



Vietnam Legal Update

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Part 1 Selected New Legal Instruments

1.1 Insurance Offences

Circular 31-2004-TT-BTC of the Ministry of Finance dated 12 April 2004 Providing Guidelines for Implementation of Decree 118-2003-ND-CP of the Government dated 13 October 2003 on Dealing with Administrative Offences in Insurance Business

Following the new Ordinance on Administrative Offences dated 2 July 2002 and its implementing Decree 134-2003-ND-CP of the Government dated 14 November 2003, the Ministry of Finance ("MoF") has provided guidelines for implementation of Decree 118 with respect to:

- jurisdiction to impose penalties;
- application of minimum and maximum levels of penalties;
- procedures for imposition of penalties;
- specific administrative offences in the insurance sector, such as licensing offences, unlawful promotions, and other unlawful conduct; and
- co-ordination between functional bodies in imposition of penalties.

Of note:

- The minimum level in a fine bracket will be applied to a first administrative offence, which was committed unintentionally, and where there are mitigating circumstances. The maximum level will be applied to an offence where there are a number of aggravating circumstances.
- Due to the special nature of insurance business operations, the simple procedure provided for in the Ordinance and Decree 134 of an on-the-spot fine without a written record will not be applied to administrative offences in the insurance sector. Any administrative penalty in the insurance sector must be based on minutes prepared by the competent body and the authorized person in the form and with the contents stipulated by law.
- Penalty decisions must be issued within the following time-limits: 10 days from the date of the minutes, in simple cases; 30 days, in complicated cases (with power to extend a further 30 days). These time-limits do not apply to decisions on application of remedial measures or to decisions on confiscation of evidence prohibited from circulation.
- *Conducting unlawful promotions* is defined as using promotional means prohibited by the *Commercial Law* and other regulations, including:
 - Promoting insurance products not yet registered or promulgated and approved by the MoF;
 - Conducting promotions which are untruthful or which cause misunderstandings about insurance services in order to deceive customers;
 - Conducting promotions which have an adverse effect on landscape or environment;
 - Promising gifts or prizes but failing to provide them or providing them other than as promised.
- *Illegally compelling a person to sign a contract of insurance* is defined as an agency, organization, enterprise or individual using its influence, administrative means or some other pressure to force a person needing insurance to insure with a certain insurer or to force an insurer to accept insurance or re-insurance broking services against its will.

Under Decree 118, insurance businesses may be fined up to VND20 million for unlawful competitive acts and up to VND5 million for compelling persons to buy insurance.

Circular 31 will be effective as of early May 2004.

1.2 High-Tech Zones - Incentives

Decision 53-2004-QD-TTg of the Government dated 5 April 2004 on a Number of Policies for Investment Incentives in High-Tech Zones

In light of the new Regulations on High-Tech Zones ("HTZs") issued under Decree 99-2003-ND-CP of the Government dated 28 August 2003 (reviewed in Part 1.4 of the September 2003 Issue of Vietnam Legal Update) and the various land, corporate income tax ("CIT") and personal income tax ("PIT") reforms introduced in 2004, the Government has revised the preferential treatment available to domestic and foreign investors in HTZs and to the Vietnamese and foreign individuals working for investment projects in HTZs, as follows:

CIT: Investors are entitled to CIT rate of 10% for the whole duration of project implementation; and to CIT exemption for 4 years as from when they have taxable income; and to 50% CIT reduction for subsequent 9 years.

PIT: Vietnamese individuals (including overseas Vietnamese) are entitled to PIT exemption/reduction such that their PIT obligations are equal to those of foreign individuals with the same level of income.

Land use: An uniform land leasing price will apply to domestic and foreign investors in HTZs. Investors are permitted to mortgage land use rights and assets attached to land during the term of lease or sub-lease of land to credit institutions operating in Vietnam in accordance with law. Investors implementing a project on research and development of technology or on high level skills training in science and technology will be exempt from land rent.

Credit: Domestic investors in manufacturing in a HTZ will be considered by the Development Assistance Fund for medium or long term credit with a preferential interest rate, for a loan guarantee, and for assistance with interest after the investment. Any investor will be entitled to State preferences regarding credit assistance for export when it directly exports products; and the regime on export awards shall apply to such investors.

Visas: Foreign individuals and overseas Vietnamese investing or working in HTZs and members of their families are entitled to multiple entry visas with a term compatible with the duration of their work and operation in the HTZ.

Housing: Favourable conditions will be created for all investors and workers in HTZs with respect to their residence and renting/purchasing houses in HTZs.

In addition, uniform prices for public services will apply to domestic and foreign investors and workers in HTZs. Investors in designated "specially important projects" may be entitled to additional preferential treatment.

Decision 53 is effective as of 1 May 2004.

1.3 Business Registration

Decree 109-2004-ND-CP of the Government dated 2 April 2004 on Business Registration

More than 4 years after the Law on Enterprises and its implementing Decree 02-2000-ND-CP of the Government dated 3 February 2000 on Business Registration became effective and radically reformed the Vietnamese business environment, the Government has, for the first time, revised the duties and powers of business registration offices ("BROs") and the rights and duties of organizations and individuals registering their businesses.

