enterprises are set to be increased, only one year after the last increase.

Under Decree 94, the basic minimum monthly wage for employees of domestic enterprises will be increased to VND450,000 (approx USD29.25) as of 1 October 2006, up from VND350,000 (USD22.75). This minimum monthly wage forms the basis for calculating salary levels and allowances in the State sector and in the labour contracts of the private sector (ie enterprises, co-operatives, family households, and other individuals and organizations recruiting employees) and also for adjusting retirement pensions, social insurance allowances, severance allowances, and other benefits.

Guidelines for implementation of Decree 94 have already been issued under Circular 12-2006-TT-BLDTBXH of the Ministry of Labour, War Invalids and Social Affairs dated 14 September 2006.

1.3 Goods labelling

Decree 89-2006-ND-CP of the Government dated 30 August 2006 on Goods Labelling

Vietnam attempted to introduce its current goods labelling regime in March 2000 under Decision 178-1999-QD-TTg of the Government dated 30 August 1999. Implementation was delayed for various reasons. Almost all ministries responsible for providing detailed guidelines for labelling of special categories of goods (such as Ministry of Health for labelling of food and medicine) failed to do so. Business and production enterprises did not know what to do with stock bearing non-compliant labels and did not know how much latitude they had in interpreting the labelling regulations, eg could they abbreviate some of the mandatory text. Some faced technical problems, such as: some goods packaging didn't have a flat side on which to affix labels or wasn't big enough to bear labels specifying all mandatory text. Numerous applications were made to the Government to defer commencement.

Enforcement was deferred until 1 January 2001 under Decision 95-2000-QD-TTg of the Government dated 15 August 2000. Decision 95 also modified a number of the mandatory requirements of the labelling regulations which had caused considerable confusion, such as the height of the letters indicating the names of goods and the position of the quantity description.

Now, a new goods labelling regime is to be introduced under Decree 89. Hopefully, it will be a more workable, less rigid labelling regime. Like its predecessor, the new regime applies to:

- > goods produced in Vietnam for domestic circulation and for export; and
- > goods produced in foreign countries which are imported for sale in the Vietnamese market.

The new regime does not apply to unpackaged fresh, uncooked and processed foods which are sold directly to consumers and (now also) unpackaged raw materials (such as agricultural products, aquaculture products, minerals), construction materials (such as bricks, tiles, lime, sand, stone, gravel, cement, rich soil, mortar, commercial concrete mixture), and wastes (from production and trading) which are sold directly to consumers. The new regime is also not applicable to goods temporarily imported for re-export or in transit and (now also) real property and moveable assets, gifts, and luggage of persons exiting from or entering into Vietnam.

Mandatory contents of labels include: name of goods; name and address of the entity responsible for the goods; ingredients; any necessary technical specifications or health or safety information. As before, depending on the nature of a specific type of goods, other mandatory text must be included on goods labels.

Decree 89 will become effective 6 months after its date of publication in the Official Gazette, which occurred on 13 September. So businesses have until 13 March 2007 to modify their labelling systems. Transitional arrangements for stock bearing non-compliant labels (such as affixing of supplementary labels after declaration of old stock) are expected to be permitted. We will feature the new labelling requirements in detail in coming months.

1.4 Business registration

Decree 88-2006-ND-CP of the Government dated 29 August 2006 on Business Registration

Vietnam's new investment-enterprise regime was introduced as of 1 July 2006. For the first time, domestic and foreign invested enterprises are governed under a single corporate law - the 2005 Law on Enterprises. Notwithstanding that single law, domestic and foreign invested enterprises are regulated differently with respect to various aspects of their corporate life. One such aspect is business registration.

Vietnam followed an unique route when it attempted to "level the playing field" for investors. Rather than lowering the bar for foreign investors, Vietnam raised the bar for domestic investors. Until 30 June 2006 domestic investors did not require any specific investment approval, just business registration. From 1 July, all domestic investments above VND15 billion/USD937,500 will require investment registration (or investment evaluation if above VND300 billion/USD18.75 million or in a conditional sector) in addition to business registration. Furthermore, for domestic investors, investment registration/evaluation and business registration are two separate steps. In this respect, foreign investors came off better - for them, investment registration/evaluation and business registration occur concurrently, as under the old investment regime. (In other respects, foreign investors are still at a disadvantage - for them, all investment projects require investment registration/evaluation, not just those above VND15 billion/USD937,500.)

So Decree 88 primarily relates to domestic business registration, however various provisions affect foreign investors (eg., recording of foreign shareholdings in domestic enterprises). Given the success of the business registration system introduced as of 1 January 2000 under the 1999 Law on Enterprises, Decree 88 does not introduce any radical overhaul of business registration procedures. Prescribed time-limits for processing business registration applications have been reduced for enterprises and for sole traders to 10 and 5 working days respectively (down from 15 and 7 days respectively).

Business registration will be processed by Business Registration Offices under provincial-level Departments of Planning and Investment (in Hanoi and HCMC, multiple Business Registration Offices may be established) or Finance-Planning Bureaus at district level (where the average annual number of newly-established sole traders and co-operatives has exceeded 500 in the last two years).

Now, business registration fees will be determined on the basis of the number of registered business lines, rather than being a fixed amount as previously. Another reform relates to business lines for which a practising certificate is compulsory; now, an individual may only register one business to which his or her practising certificate will attach.

Reportedly, the Prime Minister has directed the Ministry of Planning and Investment, the Ministry of Finance and the Ministry of Police to co-ordinate to issue a circular providing for 3 administrative steps for establishment of an enterprise (business registration, seal-engraving and tax registration) to be carried out at a "one-stop shop", *Vietnam Economy 5 September 2006*.

Decree 88 became on 27 September 2006 and replaces Decree 109-2004-ND-CP of the Government dated 2 April 2004.

1.5 Finance leasing

Circular 07-2006-TT-NHNN of the State Bank of Vietnam dated 7 September 2006 Providing Guidelines on Finance Leasing in Form of Sale and Lease Back as Provided for in Decree 16-2001-ND-CP of the Government dated 2 May 2001 and Decree 65-2005-ND-CP of the Government dated 19 May 2005

Decree 16 provides for the establishment and operation of finance leasing companies in Vietnam. Effective as of 11 June 2005, a number of amendments of Decree 16 were introduced by the Government under Decree 65.

