



Vietnam Legal Update

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Part 1 Selected New Legal Instruments

1.1	Credit Institutions	2
1.2	Accounting	3
1.3	Foreign Currency Trading	4
1.4	Effectiveness of Recent Legislation	4

Part 2 Features

2.1	Mid-Year Review of Recent Law Reforms	5
2.2	Trading and Distribution Rights	11
2.3	Proposed New Decree on Industrial Zones and Export Processing Zones	13

Part 3 Did You Know?

3.1	National Assembly Update	15
3.2	Land - Prepaid Rent	16
3.3	Land - Clearance and Compensation	17
3.4	Land - Real Estate Market in HCMC	17
3.5	Jackson-Vanik Waiver	18
3.6	Securities Market Update	18
3.7	Foreign Contractor Tax Reforms	19
3.8	Labour Rules	19
3.9	WTO Update	20
3.10	Vietnam Laws Online Database - Launch	20

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Part 1 Selected New Legal Instruments

1.1 Credit Institutions

Law 20-2004-QH11 of the National Assembly dated 15 June 2004 on Amendment of and Addition to a Number of Articles of the Law on Credit Institutions

Law 20 amends and adds to a number of articles of the 1997 Law on Credit Institutions, effective as of 1 October 2004.

From a foreign investment perspective, the most significant reforms are:

- > 100% foreign owned banks will be permitted to be established in Vietnam. Currently, foreign credit institutions are only permitted to establish joint venture banks, foreign bank branches, representative offices, and joint venture or 100% foreign owned *non-banking* credit institutions in Vietnam.
- > Foreign credit institutions will be permitted to contribute capital to and purchase shareholdings in credit institutions operating in Vietnam.

As expected, it remains State policy to facilitate State owned credit institutions to play a decisive and leading role in the monetary market. However, credit policies applicable to State owned enterprises, co-operatives, agricultural and rural areas, disadvantaged areas and poor people will no longer be enshrined in the Law on Credit Institutions (as amended).

A credit institution will be permitted to establish with its own equity any number of independent cost accounting subsidiaries having legal status in order to conduct operations in the sectors of finance, banking, insurance, and (now also) management, use and sale of assets during process of realization of loan security and of assets assigned by the State to credit institutions to realize for the purpose of debt recovery. This reform was introduced in late 2001 but, for the first time, will now be enshrined in the Law on Credit Institutions (as amended).

The chairman of the board of management of a credit institution will be permitted to serve concurrently as a member of the board of management of another credit institution provided that he/she does not serve as board chairman of that other credit institution unless it is a subsidiary of the former credit institution. Similarly, the board chairman of a credit institution will be permitted to participate concurrently in management of another credit institution provided that he/she does not act as general director of that other credit institution unless it is a subsidiary of the former credit institution.

A new restriction will be imposed on the general director of a credit institution: he/she will not be permitted to be the general director or board chairman of any other credit institution unless the latter is a subsidiary of the former credit institution.

A new standard will be imposed on general directors and deputy general directors of credit institutions. In addition to the requirements to (i) reside in Vietnam during his/her term of office and (ii) possess professional qualifications and the ability to operate and manage a credit institution, he/she will be required to (iii) have good health, professional ethics, be honest and incorruptible, have knowledge of the law and a sense of compliance with law.

The Law on Credit Institutions (as amended) will, for the first time, enshrine a credit institution's right to autonomy in loan decision-making, including with respect to loan security, thereby legitimizing reforms introduced in late 2002 to mid-2003. Credit institutions will remain prohibited from taking a pledge of shares issued by it as security for a loan. A prudential limit on the maximum ratio of total outstanding

loans as a percentage of total deposits will no longer be provided for in the Law on Credit Institutions (as amended).

1.2 Accounting

Decree 129-2004-ND-CP of the Government dated 31 May 2004 Providing Detailed Regulations and Guidelines for Implementation of a Number of Articles of the Law on Accounting Applicable to Business Operations

Decree 129 governs accounting by entities engaged in business operations, including foreign invested enterprises ("FIEs"), foreign branch offices, representative offices of foreign companies operating in Vietnam, State owned enterprises and private Vietnamese entities ("business entities").

All business entities must appoint a chief accountant, except foreign representative offices, individual family businesses and co-operatives. Decree 129 stipulates the standards and conditions for appointment of a person to act as chief accountant:

- In the case of FIEs, the chief accountant must have professional accounting qualifications and skills at the university or higher level and at least 2 years actual accounting work experience; or professional accounting qualifications and skills at the college level and at least 3 years actual accounting work experience.
- In the case of foreign branch offices, the chief accountant must have professional accounting qualifications and skills at the intermediary or higher level and at least 3 years actual accounting work experience.

As an alternative to an internal personnel appointment, a business entity may hire an external accountancy firm or certified practising accountant to act as its chief accountant and/or accounting personnel. In all cases, the person appointed as chief accountant must have attended and passed a chief accountant training course in accordance with regulations of the Ministry of Finance.

Accountancy firms may be established and operate in one of three forms: limited liability company, partnership, or private enterprise. In order to establish an accountancy firm, there must be at least 2 persons with accountancy practising certificates; and 1 of those 2 persons must be involved in management of the firm's practice. A certified practising accountant may register a sole practice. Decree 129 regulates accountancy examinations, issuance of accountancy practising certificates, training courses, the scope of accounting services which may be provided, and the rights and responsibilities of accounting personnel.

In addition to general accounting matters for business entities, Decree 129 provides guidelines for preparation of annual financial reports. FIEs and foreign branch offices must lodge their annual financial reports with the State authorities within 30 days of the end of the annual accounting period and must publicize them within 120 days. Foreign representative offices are exempt from preparing financial reports but they must prepare tax declaration lists.

