



# Vietnam Legal Update

## August 2005

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

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

Melbourne Office  
Level 44, 120 Collins Street  
Melbourne  
Australia  
Tel +61 3 9274 5000  
Fax +61 3 9274 5111  
maureen.mclaughlin@phillipsfox.com

[www.vietnamlaws.com](http://www.vietnamlaws.com)  
[www.phillipsfox.com](http://www.phillipsfox.com)

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

### Part 1 Selected New Legal Instruments

1.1	<a href="#">Multi-level selling</a>	2
1.2	<a href="#">Deposit insurance</a>	3
1.3	<a href="#">Steel industry</a>	4
1.4	<a href="#">Mining law</a>	4
1.5	<a href="#">Education law</a>	6
1.6	<a href="#">Land mortgages and guarantees</a>	7

### Part 2 Features

2.1	<a href="#">New investment law</a>	10
2.2	<a href="#">Import &amp; distribution update</a>	14

### Part 3 Did You Know?

3.1	<a href="#">National Assembly update</a>	21
3.2	<a href="#">Anti-money laundering</a>	21
3.3	<a href="#">Land use right certificates</a>	22
3.4	<a href="#">Supreme Court decisions 2000-2004</a>	22

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

<a href="#">Vietnam Laws Online Database</a> celebrated its 1st anniversary on 1 July - see what's new	23
---	----

Visit [www.vietnamlaws.com](http://www.vietnamlaws.com):

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

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

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

---

## Part 1 Selected New Legal Instruments

---

### 1.1 Multi-level selling

#### **Decree 110-2005-ND-CP of the Government dated 24 August 2005 on Supervision of Multi-Level Selling of Goods**

One of the matters of key concern to the Vietnamese authorities when drafting the Law on Competition (which was passed by the National Assembly on 3 December 2004) was to regulate multi-level selling (also known as pyramid selling). Multi-level selling is a well-known concept in developed economies. It is a method for retailing products via a network of participating sellers at different levels, with products marketed and sold not at the regular selling location of the enterprise or participating sellers but at the home or workplace of the consumer, with the participating seller enjoying commission and bonuses on sales by him or her or by lower-level participating sellers introduced into the network by the participating seller.

Multi-level selling has only emerged as a popular trend in Vietnam in recent years, with not all individuals experiencing the promised benefits. According to the Ministry of Trade in its Official Letter 4907-TM-TC dated 4 October 2004, multi-level selling started in Vietnam in 2000 and unofficial statistics say 20 enterprises are currently implementing this marketing/sales method for their lines of goods (mostly health products) and that commission rates vary from 5% to 53%. (Now, in mid-2005, it is estimated that around 30 enterprises are employing this retailing method.) In response to the emergence of unregulated multi-level selling in Vietnam, the Prime Minister directed that supervision of multi-level sales be strengthened in his Official Letter 4893-VPCP-KTTH dated 14 September 2004. All Departments of Trade were required to:

- > Inspect enterprises' methods of displaying their goods, organizing introductions and recruiting sellers;
- > Contact tax offices and check on tax payments as sales do not pass through a shop so there is a danger of reduced tax collection;
- > Check on health products which claim to have medical treatment effects (which must be registered with the Ministry of Health); check on advertising for offences in the cultural information sector; check on labelling to ensure full information is given about health;
- > Check on foreigners who may be working in, or foreign companies who may be operating multi-level selling networks in Vietnam, and check for income tax evasion.

As of 1 July 2005, for the first time in Vietnam, multi-level selling is now regulated under the Competition Law as one of a number of unfair competitive practices. The Competition Law (article 48) does not ban multi-level selling per se. It prohibits enterprises from conducting the following acts aimed at obtaining illegal profit from recruitment of new participants to a multi-level sales network:

- > Requiring persons who wish to participate to pay a deposit, to buy an initial fixed quantity of goods, or to pay an amount of money in order to have the right to participate in multi-level selling of goods;
- > Failing to undertake to re-acquire the goods sold to a participant at at least 90% of their original price;
- > Allowing participants to receive commissions, bonuses and/or other economic benefits essentially only from their enticing other participants into the network for multi-level selling of goods;
- > Providing untruthful information about the benefits of participation in the network for multi-level selling of goods, or untruthful information about the quality and use of goods in order to entice other participants into the multi-level selling network.

Of note, of all the significant matters to be regulated under the new Competition Law (such as mergers and acquisitions, abuse of dominant market position, anti-competitive agreements), the first implementing decree which was drafted was Decree 110 on supervision of multi-level selling.

Under Decree 110, an enterprise wishing to retail its product by multi-level selling must obtain a certificate of satisfaction of business conditions from the Ministry of Trade. 5 business conditions must be satisfied, including payment of a deposit of 5% of the enterprise's charter capital (but not less than VND1 billion) to a commercial bank operating in Vietnam. This deposit is security for payment of commissions and bonuses to participating sellers and for the cost of re-acquiring goods from participating sellers in the event that the multi-level selling enterprise is unable to pay such amounts. The source of goods sold, their characteristics and their use purpose must be clear and lawful, in order to avoid recent problems with ambiguous health food and healthcare products, medicines and medical apparatus. Participating sellers will be liable to pay damages for loss to consumers caused by untruthful information provided by them about the goods sold.

Re-enforcing the Prime Minister's directions in the last quarter of 2004, Decree 110 requires all provincial Departments of Trade to check and ensure the provisions on payment of the security deposit are implemented within 3 months of the date of effectiveness of Decree 110 (expected to be around end of September 2005).

## 1.2 Deposit Insurance

### **Decree 109-2005-ND-CP of the Government dated 24 August 2005 on Amendment of Decree 89-1999-ND-CP of the Government dated 1 September 1999 on Deposit Insurance**

Deposit insurance was introduced in Vietnam in late 1999 in order to protect the lawful rights and interests of individual depositors, contribute to the stability of credit institutions and ensure the secure and healthy development of banking activities.

Participation in deposit insurance is compulsory for credit institutions and any other institutions which are permitted to carry on the banking activity of receiving VND deposits from individuals. Deposit premiums are payable at the rate of 0.15% per annum of the average deposit balance of individuals at the institution participating in deposit insurance. All institutions participating in deposit insurance must display publicly notification of their deposit insurance at their head offices and transaction places.

If an institution participating in deposit insurance is in danger of insolvency, but not to the extent of being put under special control, Vietnam Deposit Insurance may assist it by providing loans to support payment of the insured deposits, by providing guarantees for special loans to fund payment of the insured deposits, or by purchasing debts in cases where such debts are secured by property.

Reforms introduced under Decree 109 include:

- > The maximum amount of insurance proceeds payable for all deposits (including principal and interest) of any one individual at any one institution participating in deposit insurance has been increased to VND50 million (from VND30 million under Decree 89).
- > If an institution participating in deposit insurance is required to terminate operations pursuant to a decision of a competent State body in order to commence liquidation procedures or pursuant to a decision of a court on commencement of liquidation procedures, there is now a time-limit for payment of deposit insurance proceeds to depositors. The time-limit is 60 days from the date of any such decision.

Decree 109 is expected to become effective as of the end of September 2005.

### 1.3 Steel industry

#### **Decision 2212-2005-QD-BTM of the Ministry of Trade dated 15 August 2005 issuing Regulations on Trading Construction Steel**

Decision 2212 regulates the business of trading in construction steel in the Vietnamese market. It applies to organizations and individuals trading construction steel from all economic sectors, including foreign invested enterprises. Construction steel is defined as steel used for construction and includes: round coil steel, plain bar steel, streaked bar steel, joint bar steel. Decision 2212 regulates the rights and obligations of construction steel traders in Vietnam, including suppliers, distributors, general agents, retail agents and affiliated units. Construction steel must be labelled, either directly on the product or by enclosing an auxiliary label with products displayed at the place of sale or by writing in a separate bill for dispatch to customers. Suppliers, distributors, general agents and retail agents are required to display publicly the selling price of construction steel at their places of trading and are responsible for implementing price stabilization methods as stipulated by State competent authorities. Decision 2212 is expected to become effective as of mid-September 2005.