There are several circulars implementing these decrees. In particular, Circular 08 of the State Bank of Vietnam dated on 6 September 2001 provides detailed guidelines for implementation of Decree 16. This circular was amended by Circular 07 dated 1 November 2004 with respect to the procedures and application files for obtaining the necessary State Bank approval of changes to the name, charter capital, office locations, operations, major shareholdings and management personnel of a financial leasing company. On 6 December 2005, the Ministry of Justice issued Circular 09 updating its guidelines on authority, order and procedures for registration and provision of information on financial leasing contract and State administration over registration of financial leasing contracts. More recently again, the State Bank issued Circular 05 dated 25 July 2006 providing guidelines on the operation of finance leasing and service of finance leasing by proxy in accordance with Decree 16 and Decree 65.

Now, under Circular 07, the State Bank provides guidelines on sale and lease back operations, more than 5 years after sale and lease back was provided for as one of the permitted functions of a finance leasing company under Decree 16. Finance leasing in the form of sale and lease back is defined as where a finance leasing company purchases property under the ownership of the lessee then leases it back to the lessee so that the lessee can continue its operation. In effect, the lessee is concurrently also the supplier of property in these types of transaction.

Property which may be purchased and leased back under Circular 07 includes machines and equipment, means of transport and other moveable assets under the ownership of the lessee, sold to the lessor and then leased back to the lessee for its continuing operation. The conditions for property to be purchased and leased back comprise: (i) the assets must be under the lawful ownership of the lessee; (ii) the assets must not be being used to guarantee any other obligation; (iii) there must be no dispute relating to the assets; and (iv) the assets must be in normal operating condition.

All sale and lease back transactions must be conducted pursuant to an asset purchase contract and a finance leasing contracts between the lessor and the lessee. Both contracts must become effective simultaneously. Registration of ownership of the leased assets must be conducted in accordance with Decree 65. A finance leasing company may carry out registration with the competent authority where its head office or a branch is located or where the lessee resides or has its head office.

Circular 07 provides guidelines on contract contents; monies used in sale and lease back transactions; rights and obligations of the lessor and the lessee; tax applicable to sale and lease back transactions; and dealing with offences.

Finance leasing companies must issue internal regulations for implementation of sale and lease back transactions on the basis of Circular 07 and existing legal provisions.

>>> *For more on finance leases and operating leases, see July 2005 Issue of Vietnam Legal Update*

Part 2 Features

2.1 New investment decree

>>> *The long-awaited decree on investment has finally been issued. Decree 108-2006-ND-CP of the Government dated 22 September 2006 is the most important decree to implement Vietnam's new investment regime introduced under the 2005 Law on Investment as of 1 July 2006.*

The Ministry of Planning and Investment ("MPI") is currently finalizing the official text of Decree 108, after which it can be published in Vietnam's Official Gazette. Decree 108 is expected to become effective as of mid to late-October 2006. Until then, the MPI's provisional investment guidelines remain in force (see July 2006 Issue of Vietnam Legal Update on www.vietnamlaws.com).

Below we highlight a few aspects of the investment decree - the first two represent a significant change in Vietnam's policy for State administration of investment.

Our comments below are based on our translation of the e-copy of Decree 108 provided to us by the MPI and now available on Vietnam Laws Online Database on www.vietnamlaws.com. We look forward to confirming the below and providing more commentary on Decree 108 over the coming months after the official text is released.

> Investment approval authority

The hierarchy of authority to approve investment projects is as follows:

Prime Minister ("PM")	Projects regardless of capital source or capital level within specified sectors: airports & air transportation; national seaports; minerals exploration & mining, petroleum exploration, production & processing; radio & TV broadcasting; casinos; cigarette manufacturing; universities; establishment of industrial zones, export processing zones, high-tech zones and economic zones ("zones")
	Projects regardless of capital source with capital level over VND1,500 billion within specified sectors: electricity business; mineral processing; metallurgy; construction of railways, roads & internal waterway infrastructure; alcohol & beer production & trading
	Projects with foreign invested capital source regardless of capital level within specified sectors: such as: sea transportation; post, delivery, telecommunications & internet networks; printing & distribution of newspapers & other printed matter; publishing; independent scientific research establishments
Provincial/municipal people's committee ("PC")	Projects outside zones and not within PM approval authority
	Projects for development of infrastructure in zones in localities with no MC
Provincial/municipal zone management committee ("MC")	Projects in zones and not within PM approval authority
	Projects for development of infrastructure in zones

> Investment certificate-issuing authority

All investment certificates will be issued by the relevant PC or MC. The only exception is in specialized sectors, eg banking or insurance, where the relevant line ministry has investment approval authority and fulfils the certificate-issuing role.

The MPI will have no investment approval authority and will not even retain its role as the certificate-issuing body for projects within PM authority.

Where proposed investment projects falling within PM authority are already provided for in an approved master plan and/or satisfy market-opening conditions prescribed in law or international treaties, the relevant PC or MC may issue the investment certificate without making any submission for PM approval. They will issue certificates in accordance with the master plan and/or satisfy market-opening conditions prescribed in law or international treaties.

Where proposed projects are not provided for in an approved master plan or do not satisfy prescribed market-opening conditions, the relevant PC or MC must obtain opinions from the relevant line ministry, the MPI and other bodies and collate into a submission to the PM for a decision on investment policy.

Where there is no approved master plan, the relevant PC or MC must obtain opinions from the relevant line ministry, the MPI and other bodies and collate into a submission to the PM for a decision on investment policy.

> Conditional sectors

Under the 2005 Law on Investment, all investment projects (regardless of whether foreign invested or domestic) in the following sectors are conditional projects and subject to investment evaluation (by the relevant PC or MC or by the PM, as above) prior to issuance of an investment certificate:

- Sectors impacting on national defense and security, social order and safety
- Banking and finance sector
- Sectors impacting on public health
- Culture, information, press and publishing
- Entertainment services
- Real estate business
- All aspects of natural resources; the ecological environment
- Development of education and training
- A number of other sectors in accordance with law

For foreign investors, the range of conditional sectors is wider still, and includes any sector for which Vietnam has committed to market-opening conditions in international treaties.