Of particular note, Decree 129 regulates electronic vouchers, including the conditions for using e-vouchers and the validity of e-vouchers. Electronic vouchers must contain all items which are prescribed for accounting vouchers and they must be encoded so as to ensure safety of electronic data while it is being processed, transmitted and saved. Electronic vouchers used in accounting may be contained on an information-carrying object such as a compact tape, compact disc or any type of payment card. The confidentiality and integrity of data and information on an electronic voucher must be ensured during the process of using and saving the electronic voucher. There must be management methods for prevention of abuse, penetration, copying, theft or illegal use of electronic vouchers. Electronic signatures on e-vouchers must be encoded by a cipher key. A separate e-signature must be established for each individual. Importantly, an e-signature on an electronic voucher has the same validity as a signature written by hand on a paper voucher.

Complementing Decree 129, the Government issued separate detailed regulations applicable to the State accounting sector in Decree 128-2004-ND-CP of the Government dated 31 May 2004. Decrees 128 and 129 follow after Decree 40-2004-ND-CP of the Government dated 13 February 2004 providing guidelines for implementation of the 2003 Law on Statistics.

Decree 129 (and Decree 128) was effective as of 30 June 2004.

1.3 **Foreign Currency Trading**

Decision 648-QD-NHNN of the State Bank of Vietnam ("SBV") dated 28 May 2004 on Amendment of and Addition to Decision 679-2002-QD-NHNN of the SBV dated 1 July 2002 Issuing Regulations on Foreign Currency Trading by Credit Institutions Authorized to Conduct Foreign Currency Trading

Decision 648 amends the permissible terms of forward and swap transactions from a minimum 7 and maximum 180 days to a minimum 3 and maximum 365 days.

Decision 648 also allows a bank to agree with its customers on the forward exchange rate between VND and US dollars provided that it does not exceed the rate determined on the basis of the following prescribed formula:

- (i) the spot exchange rate on the date of signing the forward or swap transaction;
- (ii) the difference between the current two interest rates being the Vietnamese dong basic interest rate (annual rate) as published by SBV and the US dollar target interest rate published by the Federal Reserve Bank (Fed Funds Target Rate); and
- (iii) the contract term.

A bank may agree with its customers on the forward exchange rate between VND and other foreign currencies or as between different foreign currencies without the above limit.

1.4 **Effectiveness of Recent Legislation**

	<i>Issued</i>	<i>Effective</i>
Decree 125 on Enterprise Law	19 May 2004	13 June 2004
Decision 87 on Foreign Construction Contractors	19 May 2004	13 June 2004

For a summary of the above legislation, go to May 2004 Issue of Vietnam Legal Update on www.vietnamlaws.com

Part 2 Features

2.1 Mid-Year Review of Recent Law Reforms

Vietnam has introduced a wide range of legislative reforms in the past 18 months, motivated by its commitments under the US-Vietnam Bilateral Trade Agreement ("BTA") and its ambition of WTO accession in 2005.

Foreign investment regulations

All foreign direct investment ("FDI") in Vietnam is subject to licensing under the Law on Foreign Investment in Vietnam ("LFI") and its implementing regulations. FDI will be licensed in the forms of 100% foreign owned enterprise ("100%FOE"), joint venture enterprise ("JVE") and business cooperation contract ("BCC") - together referred to as foreign invested enterprises ("FIEs").

The latest amendments to the LFI regulations in May 2003 introduced the following reforms:

- > Existing FIEs are now permitted to co-operate with other foreign investors to perform a BCC.
- > JVEs may now be established between an existing 100%FOE and a Vietnamese enterprise, or between an existing 100%FOE and an existing JVE.
- > Existing 100%FOEs are now permitted to co-operate with other existing 100%FOE(s) and/or foreign investor(s) to establish a new 100%FOE.
- > Although the majority of FDI projects remain subject to evaluation prior to licensing, the conditions for *registration* for licensing have been relaxed.
- > More detailed guidelines on restructuring FIEs by way of merger, consolidation, division and demerger and by way of conversion of the form of FDI were provided. The most favoured restructure of FIEs is the conversion of JVEs into 100%FOEs.

Foreign invested shareholding companies

In mid-2003, Vietnam introduced the option of conversion of FIEs into foreign invested shareholding companies ("FISCs"), representing the first tentative steps towards unifying the law regulating FIEs and domestic Vietnamese companies.

A FISC must continue to implement the licensed FDI project of the former FIE and will be entitled to preferential treatment under the LFI and its implementing regulations - but the rights of shareholders and the organizational structure of the FISC will be governed by the Law on Enterprises (as for domestic shareholding companies).

Eligibility for participation in the first pilot conversions was limited to a narrow range of JVEs and 100%FOEs. Applications closed in May 2004. Of the 30 applications received, 12 have been submitted to the Prime Minister for approval. There are some interesting rules, some of them disincentives, applicable to conversions. Hopefully, the review of the FISC legislation (scheduled for 2005) will see the introduction of a more liberal and comprehensive scheme for foreign investment in shareholding companies.

Tax

Significant tax reforms have been introduced in 2004, in particular:

<i>Corporate income tax</i>	As of 1 January 2004, a new uniform standard rate of 28% applies to domestic businesses and new FIEs. This represents a 4% reduction for domestic businesses, but a 3% increase for FIEs. Preferential rates of 20%, 15% and 10% and periods of exemption and reduction are available. Existing FIEs will remain subject to the tax rate and preferential treatment stipulated in their investment licenses.
<i>Value added tax</i>	As of 1 January 2004, only 3 rates apply (0%, 5% and 10%). The 20% rate has been abolished. However, a number of previously VAT-exempt goods and services are now subject to VAT.
<i>Profits remittance tax</i>	Abolished for foreign investors as of 1 January 2004.
<i>Personal income tax</i>	As of 1 July 2004, income tax rates for Vietnamese individuals have been dramatically reduced (significantly lowering employment costs in Vietnam). The maximum tax rate for foreign individuals is now 40%, applicable to all monthly income over VND80 million (approx \$USD4,500). The former income tax exemption for non-resident foreigners remaining in Vietnam for less than 30 days has been abolished - <i>all</i> foreigners remaining in Vietnam for less than 183 days are now subject to fixed tax rate of 25%.