### 1.4 Mining law

#### **Law 46-2005-QH11 of the National Assembly ("NA") dated 14 June 2005 on Amendment of and Addition to the Mineral Law**

and

#### **Circular 04-2005-TT-BCN of the Ministry of Industry dated 2 August 2005 Providing Guidelines for Export of Minerals in Period 2005-2010**

Effective as of 1 October 2005, Law 46 amends the Mineral Law dated 20 March 1996 for the first time in its history, but not significantly. Unfortunately, the flaws in the current regulatory framework for mining projects in Vietnam (such as lack of automatic right to mine minerals discovered within an exploration area) have survived this round of amendments.

Interestingly, amendments to the 1996 Mineral Law were only scheduled for consideration at the NA's May 2005 Session. However, as part of the NA's effort to get through as much legislation as possible in 2005 in support of the Government's push for WTO accession at the end of 2005, Law 46 was approved after consideration at the May Session (a rare occurrence in Vietnam). To achieve this, only minor amendments were approved - a complete review of the 1996 Mineral Law has been deferred until the next NA Legislature XII (2008-2013).

Amongst little of any note, Law 46 enshrines new policies for conduct of mineral activities, including:

- > Encouragement of investment in and preferential treatment to:
  - mining projects with on-site processing of minerals in areas with difficult socio-economic conditions and in areas with specially difficult socio-economic conditions;
  - mining projects applying modern techniques and technology, protecting the environment, maximizing the recovery of beneficial components, producing metal and metal alloy products or products of high socio-economic value and efficiency; and
  - mining projects for processing imported minerals which satisfy the requirements for domestic use and export;
- > Restriction on export of crude raw materials or ore concentrate (the Government will issue the list, conditions and criteria of minerals permitted to be exported, and the list of minerals whose export is restricted).

Law 46 also provides for the following new State administrative hierarchy (reflecting the administrative restructure of the Government in mid-2002):

- > Ministry of Natural Resources and Environment - responsible for State administration of minerals throughout the whole country;
- > Ministry of Industry - responsible for State administration of mining and processing minerals, except for minerals as construction materials and except for minerals as raw materials for production of cement;
- > Ministry of Construction - responsible for State administration of mining and processing minerals as construction materials and minerals as raw materials for production of cement;
- > People's committees at all levels - responsible for State administration of minerals within their respective localities.
- > Mineral Reserves Assessment Council - responsible to assist the Government in the evaluation and approval of mineral reserves in reports on exploration of minerals, except for minerals as construction materials and peat.

Reflecting the new policy to restrict export of valuable minerals in crude form, Circular 04 restricts the categories of minerals which are permitted to be exported and imposes conditions for enterprises to be permitted to export minerals. Mineral exporters must be duly established in accordance with law, must satisfy conditions stipulated in the Commercial Law with respect to import, export, processing and sale agency of goods with foreign partners, and must satisfy one of following conditions: i) have a valid mineral mining license issued by the competent State authorities; ii) have a valid mineral processing license or a mineral purchase contract for processing with individuals or organizations having a valid mineral mining license, iii) have a mineral purchase contract or contract for mineral export by proxy with individuals or organizations having a valid mineral mining license or mineral processing license. Effective as of 1 September 2005, Circular 04 replaces Circular 02-2001-TT-BTC of the Ministry of Finance dated 27 April 2001 providing guidelines for export of mineral products in period 2001-2005.

- >>> For an English translation of the 1996 Mineral Law and the new amending Law 46, as well as a wide range of other relevant legislation, subscribe to [Vietnam Laws Online Database](http://www.vietnamlaws.com) on [www.vietnamlaws.com](http://www.vietnamlaws.com).

## 1.5 Education law

### **Law 38-2005-QH11 of the National Assembly ("NA") dated 14 June 2005 on Education**

Effective as of 1 January 2006, Law 38 will replace the old 1998 Law on Education which has been in force since 1 June 1999 ("the 1998 Law").

As under the 1998 Law, Law 38 provides that the system of education of Vietnam generally consists of 4 levels: (i) kindergarten education, (ii) "general education", including primary education (grades 1-5), lower-secondary education (grades 6-9) and upper-secondary education (grades 10-12), (iii) vocational education, and (iv) university education, including undergraduate and post graduate education. There are also other forms of education for specific purposes, such as remote learning, continuing education, etc.

Some main points of Law 38 are discussed below:

- > Most notably, primary education *and* lower-secondary education will be compulsory as of 2006. Under the 1998 Law, only primary education was compulsory. Law 38 is said to satisfy the purposes of "socializing and generalizing education".
  - > The entrance examination from primary school to lower-secondary school will be abolished. In Vietnam, examinations are notoriously stressful to pupils (and their parents!). The abolition under Law 38 is consistent with the fact that lower-secondary education will be compulsory. So, now, there are only 2 main entrance examinations, ie to upper-secondary schools and universities.
  - > Fees other than school fees and entrance examination fees will be abolished. Previously, students and their parents were required to pay several other "fees", such as fees used to build schools, fees used to set up school funds, etc. Parents claimed that such requirements prevented poor pupils and students from going to school. Law 38 specifies that pupils, students and their parents are not required to pay any such additional fees.
  - > The Ministry of Education and Training will no longer be responsible to write textbooks used in schools and universities. Such responsibility will be vested in schools and universities. The Ministry of Education and Training will only promulgate the framework curricula on which textbooks must be based, and will approve textbooks based on inspection. This increased flexibility is welcomed by teachers and students alike.
  - > There will be no change in university education. Currently, university education in Vietnam is not based on credit accruals. Rather, university students must study their course over 4 to 6 years, and then sit a graduation examination in order to obtain a bachelor's degree. This is unlike the system in most developed countries where students accrue credits during the course of their studies.
  - > Provisions on foreign investment in education will remain unchanged. Both the 1998 Law and this new Law 38 specify that the Government is responsible to issue regulations on co-operation with foreign countries in education and establishment of foreign-invested schools in Vietnam. The current law on this field is Decree 06 issued on 6 March 2000. Generally, when a new law is passed, several decrees (and circulars) implementing the law will be issued. Given that the provisions on foreign investment in education are unchanged, it is unlikely that a new decree will be issued to replace Decree 06.
- >>> See the May 2005 Issue of Vietnam legal Update on [www.vietnamlaws.com](http://www.vietnamlaws.com) for the latest guidelines on foreign investment in Vietnam's education sector.
- >>> For an English translation of Decree 06 and other education-related legislation, subscribe to [Vietnam Laws Online Database](http://Vietnam Laws Online Database) on [www.vietnamlaws.com](http://www.vietnamlaws.com).

## 1.6 Land mortgages and guarantees

### **Interministerial Circular 05-2005-TTLT-BTP-BTNMT of the Ministry of Justice ("MoJ") and the Ministry of Natural Resources and Environment ("MoNRE") dated 16 June 2005 Providing Guidelines on Registration of Mortgages or Guarantees using Land Use Right ("LUR") or Assets Attached to Land**

Circular 05 is issued pursuant to the 2003 Law on Land (effective as of 1 July 2004) and the implementing Decree 181 (featured in the January-February 2005 Issue of Vietnam Legal Update). Circular 05 became effective as of 29 July 2005.

Circular 05 repeals Interministerial Circular 03-2003-TTLT-BTP-BTNMT of the MoJ and the MoNRE dated 4 July 2003 on the same subject. Circular 03 was issued pursuant to Decree 17-1999-ND-CP of the Government dated 29 March 1999 on procedures for conversion, assignment, lease, sublease and inheritance of land use rights and for mortgage and capital contribution of value of land use right as amended in 2001 (now repealed).

Below we outline the main reforms applicable to the registration of mortgages and guarantees relating to LUR and/or assets attached to land introduced under Circular 05.