Foreign investors have expressed their concerns about the uncertainty that arises from the failure to specify in domestic legislation all sectors in which investment is conditional. Decree 108 goes part of the way to assuage this concern, but fails to provide foreign investors with the sort of certainty that will boost foreign investor confidence in Vietnam.

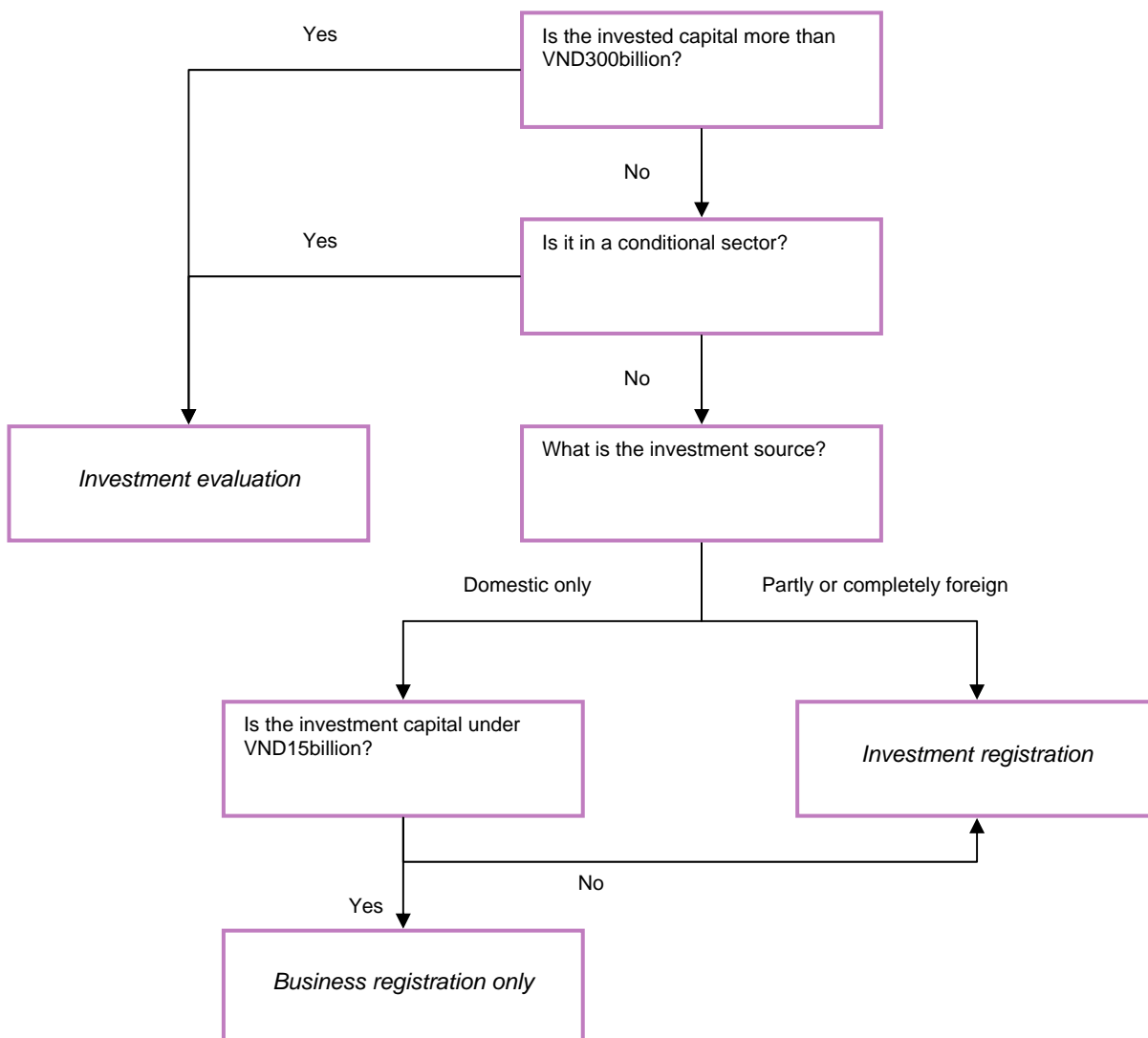
Appended to Decree 108 is the following list of sectors in which foreign investment is conditional:

- Broadcasting and TV
- Production, publishing and distribution of cultural products
- Exploration and exploitation of minerals
- Establishment of infrastructure for telecommunications networks, transmission and provision of internet and telecommunications services
- Establishment of public postal networks and provision of postal services and express delivery services
- Construction and operation of river ports, seaports, terminals and airports
- Transportation of goods and passengers by railway, air, road, sea and inland waterways
- Catching of aquaculture
- Production of tobacco

- Real estate business
- Import, export and distribution business
- Education and training
- Hospitals and clinics
- Other investment sectors for which Vietnam has committed to market-opening conditions in international treaties

For foreign investors, the reliance on international treaties as a source of regulation of foreign investment in Vietnam is troublesome. Each foreign investor will need to conduct an analysis of which international treaties apply to it and what types of investment projects are conditional under those international treaties before it will know for certain that whether it is entitled to straightforward investment registration or whether it is subject to investment evaluation. A great deal of time and effort may be required to achieve a comfortable degree of certainty. (For more on the role of international treaties in Vietnam's new investment regime, see August 2006 Issue of Vietnam Legal Update on www.vietnamlaws.com.)