Labour

The first ever amendments to the 1994 Labour Code of Vietnam became effective as of 1 January 2003. Throughout 2003 a raft of decrees and circulars was passed to implement the amendments with respect to labour agreements, labour contracts, working hours, rest breaks, occupational safety and hygiene, wages, social insurance and other labour matters. Of note, FIEs are now free to recruit Vietnamese employees directly.

Regrettably, as of late 2003, a cap has been imposed on the number of foreign employees of FIEs. No more than 3% of the total number of employees may be foreigners, up to a maximum of 50 foreign employees. The cap also applies to private domestic and State owned enterprises. Foreign representative and branch offices are not subject to this cap but must obtain the approval of the local people's committee chairman for the employment of foreigners. The cap on foreign employees has been widely criticized as draconian and counter-productive to Vietnam's efforts to encourage FDI and improve the management experience of Vietnamese employees. In response, a number of exceptions to the cap were introduced in March 2004. Encouragingly, the Ministry of Planning and Investment supports the cap's abolition; and reportedly, the Ministry of Labour, War Invalids and Social Affairs is currently drafting amended regulations for approval by the Prime Minister.

Land

A new Land Law became effective on 1 July 2004. The basic legal principles remain unchanged - land is owned by "all citizens" and administered by the State as "representative owner" which allocates or leases land to "land users". As before, FIEs and other foreign entities may only lease land and only for a limited duration (for FIEs, generally 50 years, or 70 years for large projects and projects located in prescribed disadvantaged areas). Of note, mortgages of land use rights may still only be made in favour of credit institutions authorized to operate in Vietnam.

Of note, the new Land Law recognises for the first time the real estate market in Vietnam. In May 2004, the Government published its plan for development of residential housing to year 2020 - one of its objectives being to promote the real estate market.

Capital markets and securities

Vietnam's securities market is still in its infancy, having opened in mid-2000. To date, there is only one Securities Trading Centre operating, in HCMC, with less than 30 companies listed to date. The Hanoi Securities Trading Centre is preparing to open in the third quarter of 2004.

In an effort to stimulate the securities market, in November 2003, the regulations governing the public issue, listing and trading of securities, the organization of the securities market and the operation of securities-related businesses were updated for the first time. Conditions for public issues and listings have been relaxed. Grounds for monitoring listed securities and for suspending securities trading are now prescribed. Stricter disclosure provisions should go a long way to improving transparency. Tightening of the insider trading prohibition is also reassuring.

Options for foreign participation in Vietnam's securities market were expanded in July 2003:

- > The cap on total aggregate shareholdings of all foreign shareholders in any one listed company was raised to 30% (from 20%) of the company's shares - the same cap applicable to unlisted companies.
- > The maximum foreign capital contribution in a joint venture securities company was increased from 30% to 49%.
- > Joint venture investment funds management companies are now permitted, with up to 49% foreign capital contribution.

Foreigners are permitted to contribute capital to and purchase shares in unlisted Vietnamese enterprises conducting business in prescribed industries and trades only. Revised regulations introduced the following reforms in March 2003:

- > Prime Ministerial approval is no longer required for the sale of shares in unlisted Vietnamese companies to foreign investors.
- > The prohibition on transfer of shares for 1 year from the date of acquisition (or 3 years where the foreign investor participates in management of the shareholding company) has been abolished.
- > Foreign investors may now mortgage or pledge shares as security for the discharge of civil obligations (as well as security in credit relations, as previously).
- > Foreign individuals are now entitled to exemption from personal income tax on income earned from capital contribution or shareholdings in unlisted enterprises. (Previously, this exemption was available only to foreign investors in listed companies.)

New foreign currency controls on foreign investment in unlisted Vietnamese enterprises were introduced in May 2004.

Banking and finance

Amendments to the 1997 Law on Credit Institutions were passed by the National Assembly in May 2004. From 1 October 2004, 100% foreign owned banks will be permitted to be established in Vietnam; and foreign credit institutions will be permitted to contribute capital to and purchase shareholdings in credit institutions operating in Vietnam. (For a more detailed summary, see [Part 1.1](#) above.)

One litmus test of the fair and equal treatment of US and non-US investors in the post-BTA environment is the level at which US and non-US bank branches in Vietnam are permitted to accept Vietnamese dong deposits. According to Vietnam's BTA commitments, US bank branches were permitted to accept up to 100% of their charter capital in dong deposits as of the end of 2002. This was in stark contrast to non-US bank branches which remained subject to the statutory 25% cap. After considerable pressure, the State Bank lifted the cap on dong deposits of non-US bank branches to 50%, as of October 2003. This was small comfort as, by the end of 2003, the cap for US bank branches was raised to 250%. As of April 2004, EU banks are now also entitled to the 250% cap (reportedly, in exchange for an increase in apparel quotas from the EU). So now, only non-EU and non-US bank branches remain subject to the 50% cap.

