



Vietnam Legal Update

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Part 1 Selected New Legal Instruments

1.1 Foreign Employees

Official Letter 3668-VPCP-VX of the Office of Government dated 15 July 2004 on Percentage of Foreign Employees Working in Vietnam Pursuant to Decree 105-2003-ND-CP

Effective as of 7 October 2003, Decree 105 imposed a maximum limit on the number of foreign employees who may be employed by Vietnamese enterprises operating under the Law on Enterprises, by State owned enterprises and by foreign invested enterprises. No more than 3% of the total number of employees may be foreign employees - up to a maximum of 50 foreign employees.

The cap on foreign employees has been widely criticized by the foreign business community as draconian and counter-productive to Vietnam's efforts to encourage foreign investment and improve the management experience of Vietnamese employees. The Ministry of Planning & Investment ("MPI") supported this view.

In the spirit of the Government's Resolution 01-2004-NQ-CP of January 2004 which attempted to soften the impact of the cap, the Ministry of Labour, War Invalids & Social Affairs ("MoLISA") allowed for a number of exceptions to the cap in its implementing Circular 04-2004-TT-BLDTBXH dated 10 March 2004.

Now, by Official Letter 3668, Deputy Prime Minister Pham Gia Khiem on behalf of the Prime Minister directs the MPI and the MoLISA to co-ordinate to investigate and submit to the Government an amendment to article 3.1 of Decree 105 in the direction of an increase in the percentage of foreign employees working in enterprises in all economic sectors in Vietnam.

1.2 Environment

Decree 143-2004-ND-CP of the Government dated 12 July 2004 on Amendment of Article 14 of Decree 175-CP of the Government dated 18 October 1994 Providing for Implementation of the Law on Protection of the Environment

Rather belatedly, the Government has provided for the updating of Decree 175 to reflect the transfer of responsibility for environmental matters from the former Ministry of Science, Technology & Environment (now the Ministry of Science & Technology) to the Ministry of Natural Resources & Environment ("MoNRE"), which took place in the second half of 2002.

Effective as of 3 August 2004, under the revised Article 14, environmental impact evaluation reports will be subject to appraisal by the MoNRE in the case of important large scale projects such as: projects using land of national parks, reservation areas, historical monuments; projects using land crossing the borders of 2 provinces or more; projects for construction of infrastructure of urban areas (3rd class or up); industrial zones and high-tech zones of 150ha or more, economic or commercial zones of 1,000ha or more; projects for construction of permanent bridges, sea ports, airports, ship building and repairing plants, petroleum warehouses; hydroelectric, thermoelectric plants; projects for oil refinery, petrochemical and other high capacity manufacturing factories; mining projects; industrial and harmful waste projects. As previously, the authority to appraise the above reports may be delegated on a case-by-case basis to the relevant line ministry or branch.

Also in July, the MoNRE provided for the powers, duties and organizational structure of its Department for Protection of Environment under Decision 15-2004-QD-BTNMT dated 5 July 2004, effective as of 2 August 2004.

1.3 Credit Institutions - Compulsory Reserves

Decision 796-2004-QD-NHNN of the State Bank of Vietnam ("SBV") dated 25 June 2004 on Adjustment of Compulsory Reserve of Credit Institutions

As of 1 July 2004, the compulsory reserve obligations of credit institutions in Vietnam have increased significantly, apparently as a temporary solution of the SBV to control the current high inflation rate. Compulsory reserve ratios are now as follows:

- > VND on-call deposits and term deposits under 12 months: 5% of the total balance of such deposits held by most State commercial banks, urban commercial shareholding banks, joint venture banks, foreign bank branches and finance companies - up from 2%;
- > VND term deposits from 12-24 months: 2% of the total balance of such deposits held by all banks, finance companies and finance leasing companies - up from 1%;
- > Foreign currency on-call deposits and term deposits under 12 months: 8% of the total balance of such deposits held by all banks and finance companies - up from 4%;
- > Foreign currency term deposits from 12-24 months: 2% of the total balance of such deposits held by all banks, finance companies and finance leasing companies - up from 1%.

Decision 796 replaces SBV's Decision 831-2003-QD-NHNN dated 30 July 2003 and parts of SBV's Decision 582-2003-QD-NHNN dated 9 June 2003.

1.4 Banks - Share Issues & Listings

Decision 787-2004-QD-NHNN of the State Bank of Vietnam ("SBV") dated 24 June 2004 issuing Provisional Regulations on Registration for Listing and Public Issue of Shares by Commercial Shareholding Banks

Decision 787 provides for a provisional regime for the initial procedures for a commercial shareholding bank (also known as joint stock commercial bank, "JSCB") to list its shares and conduct a public issue of shares to increase its charter capital, namely the procedures for registration to obtain SBV approval. Only after SBV approval is obtained, a JSCB may then apply to the State Securities Commission ("SSC") for permission to list shares and conduct a public issue at a Securities Trading Centre - the SSC procedures are not dealt with in Decision 787.

Effective as of 20 July 2004, the following new provisional regime for registration to issue and list JSCB shares applies:

- > To list, a JSCB must satisfy prescribed conditions:
 - Its paid up charter capital must be at least equal to the stipulated level for legal capital;
 - It must have been operating for at least 5 years, profitably for the last 2 years;
 - Its ratio of bad debts over total loans balance must have been under 3% for the past 2 years;
 - It must not be in breach of prudential limits or banking regulations;
 - It must comply with SBV regulations on ownership shares;

- It must be classified by the SBV as a group A JSCB;
- It must submit an application with contents as prescribed in Decision 787.

Within 10 days, the SBV's municipal or provincial branch must evaluate the application, assess the current financial and operational status of the JSCB, and make a submission to the SBV Governor recommending that he agree to consider and make a decision or reply to the JSCB to supplement its file. Within 20 days, the SBV (Department of Banks and Non-Banking Credit Institutions) must consider and provide a letter of approval or request the SBV branch to direct additional explanation for correct implementation of the regulations.