The flowchart below shows which investment projects are entitled to investment registration and which must undergo investment evaluation prior to issuance of an investment certificate:



2.2 Options for existing foreign investors to transition to new investment-enterprise regime

>>> *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 Registration for Replacement with Investment Certificates by Business Co-operation Contracts Pursuant to the Law on Enterprises and the Law on Investment is one of the most important decrees to implement Vietnam's new investment-enterprise regime introduced under the 2005 Law on Investment and Law on Enterprises as of 1 July 2006.*

Decree 101 provides for joint venture enterprises, 100% foreign owned enterprises and foreign invested shareholding companies - together referred to as foreign invested enterprises ("FIEs") - as well as business co-operation contracts ("BCCs") that were licensed under the old Law on Foreign Investment to transition over the next 2 years to regulation under the new Law on Investment and Law on Enterprises. It also deals with existing FIEs and BCCs that opt not to make that transition.

A number of concerns from earlier drafts have been addressed. Other concerns remain; and some new queries have arisen. But, all in all, Decree 101 appears to introduce a simple and straightforward system for transition. For full version of our overview of Decree 101, go to www.vietnamlaws.com

Decree 101 provides separately for:

- > re-registration: defined as the process whereby existing FIEs register for replacement of their investment licenses with new investment certificates, but there is no change in corporate form (on this last point, Decree 101 is badly drafted but "no change" appears to mean "no change from the corresponding corporate form prescribed in Decree 101, see Table 1 below)
- > conversion: defined as the process whereby existing FIEs change their corporate form and are issued with new investment certificates
- > replacement with investment certificates: defined as the process whereby existing BCCs register for replacement of their investment licenses with new investment certificates
- > non-transition: whereby existing FIEs and BCCs do not carry out re-registration/conversion or replacement respectively.

Earlier drafts of Decree 101 did not deal with conversion. Conversion of existing FIEs had been intended to be dealt with in a separate implementing decree. Its inclusion in Decree 101 is a positive development - now, existing foreign investors need look to only one decree to know their transitional options.

Decree 101 does not apply to FIEs licensed under other laws, such as joint venture banks and insurance companies. Special provisions in Decree 101 apply where foreign investors have undertaken to transfer all assets of existing FIEs to the Government without compensation upon expiry of licensed duration.

Is transition compulsory?

Decree 101 does not make it compulsory for existing FIEs to conduct re-registration or conversion or for existing BCCs to conduct replacement with investment certificates. This is consistent with drafts of Decree 101 and the Law on Enterprises. In principle, this is a welcome provision as existing FIEs and BCCs are free to proceed with transition only if there is a tangible benefit for them to do so.

Transition time-limit

There is a time-limit on exercising the transition options. Transition options must be exercised within two years of the effective date of the Law on Enterprises. So existing FIEs and BCCs have until 1 July 2008 to carry out re-registration, conversion or replacement. Unfortunately, Decree 101 does not clarify whether the transition process must be completed by 1 July 2008 or merely commenced by then (the latter would allow an application for re-registration, conversion or replacement to be submitted as late as 30 June 2008).

To make the transition or not?

In our view, for most existing foreign investors in Vietnam, the positives of making the transition will greatly outweigh the negatives. However, this is an assessment that needs to be made taking into account the particular circumstances of each investment project. One fundamental motivation for making the transition is to avoid becoming a corporate dinosaur, which is likely to be the fate of existing FIEs and BCCs that opt not to make the transition to the new investment-enterprise regime.

If not make the transition...

Existing FIEs and BCCs that opt not to make the transition will remain creatures of the old Law on Foreign Investment and will become a dying breed as their investment licenses eventually expire. Decree 101 restricts non-transitioning FIEs and BCCs to operation in accordance with the scope of business and for the duration stipulated in their investment license. They cannot amend their licensed business line/sector or licensed duration.

In contrast to earlier drafts, Decree 101 does allow non-transitioning FIEs and BCCs to apply for other amendments of their investment licenses "in necessary cases" (undefined). It is not clear whether this would extend to amendment of their licensed corporate form - it would be surprising if it did, as this would allow such FIEs and BCCs to circumvent the time-limit on transition and apply later for the equivalent of conversion. Of note, any application for amendment must be made and processed in accordance with the new Law on Investment.

Non-transitioning FIEs and BCCs may amend specific aspects of their operations (opening of transaction offices, warehouses and shops or relocation of head office within the same province or city under central authority) without any actual amendment of their investment licenses; just the written approval of the responsible investment certificate-issuing body under the new Law on Investment (see [2.1](#) above) is required.

Decree 101 provides for non-transitioning FIEs and BCCs to retain their names, seals, bank accounts and already-registered tax code.

In all other respects, non-transitioning FIEs move to regulation (with respect to their rights and obligations) under the new Law on Investment and Law on Enterprises; and non-transitioning BCCs move to regulation under the new Law on Investment only (as the new Law on Enterprises does not contemplate BCCs). This gives rise to some uncertainty for non-transitioning FIEs and BCCs. It may require substantial investment of time and resources for non-transitioning FIEs and BCCs to work out the minefield of their rights and obligations under the new laws *versus* the restrictions of Decree 101 and the provisions of the old Law on Foreign Investment. For example, if non-transitioning FIE X has a charter that incorporates by reference various provisions from the old Law on Foreign Investment (eg "board voting must be conducted in accordance with the Law on Foreign Investment"), is FIE X entitled to continue to conduct board voting in the 'old way' or must it adopt the 'new way' under the new Law on Enterprises? This is significant because many aspects of corporate life (voting in particular) are treated very differently under the old regime and the new investment-enterprise regime. The only way to achieve certainty is for FIEs and BCCs to make the transition.

If make the transition...

Existing FIEs that opt to make the transition have the choice between:

- > re-registration (if they do not wish to change their corporate form - which we interpret to mean "do not wish to change form from the corresponding corporate forms prescribed in Decree 101", as set out below) or
- > conversion (if they do wish to change their corporate form).

Or they have the option to conduct registration and then conversion over the two-year time-limit for transition. (The different treatment of BCCs is discussed at the end of this section.)

Re-registration

The re-registration process looks simple and straightforward. Documentary requirements are not onerous. Existing FIEs must submit an application to the responsible investment certificate-issuing body under the new Law on Investment (see [2.1](#) above), comprising: written application (standard form will be issued by the Ministry of Planning and Investment), new charter (which must be consistent with the Law on Enterprises) and copy of the investment license(s). A welcome protection in Decree 101 is that the investment certificate-issuing body cannot require submission of any other documents than the above. No fees appear to be payable for re-registration (but the deletion of the express draft provision to that effect seems strange - query whether a fee may be introduced in the yet-to-be-issued implementing circular).