Vietnam's foreign currency control regime was reformed significantly in May 2003. FIEs, foreign BCC parties, foreign company branches, foreign contractors and other resident organizations are no longer required by law to sell a percentage of their foreign currency revenue to Vietnamese banks. (Originally introduced in 1998 at 80%, the percentage of foreign currency revenue subject to compulsory conversion was gradually decreased in 1999, 2001 and 2002 to 50%, 40% and 30% respectively.) Revised regulations on foreign exchange bureaus in Vietnam followed later in 2003.

From late 2002 to mid-2003, the legal framework governing security for loans from Vietnamese credit institutions underwent substantial reform. The range of property which Vietnamese credit institutions may accept as loan security was expanded to include moveable and immovable property to be formed in the future, such as harvest yield, revenue, property funded by a loan, project works, etc. A single item of property may now be used as security for performance of multiple loans. Assets attached to land may now be mortgaged separately from the associated land use rights.

Construction and tendering

The first ever Law on Construction in Vietnam became effective as of 1 July 2004. The Law governs construction activities and the rights and obligations of both domestic and foreign organizations and individuals investing in construction of works and engaging in construction activities. The Law also regulates the continuity of construction planning and the responsibility for such planning. The Law requires that all persons engaged in various aspects of construction activities are registered (where applicable), possess the requisite capabilities to undertake their respective tasks and are held accountable for their performance of such tasks.

In May 2004, revised regulations governing the operations of foreign construction contractors (organizations or individuals; head contractors, general contractors, contractors in partnership and sub-contractors) in the sectors of construction consultancy, supply of technological materials and equipment where that forms part of technical services relating to construction works, and execution of construction works were issued. As previously, a foreign contractor must be issued with a contractor's permit to operate in Vietnam; and the contractor's permit remains specific to the construction contract being performed. It is a permit condition that a foreign contractor must be in partnership with a Vietnamese contractor or must engage a Vietnamese sub-contractor (unless exempted by the Prime Minister or under Vietnamese law).

New tendering regulations were passed in mid-2003, followed by new guidelines in February 2004. A range of amendments were introduced, primarily aimed at eliminating corruption and modernizing State administration of tendering. As previously, only JVEs and BCCs in which the Vietnamese party is a State owned enterprise and contributes more than 30% capital are required to comply with the Vietnamese tendering regulations. Preferential treatment is now available for prescribed foreign invested tenderers. A tender information database is currently being established by the Ministry of Planning and Investment.

Imports

The April 2004 Ordinance Against Dumping of Imports into Vietnam is the latest limb of Vietnam's developing legal framework to regulate imports in anticipation of the opening of its markets under the terms of the BTA and its accession to the WTO. Aimed at limiting the adverse impact on domestic manufacturing industries caused by dumping of imported goods in Vietnam, the new Ordinance prescribes the range of anti-dumping measures which may be applied as of 1 October 2004 and the procedures for investigations and application of such measures. Anti-dumping measures include application of anti-dumping duty and the requirement for an undertaking on measures to eliminate dumping to be given by the organization or individual manufacturing or exporting the dumped goods.

In December 2003, the Government issued detailed regulations on measures for self-protection (such as higher import duties, import quotas) to safeguard its domestic manufacturing industries against serious losses caused by a sudden increase in volume of imports of goods. Investigations will be undertaken by the Ministry of Trade on its own initiative or upon request by any domestic manufacturer which manufactures at least 25% of the volume of similar or directly competing domestic goods.

Determination of dutiable value in accordance with the principles of GATT on the basis of transaction pricing was applied to imports of US and ASEAN origin as of December 2003 (meeting Vietnam's BTA commitments) and now also applies to imports from 39 other countries (including Australia, New Zealand, UK, Hong Kong, China, and Japan).

Commercial arbitration

A new Ordinance on Commercial Arbitration became effective on 1 July 2003, followed by detailed regulations in February 2004, substantially increasing the attractiveness of arbitration in Vietnam as an option for the resolution of commercial disputes. Of particular note, domestic arbitration awards are now enforceable.

A number of significant reforms have been introduced with respect to disputes with a foreign element (ie where one party is a foreign individual or legal entity; or where the grounds for establishing, altering or terminating a relationship the subject of a dispute arise abroad; or where assets relating to the dispute are located abroad), including:

- > Foreign arbitrators may now be appointed to resolve such disputes, alongside or in place of Vietnamese arbitrators.
- > A foreign law may be chosen as the substantive law to resolve such disputes; and procedural rules other than those provided for under Vietnamese arbitration law may be applied by the arbitration tribunal.
- > The arbitration proceedings may be conducted in a foreign country or in Vietnam; and in a foreign language.

Food safety & hygiene

Effective as of 1 November 2003, the Ordinance on Food Hygiene and Safety has imposed strict food hygiene and safety requirements during manufacture and trading (which includes raising of crops and livestock, processing, packing, preserving, transportation, sale, import and export) of fresh, raw, processed or preserved foodstuffs which people eat or drink. All Vietnamese and foreign organizations and individuals manufacturing or trading foodstuffs within the territory of Vietnam must comply with the Ordinance.

Foreign law firms

The regulatory framework for the operations of foreign law firms and foreign lawyers in Vietnam was substantially reformed as of September 2003. The conditions for offshore foreign law firms to be licensed to operate in Vietnam have been relaxed and the forms of operation have been expanded. Offshore foreign law firms may establish branch offices or now also an onshore foreign law firm or a foreign-Vietnamese law partnership. All types of foreign law practices in Vietnam may now employ Vietnamese lawyers. Significantly, foreign law practices in Vietnam are no longer restricted to advising on foreign and international law but may now also advise on Vietnamese law where the foreign law practice employs a Vietnamese lawyer or employs a foreign lawyer with a Vietnamese law degree and satisfying all requirements applicable to a Vietnamese lawyer.