Of note:

- A separate District BRO will now only be established if considered necessary by the chairman of the provincial people's committee due to the specific requirements of business registration work in the district. (Of interest, an earlier draft of Decree 109 had provided for District BROs to only be established where there were over 500 individual household businesses.) If no separate District BRO is established, the duties of business registration will be performed by the planning and financial office or the economic office (which shall be known as the District BRO).
- The grounds for revocation of business registration certificates by Provincial BROs are now stipulated in Decree 109 (previously, incorporated by reference from the Law on Enterprises). The grounds for revocation of business registration certificates by District BROs have been revised. Now, business registration certificates will be revoked upon failure to commence business within 60 (previously 30) days from the date of issuance of the certificate or upon cessation of business for 60 (again, previously 30) days without informing the District BRO, as well the other 2 previous grounds of relocation of business to another district or conducting prohibited lines of business.
- The Ministry of Planning and Investment's former duty to publish bulletins on enterprises in order to disseminate news on the establishment, dissolution and bankruptcy of enterprises and on the alteration of business registration of enterprises and other legal information relating to business has been replaced by the new duties to supervise and inspect business registration work, to check legal instruments on business registration and identify any which are ultra vires or contrary to the *Law on Enterprises* or Decree 109, and to resolve such matters. (Of interest, an earlier draft of Decree 109 had provided for the Ministry of Planning and Investment to also have the following new duties and powers: to issue criteria for officials involved in business registration; to request Provincial BROs or provincial people's committees to remedy omissions or breaches of the Law on Enterprises in relation to business registration; to establish its own organizational structure specialized in performing duties in relation to business registration.)
- Names of businesses are now subject to stricter regulation. The mandatory contents of the name of any enterprise are now prescribed. There are specific guidelines on the cases in which a business name will be deemed to cause confusion with the name of another enterprise, on names in foreign languages and on other matters relevant to naming of enterprises.
- Decree 109 includes specific provisions on recording changes in the members/shareholders of a company. BROs will not register changes in founding shareholders - this must be recorded in the shareholders register. Foreign shareholders may only be registered in the shareholders register if the total aggregate foreign shareholdings does not exceed 30% of the total number of shares which the company is entitled to issue.
- Individuals and households may now register business in the form of sole traders (individual household businesses) provided that they do not employ more than 10 employees and comply with the other previous restrictions. A sole trader must convert into an enterprise if it employs more than 10 employees or has more than one trading place. As previously, sole traders being street vendors and the like are not required to register their business.

As before:

- Ministries, Government bodies and provincial and municipal people's committees are expressly prohibited from promulgating any regulations on business registration for specific application to their own branches and localities.
- BROs are expressly prohibited from seeking bribes or causing trouble to organizations and individuals

while receiving application files and resolving business registration or changes in registered items.

Following on the heels of Decree 109 was Decree 37-2003-ND-CP of the Government dated 10 April 2004 on dealing with administrative offences in the business registration sector.

Decree 109 is effective as of 29 April 2004.

1.4 **EU Banks - VND Deposits**

Decision 327-2004-QD-NHNN of the State Bank of Vietnam dated 1 April 2004 on VND Deposits of Foreign Bank Branches from European Union Countries

Over the last few years, the level at which the various foreign bank branches in Vietnam are permitted to accept VND deposits from Vietnamese legal entities or natural persons with which there is no credit relationship has been the subject of some controversy and has been monitored by businesses, governments and commentators alike as a litmus test for the fair and equal treatment of US and non-US investors in the post-US-Vietnam Bilateral Trade Agreement ("BTA") environment.

According to Vietnam's BTA commitments, US foreign bank branches in Vietnam were allowed to accept up to 50% (as of 10 December 2001) and then 100% (as of 10 December 2002) of their chartered capital in VND deposits from Vietnamese legal entities or natural persons with which there is no credit relationship. This was in stark contrast to non-US foreign bank branches which were still subject to a 25% cap (introduced in 1996).

After considerable pressure, in September 2003, the State Bank of Vietnam ("SBV") issued Decision 1084-2003-QD-NHNN which provided for non-US foreign bank branches to accept non-term and term VND deposits up to 50% of their statutory capital, effective as of 1 October 2003.

This was small comfort as, within little more than 2 months (ie as of 10 December 2003), US banks were allowed to accept up to 250% of their chartered capital in VND deposits.

Now, under Decision 327, the SBV has again raised the cap on VND deposits for non-US foreign bank branches, *but only* for foreign bank branches from European Union ("EU") countries. Effective as of 1 April 2004, an EU foreign bank branch is now allowed to accept VND deposits up to 250% of chartered capital from Vietnamese legal entities and natural persons with which it does not have a credit relationship. It is believed that the equal treatment of EU and US foreign bank branches was granted in exchange for an increase in apparel quotas from the EU of 55 – 70% for 2004 and permission for Vietnam to use leftover quotas from 2003.

So now, only non-EU and non-US foreign bank branches remain subject to the 50% cap.

Of note, the next increase (from 250%) for US foreign bank branches is scheduled in the BTA for 10 December 2004. At that time, the % cap will differ VND deposits from Vietnamese legal entities and for natural persons as follows: up to 400% for legal entities as of 10 December 2004 (and then up to 600% as of 10 December 2005) and up to 350% for natural persons as of 10 December 2004 (and then up to 500% as of 10 December 2005).

1.5 Profits Remittance Tax and CIT Refund for Reinvestment

Circular 26-2004-TT-BTC of the Ministry of Finance dated 31 March 2004 Providing Guidelines on Profits Remittance Tax and Refund of Corporate Income Tax ("CIT") Upon Reinvestment With Respect to Foreign Investors

Following on from the CIT reforms introduced as of 1 January 2004, Circular 26 clarifies that profits remittance tax is not payable in respect of any remittance abroad of lawful income as of 1 January 2004. This extends to post-1 January remittances of profits arising prior to 31 December 2003, which will not be subject to profits remittance tax. However, prior to any remittance of profits abroad, Circular 26 requires foreign investors to prepare a Declaration of Remittance of Profit Overseas on the form in the Appendix issued with Circular 26 and to submit it to the tax office directly managing the enterprise in which such foreign investor invested capital.