Existing FIEs are restricted as to the corporate form which they may re-register as under the Law on Enterprises, as follows:

Table 1: Re-registration - corporate forms

<i>Current form</i>	<i>New form</i>
100% foreign owned enterprise with 1 foreign investor	Limited liability company with 1 member
100% foreign owned enterprise with 2 or more foreign investors	Limited liability company with 2 members or more
Joint venture enterprise	Limited liability company with 2 members or more
Foreign invested shareholding company	Shareholding company

Of note, re-registering FIEs may request amendment of other items relating to business registration and the investment project. The only 'restriction' is that they must submit the documents stipulated by law as required for such items to be amended.

The investment certificate-issuing body has 15 working days (7 days was proposed in earlier drafts) to consider the file and issue a new investment certificate (to replace the investment license of the former FIE) or explain its refusal in writing. It is not clear on what grounds the investment certificate-issuing body may refuse an application for re-registration (other than failure to submit proper application).

After re-registration, the FIE is deemed to be (and have all the concomitant rights and obligations of) an enterprise established under the Law on Enterprises and the Law on Investment. It is no longer a creature of the old Law on Foreign Investment. However, a re-registered enterprise may retain its previously registered name, seal, bank accounts and tax codes. And it will continue with its licensed investment project (but now in accordance with the terms of its investment certificate, not the old investment license). A re-registered FIE must assume all rights and interests of and will be liable for the unpaid debts, labour contracts and other obligations of the former FIE. The new investment certificate serves concurrently as the business registration certificate.

Conversion

The conversion option allows existing FIEs to adopt a new corporate form (as set out in Table 2 below). Decree 101 does not restrict them to the prescribed corporate forms applicable to re-registering FIEs in Decree 101 (as set out in Table 1 above).

The conversion process also looks relatively simple and straightforward. As with re-registration, existing FIEs must submit their application to the responsible investment certificate-issuing body under the new Law on Investment (see [2.1](#) above). There is only one extra documentary requirement to the application file for re-registration. Converting FIEs must also submit a decision on conversion by the owner (for 100% foreign owned enterprises), board (for joint venture enterprises) or general meeting of shareholders (for foreign

invested shareholding companies). The decision on conversion must specify: name and address of the converting FIE and of the FIE after conversion; period and conditions for transfer of assets, capital contribution portions, shares and bonds of the former FIE to the converted FIE; plan for employment of employees; and period for implementation of the conversion. If addition of new members/shareholders to the FIE is envisaged as part of the conversion process, the conversion application must also include documentation verifying the identity of such new members/shareholders. Probably an oversight, but there's no protection that the investment certificate-issuing body cannot require submission of any other documents than the above (contrast re-registration above). Again, no fees appear to be payable for conversion.

Existing FIEs may convert to the following corporate forms:

Table 2: Conversion - corporate forms

Current form	New form
100% foreign owned enterprise with 1 foreign investor	Limited liability company with 2 members
100% foreign owned enterprise with 2 or more foreign investors	Limited liability company with 1 member
Joint venture enterprise	Limited liability company with 1 member
Any FIE in form of limited liability company	Shareholding company (provided that it satisfies conditions in Law on Enterprises plus extra Decree 101 condition that owner of former FIE must be founding shareholder or, if more than 1 owner of former FIE, at least 1 owner must be founding shareholder)
Any FIE in form of shareholding company	Limited liability company (provided that it satisfies conditions in Law on Enterprises)

As re-registering FIEs are permitted to do, converting FIEs may request amendment of other items relating to business registration and the investment project at the same time as conversion. The only 'restriction' is that they must submit the documents stipulated by law as required for such items to be amended.

The investment certificate-issuing body has 30 working days to consider the file and issue a new investment certificate (to replace the investment license of the former FIE) or explain its refusal in writing. It is not clear on what grounds the investment certificate-issuing body may refuse an application for conversion (other than failure to satisfy prescribed conditions for a particular corporate form in the new Law on Enterprises).

After conversion, the FIE is deemed to be (and have all the concomitant rights and obligations of) an enterprise established under the Law on Enterprises and the Law on Investment. However, a converted enterprise may retain its previously registered name, seal, bank accounts and tax codes. And it will continue with its licensed investment project (but now in accordance with the terms of its investment certificate, not investment license). A converted enterprise must assume all rights and interests of and will be liable for the unpaid debts, labour contracts and other obligations of the former FIE. The new investment certificate serves concurrently as the business registration certificate.

Of note, Decree 101 entitles a converted enterprise to continue to enjoy the investment incentives stipulated in the old investment license if the foreign investors hold no less than 30% of the charter capital. The objective of this preferential treatment is unclear, but appears to be a hangover from the foreign invested *versus* domestic invested dichotomy of the old investment-enterprise regime.

BCCs

Only one transition option is available to existing BCCs. Existing BCCs may register for replacement of their investment licenses issued under the old Law on Foreign Investment into investment certificates issued under the new Law on Investment. Conversion of corporate form is not an option.

For existing BCCs, the application process appears to be very simple. Only a written application signed by the BCC parties and a copy of the old investment license(s) is required to be submitted to the responsible investment certificate-issuing body under the new Law on Investment (see 2.1 above). As transitioning FIEs are permitted to do, existing BCCs may request amendment of other items relating to the investment project and the BCC at the same time. The only 'restriction' is that they must submit the documents stipulated by law as required for such items to be amended.

The investment certificate-issuing body has 7 working days to consider the file and issue a new investment certificate (to replace the investment license of the former BCC) or explain its refusal in writing. It is not clear on what grounds the investment certificate-issuing body may refuse an application for registration by a BCC (other than failure to submit proper application).

After replacement, the BCC will continue with its licensed investment project (but now in accordance with the terms of its investment certificate, not the old investment license). It is deemed to be (and have all the concomitant rights and obligations of) a BCC established under the new Law on Investment. The parties to such BCC assume all rights and obligations under the old investment license and the BCC.