- > Any transfer of shares by members of a JSCB's boards and by the general director (during their period in office and while they are subject to any proceedings for loss for which they are personally liable pursuant to a resolution of the general meeting of shareholders) and any transfer of share certificates of foreign shareholders and of shareholders owning over 10% of the charter capital or share capital with voting rights must be implemented in accordance with article 14 of the Regulations on shareholders, shares, share certificates and charter capital of State and People's JSCBs issued with Decision 1122-2001-QD-NHNN of the SBV Governor dated 4 September 2001. Article 14 provides for a number of restrictions on share transfers, including that the SBV must approve any transfer exceeding 20% of the charter capital (as from the most recent transfer registered at the SBV) and must approve any change in the share ratio of major shareholders of a JSCB, that the above board members and general director may not transfer their shares except in prescribed cases.
- > A JSCB with shares already listed must apply for SBV approval for an increase in charter capital by public issue of shares, prior to proceeding to obtain SSC registration for the issue. To obtain SBV approval, a JSCB must show the reasons and necessity for an increase in charter capital and there must be a plan passed by the general meeting of shareholders showing the number of shares proposed to be issued, their price, and the proposed duration for each specific issue tranche within the overall public issue.

Within 15 days, the SBV's municipal or provincial branch must consider and approve the increase in charter capital; or if it considers the application is non-compliant or that an increase in charter capital is unnecessary or inconsistent with law, the SBV branch must reply to the JSCB either requesting amendment to the application or explaining the reasons for refusing the application.

- > JSCBs must report to SBV as follows:
 - Within 10 days of SSC permission to list shares, a copy of such permit must be forwarded to the SBV;
 - Within 15 days from the date of expiry of the duration of a public issue of shares, a written report on the issue (enclosing a copy letter from the SSC confirming the total number and value of shares issued) must be sent to the SBV;
 - By no later than the 15th day of the first month of each quarter, a report on changes in the previous quarter in the list of shareholders owning 5% or more of the JSCB's charter capital must be sent to the SBV.

It was expected that the SBV would also issue in June 2004 new regulations governing foreign share purchases (to replace the outdated but still current Decision 228 of the SBV dated 2 December 1993). As no such new regulations have appeared, and given the provisional status of the Decision 787 regulations, it appears that SBV policy on JSCB shares is still not completely decided.

1.5 Securities Market

Effective as of mid-July, the following new regulations and guidelines of the Ministry of Finance implement the securities market reforms introduced in Decree 144-2003-ND-CP of the Government dated 28 November 2003 (reviewed in Part 1.3 of the February 2004 Issue of Vietnam Legal Update):

<i>Legislation</i>	<i>Issued</i>	<i>Effective as of</i>
Decision 55-2004-TT-BTC on Regulations on Organization and Operation of Securities Companies	17 June 2004	18 July 2004
Circular 57-2004-TT-BTC Providing for Disclosure of Information on the Securities Market	17 June 2004	19 July 2004
Circular 58-2004-TT-BTC Providing for Securities Members and Transactions	17 June 2004	19 July 2004
Circular 59-2004-TT-BTC Providing for Listing of Shares and Bonds in the Official Securities Market	18 June 2004	19 July 2004
Circular 60-2004-TT-BTC Providing Guidelines for Issuance of Shares to Public	18 June 2004	19 July 2004

Part 2 Features

2.1 Land Assignment Tax

Following is a brief summary of the latest reforms in income tax on assignment of land use rights and land lease rights.

As from 1 January 2004, business assignors (not individuals and households) of land use rights are no longer subject to land assignment tax previously levied under the Law on Tax on Assignment of Land Use Rights dated 22 June 1994 (as amended 21 December 1999) ("Law on Land Assignment Tax"). Instead, they are subject to income tax on assignment of land use rights and land lease rights under the Law on Corporate Income Tax dated 17 June 2003 ("Law on CIT").

Under Decree 164 of the Government dated 22 December 2003 providing detailed provisions for implementation of the Law on CIT ("Decree 164"), business assignors are firstly subject to a primary tax rate equivalent to 28% of their income derived from the assignment of land use rights or land lease rights. Secondly, if after calculation under the primary rate, the remaining income still amounts to more than 15% of their expenses, such remaining income is subject to an additional tax (like a surcharge) under the following progressive tariff scale:

<i>Level</i>	<i>Rate of Residual Income over Expenses</i>	<i>Tax Rate</i>
1.	Up to 15%	0%
2.	Above 15% up to 30%	10%
3.	Above 30% up to 45%	15%
4.	Above 45% up to 60%	20%
5.	Above 60%	25%

Articles 17 and 18 of Decree 164 classify tax payers into two categories, ie "specialized enterprises" (which conduct the business of housing and land, infrastructure and buildings on land – elsewhere, such enterprises would probably be called "developers") and "non-specialized enterprises" (which do not regularly conduct the business of assignment of land use rights or land lease rights). Specialized enterprises are required to pay income tax in respect of income earned from assignment of land use rights and land lease rights using the same method of payment as applicable to payment of CIT by other enterprises (ie payable provisionally each quarter and finally within 100 days after the end of a fiscal year). Non-specialized enterprises are required to pay income tax in respect of such income separately, upon completion of the legal procedures of the assignment.

Notably, income earned from the assignment of land use rights and land lease rights (1) for the purposes of relocation to a planned area or making capital contribution, or (2) as a result of division, demerger, merger or bankruptcy, is not subject to this income tax (Article 11 of Decree 164).

Individuals and households are also not yet subject to any personal income tax in relation to income they earn from the assignment of land use rights and land lease rights. It was proposed to apply personal income tax to such income earned by individuals and households under a new law on personal income tax, which was planned to be passed last year and effective 1 January 2004. However, the National Assembly did not agree and pass this new law. Pending such new law, individuals and households are still required to pay land assignment tax under the Law on Land Assignment Tax.

2.2 Competition Law Update

1. Introduction

A Law on Competition is scheduled to be passed by the National Assembly of Vietnam at its October-November 2004 Session ("Competition Law").

Draft 10 of the Competition Law was considered by the National Assembly at its May-June 2004 Session.¹ Draft 10 has been redrafted by the Competition Law Drafting Committee under the Ministry of Trade ("MoT") to take into account the National Assembly's comments. Draft 11 was considered by the Budget and Economic Committee of the National Assembly at a meeting in late July. Draft 12 is expected to be prepared in early August to incorporate the latest comments of the Standing Committee of the National Assembly. A seminar will be held by the Vietnam Chamber of Commerce and Industry in early August to collect opinions from the business community. The final draft of the Competition Law is expected to be submitted to the Standing Committee of the National Assembly in September for final comments before submission to the National Assembly in October. The MoT's Competition Law Drafting Committee is confident that the Competition Law will be passed in November 2004.