Further, Circular 26 clarifies that, as of 1 January 2004, foreign investors using profits and other lawful income from investment activities in Vietnam for reinvestment in a current or new foreign invested project are not entitled to a refund of CIT paid on those reinvested profits.

For foreign invested projects issued a reinvestment license or official letter prior to 1 January 2004 approving the use of profits for reinvestment, CIT refunds will still be available in respect of profits earned up to 31 December 2003 which are reinvested. A refund application must be prepared in accordance with Circular 13-2001-TT-BTC of the Ministry of Finance dated 8 March 2001 (otherwise no longer effective after 1 January 2004) and forwarded to the Ministry of Finance - General Department of Taxation for consideration. Of note, our Hanoi office has been informed by the Foreign Investment Division of the General Department of Taxation that such applications for CIT refunds may be lodged until 30 June 2004.

Circular 26 is effective as of 23 April 2004.

1.6 Personal Income Tax

Ordinance 14-2004-PL-UBTVQH11 of the Standing Committee of the National Assembly dated 24 March 2004 on Amendment of and Addition to a Number of Articles of Ordinance on Income Tax of High Income Earners

Amendments to the 2001 Ordinance on Income Tax of High Income Earners will become effective as of 1 July 2004 and significantly lower the costs of employment of Vietnamese staff.

Reforms include:

- Income tax rates for Vietnamese individuals have been drastically reduced. The income tax threshold has been raised to average monthly income of VND5 million (up from VND3 million). Income tax brackets have been broadened and the number of brackets has been reduced to 5 (from 6). The top tax bracket is now average monthly income of over VND40 million and subject to 40% tax (previously, average monthly income of over VND15 million was subject to 50% tax.) "Additional income tax" of 30% (previously payable on residual income of over VND15 million) has been abolished. Only 75% of the taxable income of singers, circus artistes, dancers, footballers and professional sportsmen and sportswomen is subject to personal income tax (ie 25% of their taxable income is tax-free).

The income tax tariff for Vietnamese individuals is now:

Unit: 1000 dong

<i>Level</i>	<i>Average monthly per capita income</i>	<i>Rate of tax (%)</i>
1	up to 5,000	0
2	over 5,000 up to 15,000	10
3	over 15,000 up to 25,000	20
4	over 25,000 up to 40,000	30
5	over 40,000	40

- Income tax rates for foreigners with average monthly income up to VND80 million remain unchanged. The previous top tax bracket of average monthly income over VND120 million, subject to 50% tax, has been abolished. Now, the top tax bracket is average monthly income of over VND80 million and subject to 40% tax.

The income tax tariff for foreign individuals is now:

Unit: 1000 dong

<i>Level</i>	<i>Average monthly per capita income</i>	<i>Rate of tax (%)</i>
1	up to 8,000	0
2	over 8,000 up to 20,000	10
3	over 20,000 up to 50,000	20
4	over 50,000 up to 80,000	30
5	over 80,000	40

- Significantly, the former tax exemption for income derived in Vietnam of non-resident foreigners remaining in Vietnam for less than 30 days has been abolished. Now there are only 2 categories (down from 3) of foreigners for personal income tax purposes: (1) foreigners in Vietnam for over 183 days and subject to tax tariff and (2) foreigners in Vietnam for less than 183 days and subject to fixed rate of 25%.
- Income derived from scientific or technical services, income derived from the transfer of technology, income from the licensing of rights to use inventions or trademarks, IT services, consultancy or training services or agency services; income from royalties; and broking commissions are now expressly included as forms of regular income subject to income tax (previously, these were categorized as irregular income).
- Gifts or donations in kind sent by overseas residents are no longer included as irregular income subject to income tax.

- Irregular income tax threshold has been raised to VND15 million (from 2 million). Only 2 tax rates now apply to irregular income (down from 6 rates): 5% applies to irregular income derived from transfer of technology; and 10% applies to irregular income from a lottery win.

The following table sets out the cost estimates for Vietnamese staff having a range of monthly net income from USD1,000 to USD10,000:

Unit: USD

<i>Net income</i>	<i>Income tax paid by employer</i>	<i>Medical & social insurance paid by employer</i>	<i>Total gross cost</i>
1	2 = 1 x tax rate	3 = 1 x 17%	4 = 1+2+3
1,000	75.76	170.00	1,245.76
1,500	194.82	255.00	1,949.82
2,000	396.25	340.00	2,736.25
2,500	664.33	425.00	3,589.33
3,000	977.66	510.00	4,487.66
3,500	1,291.00	595.00	5,386.00
4,000	1,604.33	680.00	6,284.33
5,000	2,231.00	850.00	8,081.00
6,000	2,857.66	1,020.00	9,877.66
7,000	3,484.33	1,190.00	11,674.33
8,000	4,111.00	1,360.00	13,471.00
9,000	4,737.66	1,530.00	15,267.66
10,000	5,364.33	1,700.00	17,064.33

Note: The yearly gross cost will be higher than 12 times the monthly gross cost when 13th-month bonus is factored in (with corresponding increase in tax amount payable) as well as at least a half-month salary as a retrenchment allowance for staff working period exceeds 12 months.