So what to do?

In assessing whether to make the transition or not, the following positives and negatives might be relevant, depending on the particular circumstances of each investment project:

<i>Positives</i>	<i>Negatives</i>
<ul style="list-style-type: none"> > Government favours transition > Multiple investment projects will be possible (whereas non-transitioning FIEs remain single purpose investment vehicles) > No "thin capitalization" rule (assuming that this is not re-introduced in lower level regulations or in practice) > Can amend investment license in all situations, whereas non-transitioning FIEs and BCCs subject to restrictions on amendment > Can list on the stock exchange > Modern corporate structures available > Better legal framework for dealing with management of company (shareholder meetings, share issues, profit distribution etc) > Future laws will be drafted in context of new investment-enterprise laws (non-transitioning FIEs and BCCs fall further out of relevance) > Over time non-transitioning FIEs and BCCs will become corporate dinosaurs 	<ul style="list-style-type: none"> > Money and time to revise corporate documents and adjust organizational structure > May reduce current control over management (for investors holding shares of between 51% and 65%) > May be difficulties in negotiating with joint venture partners (and risk that other issues may be put forward for re-negotiation by partners) > Current charter and/or joint venture contract may contain more advantageous provisions than available under new laws > Possible re-examination of licenses by authorities against actual current operations

Decree 101 has not yet been published in Vietnam's Official Gazette, but is expected to become effective as of mid-October 2006.

Part 3 Did You Know?

3.1 Phillips Fox acts on first investment certificate under new investment-enterprise regime

Phillips Fox advised Kumho Tire on its application for an investment certificate under the new 2005 Law on Investment, which came into effect on 1 July 2006. The application was submitted on 2 July and the Ministry of Planning and Investment issued the investment certificate on 5 September 2006. It is the first investment certificate issued by the Ministry of Planning and Investment under the new Investment Law.* Kumho Tire's project is a tire manufacturing factory located in Binh Duong with an investment capital of USD156,437,000.

The preparation and submission of the application file and issuance of the investment certificate was completed in under 10 weeks. The team at Phillips Fox was led by Edward Han (right), and included Tran Van Hoai, Bui Tran Dang Khoa, and Bui Khanh Linh.



* Pending the new investment decree (see [2.1](#) above), pursuant to the provisional investment guidelines issued with Official Letter 5495 (see July 2006 Issue of Vietnam Legal Update), the Ministry of Planning and Investment has temporarily retained investment certificate-issuing authority. Under the new investment decree, the Ministry of Planning and Investment retains no authority to issue investment certificates; only provincial people's committees and industrial zone management committees will issue investment certificates.

3.2 Final WTO negotiations due to start, but US PNTR vote deferred

Having concluded all of its bilateral WTO negotiations (the last bilaterals were with the US and the US-Vietnam WTO bilateral market access agreement was officially signed off on 31 May 2006), Vietnam is preparing for its last round of multilateral negotiations for WTO accession. A number of issues are still not resolved, such as foreign trading rights, export duties, special sales tax on beverages, intellectual property rights, and investment policies under the new investment-enterprise regime. After 11 years of negotiation, Vietnam hopes to join WTO later this year.

WTO member countries are obliged to extend permanent normal trade relations ("PNTR") status on a reciprocal basis to other WTO member countries. At present, the US does not extend PNTR status to Vietnam, due to the application of Title IV of the Trade Act of 1974 of the US; Vietnam has conditional normal trade relations status, which is 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. Of all the bills currently before the US Congress (including US-Peru Free Trade Agreement), the bill for PNTR for Vietnam (introduced on 13 June 2006) was one of those expected to be passed before the Congress adjourns for October. That timing would have suited President Bush, who will visit Hanoi in mid-November. However, two Senators placed holds on the PNTR bill until objections by the US textile industry were addressed, resulting in the vote on PNTR for Vietnam now being deferred until mid-November.

If Vietnam were to become a WTO member prior to being granted PNTR status by the US (as did Romania, Mongolia, Kyrgyzstan, Georgia, Moldova and Armenia), to ensure compliance with its WTO obligations, the US would need to invoke Article XIII of the WTO Agreement, which provides for the non-application of WTO Agreements between WTO members or between a WTO Member and an acceding country. Article XIII must be invoked prior to Vietnam's WTO accession. If the US invokes Article XIII, then Vietnam will not be obliged

to apply the WTO agreements to the US. The US will not enjoy the benefits of Vietnam's WTO accession commitments (ie those commitments that are more favourable than under the BTA) but all other WTO member countries will enjoy them. The other side of the coin is that the US could leave quotas in place for Vietnamese textile imports, ie not eliminate them as it has committed to under the US-Vietnam WTO bilateral market access agreement. Upon granting of PNTR status, Article XIII would be revoked and all WTO agreements would be applicable on a reciprocal basis. In all cases (except Moldova), the US has revoked Article XIII upon granting PNTR status.

3.3 When will Vietnam be "globalized"?

When did, or will, Vietnam become a market economy that is truly part of the global economy? Some people say that this happened, or started to happen, when Vietnam adopted its "doi moi" policy in 1986, or when it introduced its law on foreign investment in 1987, or when the US lifted its trade embargo in 1994. Others point to Vietnam joining ASEAN in 1995, or the ratification of the US-Vietnam Bilateral Trade Agreement in 2001, or Vietnam joining the WTO (later this year? See 3.3 below).

Yet others say that Vietnam cannot call itself a market economy until foreign CEOs are appointed to manage a few major Vietnamese companies - most of which are State owned enterprises. China has been doing this for many years already. According to a recent newspaper report (Vietnam Investment Review, 18 September 2006), Vietnam is about to dip its toe into the same waters.

At the direction of the Office of Government, the Ministry of Transport has instructed the Board of Vinamotor (which is "under the authority" of the Transport Ministry) to recruit a foreign CEO. Evidently, the process has started, but some may wonder at how serious the attempt is. According to the report, the salary offered is under USD4,000 per month ("with bonuses") and the foreign CEO will be required to make a "deposit" of USD312,000 with the company (the purpose of which has not been stated). The report notes that Vinashin (the State owned ship builder) has been trying to recruit a foreign CEO for nearly a year, but has been unable to fill the position. Le Dan Doanh, a senior economist at the Ministry of Planning and Investment, is quoted as saying "there is a question as to whether a Vietnamese company would be willing to accept foreign leadership".