Draft 10 provides for the Competition Law to become effective as of 1 May 2005.

Draft 10 provides for establishment of the State administrative body for competition (referred to in this report as the "State competition body") under the MoT. The State competition body will have the duties and powers to evaluate exemption applications, investigate competitive practices and to penalize offences, amongst other things. Separate provision for a new Competition Department under the MoT has already been made by the Government to undertake the role of State competition body.²

Draft 10 provides for a limited scope of application of the Competition Law to:

- > Vietnamese entities:
 - Organizations and individuals conducting business (defined as "enterprises" in the Competition Law and confirmed as including foreign invested enterprises³);
 - Industry associations⁴;
- > Foreign enterprises and industry associations with activities in Vietnam.

The phrase "foreign enterprises...with activities in Vietnam" is ambiguous and not defined in Draft 10. In late 2003, the Secretary of the MoT's Competition Law Drafting Committee advised that "foreign enterprises...with activities in Vietnam" *only* includes foreign commercial presences in Vietnam, such as foreign branch offices, and does *not* include offshore foreign entities, including those investing in a foreign invested enterprise in Vietnam.

The Competition Law will govern practices in restraint of competition and practices giving rise to unhealthy competition *in the territory of Vietnam*.

1 This report is based on Phillips Fox's English translation of Draft 10, which is the latest draft publicly available.

2 Decree 29-2004-ND-CP of the Government dated 16 January 2004 on Functions, Duties, Powers and Organizational Structure of the Ministry of Trade. Consistent with the Government's administrative reform policy aimed at streamlining Vietnam's bureaucracy, this new Department is expected to have responsibility for matters relating to most favoured nation status and anti-dumping as well as competition. It is possible that the single new Department will eventually split into three separate departments.

3 Confirmed by the Secretary of the MoT's Competition Law Drafting Committee in late 2003.

4 "Industry associations" are defined as comprising trade associations and professional associations.

Draft 10 regulates:

- > [Agreements in restraint of competition](#);
- > [Abuse of dominant market position or monopoly position](#);
- > [Economic concentration](#);
- > [Unhealthy competitive acts](#).

Of note, in late 2003, the Secretary of the MoT's Competition Law Drafting Committee advised that, in developing the Competition Law, the Government's priority is to regulate abuse of dominant market position and monopoly position and unhealthy competitive acts. Although recognised as a necessary element of the Competition Law, regulation of economic concentrations is not currently a high priority of the Government.

Draft 10 defines the following terms:

- > *Relevant market* includes both relevant products markets and relevant geographical markets. *Relevant products market* comprises goods or services which may be substituted for each other in terms of characteristics, use purpose and price. *Relevant geographical market* means a specific geographical area in which goods or services may be substituted for each other with the same competitive conditions as each other, and which area is significantly different from neighbouring areas.
- > *Market share of an enterprise* with respect to a certain type of goods or services means the turnover from sales of such enterprise as a percentage of the total turnover of all enterprises conducting business in such type of goods or services in the relevant market or the turnover from inwards purchases of such enterprise as a percentage of the total inwards purchases of all enterprises conducting business in such type of goods or services in the relevant market for a month, quarter or year.
- > *Combined market share* means the total market share in the relevant market of all enterprises intending to participate in an agreement in restraint of competition or in an economic concentration.

2. Agreements in restraint of competition

Draft 10 omits any definition of agreements in restraint of competition, so it is not clear whether agreements may be in writing, oral or inferred from parallel behaviour. Draft 10 simply lists the following agreements between parties in the relevant market which will be deemed to be agreements in restraint of competition:

- > Agreements either directly or indirectly fixing the price of goods and services, including agreements fixing a reselling price between parties operating in different stages of the same production or distribution process ("vertical resale price fixing agreements");
- > Agreements to share consumer markets or sources of supply of goods and services;
- > Agreements to restrain or control the amount of goods manufactured, the volume of goods purchased or sold, or the amount of services provided;
- > Agreements to restrain technical developments or investment;
- > Agreements to impose on other enterprises conditions for signing contracts for the purchase and sale of goods and services, or to force other enterprises to accept obligations not directly related to the subject of the contract;

- > Agreements to prevent, impede or not allow other enterprises to participate in the market or to develop business;
- > Agreements to exclude from the market other enterprises which are not parties to the agreement;
- > Collusion for one or more parties to win a tender for supply of goods and services.

Draft 10 still adopts the wording of earlier drafts that appears to limit the scope of regulation to only agreements which are entered into with the *intention of achieving a restraint of competition*⁵, not also agreements which have the *unintentional effect* of restraining competition.

Vertical resale price fixing agreements and tender collusion are strictly prohibited under Draft 10. Significantly, other agreements in restraint of competition are prohibited *only* where the participating parties have a combined market share of 30% or more of the relevant market. Agreements in restraint of competition between parties' with less than 30% combined market share are not prohibited under Draft 10 even if the agreements do have the effect of substantially restraining competition. The omission of the "substantial restraint of competition" test is inconsistent with international competition principles.

An exemption may be granted for a prohibited agreement in restraint of competition if the agreement satisfies one of the following very broad criteria aimed at reducing costs or benefiting consumers:

- > Rationalizes an organizational structure or a business process, raising the business efficiency of the enterprises which are parties to the agreement;
- > Promotes technical or economic progress, improving the quality of goods and services;
- > Promotes uniform applicability of quality standards and technical ratings of certain types of products;
- > Unifies conditions on trading, delivery of goods and payment but does not relate to price or any pricing factors;
- > Increases the competitiveness of medium and small sized enterprises;⁶
- > Increases the competitiveness of Vietnamese enterprises in the international market.

Applications for exemption for prohibited agreements in restraint of competition are evaluated and decided by the State competition body. Exemptions for prohibited agreements in restraint of competition may only be granted for a definite duration.

3. Abuse of dominant market position or monopoly position

Draft 10 retains the "substantial restraint of competition" test with respect to abuse of dominant market position by a single enterprise. A single enterprise will be deemed to be in a dominant market position if such enterprise has a market share of 30% or more in the relevant market *or* is capable of substantially restraining competition.

Draft 10 also provides for a group of enterprises to be deemed to be in a dominant market position, as follows:

- > Two enterprises will be deemed to be in a dominant position in the relevant market if such two enterprises have a market share of 50% or more in the relevant market and act together in order to restrain competition substantially.