Part 2 Features

2.1 New Land Law

The National Assembly passed the new Land Law in November 2003. It comes into effect on 1 July 2004. The new Land Law follows closely the format and content of the "old" Land Law dated 14 July 1993 (as amended 2 December 1998 and 29 June 2001). It includes both substantive improvements and clarifications. But the basic legal framework remains unchanged: land is owned by "all citizens" and administered by the State as "representative owner". The State allocates or leases land to "land users". A raft of new decrees and circulars guiding the implementation of the new Land Law is expected to be issued over the next few months.

This paper summarizes the different rights and obligations that attach to different categories of land users, land use rights and land itself under the new Land Law.

Land users

Land users are categorized as follows:

- domestic organizations;
- family households and individuals;
- a community of citizens;
- religious establishments;
- foreign diplomatic, UN and governmental organizations;
- overseas Vietnamese; and
- "foreign organizations and individuals investing in Vietnam in accordance with the laws on investment" ("foreign investors"), really the foreign invested enterprises in which foreign investors invest.

Land classifications

Land is classified as:

- agriculture land;
- non-agriculture land; or
- unused land.

Each of the first 2 categories has multiple sub-categories, each with its own rules relating to use of the land.

Land use rights

Land use rights may be:

- allocated by the State;
- leased by the State;
- recognized by the State (ie in cases where the State has not formally allocated or leased the land use rights); or
- received from others in accordance with the new Land Law (ie assigned, donated or inherited).

Allocation of land

Land may be allocated to domestic organizations, family households and individuals (including overseas Vietnamese) on either:

- a "stable and long term basis" (meaning for an indefinite duration) for prescribed non-commercial purposes (including residential purposes); or
- a fixed duration basis (for up to 50 years, or 70 years for large projects and projects located in prescribed disadvantaged areas, for land that is used for "non-agricultural production and business purposes").

Allocation of land may be:

- Allocation *without collection of land use fees* - to family households and individuals using the land for agriculture, forestry, aquaculture or salt mining, and to other prescribed domestic organizations for very limited purposes.

As a general rule, entities being allocated land without collection of land use fees are prohibited from dealing with (eg., assigning or mortgaging) the land use rights.

The sole exception is for domestic economic organizations to which the State has allocated land for the purpose of constructing non-State Budget funded works - they have the rights to sell, mortgage, use for guarantee or contribute as capital any assets owned by them on such land.

- Allocation *with collection of land use fees*
 - to family households and individuals using the land for residential purposes, for production or business purposes, or for construction of community buildings for business purposes;
 - to domestic organizations using the land for construction of residences for sale/lease, for production or business purposes, for construction of infrastructure for assignment/lease, for agriculture, forestry, aquaculture or salt mining, or for construction of community buildings for business purposes;
 - to overseas Vietnamese implementing investment projects, including for construction of residences for sale/lease.

Entities being allocated with land with collection of land use fees *where fees are not paid from the State Budget* may, inter alia:

- assign or lease the land use rights and buildings/infrastructure on the land;
- mortgage or use for guarantee the land use rights and buildings/infrastructure on the land to credit institutions in Vietnam as security for loans;
- contribute the land use rights and buildings/infrastructure on the land as capital in business/production co-operations with domestic, overseas Vietnamese and foreign investors.

Entities being allocated with land with collection of land use fees *where fees are paid from the State Budget* are prohibited from dealing with (eg., assigning or mortgaging) the land use rights in the same manner as entities being allocated land without collection of land use fees (as above, there is only one exception to this general rule).

Lease of land

Land may be leased to:

- family households and individuals for agriculture, forestry, aquaculture or mining, for production and business purposes, or for construction of community buildings for business purposes;
- domestic, overseas Vietnamese and foreign investors; and
- foreign diplomatic, UN and governmental organizations for construction of offices.

Foreign investors and foreign diplomatic, UN and governmental organizations may *only* lease land. The other entities above may select allocation of land with collection of land use fees or lease of land, and they may convert from lease to allocation (Article 31).

Again, the duration of any land lease is limited - generally 50 years, or 70 years for large projects and projects located in prescribed disadvantaged areas, or up to 99 years in the case of foreign diplomatic, UN and governmental organizations.

Options for payment of rent for lease of land are:

- *Annual payment of land rent.*

Family households and individuals leasing land for the above purposes have the sole option of annual payment of rent.

Entities leasing land with annual payment of rent may, inter alia:

- mortgage or use as guarantee any assets owned by them attached to the land to credit institutions in Vietnam as security for loans for production or business;
- sell or contribute as capital any assets owned by them attached to the land; and
- sub-lease land on which infrastructure has been completed, in the case of investors in infrastructure construction of industrial, high-tech and economic zones.

If assets are sold to a domestic purchaser, the State will allocate or lease the land to the purchaser; if the purchaser is a foreign investor, the State will lease the land to the purchaser. In both cases, the land must continue to be used for the pre-determined land use purpose.

Economic organizations sub-leasing land in industrial zones will also enjoy the above rights.

- *Lump sum payment of land rent for the whole term of the lease:*

Foreign diplomatic, UN and governmental organizations for construction of offices have the option of annual payment of rent or lump sum payment of rent.

Foreign organizations with diplomatic functions leasing land (irrespective of method of rent payment) have the right to:

- construct works on the land (in accordance with a permit);
- own the works they construct on leased land during the term of the lease;
- any rights provided for in international treaties signed or acceded to by Vietnam; and other rights stipulated in the land lease contract.