3.4 Representative offices - re-registration alert

The new representative office regulations issued under Decree 72-2006-ND-CP of the Government dated 25 July 2006 became effective as of 14 August. Any representative office of a foreign business entity which was established prior to 25 July 2006 (excluding those in special sectors, such as banking, finance, legal services, culture, education, tourism, which are outside the scope of Decree 72) is required to re-register so that its representative office license can be re-issued in accordance with the provisions of Decree 72. The transition 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.

Exactly what forms and documentation will be required to be submitted for re-registration and what procedures need to be followed is still unknown as the Ministry of Trade's proposed circular implementing Decree 72 has still not been issued.

Other questions also remain unanswered, including important questions such as:

- > will the unlimited duration of representative office licenses issued under Decree 45-2000-ND-CP of the Government dated 2 September 2000 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)?
- > if the chief representative of Foreign Company X's representative office currently also holds the position of legal representative of Foreign Company X's Vietnamese subsidiary, will a change of chief representative (or legal representative) be required in order to comply with Decree 72's restriction on chief representative's concurrently holding other prescribed positions?

- > or is it just new representative offices which are established for the first time under Decree 72 that will be subject to the above restrictions under Decree 72?

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 our [feature 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. Vietnamese legislators and State administrators must ensure that re-registration procedures are straightforward and expeditious. And in the case of representative offices, detailed guidelines and forms for re-registration and any necessary structural changes to existing representative offices must be issued pronto.

3.5 VND deposits - who can accept what?

Vietnamese banks (including joint venture banks as of 1 December 1999) are unrestricted with respect to the levels at which they may accept VND deposits from Vietnamese individuals with whom and legal entities with which they do not have a credit relationship. In stark contrast, foreign bank branches are subject to a cap on such VND deposits of 50% of issued capital (under Decision 1084 of the State Bank dated 16 September 2003).

Under the US-Vietnam Bilateral Trade Agreement, since 10 December 2002, US foreign bank branches have been permitted to accept VND deposits from Vietnamese individuals with whom and legal entities with which they do not have a credit relationship subject to progressively higher caps (increasing on an annual basis). As of 10 December 2005, the caps are now up to 500% and 600% respectively of issued capital. As of 10 December 2006, they will increase to 650% and 700% respectively; and full national treatment will be available between end of 2008-2010.

Reportedly in exchange for an increase in apparel quotas from the EU and other concessions, as of 1 April 2004, Vietnam granted EU foreign bank branches equal treatment with US foreign bank branches at that time. As of 1 March 2005, EU foreign bank branches have been permitted to accept VND deposits up to 400% of capital from Vietnamese legal entities and up to 350% from Vietnamese individuals without a credit relationship (under Decision 210-2005-QD-NHNN of the State Bank dated 28 February 2005).

Most recently, the above rights granted to EU foreign bank branches have now been extended to foreign bank branches from Singapore (under Official Letter 7753-NHNN-CNH of the State Bank of Vietnam dated 11 September 2006, effective as of date of signing). These VND deposit rights are not expected to be available to foreign bank branches from other WTO-member countries until 1 April 2007 (assuming WTO accession).

3.6 Securities taxation - is the holiday over?

To encourage investment in Vietnam's securities market, various tax incentives have been on offer. Fees applicable to securities business (such as fees for annual management of listings) were suspended in 2002. Preferential corporate income tax rates were offered in 2004 to securities companies and fund management companies. And preferential corporate income tax treatment was also offered to companies upon initial listing of securities at HCMC Securities Trading Centre. Under Official Letter 11924-TC-CST of the Ministry of Finance dated 20 October 2004, newly-listed companies were entitled to a 50% reduction of corporate income tax for 2 years from date of listing (or from expiry of any other period of preferential corporate income tax treatment to which the company was entitled under the Law on Corporate Income Tax). The same preferential treatment was extended to companies registered for trading of shares at Hanoi Securities Trading Centre under Official Letter 5248-TC-CST of the Ministry of Finance dated 29 April 2005.

But now the holiday is drawing to a close. Under Official Letter 10977-BTC-CST of the Ministry of Finance dated 8 September 2006, the preferential corporate income tax treatment applicable to companies with listed or registered securities will no longer be available as of 1 January 2007. Of note, any company with listed or registered securities prior to 1 January 2007 will continue to be entitled to preferential corporate income tax treatment for the remaining duration of the 2-year period (including where the 2-year period followed or follows

on from another period of preferential corporate income tax treatment). When the holiday's over, will the foreign tourists in Vietnam's securities market return home?

Dividends from shares (listed or unlisted) have been free of personal income tax since 1994. But that very long "temporary exemption" is expected to come to an end under the proposed Law on Personal Income Tax, which will be considered for the first time at the National Assembly's October-November 2006 Session and is expected to be passed at the May-June 2007 Session. If passed in its current draft form, dividends from shares will be subject to personal income tax as of 1 January 2009. Of note, profits from bonds will remain free of personal income tax.

3.7 Labour Code reform on strikes

At the National Assembly's October-November 2006 Session (due to commence on 17 October and run for 36 days), a Law on Amendment of and Addition to the 1994 Labour Code (as amended 2002) is scheduled to be promulgated. The single-issue amendment relates to strikes and resolution of strikes.

Chapter 14 of the Labour Code provides for the right to strike under certain circumstances. All labor disputes must be referred first for resolution through an enterprise's own labor conciliation council. If disputes are not resolved, individual labor disputes may be referred to court; and collective labor disputes must be referred to the provincial-level labor arbitration council. If the council's decision is unsatisfactory to the employer or the labor collective, each party has the right to refer the dispute to court; or the labor collective has the right to strike. The decision of the employer to refer a dispute to court does not affect the right to strike of the labour collective. The Labour Code prohibits strikes at enterprises listed by the Government as serving the public or being essential to the national economy or national security and defense (ie enterprises involved in electrical production, post and telecommunications, railway, maritime, and air transportation, banking, public works, and the oil and gas industry). The Prime Minister has the power to suspend or terminate a strike considered detrimental to the national economy or public safety.