⁵ See use of "agreements to [achieve result]".

⁶ *Medium and small sized enterprise* is not defined in the Competition Law. Under Decree 90-2002-ND-CP, to qualify as a medium and small sized enterprise, the total capital of an enterprise must not exceed VND10 billion and the number of its employees must not exceed 300.

- > Three enterprises will be deemed to be in a dominant position in the relevant market if such three enterprises have a market share of 65% or more in the relevant market and act together in order to restrain competition substantially.
- > Four enterprises will be deemed to be in a dominant position in the relevant market if such four enterprises have a market share of 75% or more in the relevant market and act together in order to restrain competition substantially.

From the use of "act together" in the above, it appears that only parallel abuses carried out by all members of a dominant group are prohibited; individual abuses of one member of a dominant group will not be prohibited unless that member is individually dominant.

Any enterprise or group of enterprises in a dominant market position is strictly prohibited from:

- > Selling goods or providing services below production cost of the goods or services aimed at excluding competitors;
- > Fixing an unreasonable selling or purchasing price causing loss to customers;
- > Restraining production, distribution, limiting the market, or impeding technical development causing loss to customers;
- > Applying different commercial conditions to the same transactions with different enterprises, thereby creating a competitive disadvantage;
- > Imposing conditions on other enterprises signing contracts for the purchase and sale of goods and services, or forcing other enterprises to agree to obligations which are not directly related to the subject matter of the contract;
- > Preventing market entry by new competitors.

An enterprise will be deemed to be in a monopoly position in the relevant market if there are no other enterprises competing in the goods and services in which the former enterprise conducts business. Any enterprise in a monopoly market position is strictly prohibited from carrying out the above prohibited practices and prohibited from imposing disadvantageous conditions on customers and from unilaterally changing or rescinding a signed contract without legitimate reason.

No exemptions for the above prohibited practices are available.

4. Economic concentration

Under Draft 10, the term "economic concentration" comprises merger, consolidation, acquisition, joint venture, and other (undefined) forms of economic concentration aimed at controlling or governing the activities of other enterprises.

Of note:

- > "Acquisition" is defined as "purchase by one enterprise ... of all or part of the assets and shares in another enterprise ... *sufficient to control or govern the activities of one or all of the trades of the acquired enterprise*".
- > Only joint ventures between two or more Vietnamese enterprises (including foreign invested enterprises) are subject to the Competition Law. Joint ventures between a Vietnamese enterprise and an offshore foreign investor are *not* intended to be subject to the Competition Law.

Any economic concentration in which the participating parties have a combined market share above 50% is prohibited unless:

- > The economic concentration results in a medium or small sized enterprise; or

- > An exemption is granted.

Exemptions for prohibited economic concentrations may be granted in the following cases only:

- > One or more of the parties to the economic concentration is at risk of being dissolved or becoming insolvent (evaluated and decided by the State competition body); or
- > The economic concentration has the effect of extension of export or contributing to socio-economic development, or technical progress (evaluated and decided by the Prime Minister).

Exemptions for prohibited economic concentrations are granted for an indefinite duration.

Any economic concentration where the participating parties have a combined market share of over 30% up to 50% must be notified to the State competition body 30 days in advance, except where the result of the economic concentration is a medium or small sized enterprise⁷. The State competition body must confirm in writing whether the proposed economic concentration can proceed without application for exemption or requires application for exemption. At this notification stage, the State competition body is not entitled to exercise any *discretion* - its role is simply to confirm how the proposed economic concentration may proceed in accordance with the provisions of the Competition Law. Failing any response by the State competition body within the prescribed time-limit, the proposed economic concentration is automatically deemed to be permitted to proceed without application for exemption.

Where the parties participating in an economic concentration have a combined market share of less than 30%, they are not subject to any exemption or notification requirements.

As noted earlier, regulation of economic concentrations is understood to not be a high priority of the Government. This is reflected in the high percentage market share threshold of 50% for economic concentrations to require exemption, which is understood to have been deliberately adopted in order to *encourage* mergers and consolidations of Vietnamese enterprises so that they are in a better position to compete in the global market. The 50% threshold was reportedly criticized by National Assembly delegates at the May-June 2004 Session as still preventing desirable mergers and consolidations of Vietnamese enterprises.

5. Acts of unhealthy competition

Draft 10 prohibits the following acts of unhealthy competition: falsification of commercial instructions; infringement of business secrets; bribery, inducement or coercion in business; defamation of another enterprise; causing disruption of business activities of another enterprise; advertisement and promotion aimed at unhealthy competition; discrimination within an association; and illegal multi-level selling.

6. Exemption applications

Exemption applications are submitted to the State competition body. An application fee is payable.

Decisions on exemptions (either permitting or refusing an exemption) made by the State competition body must be issued within 60 days of receipt of a proper application file. In complex cases (undefined), this time-limit may be extended, but no more than three times, and for no more than 30 days on each occasion. Decisions on exemptions made by the Prime Minister must be issued within 90 days, or 180 days in complex cases (undefined) of receipt of a proper application file.

Exemption decisions must be issued in writing, recording the names and addresses of the parties permitted to carry out the competitive practice; the contents of the permitted practice; the duration of effectiveness of the decision, any conditions applicable and the obligations of the parties.

Decisions on exemption must be publicized by the State competition body.

7 This exception is a new addition in Draft 10.

7. Complaints and investigations

Any organization or individual believing their rights and interests have been infringed by a breach of the Competition Law has the right to lodge a complaint with the State competition body. Draft 10 now prescribes a 3 year limitation period for lodging a complaint about an alleged anti-competitive practice.⁸

A fee for dealing with a complaint is payable in advance to the State Competition Body.

Upon receipt of a complaint or on its own initiative, the head of the State competition body will issue a decision to conduct a preliminary investigation into the competitive practice.

An investigator will be appointed by the head of the State competition body. For the first time, Draft 10 stipulates the standards that investigators must satisfy; they must be politically astute, have good ethics and are honest and objective; they must have a bachelor degree in law or a bachelor or higher degree in economics/finance; and they must be able to perform an investigation.

The preliminary investigation must be conducted within 30 days of the date of the preliminary investigation decision. The investigator must make a recommendation to the head of the State competition body as to whether to conduct an official investigation or to suspend the investigation.