Advertising

Detailed advertising regulations became effective as of mid-April 2003 (almost one year after the Ordinance on Advertising governing all advertising activities in Vietnam became effective in May 2002). Of particular interest, the advertising regulations include detailed provisions on licensing of branch offices of foreign advertising businesses (permitted for the first time under the Ordinance on Advertising). By virtue of the licensing conditions prescribed in the advertising regulations, the first foreign advertising branches cannot be licensed until December 2008 at the earliest. Implementing guidelines on advertising were passed in July 2003.

In the pipeline

Of particular interest, the National Assembly recently debated a draft Law on Competition at its May-June 2004 Session. The Law on Competition will govern agreements in restraint of competition, abuse of dominant or monopoly market position, concentrations of economic power and acts of unhealthy competition. It is expected to be re-drafted and re-submitted to the National Assembly for promulgation at its November 2004 Session (but is not expected to become effective until mid-2005).

Other draft laws scheduled to be considered by the National Assembly at its November 2004 Session and promulgated at its May-June 2005 Session include amendments to the Commercial Law (expected to provide for foreign investment in import and distribution sector), amendments to the Civil Code and a revised Maritime Code.

Massive conceptual reform of Vietnam's investment and company laws is scheduled within the next two years. Vietnam has recently commenced preliminary drafting of a Common Investment Law to replace the separate domestic and foreign investment laws, as well as a Unified Enterprise Law to apply to FIEs, private domestic enterprises and State owned enterprises alike. The aim of this unprecedented reform of the main business laws is to create a more open and level playing field for investors in Vietnam.

2.2 Trading and Distribution Rights

Under the US-Vietnam Bilateral Trade Agreement ("BTA"), effective as of 10 December 2001, Vietnam has committed to a schedule for gradually opening up its import-distribution sector to foreign investment.

Trading activities under the BTA

Beginning 10 December 2004 (3 years after the effective date of the BTA) enterprises with capital directly invested by US nationals and companies¹ which are lawfully operating in Vietnam and engaged in substantial business activities in the production and manufacturing sectors will be allowed to engage in "trading activities", subject to the restrictions listed in Annexes B, C, and D to the BTA².

As of the same date, US nationals and companies¹ will also be allowed to form joint ventures with Vietnamese counterparts, in which US investors may contribute up to but not more than 49% of legal capital, to engage in "trading activities in all products" subject to the restrictions in the above Annexes³.

The BTA defines "trading rights" as "the right to engage in import and export activities".

Under Article 76 of Decree 24 on Foreign Investment dated 31 July 2000 (as amended on 19 March 2003) ("Decree 24"), foreign invested businesses already have a general right to export products manufactured or produced in Vietnam. And under Article 72 of Decree 24, foreign invested businesses are allowed to import certain "raw materials" for use in their manufacturing or production process. The only major "new" benefit under the BTA for foreign invested businesses already manufacturing and producing in Vietnam would be the right to import and distribute certain finished products.

A central issue in understanding the scope of the forthcoming right to import introduced by the BTA is determining what products are allowed for importation.

Annexes B, C, and D to the BTA provide a number of limitations on imports by restricting the importation of certain products (eg citrus fruits, wine, bicycles, televisions) until the specified phase-out period has expired.

As noted above, new joint venture businesses established for trading and distribution as of 10 December 2004 will be permitted to trade in "all products" (subject to BTA Annexes B, C and D). However, with respect to foreign invested manufacturing and production businesses, the BTA simply provides that such businesses have the right to engage in "trading activities", without adding the language "in all products".

The failure to include such specific language with respect to foreign invested manufacturing and production businesses begs the question that if the BTA does not provide such businesses the right to import "all products" then what products are they permitted to import?

One interpretation may be to deem the lack of such language an oversight in the BTA and assume that foreign invested manufacturing and production businesses in Vietnam will be permitted to import "all products". Although such an interpretation would be fair, it is unlikely. Given the extensive drafting and revision of the BTA prior to its signing, the omission of "all products" was likely the result of an intentional decision rather than a drafting oversight.

1 Although the BTA is a treaty only between Vietnam and the United States, the general view is that it represents a road map for liberalization of the import and distribution sectors for *all* foreign investors, not just US investors.

2 Annex B set out the quantitative restrictions Vietnam is permitted to maintain and their phase-out period. Annex C lists the imports and exports restricted to State trading companies and their phase-out schedule, where applicable. Annex D lists phase-out periods for restrictions on trading and distribution rights for specific industrial and agricultural products.

3 Both descriptions and citations in this paragraph and the preceding paragraph are excerpts from Article 2.7 of Chapter of the BTA.

Another interpretation is: a foreign invested manufacturing or production business in Vietnam may only import products *related* to its manufacturing or production activities. This interpretation is fraught with difficulty; how and who will determine what products are "related" products?

Ideally, there should be no reason to resort to interpreting the provisions of the BTA, the commitments in the treaty should be transparent and easily understood. Without clear guidelines, such ambiguity creates a perplexing roadmap for a foreign invested manufacturing and production business to follow.

Distribution activities under the BTA

The BTA distinguishes the right to "trade" (ie import and export) from the right to distribute (ie sell products domestically to consumers).

In the case of the new trading joint ventures permitted as of 10 December 2004 (discussed above), they will be specifically allowed to also engage in distribution activities as of 10 December 2004.

With respect to foreign invested manufacturing or production businesses, to date, an implied right to distribute the products manufactured in Vietnam has been assumed. Existing foreign investors engaged in the manufacturing and production of goods also distribute and sell their goods in Vietnam. This is the case even though their investment licenses usually only state the right to manufacture and produce a certain product(s) and are silent as to the right to sell such product(s). Indeed, it would make no sense for a foreign invested manufacturing or production business to manufacture goods for domestic consumption if the right to distribute (ie sell) such products was not included in its scope of business activities, and permitted pursuant to its investment license. In our view, the right to distribute may be inferred from the manufacturing right already provided to a foreign invested business in its investment license.