	<b>Circular 03</b>	<b>Reforms under Circular 05</b>
<i>Definition of assets attached to land</i>	Assets attached to land are immoveable assets, including: <ul style="list-style-type: none"> <li>&gt; Residential houses and other construction works attached to land.</li> <li>&gt; Assets attached to residential houses and other construction works where the mortgaged or guaranteed assets also include those assets.</li> <li>&gt; Perennial tree gardens and forests.</li> <li>&gt; Other assets attached to land.</li> </ul>	No definition of assets attached to land.
<i>What agreements must be registered? (compulsory)</i>	Mortgage of or guarantee with: <ul style="list-style-type: none"> <li>&gt; LUR.</li> <li>&gt; LUR and assets attached to land.</li> <li>&gt; Assets attached to land which are subject to ownership registration.</li> <li>&gt; Assets attached to land if the mortgagor of third party keeps such assets.</li> <li>&gt; Assets attached to land if it is security for performance of multiple obligations.</li> </ul> Notices on disposal of mortgaged or guarantees assets.	Agreements to be registered at the Office for Registration of LUR:  Mortgage of or guarantee with: <ul style="list-style-type: none"> <li>&gt; LUR.</li> <li>&gt; Residential houses, other architectures, forest trees and perennial trees.</li> <li>&gt; LUR and assets attached to land; LUR and future assets attached to land.</li> <li>&gt; Future assets attached to land.</li> </ul> Amendments or removal of registrations.  Notices on disposal of mortgaged or guarantees assets.  Any registration of mortgages of or guarantees with assets attached to land other than the above cases shall be carried out at the National Registration Agency for Secured Transactions.
<i>What agreements may be registered on request?</i>	Option - Any guarantee of assets attached to land that does not fall within the above category of compulsory registration may be registered on request.	No option - all mortgages and guarantees must be registered.

	Circular 03	Reforms under Circular 05
<i>What changes must be registered?</i>	<ul style="list-style-type: none"> <li>&gt; Change of one of the signatories to a mortgage or guarantee contract.</li> <li>&gt; Change of names, addresses, identity card or passport, serial number, business registration numbers, establishment or investment license number changes.</li> <li>&gt; Partial withdrawal of mortgaged or guarantee assets.</li> <li>&gt; Replacement or addition of mortgage or guarantee assets.</li> <li>&gt; Change of payment of priority order upon disposal of mortgaged or guaranteed assets.</li> <li>&gt; Completion of construction works or new planning of perennial trees or forests.</li> </ul>	<p>Slight difference in the first 2 changes which must be registered under Circular 03 as follows:</p> <ul style="list-style-type: none"> <li>&gt; Change of a signatory/<i>signatories</i> to mortgage or guarantee contract.</li> <li>&gt; Change of <i>name</i> of a signatory/signatories to a mortgage or guarantee contract.</li> </ul> <p>The other 4 changes which must be registered under Circular 03 remain unchanged.</p> <p>The following changes were subject to new registration under Circular 03 but are now just subject to registration of change under Circular 05:</p> <ul style="list-style-type: none"> <li>&gt; Replacement or addition of mortgaged or guarantee assets being LUR.</li> <li>&gt; Change of LUR mortgagors or guarantors.</li> </ul>
<i>Cases subject to new registration</i>	<ul style="list-style-type: none"> <li>&gt; Replacement or addition of mortgaged or guarantee assets being LUR.</li> <li>&gt; Change of LUR mortgagors or guarantors.</li> </ul>	The cases subject to new registration under Circular 03 are now subject to registration of changes under Circular 05 (see above).
<i>Who can register?</i>	<ul style="list-style-type: none"> <li>&gt; Mortgagor or mortgagee</li> <li>&gt; Guarantor or beneficiary of guarantee</li> <li>&gt; New mortgagor/guarantor /mortgagee/beneficiary of guarantee, if a party changes.</li> <li>&gt; Persons authorized by one of above parties.</li> </ul>	<p>No change.</p> <p>Circular 05 adds that the head of the committee for management and liquidation of assets will be the person who requests registration in case of registration of mortgage or guarantee in accordance with Law on Bankruptcy.</p>
<i>Priority</i>	<ul style="list-style-type: none"> <li>&gt; Registered contracts of mortgage and guarantee take priority over third party claims.</li> <li>&gt; If the assets or LUR are sold to a third party, the mortgagee or guaranteed still has the right to the LUR/assets unless the assets are goods circulated in the production of business process.</li> </ul>	<ul style="list-style-type: none"> <li>&gt; Registered contracts of mortgage and guarantee take priority over third party claims.</li> <li>&gt; Second point under Circular 03 not mentioned in Circular 05.</li> </ul>
<i>Effectiveness of registration</i>	<ul style="list-style-type: none"> <li>&gt; The registration is effective from the time when a valid registration file is lodged.</li> <li>&gt; If assets are replaced, the registration is effective from the time when a new registration file is lodged.</li> </ul>	<ul style="list-style-type: none"> <li>&gt; The registration is effective from the time when a valid registration file is lodged.</li> <li>&gt; Second point under Circular 03 not mentioned in Circular 05.</li> </ul>
<i>Time-limit for registration</i>	Not specified.	5 working days as from date of execution of the credit agreement. Failing this time limit, the registration requestor shall be subject to a fine of between VND200,000 to VND500,000.
<i>Fee payable</i>	See Joint Circular 33 dated 12 April 2002.	No change.

	Circular 03	Reforms under Circular 05
<i>What is the relevant body for registration?</i>	<ul style="list-style-type: none"> <li>&gt; If the mortgagor or guarantor is an organization: the Department of Natural Resources and Environment in the locality where the land and assets are located.</li> <li>&gt; If the mortgagor or guarantor is a household or individual: the local people's committee.</li> </ul>	<ul style="list-style-type: none"> <li>&gt; The Office for Registration of LUR under the provincial-level Department of Natural Resources and Environment: for mortgagors or guarantors being economic organizations, overseas Vietnamese carrying out foreign investment projects in Vietnam, foreign organizations and foreign individuals.</li> <li>&gt; The Office for Registration of LUR under the district-level Division of Natural Resources and Environment (or the Division of Natural Resources and Environment where the Office for Registration of LUR is not established or not yet established): for mortgagors or guarantors being family households or domestic individuals, overseas Vietnamese people permitted to purchase residential houses.</li> </ul>
<i>What documents are required?</i>	<p>If LUR or LUR plus assets attached to land:</p> <ul style="list-style-type: none"> <li>&gt; Application.</li> <li>&gt; Letter of authorization (if lodger of application is an authorized person).</li> <li>&gt; Contract of mortgage (2 copies) or guarantee (3 copies)</li> <li>&gt; LUR certificate, certificate of residential house ownership.</li> <li>&gt; Extract of cadastral map or the cadastral measure extract (if cadastral map not yet made).</li> <li>&gt; Land rent payment vouchers (if land leased by State).</li> </ul> <p>If assets attached to land <i>only</i>:</p> <ul style="list-style-type: none"> <li>&gt; Application.</li> <li>&gt; Letter of authorization (if lodger of application is an authorized person).</li> <li>&gt; Certificate of ownership of assets, if registration of ownership is required by law.</li> </ul>	<p>If LUR or LUR plus assets attached to land:</p> <ul style="list-style-type: none"> <li>&gt; Application (2 copies).</li> <li>&gt; Letter of authorization (if lodger of application is an authorized person).</li> <li>&gt; Contract of mortgage or guarantee (1 notarized or certified copy).</li> <li>&gt; LUR certificate or equivalent papers, certificate of residential house ownership.</li> </ul> <p>If assets (now also including future assets) attached to land <i>only</i>:</p> <ul style="list-style-type: none"> <li>&gt; Application (2 copies).</li> <li>&gt; Letter of authorization (if lodger of application is an authorized person).</li> <li>&gt; Contract of mortgage or guarantee (1 notarized or certified copy).</li> <li>&gt; Certificate of LUR or equivalent papers.</li> <li>&gt; Certificate of ownership of assets (if any).</li> <li>&gt; For future assets attached to land: Construction license or investment project approved by competent State body.</li> </ul>
<i>Must the documents be notarized?</i>	<p>A mortgage or guarantee using LUR or assets attached to land must be notarized if the parties so agree or if so provided for by law.</p>	<p>Mortgage or guarantee using LUR must be notarized (no exceptions).</p> <p>A mortgage or guarantee using LUR by a family household or an individual must be notarized by a notary public or certified by the people's committee of the commune or ward where the land is located (Article 130.1(a) of the Law on Land).</p>

---

## Part 2 Features

---

### 2.1 New investment law

Vietnam first announced its proposal to introduce a common investment law (to apply to both foreign and domestic investors) and a unified enterprise law (to apply to all types of Vietnamese enterprise, including State owned, private and foreign invested) in April 2004. At that time, our Hanoi managing partner Bill Magennis expressed our enthusiasm for such fundamental structural reforms and our optimism about the seriousness and determination with which Vietnam appeared to be going to pursue the reforms (see April 2004 Issue of Vietnam Legal Update). But, like many, we were also somewhat sceptical as to whether or not such reforms would really materialize as we have seen other important reforms proposed in the past, only to vaporize before our eyes.