Domestic, overseas Vietnamese and foreign investors leasing land to implement investment projects in agriculture, forestry, aquaculture or salt mining, to construct business or production facilities, to construct community buildings for business purposes, to construct infrastructure for assignment/lease, for mineral activities, for production of construction materials and ceramics, or to construct residences *for lease* have the option of annual payment of rent or lump sum payment of rent.

Domestic, overseas Vietnamese and foreign investors leasing land to construct residences *for sale* have the sole option of lump sum payment of rent.

The above entities leasing land with lump sum payment of land rent for the whole term of the lease have the right to:

- assign the land use rights and the assets attached to the land during the term of the lease;
- sub-lease the land use rights and assets during the term of the lease;
- mortgage or use as guarantee the land use rights and assets to credit institutions in Vietnam during the term of the lease; and
- contribute the land use rights and assets as capital during the term of the lease.

These rights are similar to those of domestic organizations that are allocated land with collection of non-State Budget funded land use fees.

If overseas Vietnamese and foreign investors leasing land with lump sum rent payment have been licensed for residential housing sale/lease business, they have the right to sell or lease residential housing "in accordance with the regulations of the Government". The purchasers of residential housing will be issued certificates of land use right. (If overseas Vietnamese and foreign investors which are licensed for residential housing business lease land with annual rent payment of rent, they only have the right to lease out the residential housing.)

Of note, there is no provision for partial pre-payment of land rent after 1 July 2004. However, the new Land Law does make provision for those entities which leased land prior to 1 July 2004 with pre-payment of rent for a number of years of which at least 5 years remain. In particular, economic organizations in that category will have, for the remainder of the term for which rent has been pre-paid, the same rights as entities being allocated with land with collection of land use fees where fees are not paid from the State Budget. If domestic organizations or overseas Vietnamese wish to convert to allocation of land with collection of land use fees, they may do so (foreign investors do not have this option) and the pre-paid rent will be deducted from land use fees - thereafter they will enjoy the rights accompanying land allocation with collection of non-State Budget funded land use fees.

2.2 Common Investment and Company Laws

Massive conceptual reform of Vietnam's investment and company laws is scheduled within 19 months.

Vietnam has recently announced unprecedented reform of the main business laws in these terms:

"To further spur economic growth by creating a more open and level investment climate for foreign, domestic private and State owned enterprises alike, the Government of Vietnam is currently developing two unifying laws for the corporate sector and the investment regime. It is anticipated that the *Common Investment Law* will replace the existing domestic investment promotion law and foreign investment law and that the *Unified Enterprise Law* will be an expanded company law applying to foreign, domestic private and State owned enterprises and possibly cooperatives."

This announcement was made by the newly-established Prime Minister's Research Commission (PMRC) in its 12 April invitation to 26 foreign experts residing in Hanoi to attend a meeting for "opinion sharing" on 16 April 2004.

Bill Magennis of Phillips Fox was one of the attendees and was stunned by the seriousness and determination of PMRC members. In deference to efficiency, most presentations by PMRC members were made in English and supported by Power Point presentations. There was an open discussion in which PMRC members made plain their views of the extensive shortcomings of current legislation and their intention for Vietnam to introduce a single *fully detailed* company law and a single investment law based on best international practice as deployed in market economies.

Is this real? Only time will tell but it is clear that the Prime Minister has selected the best of the best in terms of members for the PMRC and they have been charged with an ambitious task which they have adopted with enthusiasm: As the PMRC says "The timetable for the development of these laws is tight. The new laws are planned to be presented to the National Assembly by the end of 2005 and effective in 2006. We have a big challenge but we need this reform to comply with commitments maturing under the Bilateral Trade Agreement with the USA in 2006 and to gain admission that year to the WTO".

Over the years, since its re-opening to the world in 1989, Vietnam has made many announcements of reform of one kind or another but most have been without any eventual material substance. This time, for the biggest reforms yet contemplated, there seems to be fresh determination and fresh process. Let's hope the process yields delicious fruit. Bill Magennis predicts it will, hopefully leading to equally necessary wholesale reform of the law enforcement system, so that one day he might be able to advise clients on the receiving end of corporate shenanigans that the remedy of injunctive relief is available at the local court.

The PMRC will submit its *Concept Guidelines and Fundamental Contents* to the Prime Minister in May 2004 for approval, before being forwarded to the law drafting committees under the Ministry of Planning and Investment.

General concepts include:

- Respect for the business freedom of enterprises;
- Application of registration system (instead of licensing);
- Removal of "patronage" and other unreasonable conditions contrary to the business freedom principle;
- Respect for enterprise's rights in setting internal management regulations, freedom in negotiation and decision of the enterprise's internal affairs.

Fundamental contents of the *Unified Enterprise Law* include:

- Separate chapter to regulate State owned enterprises. In shareholding companies, equality between State and non-State shareholders, thus protecting minor shareholders. Rights and obligations of the State as owner and the representative of the State's ownership;
- Extension of scope to provide for foreign investors to register in all four business types like their Vietnamese counterparts (limited liability companies, shareholding companies, partnerships and private enterprises);
- Minimize restrictions on foreign invested enterprises, expand investment areas and diversify forms of

- foreign investment appropriately to internationally committed requirements and roadmap, in order to attract more foreign investors, including multinational groups;
- Introduce business registration for foreign investors rather than investment licensing, following the same procedures and regulations as domestic businesses, with some additional stipulations (if necessary). For foreign investors in some special or large-scale business lines, such as oil and gas, mining, banking, insurance, telecommunication, airlines, port construction and training, the investment project appraisal mechanism will be retained, but appraisal will be streamlined and phased out according to committed schedule;
 - Emphasis on self-accountability of enterprises; clarification of what Government is supposed to do for enterprises and what enterprises are supposed to take responsibility for vis-a-vis the Government, clients, partners, local authorities and the social community;
 - Protection of minor shareholders' interests;
 - Removal of "concensus" principle from approval of decisions made by the board of management in foreign invested enterprises.