The BTA does not include any provisions with respect to distribution rights for foreign invested manufacturing and production businesses. In our view, this reflects the above generally recognized assumption that such distribution rights are included in a business's licensed scope of activities. By extension, we assume that foreign invested manufacturing and production businesses importing finished products as of 10 December 2004 pursuant to the BTA will have the implied right to distribute such products.

Legislative clarification

The commitments agreed between Vietnam and the US in the BTA provide only a framework for their respective rights and obligations. The realization of the BTA's objectives can only occur through enabling legislation enacted by each government.

In Vietnam, the appropriate legislation to enshrine trading and distribution rights is the Commercial Law. The Commercial Law is currently undergoing revision and is now up to Draft 4. The revised Law is expected to confer *in-principle* trading and distribution rights on foreign invested businesses.⁴ The Vietnamese Government will then issue one or more decrees to provide the specific details for implementation of these rights under the Commercial Law.

As the revised Commercial Law is not scheduled for promulgation until May-June 2005 at the earliest, it will be interesting to see how Vietnam addresses its commitments under the BTA in the months prior to 10 December 2004.

4 Together, Articles 5 and 22 of Draft 3 of the Commercial Law (2 April 2004) extend distribution rights to "all forms of companies which are established and operated according to regulations of Vietnam", which includes foreign invested enterprises.

2.3 Proposed new decree on industrial zones and export processing zones

Following is a brief summary and review of the draft new decree on industrial zones and export processing zones. The draft new decree will replace Decree 36 of the Government dated 24 April 1997 on industrial zones, export processing zones and high-tech zones ("Decree 36"). Decree 36 is already repealed in part with respect to high-tech zones, which are now governed by Decree 99 of the Government dated 28 August 2003.

Generally, the draft new decree codifies current provisions in other relevant laws and provides a number of new provisions. Significant changes of the draft new decree are:

- > An export processing zone ("EPZ") may be located inside an industrial zone ("IZ") (Article 3.1).
- > "Export processing enterprises" will extend to qualified enterprises⁵ located outside an EPZ or IZ (Articles 3.4 and 38). Currently, only enterprises located in an EPZ and enterprises which export the whole of their products are classified as export processing enterprises.
- > The draft new decree vaguely provides that foreign invested enterprises, foreign organizations, foreign individuals and overseas Vietnamese will be permitted to invest in and develop IZs (probably including EPZs) (Articles 2 and 11.1). It is likely that the compulsory investment vehicle (ie joint venture) as expressly required by Decree 36 will be removed. Notably, Decree 24 of the Government dated 31 July 2000 (as amended) does not classify the investment in and development of IZs/EPZs as a conditional investment sector (ie requiring joint venture or business cooperation contract with Vietnamese partners). In practice, the Government has permitted foreign investment in the form of a 100% foreign owned enterprise to invest in and develop an IZ in Chu Lai, Quang Nam Province⁶.
- > IZ infrastructure development enterprises (probably including EPZ infrastructure development enterprises⁷) will be permitted to sub-lease the whole or part of any unleased land area to organizations, individuals and enterprises in and outside Vietnam which have financial ability and experience in calling for investment in order to attract projects to use such land (Article 12.3). Decree 36 does not contemplate this circumstance.
- > IZ infrastructure development enterprises (probably including EPZ infrastructure development enterprises) will be permitted to mortgage, use for guarantees, and assign the right to use land (including infrastructure facilities) and to make capital contribution using the value of land use rights together with assets attached to the land (Article 14.3).
- > Likewise, IZ enterprises (probably including export processing enterprises) will be permitted to mortgage, use for guarantees, and assign the right to use sub-leased land and to make capital contribution using the value of the right to use sub-leased land; and in respect of individuals, to bequeath the land use right within the term of land sub-lease (Article 16.3).
- > IZ enterprises (probably including export processing enterprises) will be entitled to exemption from or reduction of land rent within the rates of "uncleared land" in accordance with the applicable laws on foreign investment and the laws on land (Article 16.2).

5 Conditions for an export processing enterprise situated outside IZ or EPZ: (1) export the whole of its products; (2) average export revenue of the last 2 years being over USD50mn/year; and (3) production facilities concentrated in one site and using over 30 hectare of land.

6 Official Letter 319 of the Government dated 23 April 2001.

7 EPZ is defined to be a IZ. However, the definition of IZ infrastructure development enterprises does not specifically refer to enterprises investing in development of EPZs (Articles 3.1 and 3.5 of the draft new decree).

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- > Export processing enterprises will *only* be permitted to enter into processing contracts with Vietnamese enterprises (including foreign invested enterprises) for processing a part of products or in a numbers of stages which the capacity of machinery, equipment or technological line of the export processing enterprises cannot ensure (Article 34.1). Likewise, export processing enterprises will *only* be allowed to carry out processing of part of products or in a number of stages which the capacity of machinery, equipment or technological line of Vietnamese enterprises (including foreign invested enterprises) cannot ensure (Article 24.2). Currently, export processing enterprises may enter into any processing contracts with any Vietnamese enterprises and foreign invested enterprises without any conditions.

Part 3 Did You Know?