Where the preliminary investigation indicates the existence of a breach of the Competition Law, an official investigation will be conducted. The length of an official investigation will vary depending on the competitive practice under investigation:

- > for unhealthy competitive practices, 90 days (or up to 150 days, where necessary);
- > for agreements in restraint of competition, abuses of dominant or monopoly market position or concentrations of economic power, 180 days (extendable where necessary, for no more than 2 times, and for not more than 90 days on each occasion).

Investigators' powers include to recommend that the head of the State competition body impose administrative preventive measures at this stage. Where necessary, the investigator may recommend to the head of the State competition body to request local authorities, police authorities and other State bodies to co-ordinate and support an the investigative process. Investigators' obligations include to maintain the confidentiality of the business of enterprises.

Any party under investigation has the following rights: to know about the evidence brought against it and to lead its own evidence; to participate in investigative sessions; to be represented by a lawyer or other person in proceedings; to request attendance and testimony of witnesses; and to propose that the State competition body seek an expert opinion. In addition, complainants also have the right to request the head of the State competition body to apply administrative preventive measures relating to the competitive practice complained of. Any party under investigation and any complainant has the obligation to provide fully and promptly the necessary evidence concerning their claims, to attend when summonsed by the Competition Council, and to implement any decision of the Competition Council.⁹

Minutes of investigation must be prepared. The investigator must read such minutes out to the party(ies) under investigation before they all sign them. If a party under investigation refuses to sign the minutes, the reasons for such refusal must be recorded in the minutes.

The head of the State competition body must send an official investigation report together with the case file to the Competition Council.

If the investigator identifies indications of a criminal offence in the competitive practice, the investigator must immediately recommend to the head of the State Competition Body to consider and forward the file

⁸ Draft 9 had prescribed a 5 year limitation period. Draft 8.3 had omitted any limitation period. Draft 8.2 had provided for a 3 year limitation period.

⁹ These rights and obligations extend across all competition legal proceedings.

to the authorized criminal prosecution body.¹⁰

8. Competition Council

Draft 10 provides for a permanent Competition Council to be established pursuant to a Prime Ministerial Decision. The Competition Council will consist of at least 7 members appointed (and removed) by the Prime Minister on the proposal of the Minister of Trade. One member will be Council Chairman. The term of office of a member of the Competition Council is 5 years (renewable).

Upon receipt of an official investigation report on a specific competition case, the Competition Council will establish a "council to deal with the case", consisting of at least 5 of members of the Competition Council, one of whom will be the chairman.

Within 30 days of receipt of an investigation report, the council must issue in writing one of the following decisions by majority vote:

- > Stay of resolution of the case;
- > Return of case for additional investigation;
- > Decision to hold an investigative hearing, where there is sufficient evidence of a breach and the offending competitive practice has not been voluntarily terminated.

The decision to hold a hearing must specify, inter alia, the specific articles and clauses of the Competition Law considered to be breached and whether the hearing is to be held in public or in camera (hearings will be held in public unless the case concerns national security or business secrets). The council must conduct a hearing within 15 days of its decision.

After hearing argument from all interested parties and after deliberation, the council will reach a decision on how to deal with the case. Decision will be passed by majority vote by secret ballot, with the chairman having the casting vote. Its decision must contain: a summary of the facts of the case; an analysis of the case; and the conclusion of the council on how to deal with the case.

A competition case may be dealt with in the following ways:

- > Warning;
- > Fine up to 10% of the total turnover of the financial year preceding the year in which the prohibited anti-competitive practice was conducted;
- > Revocation of business registration certificate or right to use a practising license or certificate;
- > Confiscation of exhibits and facilities used for the breach of the Competition Law; and/or
- > One or more of the following compulsory measures: re-structure of an enterprise which abuses its dominant market position; division or separation of enterprises which merged or consolidated; compulsory re-sale of that part of an enterprise which was acquired; public correction of false information; removal of illegal terms and conditions from a contract or business transaction; other measures necessary to remedy the effects of restraint on competition caused by the practice in breach.

Compensation may also be payable.

The decision on how to deal with a competition case will become effective 30¹¹ days after its signing, unless an appeal is instituted by a concerned party within that time in the economic court of Hanoi or HCMC. This is a new and welcome provision in Draft 10.

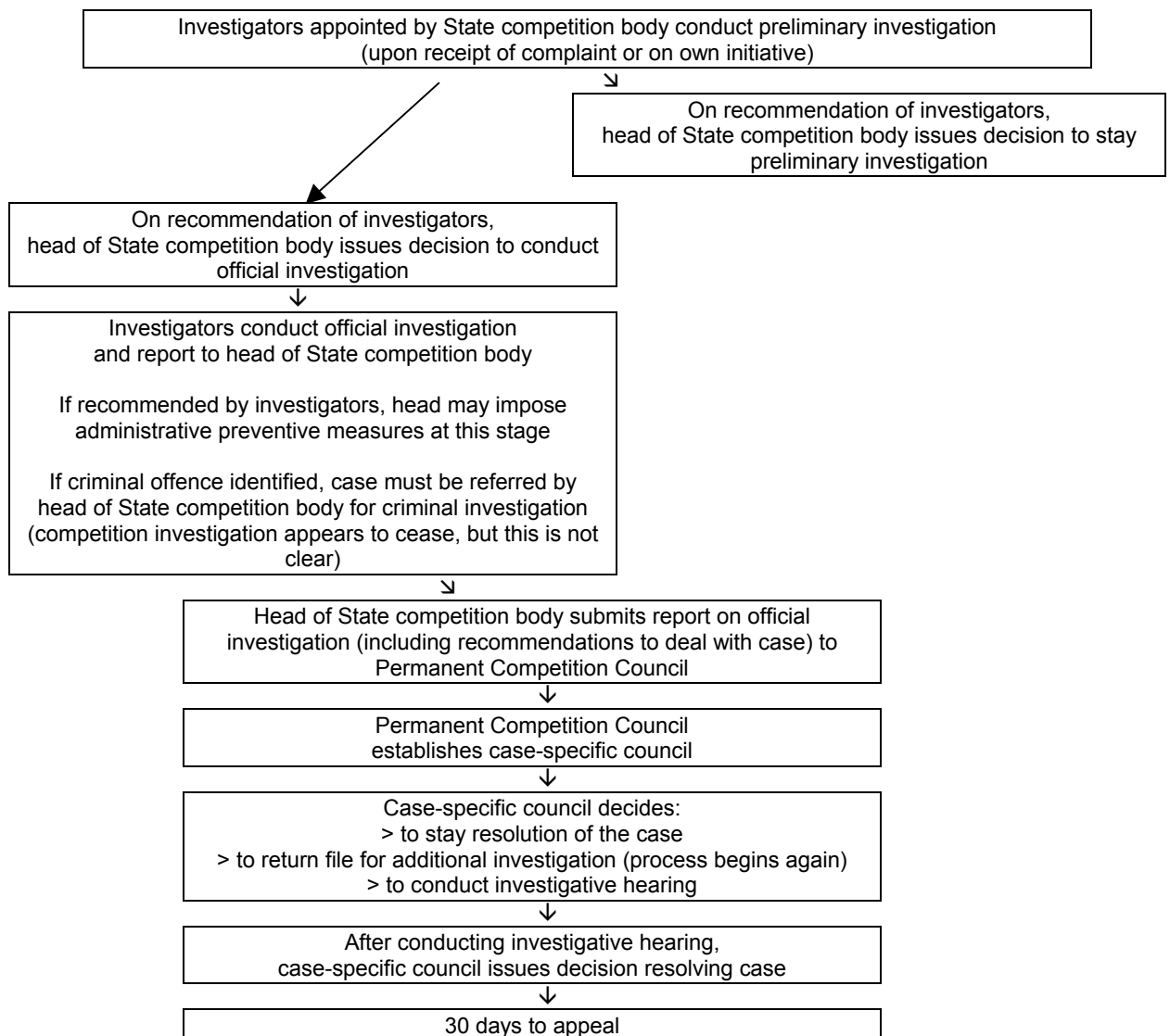
10 The Competition Law does not indicate whether a matter referred for criminal prosecution will also be forwarded to the Competition Council for a hearing and decision under the Competition Law.