In June 2005, our HCMC managing partner Nigel Russell gave a presentation at a workshop in Hanoi on the then current draft of the common investment law (see June 2005 Issue of Vietnam Legal Update). Nigel highlighted the issues that needed to be addressed before issuing a final law that would truly implement the favourable investment conditions first announced in 2004.

Now, the day of reckoning approaches. At the November 2005 Session of the National Assembly, for the first time, the proposed common investment law will be tabled and debated. The National Assembly has expedited its legislative program, so the new investment law will also be passed at the November 2005 Session. The new enterprise law will also be tabled, debated and passed at the same Session. Both laws will become effective in 2006 (exactly when has not yet been decided, or not publicly announced anyway).

Drafting of the new investment law is now up to Draft 13 (August 2005). Happily, the important principles of the reforms proposed in the first half of 2004 appear to have survived (despite a nervous period when draft legislation suggested that they had indeed disappeared into the ether). A number of the issues highlighted by Nigel in June have indeed been addressed.

In no small part, this is due to the realities of WTO membership. For Vietnam to be accepted into the WTO, it needs to level the playing field for foreign investors to compete effectively with domestic companies. For Vietnam to be accepted into the WTO at the end of this year, it needs to introduce the necessary reforms as soon as possible. Of note, the new investment law will be one of the focal points of the next round of bilateral negotiations for WTO accession with the US (expected to be held in mid-September).

*>>> Phillips Fox is pleased to assist the Ministry of Planning & Investment with translation of the proposed Law on Investment. Our translation of Draft 13 will be submitted by Vietnam at the US negotiations.*

Although there is reason for optimism again, it has to be kept in mind that this is an evolving piece of legislation and further revisions before it is passed are possible. Before the National Assembly's November Session, the draft is still to be submitted for consideration by the Government and the Standing Committee of the National Assembly. Of comfort, the Standing Committee reviewed Draft 11 of the new investment law in late July, and Draft 13 is the result of that review (what happened to draft 12 of the new investment law is anyone's guess!), so hopefully there won't be any major changes of principle. But, possibly, the US negotiations may result in more concessions by Vietnam (discussed below).

Below we look at one of the most important features of the proposed Law on Investment, as well as issues that have been addressed in Draft 13 since earlier drafts.

*Move from discretionary investment licensing to investment registration*

Draft 13 of the proposed Law on Investment makes investment registration the norm, and discretionary investment licensing the exception (albeit a very broad multi-categorized exception, as you will see below).

Vietnam took its first steps towards an investment registration regime in March 2003. Under Decree 27-2003-ND-CP of the Government dated 19 March 2003 amending the foreign investment regulations issued with Decree 24-2000-ND-CP of the Government dated 31 July 2000, the conditions for investment registration were relaxed. Currently, the conditions for investment registration comprise:

- > 3 mandatory conditions, all of which must be satisfied:
  - not being Group A projects;
  - conforming to the approved planning (clarified under Decree 27 as) for development of the relevant industry or planning for products, in the absence of which the consent of the ministry in charge of the industry is required;
  - not requiring an environmental impact statement;and
- > 3 "alternative" conditions, of which at least one must be satisfied:
  - exporting 80% of products (relaxed by Decree 27 from 100%);
  - investing in an encouraged or specially encouraged project located in an industrial zone, but not a Group A project (previously, investing in an industrial zone and satisfying export ratio criteria); or
  - belonging to the manufacturing sector with up to USD5 million invested capital (no longer required under Decree 27 to also export at least 80% of products).

Also of note, for the first time, Decree 27 included an express statement that, where a project satisfies all necessary conditions for registration, the investment licensing body must issue the investment license without obtaining recommendations from any other body.

Under Draft 13 of the proposed Law on Investment, investment registration will become the norm. All "ordinary" foreign direct investment projects will be entitled to investment registration. "Ordinary projects" will be everything except "nationally important projects", "important projects" and "ordinary projects subject to conditions". As set out below, these exceptional categories are very broad:

- > "Nationally important projects" are projects with a special role and significance in the overall socio-economic development of the country and which satisfy one of the following criteria:
  - project in which the State contributes capital of VND10,000 billion or more;
  - project funded by other sources with invested capital of VND20,000 billion or more;
  - project which has a significant impact on the ecological environment, on historical and cultural sites, or on places of scenic beauty;
  - project involving the re-settlement of 50,000 or more people in densely populated areas or 20,000 or more people in mountainous areas and in sparsely populated ethnic minority areas;
  - project located in a geographical area which is specially important in terms of national defence and security.

- > "Important projects" are projects with a special role and significance in the socio-economic development of an industry, sector, region and territory and which satisfy one of the following criteria:
  - project in which the State contributes capital of VND1,500 billion or more and the State holds the controlling shareholding;
  - project not using State invested capital, nor does the State hold the controlling shareholding, and which has a capital scale of VND800 billion or more in the following sectors: energy, mechanical manufacturing, mineral mining and processing, metallurgy, cement, chemicals, entertainment complexes, BOT, BTO, and BT projects;
  - project for construction of infrastructure facilities in industrial zones, export processing zones, high-tech zones, economic zones and new urban areas with an area of land use of 100 hectares or more; or a project for a hospital with 300 beds or more;
  - project not using State invested capital for construction and business operation of seaports and airports; exploration, mining and processing of oil and gas; insurance and banking; post and telecommunication services; radio and television; education at college, undergraduate, postgraduate and equivalent levels; formation of scientific research institutes; production of treating medicines for humans; foreign invested projects for construction of residential housing for sale, transportation business, maritime and aviation services;
  - irrespective of scale and source of invested capital, project in the following sectors: publishing, press; advertising services involving publication of advertisements; business of conducting games with prizes; exploration and mining of rare and precious natural resources;
  - project involving the re-settlement of 20,000-50,000 people in densely populated areas, or 5,000-20,000 people in mountainous areas and in sparsely populated ethnic minority areas.
- > "Ordinary projects subject to conditions" are projects not within the above categories but which satisfy one of the following criteria:
  - project in a number of manufacturing and service sectors in which investment is conditional, ie subject to conditions relating to the type of economic organization formed, the form of investment adopted and the extent to which markets are opened; such conditions will be stipulated in Government regulations, based on the "requirements for socio-economic development" and consistent with the schedules and undertakings in international treaties of which Vietnam is a member (an example of this type of "ordinary project subject to conditions" would be a project in the import and distribution sector, see [Part 2.2](#));
  - project in which the State contributes capital of VND100 billion or more;
  - project not using State capital and which has a capital scale of VND300 billion or more.

Hopefully, the US negotiations in mid-September will result in more concessions by Vietnam and a narrowing of these exceptions to the investment registration norm.

Investment registration will only require completion of an investment registration form. The contents of investment registration forms will only be reviewed by the local business registration office. No additional documents or papers will be required. Opinions will not be obtained from any external governmental bodies. A 7 day time-limit from the date of receipt of the investment registration form will apply for issuance of an investment approval certificate. An investment approval certificate will be issued specifying, amongst other things, the duration of investment, the permitted scope of activities and the investment incentives. (Although ordinary projects require registration and not approval, Draft 13 refers to the certificate of registration as "investment approval certificate", presumably for consistency of terminology throughout the Law, especially with respect to withdrawal of such certificates under certain conditions, eg. no investment commencing after a 12 month period. This is confusing and is the sort of minor issue which it is hoped will be cleaned up during the Government and National Assembly reviews.)