3.1 National Assembly Update

Legislature IX of the National Assembly concluded its May-June Session on 15 June 2004, on which date the following legislation was passed:

- > *Law 20-2004-QH11 on Amendment of and Addition to Law on Credit Institutions*, effective as of 1 October 2004. See summary in [Part 1.1](#) above.
- > *Law 21-2004-QH11 on Business Bankruptcy (Amended)*, effective as of 15 October 2004. Replaces the 1993 Law on Business Bankruptcy.
- > *Law 22-2004-QH11 on Inspections*, effective as of 1 October 2004. Replaces the 1990 Ordinance on Inspections.
- > *Law 23-2004-QH11 on Inland Waterway Transportation*, effective as of 1 January 2005.
- > *Civil Procedure Code 24-2004-QH11*, effective as of 1 January 2005.

For the first time, the Civil Procedure Code consolidates the procedures for legal proceedings in civil matters, marriage and family matters, economic and commercial matters, and labour matters before the civil courts of Vietnam. The Code also stipulates the procedures for recognition of foreign court decisions and foreign arbitration awards and for the right to appeal against decisions not to recognise such foreign court decisions and arbitration awards.

Under *Resolution 32-2004-QH11 on Implementation of the Civil Procedure Code*, the following legislation will be repealed as of 1 January 2005:

- Ordinance on Procedures for Resolving Civil Proceedings;
 - Ordinance on Recognition of Foreign Court Judgments, 1993;
 - Ordinance on Procedures for Resolving Economic Proceedings, 1994;
 - Ordinance on Recognition of Foreign Arbitration Awards, 1995;
 - Ordinance on Procedures for Resolving Labour Disputes, 1996
- > *Law 25-2004-QH11 on Protection, Care and Education of Children*, effective as of 1 January 2005. Replaces 1991 Law on Protection, Care and Education of Children.
 - > *Law 26-2004-QH11 on Amendment of and Addition to Law on Complaints and Denunciations*, effective as of 1 October 2004.

3.2 Land - Rights of Foreign Organizations that Prepay Land Rent

Article 119.3 is one of the most important and controversial provisions in the new Land Law, which came into effect on 1 July 2004. It states that "foreign organizations which invest in Vietnam and to which the State of Vietnam leases land with one-off payment of rent for the whole term of the lease" are entitled to deal with such land in much the same way as a freehold owner of land would in other countries. This includes assigning, subleasing, mortgaging and contributing as capital the land use rights.

Most importantly for foreign companies that are interested in developing residential for sale projects in Vietnam, "foreign organizations" (which, in this context, means foreign invested enterprises ("FIEs"), ie 100% foreign owned enterprises and joint venture enterprises ("JVEs")) that are licensed to develop a residential for sale project and that prepay land rent for the whole lease term are entitled to "sell...residential housing in accordance with the regulations of the Government; and purchasers of residential housing shall be issued certificates of land use right pursuant to the provisions of this law".

The obligation to prepay land rent for the whole lease term raises some interesting questions that have not yet been addressed in any Government regulations (or, to our knowledge, any draft Government regulations), including:

- > The wording of Article 119.3 states that the FIE must prepay the land rent. This suggests that JVEs in which the Vietnamese party contributes the value of land use rights can never develop residential for-sale projects, even if the Vietnamese party prepays the land rent for the whole term. This is because, in such a JVE, the Vietnamese party is the lessee of the land, not the JVE itself.
- > Many developers want to develop and sell residences as quickly as possible, in say 2 to 4 years, and then exit the project completely. Will it be possible for a FIE that is licensed to develop a residential for sale project to lease the land for such a short period and prepay land rent accordingly, or will the authorities require lease and prepayment over a longer period of time, like 30 years?
- > Does the area of land in respect of which land rent must be prepaid extend beyond the footprint of the residences, to include all the common areas, green areas and any other areas on which building is not permitted or possible?

These types of questions will need clear, quick answers if the current foreign investor interest in residential for sale projects is to translate into bricks and mortar reality.

3.3 Land Clearance and Compensation

Regulations implementing the new Land Law with respect to land clearance and compensation are expected to be passed soon by the Government. The current draft is commendable in providing more detail in relation to how compensation and land clearance matters are supposed to be implemented, and therefore should provide some greater transparency and certainty to investors on this subject. However, the fundamental problems for investors are likely to remain, ie they have no assurance as to (i) the total cost of compensation that they must fund, and (ii) how long it will take to clear the land, before the process begins. The compensation plan prepared at the district level and approved at the municipal/provincial level only provides for estimates of these matters. Investors are required to fund the compensation and land clearance and comply with all sorts of administrative requirements, but they do not control the process, they are able to participate in and influence such process to only a limited degree, and they have no recourse against the authorities in the event of delay or increase in cost. The municipal/provincial people's committees should be required to guarantee a final total compensation amount and implementation schedule, ie if the cost exceeds the guaranteed amount, then the people's committee should bear the difference; if the compensation and land clearance process is not completed within the guaranteed schedule, then the people's committee should pay the investor an amount on account of its costs/losses as a result of such delay. This would be fair, and would provide incentive for the people's committees to manage the compensation and land clearance procedures more successfully than they have to date.

3.4 Land - Real Estate Market in HCMC

Mr Luong Van Ly, Deputy Director of the HCMC Department of Planning and Investment, made the following comments at a real estate seminar in HCMC on 1 June 2004:

- > The new Land Law represents "tremendous headway towards acknowledging the commercial value of land", but some adjustments and rectifications are required.
- > Despite the impression that some investors may have had in the past, the HCMC authorities wish to encourage foreign investment in real estate projects, given the high growth rate of the city and likely shortage of housing in the future.
- > The HCMC authorities are working on a comprehensive zoning plan for HCMC. So far, only 25% of the HCMC plan has been completed. They are aiming to complete the whole plan some time in 2005.
- > The biggest problem facing property projects in HCMC is compensation and land clearance. The requirement under the new Land Law that the compensation price must be negotiated is a cause for concern. What is required is a clear, efficient mechanism for determining and implementing the appropriate price. It is also necessary to determine who is responsible for land clearance - the State, or investors themselves? The HCMC authorities would like to do more to assist investors in relation to compensation and land clearance, and to offer "free" land for important projects, but they are constrained by the current legislative framework.