11 15 days in Draft 8.3.

In the absence of an appeal, if one of the parties fails to execute voluntarily the decision within 30 days of its effectiveness, Draft 10 now entitles the judgment creditor to lodge a request with the competent State administrative body for enforcement of the decision. If the decision resolving the competition case relates to assets of a judgment debtor, the judgment creditor is entitled to request the judgment execution office at the provincial level where the judgment creditor has its headquarters or resides or where the assets of the judgment debtor are located to execute the decision dealing with the competition case.

Draft 10 also empowers the Competition Council to report its opinion on a case to the body with jurisdiction to decide application of measures for dealing with cases in accordance with the law on anti-dumping of imported goods, the law on self-protective measures, and the law on measures against subsidies in international trade.

9. Flowchart: Procedure for dealing with competition cases



>>> For a full copy of our Competition Law Update July 2004, feel free to contact maureen.mclaughlin@phillipsfox.com

2.3 Status of Vietnam's WTO Accession

At a briefing held in Ho Chi Minh City on 6 July 2004, an official from the Australian Embassy noted:

- > Australia supports the accession of Vietnam to the WTO "on appropriate terms". This means Australia will support Vietnam's application provided that the tariffs on goods and services and other matters are in accordance with what Australia believes are fair and appropriate.
- > Countries fight to get concessions on goods and services, but not all countries value goods and services the same way (eg, Australia may want concessions on certain products that are of no interest to the United States and visa versa). However, once Vietnam is in the WTO, all bilateral concessions become applicable to all WTO members; so the bilateral negotiations are important. Vietnam is currently in bilateral negotiations with 15 members of the WTO and its market access commitments are considered payment for the entry ticket into the WTO.
- > WTO accession steps:
 1. Vietnam applied to join the WTO in 1995.
 2. Vietnam provided the WTO Working Party with a memorandum of its foreign trade regime in September 1996 (it did not provide a copy of its applied tariff schedule until 2003).
 3. Members, including Australia, asked questions about Vietnam's trade regime and how it intends to adjust its trade policies and practices to conform to WTO rules.
 4. Replies to the questions were received and the first meeting of the Working Party was scheduled.
 5. This process now has been repeated 8 times with the most recent Working Party meeting held in June 2004. It was agreed at that meeting that work should commence on a draft of the Working Party Report. Once finalized, this Report will be submitted to the WTO General Council, together with schedules of commitments on tariffs and services, and a protocol of accession. A two-thirds majority vote of the General Council is required to approve WTO membership.
 6. Once WTO membership is approved by the General Council, Vietnam must complete its domestic ratification procedures (this took 1 year for the US-Vietnam Bilateral Trade Agreement).
 7. Thirty days after domestic ratification, Vietnam would become a member of the WTO.
- > ASEAN countries will enjoy lower tariff rates than WTO members once Vietnam joins the WTO. Regional economic organizations, such as ASEAN through its free trade agreement (AFTA), are an exception to the equal treatment of members of the WTO. The only other exception is for bordering countries.

Phillips Fox notes that, given the timeframe for the above steps to occur, Vietnam's plan for full WTO accession in 2005 is unlikely. A June 2004 report by the WTO on Vietnam's WTO membership negotiations (http://www.wto.org/english/news_e/news04_e/acc_vietnam_15june04_e.htm) states that as Vietnam's draft Working Party Report (to be drafted in October or November 2004) won't be discussed by the Working Party until its December 2004 meeting, "Vietnam is not going to achieve its earlier ambition to join by 1 January 2005." The report goes on to quote Vietnam's Trade Minister, Luong Van Tu, as speaking only of Vietnam joining WTO "as soon as possible".

Part 3 Did You Know?

3.1 National Assembly Update

Following on immediately from the National Assembly's May-June Session (which concluded on 15 June 2004), the Standing Committee of the National Assembly ("NASC") has already commenced preparations for the October-November Session (expected to open around the last week of October).

On 17 July the NASC commenced a 4 day meeting to plan for the October-November Session at which the National Assembly is scheduled to pass the following laws: Law on Electricity; Law on Competition (see [Part 2.2](#) above); Law on Promulgation of Legal Instruments by People's Councils and People's Committees; Law on Amendment of Law on Publications; Law on Protection and Development of Forests; and Law on National Security. Drafts of these laws were considered by the NASC and will now be redrafted before resubmission to the NASC for promulgation at the October-November Session.