Evaluation for "approval for investment" will be applicable to "nationally important projects", "important projects" and "ordinary projects subject to conditions", as follows:

> "Nationally important projects":

Application files must comprise: application for approval of investment, pre-feasibility study report and other necessary related documents. The pre-feasibility study report must contain following main items: necessity for investment, proposed scale of investment location and land use requirement; form of investment, main technological solutions; overall site planning and determination of the proposed scale of investment items (with respect to a project involving construction); determination of the requirement for invested capital and a plan for raising capital; preliminary environmental impact assessment report; plan for re-settlement (if any); and preliminary calculation and assessment of investment efficiency in terms of financial, economic and social aspects of the project.

Application files are submitted to the Standing Committee of the State Evaluation Council for Investment Projects for evaluation and report to the Government which in turn will submit the application to the National Assembly to approve the investment policy. After the investment policy has been approved by the National Assembly, the Prime Minister will "approve the investment". Then, for foreign invested projects, the Ministry of Planning and Investment ("MPI") shall issue an investment approval certificate.

> "Important projects":

Application files must comprise: application for approval of investment, pre-feasibility study report (with contents as above) and other necessary related documents.

Applications for foreign invested projects are submitted to the MPI for evaluation. Matters to be evaluated by the MPI comprise: legal entity status of the investor; investment objectives, scale and location of the investment; compliance with zoning; financial capability; main technical and technological solutions; implementation schedule for requirements on mining and use of natural resources, environmental protection and national security; plan for resettlement of local inhabitants (if any). The MPI will report to the Prime Minister for his consideration and "policy approval", then the MPI will issue the investment approval certificate. The time-limit for evaluation and issuance of an investment approval certificate will be 30 working days from the date of receipt of a complete and valid application file.

> "Ordinary projects subject to conditions":

Application files must comprise: application for approval of investment, eco-technical explanatory statement and other necessary related documents. An eco-technical explanatory statement must contain the following main items: conditions for investment which the project must satisfy; legal entity status; investment objectives, location and land use requirement; output capacity; main technical and technological solutions; invested capital and capital sources; implementation schedule, and environmental standards.

Application files are submitted to the (undefined) competent State authority for evaluation of the following matters deal with in the eco-technical explanatory statement. The time-limit for evaluation and issuance of an investment approval certificate will be 20 working days from the date of receipt of a complete and valid application file.

A troubling provision of Draft 13 is the requirement for a first-time foreign investor to apply for issuance of an investment approval certificate (after which, additional projects of that foreign investor which do not involve establishment of a new economic organization will not require approval.) Draft 13 is not clear, but the requirement for initial approval appears to apply irrespective of which category the first-time project falls into. This would create yet another exception to the norm of investment registration. Possibly, the problem is merely the misuse of the term "investment approval certificate" as noted above. If that is the case, it is hoped that the ambiguity will be cleaned up during the Government and National Assembly reviews.

*Issues addressed since earlier drafts*

Draft 13 of the Law on Investment corrects several issues that concerned us in earlier drafts:

- > Indirect investment now includes "other securities" in addition to shareholding, bonds and shares.
- > The term "State Capital" is now defined and includes capital funded from the State budget, capital funded by credit facilities guaranteed by the State, capital funded by credit facilities for investment and development of the State.
- > Investment guarantee language has been expanded and improved.
- > Investors are now permitted to calculate their own investment incentives and present their determinations to the relevant State body for issuance of investment incentives.
- > The State will guarantee and create more favourable conditions for offshore investment. The sectors in which offshore investment are encouraged will be specified.

There are still a few months to go before the National Assembly meets, so we will keep you informed of any further developments.

- >>> For an English translation of Draft 13 of the Law on Investment, as well as a wide range of other relevant legislation, subscribe to [Vietnam Laws Online Database](http://www.vietnamlaws.com) on [www.vietnamlaws.com](http://www.vietnamlaws.com).

## 2.2 **Import and distribution update**

The potential of Vietnam's consumer market is huge. But, for many years, foreign investors have been locked out, unless they invested in manufacturing their products in-country. Vietnam's import and distribution sector was initially the province of State owned import enterprises only. Then private Vietnamese enterprises were allowed in. Then Vietnam opened a crack in the door for very limited foreign investment in its import and distribution sector. To date, licensing has remained on a purely discretionary case-by-case basis. The US-Vietnam Bilateral Trade Agreement ("BTA") gives some hope. But real law reform has lagged sorely behind foreign expectation. Meanwhile, foreign investors have continued to find other ways to get their products into the Vietnamese market and control how and where they are marketed. Now, Vietnam is widening the crack in its doors to allow broader foreign investment in its import and distribution sector. And it's giving frontrunning to US companies.

*Current black letter law*

Under the Law on Foreign Investment in Vietnam dated 12 November 1996 (as amended 9 June 2000) ("LFI") and Decree 24-2000-ND-CP of the Government dated 31 July 2000 (as amended 19 March 2003) Providing Detailed Regulations on Implementation of the LFI ("Decree 24"), licensing of foreign investment in a number of sectors is subject to conditions. "Investment projects in import services and domestic distribution services" are subject to the condition that they must be implemented in accordance with separate provisions of the Prime Minister.<sup>1</sup> No such separate provisions have ever been issued. So, at present, foreign direct investment in the import and distribution sector in Vietnam faces a legal vacuum. It is not prohibited but there is no enabling legislation.<sup>2</sup>

Outside the foreign direct investment regime, foreign trading branch offices may be established and operate under Decree 45-2000-ND-CP of the Government dated 6 September 2000 on Representative Offices and Branches of Foreign Business Entities and Foreign Tourism Enterprises in Vietnam ("Decree 45"). However, such branch offices are only permitted to conduct trading in a very limited range of goods and services. Only 5 categories of goods (handicrafts; processed agricultural products and agricultural products other than rice and coffee; fresh and processed fruit and vegetables; industrial consumer goods; meat of livestock and poultry and processed foodstuffs) may be exported. Only 3 categories of goods (machinery and equipment for mining

1 Appendix I.IV of Decree 24.

2 This was confirmed by the Ministry of Trade in its Official Letter 3067-TM-DT dated 7 August 2002 to the Office of Government.

or processing of agricultural and aquatic products; raw materials for production of human medicines or veterinary medicines; raw materials for production of fertilizer and insecticide) may be imported for sale in the Vietnamese market. An import permit is required to be obtained from the Ministry of Trade. Further, foreign trading branch offices are subject to the restriction that turnover from import may not exceed turnover from export. They are not permitted to purchase goods in Vietnam for resale in Vietnam. At the time of issuance of Decree 45, our informal discussions with one of the draftspersons revealed that the Government was aware of the impracticalities and unattractiveness of the limitations on Decree 45 branch offices but was attempting to open (albeit ineffectively) a small segment of the trading sector to foreign participation, which at that time was seen as in need of foreign assistance with respect to import and export markets.

#### *Practice to date*

In the absence of enabling regulations under the foreign investment regime, licensing of foreign investment projects in the import and distribution sector has been approved by the Prime Minister on a limited, discretionary case-by-case basis only. Licensed projects include:

- > A foreign invested enterprise ("FIE") in the agricultural chemicals sector is licensed to import its products in bulk and package them for sale in Vietnam (without any manufacturing obligation).
- > FIEs "Big C" and Metro Cash and Carry are expressly licensed to invest (on a large scale) in distribution only (ie without any, or only very little, value adding processing or packaging).
- > Several FIEs (in this case, only 100% foreign owned enterprises ("100%FOEs")) are licensed to provide various services related to import and distribution of products of their foreign parent. Most of these are in the industrial sector, where they are licensed to install, commission, maintain, repair and stock spare parts. In this way, the FIEs can also manage the supply of equipment, lifts, airconditioners, etc to customers in Vietnam. In the consumer products sector, at least one 100%FOE has been licensed to provide "ancillary" activities of storage, packaging, labelling, warehousing, delivery and record-keeping services. In this case, the import and distribution of the products of the foreign parent is conducted by a Vietnamese company "controlled" by the FIE.

Based on the above and similar "exceptional" cases, licensing of import and distribution activities depends on a range of factors, including size of investment; extent to which proposed activities include processing packaging or other value-adding, and substitution of finished-product imports where products cannot be manufactured locally; and "sweeteners" offered, such as undertaking to invest in improvement of supply chains for Vietnamese agricultural producers.