Fundamental contents of the *Common Investment Law* include:

- Focus on encouragement and protection of investment;
- Covering all domestic investors and all foreign investors;
- Emphasis of preferential policies (exemption/reduction of tax and fees for commodities, land use, profits, import and export, technology transfer) on location, scales of investment, labour and export; level of new and high technology application. Post-investment incentives to be applied extensively, when enterprises have finalized their establishment period and entered the effective business operation period. Preferential treatment to be applied equally for all investors, without discrimination or inequality, and not contradicting international commitments. Current preferential treatment for foreign investors to be continued, thus ensuring an attractive investment environment with high competitiveness in the region.

Postscript: Following the meeting with the PMRC, Bill Magennis has been personally invited to assist the Legal Department of the Ministry of Planning and Investment with the drafting of the Common Investment Law.

2.3 100% Foreign Owned Enterprises - Able to Purchase Shares?

To date, foreign invested enterprises ("FIEs") have only been permitted to engage in the revenue-earning activities stated in (or implied from) their investment licenses. Article 31 of the Law on Foreign Investment dated 12 November 1996 (as amended 9 June 2000) states that FIEs and business co-operation contracts have the right to autonomy in conducting their businesses "in accordance with the objectives stipulated in the investment license".

Recently, however, in its Official Letter 151 dated 11 March 2004, the State Bank of Vietnam ("SBV") has opined that 100% foreign owned enterprises ("100%FOEs") are permitted to purchase shares in joint stock commercial banks ("JSCBs") and earn dividends from such shareholdings, just as domestic companies are so permitted. The reason given by SBV in Official Letter 151 is that 100%FOEs have Vietnamese legal entity status and are considered Vietnamese companies.

It is important to note that, other than Official Letter 151, there is no specific law permitting 100%FOEs (or FIEs in general) to purchase shares of JSCBs or other shareholding companies. And it is curious to note that Official Letter 151 does not recognize the Vietnamese legal entity status of joint venture enterprises and bestow on them this right to purchase shares in JSCBs.

Official Letter 151 refers to Decision 1122 of the SBV dated 4 September 2001 which regulates shareholdings in JSCBs. Under Decision 1122, shares may be purchased by State owned enterprises, State credit institutions, individuals and organizations. Foreign "individuals and organizations" are permitted to purchase shares if they obtain the SBV's approval. Share purchases by foreign individuals and organizations are further specifically regulated under Decision 228 of the SBV dated 2 December 1993. In Official Letter 151, the SBV appears to have deemed that 100%FOEs are not "foreign organizations" because they are established in Vietnam and have legal status as Vietnamese companies. Accordingly, they are permitted to purchase shares in JSCBs under Decision 1122, without reference to Decision 228.

Our informal discussions with an official of the SBV's Department of Banks revealed that Official Letter 151 was initiated by queries from a number of FIEs expressing their interest in purchasing shares in JSCBs. The official went so far as to say that Official Letter 151 can apply to all types of FIE, not just 100%FOEs. However, according to this official, in order for a FIE to purchase shares of JSCBs, it must meet these conditions: (i) the FIE's investment license must permit it to purchase shares and (ii) (if so) its capital as stated in its investment license is sufficient to purchase shares. As discussed above, condition (i) is currently not able to be satisfied by FIEs. However, to the query whether a FIE could apply to amend its investment license to include a provision allowing it to increase its capital to buy shares, the official believed this would be possible.

In its own right, it is questionable whether Official Letter 151 could be relied on to enable FIEs to purchase shares in JSCBs. However, Official Letter 151 appears to be signaling (in a somewhat muddled fashion) a modification of the current restriction on FIEs purchasing shares. According to Decision 109 of the SBV dated 30 January 2004, the SBV is due to issue new regulations on foreign share purchases in shareholding commercial banks (to replace Decision 228) by the end of June 2004 - it is expected that the SBV will take this opportunity to clarify its new policy of FIEs purchasing shares in JSCBs.

Based on a recent newspaper report (VIR 5-11 April), an increase in the current 10% limit on shareholding of any one foreign investor in a JSCB (under Decision 228) is also expected in the new regulations on foreign share purchases in JSCBs. *Abolition* of the 10% limit would be consistent with the abolition of the former limit on shareholdings by any one foreign investor in listed Vietnamese shareholding companies in August 2003 and also the absence of a cap on shareholdings of any one foreign investor in unlisted Vietnamese shareholding companies. However, it is unlikely that the current Decision 228 limit of 30% on *total* foreign shareholdings in a JSCB will be increased at this time.

Part 3 Did You Know?

3.1 National Assembly Update

The May 2004 Session of the National Assembly ("NA") will be held from 11 May to 12 June. The proposed amendments to the Law on Credit Institutions (expected to allow for establishment of 100% foreign owned banks in Vietnam) and the proposed revision of the Law on Business Bankruptcy were approved in principle by the NA Standing Committee at its April session and are expected to be promulgated by the NA at its May Session, along with 5 other scheduled laws.