The NASC also considered drafts of laws which are scheduled to be submitted for initial consideration by the National Assembly at the October-November Session, including:

- > Maritime Code of Vietnam (Amended). Whether the current provisions conferring Vietnamese ships priority in transporting cargo, passengers and luggage between Vietnamese seaports should be retained or abolished was debated. Most delegates supported abolition. The proposed abolition of a port director's right to arrest a ship and the proposed conferral of this power on courts only was criticized by many delegates. Delegates favoured retaining a port director's right to arrest a ship in cases of smuggling and invasion of Vietnamese territorial waters. Uncertainty in the draft Code as to which ships can register Vietnamese nationality was also discussed. The Deputy Chairman of the National Assembly has directed the Ministry of Transport and Communications to improve the draft Code before submission the October-November Session. (Vietnamnet 20 July)
- > Law on Pharmacy. Although up to its 21st draft, delegates did not consider the draft ready for submission to the October-November Session. The draft was criticized as being too general in parts, with too many important issues being left to the Government to regulate, such as conditions to conduct business, and too detailed in other parts, such as clinical testing of medicines. The proposed scope of the Law (regulation of registration and circulation of medicines; conduct of business in medicines; prescribing and use of medicines; supply of medicines; information about and advertising of medicines; clinical testing of medicines; administration of addictive and psychiatric drugs; and quality standards) was criticized as omitting "manufacture of medicines" and failing to address two major issues of drug technology and State administration of medicine in a market economy. Again, the NASC concluded its debate by directing the drafting committee to improve the quality of the draft and seek assistance from the Ministry of Justice to do so. (VNExpress21July)
- > Law on Railways. The majority of NASC delegates supported private investment from all economic sectors in the railways transportation business sector, in particular railways infrastructure, recognizing that infrastructure construction requires large investment, with high maintenance costs and difficult capital recovery, and that private investment reduces the burden on the State Budget. International experience of well-managed and profitable privately invested railways was considered. However, the Deputy Chairman of the National Assembly acknowledged that the Government was yet to decide the schedule for its policy of diversifying ownership of and separating out management of infrastructure used for railways transportation business. (VNExpress 20 July)

The NASC also considered the draft Ordinance on Anti-Subsidies, which will create a legal framework for application of measures to protect domestic manufacturing industries when importation of subsidized foreign goods into Vietnam causes or threatens to cause substantial loss to a domestic manufacturing industry. The draft regulates 4 forms of subsidy which is defined as "financial assistance by a Government or Government body to an organization or individual which thereby derives a benefit" and provides for 2 anti-subsidy measures, namely an anti-subsidy tax and an undertaking to be given to the competent Vietnamese body by the foreign Government or by the subsidized organization or individual. Apparently, there are still differing opinions as to whether or not the Ordinance on Anti-Subsidies should be issued at all - some interests argue that there are benefits to consumers when subsidized foreign goods are sold cheaply in Vietnam.

As an indication of the mountainous task facing the National Assembly, its deputy chairman (speaking at a seminar organized by the Laws Projects Working Committee of the Office of the National Assembly, which opened on 12 July) estimated that Vietnam only has about 150-170 of the 500 laws it needs and that its annual rate of 7 new laws and ordinances has to increase five-ten fold.

3.2 Residential Housing Market

A Plan for Residential Housing to 2020 was approved by the Prime Minister on 6 May 2004 under Decision 76-2004-QD-TTg and became effective as of 2 June 2004. According to the Decision 76 Plan, Vietnam now has a goal for each urban citizen to have 15m² of residential floor space by 2010 and 20m² by 2020. All economic sectors (including foreign investment) are encouraged to invest in development of urban residential housing. However, there is no mention of whether foreign investment in this sector will be made any easier. Currently, although foreign investors may invest in all investment forms (ie business co-operation, joint venture enterprise or 100% foreign owned enterprise) to develop residential housing for sale, licensing is subject to Prime Ministerial approval, and implementing regulations for such investment projects have not yet been issued. Under Decision 76, the Ministry of Planning and Investment is required to coordinate with other agencies to research policies for a new law that will encourage foreign investment in housing development. This appears to acknowledge the failure of Decree 71-2001-ND-CP of the Government dated 5 October 2001 on Incentives for Investment in Residential Housing Construction. Decision 76 also welcomes international cooperation in order to acquire experience on master planning, architecture and project management. Notably, the Prime Minister emphasizes the importance of developing apartments and the need to restrict and eventually prohibit allocation of land individually for building residential housing in urban areas. The Ministry of Construction has been assigned to draft a Law on Residential Housing to be promulgated by the National Assembly in 2005.

3.3 Land Clearance and Compensation

A decree implementing the new Land Law (effective as of 1 July 2004) is expected to be passed soon. The Ministry of Natural Resources and Environment ("MoNRE") is currently collating the opinions of ministries and Government bodies on its latest draft. Investors are looking to the land decree to resolve some of the serious land issues facing them. One of the most important issues is who will pay for site clearance and compensation.

According to Article 39 of the draft Decree, the State is responsible for compensating and resettling land users when their land is cleared in the name of national defence, public security, or the interest of the country as a whole. Article 40 provides for State responsibility for *carrying out land recovery* for use for objectives of economic development in cases of investment in construction of industrial zones, high-tech

zones, economic zones and large investment projects as stipulated by the Government. (The scope of "large investment projects" is not yet settled but may include "national tourist areas, Group A projects, ODA funded projects, and 100% foreign owned projects" based on discussions at the Government's regular meeting in June). Article 40 is silent on responsibility for compensation and resettlement.

Ambiguity arises in Article 41.2 which states: "The State shall recover land, *pay compensation*, conduct site clearance and allocate land to investors for implementation of projects in the case where such investment projects have been approved by the competent State body." This broad provision suggests that the State, rather than the investor, will be responsible for compensation.

Our enquiries with an official from the department of public assets management of the Ministry of Finance (in charge of drafting the provisions relating to finance issues in the Land Law) have confirmed that *investors*, not the State, are responsible to pay compensation on site clearance. However, investors do not control the process - the State will arrange compensation on behalf of the investor and then the investor must reimburse the State.

However, investors should check the policy of the city/province where their investment is to be made. Some cities/provinces have their own incentive policies to attract investors to their locality, such as HCMC and Danang.