3.5 Jackson-Vanik waiver

On 3 June 2004, the US President sent to the US Congress his annual recommendation to renew the Jackson-Vanik waiver for Vietnam. This waiver allows for the continuation of key US Government programs such as EXIM, OPIC, and NTR status for Vietnam. The waiver automatically goes into effect unless overturned by a disapproval resolution which must pass both the House and the Senate by 1 September 2004. A House vote is expected to be taken in mid to late July. For more information, go to www.usvtc.org.

3.6 Securities Market Update

- > A Securities Trading Centre ("STC") is expected to open in Hanoi in the third quarter of 2004. This will be the second STC in Vietnam, following the opening of the HCMC STC in mid-2000. The Hanoi STC is scheduled to commence trial operation in July and August.

According to a Vietnamnet, Vietnam Economy, VOV report, in the first phase (2004-2010), the Hanoi STC will provide a market for small and medium-sized companies located in Hanoi and neighbouring provinces such as Hai Phong and Nam Dinh. To list on the Hanoi STC, companies must have registered capital ranging from VND5-30 billion and have been profitable for the last 2 years and be willing to publicize their financial status. (The shares of enterprises with capital of more than VND30billion will be traded at the HCMC STC.) The State Securities Commission will co-ordinate with relevant agencies under Hanoi's People's Committee to select profitable businesses for listing. It is aimed to list around 10 companies when the Hanoi STC opens.

- > In mid-June 2004, Mekong Enterprise Fund (an investment fund managed by Mekong Capital) acquired a US\$900,000 shareholding in Nam Hoa Production & Trading Corp, a Vietnamese shareholding company that produces wooden toys for export. Phillips Fox advised Mekong Capital on the acquisition, including due diligence of Nam Hoa and advice on investment into the company. Foreign investors are permitted to acquire up to 30% of the capital of Vietnamese domestic companies whose licensed business functions are included in a published list of industry sectors. The rules and mechanisms for such investments are still in their infancy, and relatively few such transactions have been completed to date.
- > The charter of the recently established Vietnam Securities Trading Association was approved on 2 March 2004. Members of the Association include Vietnamese securities companies, fund management companies, depository banks and designated payment banks. Organizations from the finance, insurance, banking and investment sectors may be associate members.
- > Amendments to Decree 64 governing equitization of State owned enterprises are expected to be issued in July and to require equitized State owned enterprises to list their shares on the securities market.

3.7 Foreign Contractor Tax Reforms Delayed

The General Department of Taxation has announced that proposed increases in foreign contractor tax will be delayed until the end of 2004 at the earliest. It had been expected that a new circular with higher foreign contractor tax rates (up to 40-50% higher in some cases) would be issued in June and become effective as of 1 July 2004. Reportedly, the delay comes after recognition that the tax increases for foreign contractors would translate into higher project costs for Vietnamese enterprises and adversely affect the business environment.

3.8 Labour Rules

Pursuant to Article 82 of the Labour Code, all "enterprises" (a term which includes foreign invested enterprises) that employ 10 or more employees must have labour rules that have been registered with the relevant provincial department of labour. These labour rules must cover matters such as: (i) working hours and rest breaks; (ii) requirements as to order in the enterprise; (iii) occupational safety and hygiene; (iv) protection of assets and confidentiality of the enterprise; and (v) conduct which is in breach of the labour rules and penalties imposed for those breaches.

The fundamental importance of labour rules for an employer is to provide a basis for disciplining employees. Under Vietnamese law, employees may only be terminated in limited circumstances including those set out in Article 85 of the Labour Code:

- > where an employee commits an act of theft, embezzlement, disclosure of business or technology secrets, *or other conduct which is seriously detrimental to the assets or well-being of the enterprise*;
- > where an employee who is disciplined by extension of the period for wage increase or transfer to another position re-commits an offence during the period when he is on trial or re-commits an offence after he is disciplined in the form of removal from office; and/or
- > where an employee takes an aggregate of five (5) days off in one month or an aggregate of twenty days off in one year on his own will without proper reasons.

A well drafted and comprehensive set of labour rules allow the employer to define explicitly those violations of labour discipline that will constitute "other conduct seriously detrimental to the assets or well being of the enterprise" and, hence, may be disciplined by termination. In addition, the labour rules are an opportunity to enshrine company policy on various issues in a document that has legal standing and effect in Vietnam.

Correction: In Part 2.2 of the May 2004 Issue of Vietnam Legal Update, our Labour Recruitment Checklist incorrectly stated that an employer is required to make a health insurance contribution equal to 3% of the employee's salary. The correct figure is 2%.

3.9 WTO Update

The latest round of Vietnam's WTO negotiations took place in mid-June. Vietnam's WTO Working Party met for its 8th session on June 15. The session was considered a marked improvement over past meetings. Working Party members agreed to produce a Draft Working Party Report and hold the 9th Working Party session in early December 2004. Vietnam also conducted bilateral negotiations with approximately 15 WTO Members, including Argentina, Australia, Colombia, Cuba (for the first time), European Union, Korea, New Zealand, Norway, Switzerland, and United States. It is now imperative that Vietnam close as many bilateral negotiations as soon as possible in order to meet its ambition of WTO accession by 2005. For more information, go to www.usvtc.org.

3.10 Vietnam Laws Online Database - Launch

Vietnam Laws Online Database

on

www.vietnamlaws.com

On 1 July 2004, Phillips Fox launched Vietnam Laws Online Database - 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).

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