Outside the foreign investment regime, many foreign companies utilize "other means" of getting their products to market in Vietnam:

- > *Local importer/distributor.* Under this option, the foreign company appoints a local Vietnamese company as its importer and distributor. The foreign company may establish a representative office in order to "manage" the import and distribution process. This arrangement is very common. Some foreign companies have acquired an interest in their local distributor/partner (up to 30%) in order to exercise some control over such entity. Alternatively, if the foreign company has invested in a manufacturing FIE in Vietnam, then the FIE may be able to manage the import and distribution process (depending on the FIE's investment license).
- > *Manufacturer/distributor.* Some manufacturing FIEs argue that the wording of their "authorized scope of activities" in their investment licenses allows them to distribute imported products that they have not manufactured. In such cases, it may be possible for the FIE's foreign parent company to appoint a local Vietnamese company as its import agent and then supply the finished products to the FIE in Vietnam, for sale to distributors and customers in Vietnam. In one case, a FIE was apparently even permitted to import the finished products (pharmaceuticals) itself, and so could avoid the need for a local import agent. Whether such activities are possible depends on the wording of the investment license. Foreign investors should be aware that the Ministry of Planning and Investment has

challenged a number of investment licenses issued by provincial/city people's committees and industrial zone authorities as "not being in accordance with the law".

- > *Import permit.* FIEs may apply to the Ministry of Trade for a permit to import finished products for "market seeding purposes". The volume that may be imported under such a permit may not exceed 0.5% of the designed capacity of the factory, or USD500,000 in value. Several FIEs have also succeeded in obtaining import permits from the Ministry of Trade to import and distribute "complementary" products (subject to quota limits and annual review) to the products that they manufacture, or where there has been some disruption to manufacture in Vietnam. In all cases, such import permits have been subject to both volume and time restrictions.

*What hope does the BTA give?*

Under the BTA, Vietnam has committed to opening the import and distribution sector to US participation in stages. Generally, the BTA has been viewed as representing the roadmap for liberalization of the Vietnamese market for *all* foreign investors (not just US investors). On that basis, foreign participation in the import and distribution sector is expected to develop as follows:

Stage	Trading <sup>3</sup>	Distribution <sup>4</sup>
From December 2004	FIEs engaging in "substantial" production and manufacturing will be permitted to conduct trading activities <sup>5</sup> , subject to the restrictions <sup>6</sup> listed in Annexes B, C and D of the BTA <sup>7</sup>  Joint venture enterprises ( <b>JVEs</b> ) (51% Vietnamese/49% foreign legal capital) will be permitted to be licensed to conduct trading activities in all products, subject to the restrictions listed in Annexes B, C and D of the BTA	JVEs (51% Vietnamese/49% foreign legal capital) will be permitted to be licensed to provide distribution services, subject to the restrictions listed in Annex D of the BTA
From December 2007	JVEs (49% Vietnamese/51% foreign legal capital) will be permitted to be licensed to conduct trading activities, subject to above restrictions	JVEs (no limitation on % foreign legal capital) will be permitted to be licensed to provide distribution services, subject to above restrictions

3 BTA, Chapter I - Trade in Goods, article 2.7. The BTA defines "trading rights" as "the right to engage in import and export activities". "Trading activities" should be interpreted in light of this definition.

4 BTA, Chapter III - Trade in Services, article 7.1. Under Annex G.IV of the BTA, "distribution services" includes wholesale and retail sales services, agent services (excluding agent services for foreign legal persons), franchising services, but excludes oil and oil derivatives, gas, fertilizer, pesticides and insecticides, alcohol, cigarettes and cigars, medicines, precious metals and stones, explosives, rice and wheat flour.

5 Presumably, existing FIEs engaged in "substantial manufacturing" will be permitted to distribute the products that they import, but strangely, this is not stated in the BTA.

6 Again strangely, the BTA does not restrict existing FIEs engaged in "substantial manufacturing" to importing products related to those that they manufacture in Vietnam. The only restrictions appear to be those listed in Annexes B, C and D.

7 Annex B comprises: Import Quantitative Restrictions for Agricultural Products; Import Quantitative Restrictions for Industrial Products; Export Quantitative Restrictions; Prohibited Import and Exports.

Annex C comprises: Imports Subject to State Trading and Phase-out Schedule; Exports Subject to State Trading and Phase-out Schedule.

Annex D comprises: Phase-out Periods for Restrictions on Import Trading Rights and Distribution Rights for Agricultural Products; Phase-out Periods for Restrictions on Import Trading Rights and Distribution Rights for Industrial Products; Phase-out Periods for Restrictions on Export Trading Rights.

Examples of the above restrictions: quantitative restrictions apply to the importation of products such as bicycles and frozen orange juice until 10 December 2006; rice, television and radio parts may not be imported and distributed at all.

From December 2008	100%FOEs will be permitted to be licensed to conduct trading activities, subject to above restrictions	100%FOEs will be permitted to be licensed to provide distribution services, subject to above restrictions
From December 2011	Most restrictions applicable to specific products will have been phased out	Most restrictions applicable to specific products will have been phased out

Unfortunately, it is not certain that all foreign investors will enjoy the above reforms at the same time as their US counterparts. Vietnam's track record in implementing its BTA commitments is inconsistent. Some BTA reforms, such as establishment of 100% foreign owned credit institutions, have been enjoyed by all foreign investors. Others, such as relaxation of caps on VND deposits at foreign bank branches<sup>8</sup>, have been enjoyed only by US investors (and belatedly, after bargaining, by EU investors). Also, it now appears that, as one of the terms of Vietnam's accession to the WTO, a delay may be imposed on when investors from countries with which Vietnam does not have an agreement with respect to services (ie non-US and non-Japanese, query non-EU) can enjoy the import and distribution reforms under the BTA (see below).

*What has happened post-BTA?*

Since June 2002, Vietnam has been pursuing (very slowly) the following law reform process:<sup>9</sup>

> *Expansion of the scope of applicability of Vietnam's Commercial Law to provide for import and distribution activities by foreign branch offices and FIEs in Vietnam:*

On 14 June 2005, a new Commercial Law was passed by Vietnam's National Assembly ("2005 Commercial Law"). In a very brief section entitled "Foreign Business Entities Conducting Commercial Activities in Vietnam", the 2005 Commercial Law enables foreign branch offices to engage in "commercial activities", enables FIEs to be licensed to engage solely in commercial activities without any investment in manufacturing ("commercial FIEs" - a completely new class of FIE) and enables existing FIEs in the manufacturing sector to engage in commercial activities.

Regrettably, there is no specific reference to "import-export" or "distribution" in the 2005 Commercial Law's definition of "commercial activities". However, the Ministry of Trade has informally advised that the general catch-all "other activities for profit making purposes" in the 2005 Commercial Law's definition of "commercial activities" is expected to be interpreted to encompass import-export and distribution activities.

Of interest, the 2005 Commercial Law provides for a separate regulatory framework for commercial FIEs. They will be under the control of the Ministry of Trade. (This is similar to foreign credit institutions in Vietnam which are governed by a separate regulatory framework from the LFI and under the control of the State Bank of Vietnam.) FIEs undertaking commercial activities in addition to manufacturing will remain under the control of the Ministry of Planning and Investment.

>>> *At the request of the Ministry of Trade, Phillips Fox is translating the 2005 Commercial Law in co-operation with the Ministry.*

The 2005 Commercial Law will come into force as of 1 January 2006.

8 See March 2005 Issue of Vietnam Legal Update for our latest discussion of this subject.

9 Official Letter 2177-TM-DT of the Ministry of Trade dated 5 June 2002

> *Promulgation of detailed guidelines for implementation of the Commercial Law with respect to import and distribution activities of foreign branch offices and FIEs:*

Before August 2005, the Ministry of Trade had proposed a single decree to provide detailed guidelines for implementation of the Commercial Law with respect to foreign branch offices *and* FIEs. Now, the Ministry of Trade has split the proposed guidelines into two separate decrees:

- a draft decree providing detailed guidelines for implementation of the Commercial Law with respect to representative offices and branch offices of foreign business entities in Vietnam ("decree on branch offices");
- a draft decree providing detailed guidelines for implementation of the Commercial Law with respect to commercial activities of FIEs in Vietnam ("decree on commercial activities of FIEs").