The proposed Chapter 14 amendments have been criticized as not solving the basic flaws of the existing strike provisions and as drawing a spurious distinction between "rights" that the labor collective should not have to strike over and that an employer should be penalized for not honouring (ie rights in law, collective labor agreements, internal labor rules registered with the labor authorities) and "benefits" (ie entitlements that are higher than rights and not based on those documents) that the labor collective may strike for even during the life of a collective labour agreement.

3.8 Who can resolve investor disputes?

One of the positive reforms under the 2005 Law on Investment (effective as of 1 July 2006) is the provision for investment disputes to which one party is a foreign investor or foreign invested enterprise or investment disputes between foreign investors to be resolved by foreign, international or ad-hoc arbitration, or by a Vietnamese court or arbitration body. Previously, under the foreign investment regulations under Decree 24-2000-ND-CP of the Government dated 31 July 2000 (as amended 19 March 2003), the only option was for disputes between foreign invested enterprises or between Vietnamese enterprises and foreign invested enterprises to be resolved by Vietnamese arbitration or Vietnamese courts. Now, only investment disputes between domestic investors or between a domestic investor and a State body of Vietnam must be resolved at a Vietnamese arbitration body or court. This makes foreign invested projects much more "bankable" – the process of obtaining finance from international lenders who require international arbitration clauses in project documents will be easier and costs will be lower.

Under the 2005 Law on Investment, disputes between a foreign investor and a State administrative body of Vietnam relating to investment activities in the territory of Vietnam may now be resolved by offshore arbitration if so provided in an international treaty of which Vietnam is a member (e.g. ICSID Convention referred to below) or if so provided in a contract signed between a representative of a competent State body of Vietnam with the foreign investor. In the absence of an international treaty or contractual obligation, investor-State disputes must be referred at first instance to the State body with which the dispute exists under the Law on

Complaints and Denunciations); if an investor is not satisfied with or does not receive the response from the State body, the dispute may be referred to an administrative court in Vietnam for resolution.

Unfortunately, Vietnam is not yet a member of the ICSID Convention, ie the Convention of the International Center for Settlement of Investment Disputes, 18 March 1965. Our latest information is that the Department of International Co-operation under the Ministry of Justice has evaluated the ICSID Convention and submitted its opinions to the Government for approval; and that Vietnam is expected to accede to the ICSID Convention before or at the same time as its WTO accession. Until then, only domestic dispute resolution is available to foreign investors with a State-level problem.

3.9 Gripes against Government allowed?

After 2+ years in the making, the Government's website www.chinhphu.vn and www.vietnam.gov.vn was launched on 10 January 2006. On 8 September, a 'Government gripes section' was launched. But don't think we are witnessing the dawn of a new era of freedom of speech in Vietnam. This website section is only for gripes (more correctly, "opinions") about administrative procedures. You can submit 3 categories of gripes:

- > To complain about hurdles in performing administrative procedures;
- > To complain about tardy progress in implementing administrative procedures;
- > To request amendment or abolition of administrative procedures.

Website management are responsible to transfer these complaints to the Office of Government - Administrative Reform Division. But only 'typical' (not all) gripes of the public are able to be viewed in the sub-section "Status of solutions which deal with complaints and claims on administrative procedures". According to the website, hundreds of opinions have been received so far in relation to administrative reform.

The 'Government gripes section' also includes an Administrative Procedures Forum where everyone can share their opinions on administrative procedures... However, the functionality of this Forum is limited - readers can only post their opinions and send them to the website management, and cannot read the opinions of others.

3.10 Conferences

>>> AustCham Regional Business Conference 2006

The Australian Chamber of Commerce in Singapore is hosting the AustCham Regional Business Conference 2006 on 23-24 November 2006 in Singapore. The Conference is focused on **Capitalising on Asian Growth**, and will bring together an impressive array of CEO-level speakers and panelists from across the Asia-Pacific region to share their thoughts and opinions on the potential of Asia's growth this century, how to capitalise on that growth and how to deal with key issues going forward. **Nigel Russell**, managing partner of our Phillips Fox HCMC Branch Office, will be a panelist at the Vietnam Trade and Investment Forum. For more information, go to www.austcham.org.sg



>>> Vietnam-Indochina Infrastructure Investment Conference

On 28 September, **Bill Magennis**, managing partner of our Phillips Fox Hanoi Branch Office, presented on **Vietnam's Tendering Law** at the Vietnam-Indochina Infrastructure Investment Conference, held at Sofitel Plaza, Hanoi on 27-28 September 2006.

Conference attendees and others interested in Vietnam's tendering law can view Bill's slideshow on our website www.vietnamlaws.com.

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

>>> NEW subject categories in Vietnam Laws Online Database

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. Subscribers can search for legislation by subject category, keyword, date, issuing body, official number, legislation type, or advanced option. Translations can be viewed online, printed and downloaded (subject to terms & conditions).

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.

- > 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)*. For convenience, we've included several sub-categories, such as *Principal Laws* relating to investment and enterprises. All old laws on investment and enterprises can be found in *Investment-Enterprise Regime (Pre-July 2006)*. Some forms of investment (eg BOT), some special forms of enterprise (eg State owned enterprises), and now some completely new forms of enterprise (eg foreign commercial enterprises) have their own sub-category within *Investment-Corporate*.
- > 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 2 October 2006, Vietnam Laws Online Database now includes:

- > Decree 108 on Investment, 22 September 2006 (see [2.1](#) above)
- > Decree on transition options for foreign investors, 21 September (see [2.2](#) above)
- > Provisional investment guidelines for foreign investors, 26 July 2006
- > Law on Investment & Law on Enterprises, effective 1 July 2006
- > Laws on Securities, on Cinematography, on Real Estate & more, just passed on 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. Now you can search for keywords in our index. This will make it easier for you to find articles in Vietnam Legal Update on topics of interest to you.

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