The Ministry of Trade has now finalized its 3rd draft of the revised Commercial Law and will officially release it at conferences in HCMC on 6 May and in Hanoi on 10 May (according to VNExpress 20 April). The revised Commercial Law is scheduled for initial consideration at the NA's November 2004 Session and for further consideration and promulgation at the May 2005 Session. The revised Commercial Law will provide in principle for foreign investment in the trading and distribution sector.

Other laws in the pipeline in 2004 (according to Decision 51-2004-QD-TTg of the Government dated 31 March 2004 on Implementation of Resolution 34 of the 9th Session of the Executive Committee of the Central Party of Legislature XI dated 3 February 2004) include:

- Guidelines on listing of foreign invested shareholding companies on the securities market (due in second quarter of 2004);
- Amendments to Decision 146 on the percentage of participation by foreign parties in the Vietnamese securities market (due in third quarter of 2004).

Also, the Ministry of Construction has been directed to work with the Ministry of Natural Resources and Environment to commence drafting a Law on Real Estate Business, but no deadline has been scheduled.

Other news is that the Ministry of Planning and Investment is currently drafting new legislation regulating industrial zones and export processing zones.

3.2 WTO Update

Deputy Director General of the WTO, Rufus Yerxa, visited Vietnam from 5 to 8 April 2004. Mr. Yerxa was quoted in the press as noting that there are still 7 or 8 outstanding issues in Vietnam's bid for WTO accession, but did not identify those issues. We understand the outstanding issues to include restrictive trading rights, excessive customs valuations, poor enforcement of intellectual property rights, local content requirements for manufacturers, and access to Vietnam's service sector.

Vietnam last met with the WTO Working Party in December 2003 and hopes to conduct the next round of WTO accession negotiations in May/June, with a new package of materials having started to go to WTO in April.

WTO membership has risen to 147, with the entry of Nepal on 23 April 2004. Vietnam is one of 24 countries currently in the process of negotiation to join WTO. Other countries (arranged by the date of their application) are: Algeria, Russian Federation, Saudi Arabia, Belarus, Ukraine, Sudan, Uzbekistan, Seychelles, Tonga, Kazakhstan, Azerbaijan, Andorra, Laos, Samoa, Lebanon, Bosnia Herzegovina, Bhutan, Cape Verde, Yemen, Serbia and Montenegro, Bahamas, Tajikistan and Ethiopia. Vanuatu has completed negotiations but no further action has been taken since the last meeting of the Working Party on 29 October 2001. Cambodia completed negotiations in 2003 but the process of ratification in Parliament is still pending. (Source: US-Vietnam Trade Council)

3.3 Equitization - Latest Policy

When the Government introduced its equitization policy in 1998, its plan was for the State to divest approximately one third of State owned enterprises ("SOEs"), approximately 5,600, within 3 years.

By the end of 2003, 1,483 equitizations were completed. With respect to SOEs under the control of provincial and city people's committees, 63% of the planned equitizations have occurred. With respect to SOEs under the control of line ministries, 62% of the planned equitizations have occurred. With respect to general corporations which are the most important and largest SOEs and most in need of equitization, only 50% of the planned equitizations have occurred.

The delay in the Government's plan has been caused in part by:

- inconsistent and inappropriate methods of valuation and inadequate guidelines as to valuation of land or trademarks;
- poor financial condition of many SOEs, resulting from many bad debts and requiring Government 'bail out' before equitization;
- individuals within SOEs fearing change and diminution of personal prestige and power.

Resolution 34-NQ-TW of the 9th Session of the Executive Committee of the Central Party of Legislature XI dated 3 February 2004 and Decision 51-2004-QD-TTg of the Prime Minister dated 31 March 2004 on the Government's action program for implementation of Resolution 34 (effective as of 25 April 2004) have signaled a re-affirmation by the Government of its equitization policy and provide guidelines on strengthening equitization of corporations and large SOEs. The focus of the equitization policy on large infrastructure corporations has been restated and re-emphasized.

Of note, Resolution 34 and Decision 51 require the following to occur in the second quarter of 2004:

- (a) the Ministry of Finance ("MoF") and relevant ministries and branches must amend current legislation to guarantee the legal basis for expansion of equitization of large SOEs, specifically in the following industries: electricity, metallurgy, mechanics, chemicals, fertilizer, cement, construction, road transportation, river transportation, air transportation, sea transportation, telecommunications, banking and insurance;
- (b) the Steering Committee for Reform and Development of Enterprises must co-ordinate with the Ministry of Planning and Investment ("MPI") and relevant bodies to submit to the Prime Minister a list of large SOEs to be equitized;
- (c) the MPI must draft amendments to legislation that will enable more categories of SOEs to be equitized on a larger scale and will require share sales and purchases to be publicized to stop "internal equitizations" (akin to management buy-outs);
- (d) the MoF must direct bond issues with respect to one or two large corporations and establish mechanisms for large enterprises, such as Electricity of Vietnam, Cement Corporation, and VNPT, to sell bonds on the market.

Resolution 34 and Decision 51 also require ministries, branches and local authorities to solve remaining problems with respect to equitization on a timely basis. Key personnel of SOEs which resist equitization and SOEs making losses for more than two years will be replaced.

3.4 Foreign Contractor Tax Reforms

In light of the tax reforms introduced as of 1 January 2004, the Ministry of Finance is now drafting a revised circular on foreign contractor tax to replace its current Circular 169-1998-TT-BTC dated 22 December 1998.