Note: Pending issuance of the land decree, the MoNRE has provided some provisional guidelines for implementation of a number of articles of the Land Law in its Official Letter 2162-BTNMT-DD dated 2 July 2004. Of note, the current form of land use right certificate may continue to be used until 30 September 2004, with the new form to be used as from 1 October 2004.

3.4 Branch offices of Foreign Tourism Companies

Foreign tourism companies have been "permitted" to open branch offices in Vietnam since Decree 45-2000-ND-CP of the Government dated 6 September 2000 came into effect on 1 October 2000. But not one branch office license has been issued yet. Why? The simple reason is that there is no list specifically regulating activities of branch offices in tourism. Decree 45 only provides for a list for branch offices in trading. Article IV.2(b) of Joint Circular 20-2000-TTLT-BTM-TCDL of the Ministry of Trade and the General Department of Tourism dated 20 October 2000 states that the scope of activities of branch offices in tourism will be regulated specifically in a list from time to time. Almost 4 years later, no such list has been issued and, as a result, no branch office in tourism has been licensed. Another case of the law appearing to confer rights that are not recognised in practice.

3.5 Copyright Protection for Foreign Literary and Artistic Works

Vietnam's President signed the Berne Convention for Protection of Literary and Artistic Works on 7 June 2004. The Berne Convention will become effective in Vietnam from October 2004. Vietnam has been party to the Convention Establishing the World Intellectual Property Organization since 1976 and is already party to the Paris Convention for Protection of Industrial Property, the Madrid Agreement on International Registration of Marks, and the Patent Cooperation Treaty. Vietnam also has bilateral intellectual property protection agreements with the EU, Switzerland and the US. But the Berne Convention is Vietnam's first multilateral agreement on copyright. Under the Berne Convention, Vietnam must protect the copyright reservations for literary and artistic works from 155 other member nations, and will have reciprocal protection for Vietnamese works in those countries. However, whether the Ministry of Culture and Information has the capability and capacity to ensure nationwide protection

of foreign literary and artistic works in Vietnam has long been and remains a fundamental issue to be addressed.

3.6 Securities Market - Update on Hanoi Securities Trading Centre

The official opening of the Hanoi Securities Trading Centre ("STC") has been postponed until 2005. Originally planned to be opened in the third quarter of 2004 (as reported in the June 2004 Issue of Vietnam Legal Update), the Hanoi STC will operate as an over-the-counter market for small- and medium-sized enterprises that are not qualified to be listed on the HCMC STC. To list on the Hanoi STC, companies will require registered capital ranging from VND5-30 billion, to have been profitable for the last 2 years and to be willing to publicize their financial status. The shares of enterprises with capital of more than VND30 billion will be traded at the HCMC STC. The State Securities Commission is aiming to list 10 - 20 companies when the Hanoi STC opens. Reportedly, the following six shareholding companies are currently under consideration to be listed on the Hanoi STC: Thang Long Wine Joint Stock Company, Hanoi Joint Stock Pharmaceutical Company, Viet Ha Co., Hasinco, Hanoi Pharmaceutical and Medical Equipment Co. and October 10 Textile Company. (VDCmedia 14 July) After 4 years in operation, there are currently only 24 companies listed on the HCMC STC.

3.7 Securities Market - New Tax Regime

In an attempt to encourage development of Vietnam's nascent securities market, the Ministry of Finance is expected to issue a comprehensive tax regime for the securities trading sector for the first time in a new circular due in August 2004. The new circular will regulate VAT and corporate income tax ("CIT") for securities investors, securities companies, investment funds and securities brokers, and is expected to provide for:

- an incentive 20% CIT rate for securities companies (8% lower than the standard 28% CIT rate);
- VAT exemption for all businesses involved in the securities sector, from brokers to foreign investment funds;
- CIT exemption for new securities companies and fund management companies for the first 3 profitable years, followed by 50% reduction for 5 years.

Individual securities investors already enjoy exemption from the personal income tax.

3.8 Vietnam Banking Association - Foreign Members

As of 30 July 2004, foreign bank branches, joint venture banks and foreign invested finance companies may become associate members of the Vietnam Banking Association ("VNBA"). The VNBA currently has 38 official members, comprising 5 State owned commercial banks, 32 commercial shareholding banks, and the Shipping Finance Company. The VNBA hopes the participation of foreign banks will see the development of new banking products for customers. Associate foreign VNBA members will not be able to vote for, or stand for election as, leaders of the VNBA but will otherwise be on an equal footing with other VNBA members. The VNBA has recommended to the Ministry of Interior that representative offices of foreign banks should also be admitted to the VNBA. (Lao Dong, 20 July; VNExpress 22 and 30 July)

3.9 Online Business Registration

As of July, business registration applications may be emailed to Provincial Business Registration Offices ("BROs") under Circular 03-2004-TT-BKHDT of the Ministry of Planning and Investment dated 29 June 2004. If an application file is complete and valid, the BRO will advise the applicant by telephone or email, but the time-limit for issuance of a business registration certificate remains the same as if the application was lodged over the counter. The HCMC BRO has been conducting online business registration since 2001, and it now only takes 6 days for businesses to receive a reply with an appointment to call into the HCMC BRO to collect their certificates. In contrast, the Hanoi BRO remains unequipped for business registration to be completed online - applicants may submit data online to the Hanoi BRO but only for checking purposes and must still attend the Hanoi BRO in person to lodge the application.

3.10 Farewell to Craig Thomas



31 July (or July 31, as he would have it) marks Craig Thomas' last day at Phillips Fox. After 4 years of lawyering in our Ho Chi Minh City office, the boy from Alabama is leaving us to join a fast-growing Vietnamese company that is into public relations, movie producing and art galleries. While we will miss Craig for his high quality work and wry humour, it has always been apparent that his horizons stretch well beyond lawyering, and we are glad to see that he is chasing them further. All of us in the Vietnam team in Phillips Fox's Ho Chi Minh City, Hanoi and Melbourne offices appreciate the support and comradery that Craig has shown us. We wish him all the best with his change in direction, and look forward to seeing him at the trendier spots around town.

3.11 Vietnam Laws Online Database - 1 July 2004 Launch

Vietnam Laws Online Database is an online searchable database of English translations of over 2,500 Vietnamese laws relating to foreign investment and beyond.

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

For a free tour of Vietnam Laws Online Database and more details, go to www.vietnamlaws.com

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