The decree on branch offices will replace Decree 45. It allows foreign business entities to establish branch offices in order to conduct commercial activities, being import-export and "supporting" activities. What qualifies as "supporting" activities is not clear. Of note, the earlier single draft decree of the Ministry of Trade had "encouraged" foreign business entities to establish commercial FIEs in order to conduct commercial activities on a permanent basis in Vietnam, in preference to branch offices. This provision has not survived in either of the August 2005 draft decrees, but it may remain policy - and it may be that the scope of commercial activities of branch offices will remain limited to import-export and exclude distribution.

Branches will be permitted to export all types of goods, except petroleum, petroleum products, gas, fertilizer, insecticide, beer and spirits, cigarettes, medicine, precious metals and stones, explosives, rice, wheat flour, and other goods the export of which is prohibited. But the goods that may be imported by branch offices will remain restricted (albeit less restricted than under Decree 45). Permitted imports are confined to machinery and equipment, and raw materials and supplies used for production and construction. The licensed duration of a branch office is limited to 5 years (extendable)<sup>10</sup>.

The Prime Minister will decide on the continuation of existing, licensed branch offices which engage in commercial activities beyond the above limited range of goods (we are not aware of the existence of any such branch offices). New branch offices will be licensed by the Ministry of Trade.

Under the decree on commercial activities of FIEs, commercial FIEs may be established in the forms of JVE or 100% FOE. They may conduct the following activities: (i) wholesale of goods; (ii) retail of goods; (iii) agency for buying and selling goods and/or services; (iv) commercial franchising; and (v) import and export of goods.<sup>11</sup> The range of goods in which commercial FIEs may conduct activities appears to be restricted. In addition to restrictions on goods under international treaties (discussed below), the following goods are excluded: petroleum, petroleum products, gas, fertilizer, insecticide, beer and spirits, cigarettes, medicine, precious metals and stones, explosives, rice and wheat flour, and other goods the export of which is prohibited.

The most significant limitation on the establishment of commercial FIEs is that they will be licensed only in accordance with the terms of and timetable for Vietnam's commitments under international treaties. For US investors, this means in accordance with Vietnam's BTA commitments (or its WTO commitments, whichever are more favourable). So, for US investors, *at worst*, they will be limited by the BTA timetable and the restrictions in Annexes B, C and D of the BTA (see above). For investors from other countries with which Vietnam has a trade agreement, this means in accordance with the commitments in such agreement (or Vietnam's WTO commitments, whichever are more favourable). For other investors, it means *at best* Vietnam's WTO commitments.

10 Currently, Decree 45 allows unlimited duration for branches.

11 This is a significant improvement on the Ministry of Trade's single draft decree which only permitted commercial FIEs to engage in sale and purchase of goods, with no express reference to the activities of wholesale and retail of goods or import and export of goods.

The decree on commercial activities of FIEs also provides for existing, licensed FIEs to engage in distribution of goods subject to amendment of their investment license. There is no mention of import-export.<sup>12</sup> It is expected (but not stated) that the amendment of their investment licenses will be restricted by the corresponding terms and timetable for introduction of new commercial FIEs.

Under the decree on commercial FIEs, Prime Ministerial approval will be required for the licensing of commercial FIEs where the foreign business entity is incorporated in a country with which Vietnam has not made a relevant treaty commitment. The establishment of commercial FIEs by any foreign business entity incorporated in a country with which Vietnam *does* have a relevant treaty commitment, eg US, will be licensed by the Ministry of Trade. The draft decree is not clear but it is anticipated that the amendment of investment licenses of existing FIEs so that they may conduct distribution (as well as their licensed activities) will be performed by a foreign investment licensing body.<sup>13</sup> It is also unclear whether approval from the Ministry of Trade is required before the amendment of investment licenses.

The above decrees are expected to be promulgated soon and to come into force on the same date as the 2005 Commercial Law. (However, we note that this was also the expectation with the Government decrees to implement the 2004 Competition Law but, to date, only one has been issued and it's now 2 months since that Law came into force.)

*So, what of the now overdue obligations under the BTA?*

The 2005 Commercial Law won't come into force until 1 January 2006. By then, the first stage of Vietnam's import and distribution sector reforms (scheduled to be introduced by 10 December 2004) will be overdue by more than a year.

What stopgap measures would be taken by Vietnam to give effect to its BTA commitments pending the 2005 Commercial Law coming into force has been the subject of much debate - and delay - by Vietnamese authorities. It is understood that this highly sensitive subject has been an important bargaining chip in Vietnam's negotiations to join the WTO by the end of 2005.

Arguably, there is no need to introduce enabling legislation in order to give effect to Vietnam's commitments under the BTA. Vietnamese laws often contain a provision that the terms of treaties to which Vietnam has acceded will override any contrary provisions in such laws. So, based on just such a provision in Decree 2414, Vietnamese authorities could simply start to issue licenses (or license amendments) in order to allow US investors to import and distribute goods in Vietnam as permitted under the BTA. However, enabling legislation would still be required in order to give body to the skeleton commitments under the BTA.

Now, finally, Vietnam has played its hand. It appears that Vietnam will indeed commence licensing in advance of enabling legislation. On 28 July 2005, the Ministry of Trade issued a Diplomatic Note to the US Embassy in Hanoi advising that Vietnam is now ready to issue licenses to US investors interested in import and distribution rights in conformity with the provisions of the BTA. According to the Diplomatic Note, this was agreed during the BTA Joint Committee Session on 17 June 2005 in Washington DC. The Diplomatic Note provides the following point of contact for interested US investors: Ms. Hoang Tuyet Hoa, Department for Investment and Planning, Ministry of Trade, 31 Trang Tien Street, Hanoi, Vietnam, Tel: 84-4-826 5826, Fax: 84-4-826 4696.

---

12 The Ministry of Trade's single draft decree had provided for import rights for existing manufacturing FIEs, even though the extent of such rights (who could import and what they could import) was not settled. Informal discussions with the Ministry of Trade in early June 2005 suggested that only existing FIEs with investors from countries with which Vietnam has reciprocal MFN status would be permitted to import products for sale in the Vietnamese market. Other proposed conditions for existing FIEs to import products included: completion of capital construction and commencement of production or manufacturing; total invested capital of USD40 million or more; completion of legal capital contribution; commencement of income generation. What goods could be imported ranged from all goods subject to the restrictions set out in Annexes A, B and D of the BTA or (as suggested in informal discussions with the Ministry of Trade in late June 2005) to only those goods stipulated in the investment license of the existing FIE. Now it appears the issue is to be ignored completely.

13 It is not clear whether only the Ministry of Planning and Investment may approve such amendment or whether lower-level investment licensing bodies may do so also.

14 Article 120.1 of Decree 24

*Where to from here?*

The Diplomatic Note is considered to be a stopgap measure only. When the 2005 Commercial Law and (presumably) the implementing decrees come into force on 1 January 2006, US investors will have a clear basis for exercise of their import and distribution rights.

At that same time, other investors from countries with which Vietnam does not have a services agreement will also *in principle* be entitled to participate in the import and distribution sector pursuant to the 2005 Commercial Law. But, based on the limitations enshrined in the August 2005 draft of the implementing decrees, such investors may be locked out *in practice* from Vietnam's import and distribution sector until the terms of Vietnam's WTO accession allow them in. This may be some time after 1 January 2006. At the May 2005 Geneva meeting of its WTO working party, Vietnam is understood to have agreed to extend trading rights to investors from all WTO member countries (with similar restrictions as in Annexes B, C and D to the BTA) but to have requested a one year transition period for implementation. If these terms of WTO accession are accepted, and assuming Vietnam's accession is approved at the WTO Ministerial Meeting in December 2005, investors from countries with which Vietnam does not have a trade agreement may remain locked out *in practice* from Vietnam's import and distribution sector until 2007 at the earliest.

One thing is certain, the Diplomatic Note gives US investors an invaluable headstart in establishing their brands in the Vietnamese market, ahead of all other non-manufacturing investors. How much of a headstart remains to be seen - at a minimum, US investors have a 5 month advantage, but this may stretch to 17 months or more.