With respect to VAT obligations of foreign contractors not having any permanent establishment in Vietnam or having a permanent establishment but not adopting the Vietnamese accounting system, the formula for calculation of VAT payable will remain the added value of the VAT-taxable goods and services multiplied by (x) the VAT rate. And the added value of VAT-taxable goods or services remains equal to the VAT-taxable turnover multiplied by the VAT rate as a percentage (%) of the turnover. However, the table of percentages of taxable turnover for calculation of added value is expected to be revised as follows:

Under Circular 169:		Under revised circular:	
<i>Business line</i>	<i>Added value as % of turnover</i>	<i>Business line</i>	<i>Added value as % of turnover</i>
Trading (including supply of water, foods and supplies being chemical products for petroleum contractors)	10	Trading (distribution and supply of goods, raw materials, supplies, machinery and equipment to the following activities: production, construction and provision of services in Vietnam)	20
Services	50	Services: all types of services (except for transport services), including services provided via permanent establishment & services not provided via permanent establishment	70
Construction and installation <i>with</i> materials and/or machinery and equipment being provided by contractors	30	(a) Construction and installation <i>with</i> supply of materials or machinery & equipment attached to construction works	30 (40)
Construction and installation <i>without</i> materials and/or machinery and equipment being provided; survey, design or supervision	50	(b) Construction and installation <i>without</i> supply of materials or machinery & equipment attached to construction works	
Other production or transportation	25	Transport services; other production	40

With respect to corporate income tax ("CIT") obligations of such foreign contractors, the formula for calculation of CIT will remain taxable income multiplied by (x) the CIT rate as a percentage of taxable turnover (which percentage varies according to the line of business). However, the table of CIT rates as a percentage of taxable turnover is expected to be revised as follows:

Under Circular 169:		Under revised circular:	
<i>Business line</i>	<i>CIT as % of turnover</i>	<i>Business line</i>	<i>CIT as % of turnover</i>
Trading (including supply of water, foods and supplies being chemical products for petroleum contractors)	1	Trading (distribution and supply of goods, raw materials, supplies, machinery and equipment to the following activities: production, construction and provision of services in Vietnam)	2
Services	5	Services: all types of services (except for transport services), of which: - Services provided via permanent establishment: - Services not provided via permanent establishment:	10 25
Production, construction, transportation (including survey, design and supervision)	2	Construction and installation (<i>with or without</i> supply of materials or supply of machinery & equipment attached to construction works)	4
		Transport services; other production	2
Loan interest	10	Loan interest	10
Royalties	10	Income from royalties	10

3.5 Da Nang Investment Incentives

The HCMC People's Committee is not the only people's committee to revise its incentives to foreign investors (its February 2004 regulations on foreign investment incentives were reviewed in the March 2004 Issue of Vietnam Legal Update). The People's Committee of Da Nang ("PC") has revised a number of its incentive policies aimed at encouraging foreign investment, under its Decision 50-2004-QD-UB dated 10 March 2004. Effective as of 25 March and applicable until the end of 2010, incentive policies include:

- Investment licenses will be issued on a "one door" basis at the Da Nang Centre for Promotion of Investment, within 10 working days for projects within the PC's decision-making authority and within 5 working days for projects entitled to investment registration. Application files for projects entitled to investment registration may be lodged via the internet. Investors will be exempt from fees for resolution of investment procedures.
- Regarding site clearance:
 - For projects with implemented capital below USD20 million, the PC will bear 50% of the costs of compensation and site clearance, with the remaining 50% borne by the investor.
 - For projects with implemented capital of USD20 million or more, the PC will bear 100% of the costs of compensation and site clearance, but the investor must advance 50% of such costs which the PC will refund when the project is commissioned. If construction has not commenced or is not on schedule (as provided for in the application file for the investment licence) for between 6 - 12 months after the PC hands over the site to the investor, the PC will be entitled to recover the land and will not refund the 50% advance payment for costs of compensation and site clearance.
- Regarding land rents outside industrial zones (in USD):
 - 4.8/m²/year within city centre (but 6.7/m²/year for commercial/tourism/services sectors);
 - 0.7/m²/year adjacent to city centre (but 1/m²/year for commercial/tourism/services sectors);
 - 0.6/m²/year for coastal areas and areas on the edge of urban areas;
 - 0.02/m²/year for mountain communes.

The above are standard rents which will be adjusted by the co-efficient K from 0.8 to 1.2 based on conditions being the specific position of the investment location. For the Ba Na tourism area and for special projects, the PC will consider and make a specific decision for each project. An investor paying land rent in advance for the whole lease period within one year of hand-over of the site will be entitled to a 30% reduction of the amount of rent payable.

- Regarding land rents inside industrial zones managed by the PC:
 - For manufacturing projects:

<i>Method of payment of land rent</i>	<i>USD/m²/year</i>
Annual payment	0.60
Payment once every 5 years	0.57
Payment once every 10 years	0.54
Payment once every 20 years	0.41
Payment once every 30 years	0.35
One-off Payment for the Whole Term (above 40 years)	0.30

- For business/service projects: 1.4 times the rents in the above table.
- Regarding exemptions from land rent:
 - Outside industrial zones, a 7 year exemption is available to all projects, increasing up to 12 years for specially encouraged projects (with an extra 2 years for projects with implemented capital of USD10 million or more or projects in central mountain areas);
 - Inside industrial zones, a 6 year exemption is available to all projects, increasing up to 11 years for specially encouraged projects (with an extra 2 years for projects with implemented capital of USD10 million or more).
- 5 year exemption from corporate income tax (in addition to preferential treatment under the corporate income tax laws) is available.
- The only change to the lists of specially encouraged projects and encouraged projects is the addition of "construction of 5-star hotels and tourism areas" to the list of encouraged projects.

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