- >>> For an English translation of the 2005 Commercial Law, as well as a wide range of other relevant legislation, subscribe to [Vietnam Laws Online Database](http://www.vietnamlaws.com) on [www.vietnamlaws.com](http://www.vietnamlaws.com).

---

## Part 3 Did You Know?

---

### 3.1 National Assembly update

At its May-June 2005 Session, the National Assembly voted to expedite its legislative program in an attempt to achieve promulgation in 2005 of important laws necessary to support Vietnam's bid for WTO accession by the end of 2005. Now, under the National Assembly's Resolution 35-2004-QH11 on the Program for Formulation of Laws and Ordinances in 2005 and its recent Resolution 42-2005-NQ-QH dated 14 June 2005 on Adjustment of the Program for Formulation of Laws and Ordinances in 2005, the October-November 2005 Session of the National Assembly will deal with:

- > Laws to be *passed* (having already been considered at the May-June 2005 Session):
  - Anti-Corruption Law
  - Law on Bills of Exchange
  - Law on Intellectual Property
  - Law on Protection of the Environment (Amended)
  - Law on Electronic Transactions
  - Law on Youth
  - Law on Residential Housing
  - Law on the People's Police
- > Laws to be *considered and passed* at the 8th Session in:
  - Law on Enterprises
  - Law on Investment (see [Part 2.2](#))
  - Law on Amendment of the Law on VAT and Law on SST (a single law to cover amendments to two existing laws - a first in Vietnam)
  - Law on Amendment of the Law on Complaints and Denunciations
  - Law on Practising Thrift to Reduce Expenditure.
- > Laws to be considered *only* (and expected to be passed in May-June 2006):
  - Law on Lawyers
  - Law on Prevention of HIV/AIDS
  - Law on Social Insurance
  - Law on Real Estate Business
  - Law on Information Technology
  - Law on Registration of Real Estate
  - Law on Cinematography
  - Law on Civil Aviation of Vietnam (Amended)
  - Law on Personal Income Tax
  - Law on Securities

### 3.2 Anti-money laundering

Vietnam's ground-breaking anti-money laundering legislation entered into force on 1 August 2005. Of note, as yet, personnel and infrastructure for the Anti-Money Laundering Centre under the State Bank has not yet been arranged. But, in theory, obligations to report the following transactions have commenced:

- > One or more cash transactions conducted by an individual/organization in a single day with a total value of VND200 million (approx US\$12,614.32) or VND500 million in respect of savings account transactions (approx US\$31,535.79); and
  - > Other suspicious transactions.
- >>> See the June 2005 Issue of Vietnam legal Update on [www.vietnamlaws.com](http://www.vietnamlaws.com) for a summary of Decree 74 on anti-money laundering.

### 3.3 What does a land use rights certificate mean?

This may sound like a rhetorical question, but the answer is not academic. In fact, how Vietnamese law and authorities answer this question will only become more important as the number and type of property transactions in this country increases, as they inevitably will, with economic growth and liberalization.

Surprisingly (to some, but not others) neither the new Land Law nor any of the subordinate decrees and other legal instruments issued to guide the implementation of the Law define the meaning of a "land use right certificate" ("LURC"). Sure, they tell you how you can get one (eg lease or allocation of land from the State, or assignment from another entity), and what you can do with it (eg the circumstances in which you can assign, sublease, mortgage or contribute to a joint venture). They describe a LURC, as "a certificate which is issued by a competent State body to a land user in order to protect the lawful rights and obligations of such land user". And they say that a LURC entitles the owner to use the land for the purpose and duration stipulated in the LURC. But fundamentally, they do not say whether the rights represented by a LURC are indefeasible, ie not capable of being annulled or voided.

What happens when someone claims a right to land in respect of which the authorities have issued a LURC to another person or entity? What if the LURC was issued on the basis of an application that subsequently proves to be fraudulent or incorrect. In practice, perhaps, a relevant authority or court may consider the case and act on it - but pursuant to what authority and in accordance with what rule?

Indefeasibility of title, and the rare exceptions to it, are a fundamental feature of land laws in most developed countries. The ability to rely on a document as being conclusive evidence of ownership facilitates efficient dealings in property, thereby promoting economic growth and avoiding disputes.

There may need to a few serious, high profile disputes involving LURCs before the concept of indefeasibility attracts the serious attention it deserves.

### 3.4 Supreme Court Decisions 2000-2004

For the first time ever, at the start of July 2005, Vietnam published all judicial review decisions made by the Council of Judges of the Supreme People's Court in the years 2000-2004 in civil, commercial and labour cases (Volume 1) and criminal and administrative cases (Volume 2) - a total of 103 decisions. This is a significant step for Vietnam, not only in terms of transparency (a key WTO requirement), but also in terms of providing precedents to lower courts as well as investors and their lawyers looking for indications of how laws might be interpreted and applied (although how much certainty can be derived from these decisions is not yet tested). Below, and in future issues of Vietnam Legal Update, we will look at selected decisions.

*Dispute over trademark infringement - Supreme People's Court Decision 08-HDTP-DS dated 26 February 2003*

*Facts* Mr HN is a director of HN Limited Company. Mr L is the owner of the Premises. HN runs a restaurant and catering business. HN leased the Premises from Mr L and opened a restaurant named PD and registered a trademark including the words PD and a picture of the restaurant and a horse rider. Upon expiry of the lease contract for the Premises, HN reopened the restaurant PD at a new address. Mr L subsequently established PD TV Limited Company and opened a restaurant named PD TV at the Premises, and began advertising using the picture of the restaurant that formed part of HN's trademark. HN sued PD TV for trademark infringement, alleging that PD TV's advertising caused confusion to customers. After the proceedings were initiated by HN, PD TV registered a trademark PD TV. The National Office of Industrial Property ("NOIP") subsequently issued an official letter to revoke the registration of the trademark PD TV on the basis that the trademark was too similar to and could cause confusion with PD and therefore the registration was incorrect. Despite this, Mr L argued that as PD TV is the name of the street where the restaurant is located and the name of the company PD TV and as the picture he used in the advertisement is the picture of the premises in which his business is located, he is entitled to use them in advertising, regardless of any trademark registration.

*Principal issue:* Whether the advertisement of PD TV restaurant infringed the trademark PD already registered by HN.

*Preliminary decisions:* At first instance, the People's Civil Court in Hanoi decided that the advertisement bearing the logo PD TV did not infringe the trademark PD. On first appeal, this decision was reversed and the Court ordered PD TV to cease using the trademark bearing the logo PD TV and the picture of the horse rider.

The director of the Supreme People's Procuracy required a judicial review of the appeal decision on the basis that PD and PD TV are not similar enough to cause confusion, PD TV is situated in PD TV street, the use of a logo with a trademark PD TV by PD TV is consistent with common practice and cannot amount to an infringement of HN's trademark.

*Decision of Supreme Court:* The Judicial Council of the Supreme People's Court upheld the decision of the appeal court on the basis that PD TV is too similar to PD, and its use is a breach of trademark. The fact that the restaurant was located on PD TV and is the name of the company running the business was insufficient to permit PD TV to use the name PD TV and the logo.

*General lesson:* Use in advertising and promotion of a company name or reference to a location which includes the name of another company may amount to a breach of the trademark of that other company.

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

**Vietnam Laws Online Database** on [www.vietnamlaws.com](http://www.vietnamlaws.com) celebrated its 1st anniversary on 1 July 2005.

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

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

On 1 September 2005, Vietnam Laws Online Database will be updated with, amongst others:

- > Draft 13 of the Law on Investment
- > Commercial Law 14 June 2005
- > Law on Customs 14 June 2005
- > Law on Pharmacy 14 June 2005
- > Law on Amendments to Mineral Law 14 June 2005



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](http://www.vietnamlaws.com) and our **Vietnam Laws Online Database**.

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

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

Melbourne Office  
Level 44, 120 Collins Street  
Melbourne  
Australia  
Tel +61 3 9274 5000  
Fax +61 3 9274 5111  
[maureen.mclaughlin@phillipsfox.com](mailto:maureen.mclaughlin@phillipsfox.com)

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