

# HIGHLIGHTS OF THE NEW INVESTMENT AND COMPANY LAWS OF VIETNAM

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On November 29, 2005, the National Assembly of Vietnam passed, among others, two new laws: the Law on Investment No. 59/2005/QH11 and the Law on Enterprises No. 60/2005/QH11. Both laws will take effect on July 1, 2006. Some of the important changes in the new laws are briefly described below.

## INVESTMENT LAW

1. The new Law on Investment (LOI) covers both direct and indirect investment activities in Vietnam, although its main focus is on direct investment.
  - a. Direct investment includes the following:
    - i. Setting up a wholly owned economic organization.
    - ii. Joint venture with domestic investors.
    - iii. Business Cooperation Contract (BCC), Build-Operate-Transfer (BOT), Build-Transfer-Operate (BTO), Build-Transfer (BT).
    - iv. Investment in business, technological expansion.
    - v. Contributing share capital in a (newly established) Vietnamese entity (at a ratio determined by the Vietnamese government).
    - vi. Merger and acquisition.
  - b. Indirect investment, subject to laws on stocks and securities, includes:
    - i. Investment in stocks, shares, bonds and other valuable instruments.
    - ii. Investment through securities investment funds.
    - iii. Investment through financial institutions.
2. The new LOI creates a uniform legal framework for and levels the playing field between domestic and foreign investment. Currently, there are two separate systems applicable to domestic and foreign investment.
3. Basically, the new LOI is applicable to both domestic and foreign investors carrying out investment projects in Vietnam including:
  - a. Enterprises registered under the LOI.
  - b. Collectives, cooperatives registered under the current law on cooperatives.

- c. Foreign invested enterprises licensed before this new law.
  - d. Private enterprises, business households, individual investors.
  - e. Foreign individuals or businesses, overseas Vietnamese, aliens.
  - f. Other organizations as prescribed by law (currently these include medical establishments, training organizations, for-profit cultural centers, etc.)
4. The new LOI still separates domestic invested companies from foreign invested companies.
- a. Foreign invested enterprises include:
    - i. Enterprises established in Vietnam by foreign investors to carry out investment projects.
    - ii. Enterprises in which foreign investors purchase shares.
    - iii. Enterprises which foreign investors acquire.
    - iv. Enterprises which merge with foreign investors' companies.
  - b. Foreign invested enterprises are subject to additional stipulations with regard to conditional projects as outlined in the agenda of Vietnam's international commitments. These conditions are to be provided by the Government. These provisions may not apply to a foreign invested enterprise with less than 49% foreign shareholding or equity.
  - c. Licensing and/or investment registration procedures and requirements are still different for domestic and foreign invested enterprises.
  - d. Foreign invested enterprises may select foreign or international arbitration to resolve disputes with other parties. This option may not be available to domestic enterprises.
5. Currently, foreign invested enterprises can only be in the form of a limited liability no-share company. Under the new LOI, investors can select the appropriate form of business entity for carrying out investment projects in Vietnam from among several forms prescribed under the new LOI and other laws:
- a. Limited liability no-share company (or limited liability company).
  - b. Limited liability share company (or joint stock company).
  - c. Partnership.
  - d. Holding company.

Foreign invested enterprises cannot be in the form of cooperatives, collectives, or business households.

6. The current system of double pricing is completely abolished. The same statutory fees, charges or prices of goods, commodities or services under price control of the Government shall apply to both domestic and foreign invested enterprises.
7. Currently, the term of a foreign invested company has to be the same as the lease period of the land where the investment project is located. Under the new law, the term of a foreign invested enterprise can be open. However, the land lease term applicable to investment projects is still fixed at 50 years, or 70 years in exceptional cases. Therefore, for a specific direct investment project, the project term shall be only 50 years, or 70 years in exceptional cases. A foreign invested enterprise under the new law can implement various direct investment projects. Under the current law, separate foreign invested enterprises have to be set up for each project.
8. The new LOI provides the following investment covenants:
  - a. No nationalization or confiscation of investors' capital, assets and properties by administrative measures.
  - b. Compensation or payment at market value to investors if expropriation or requisition of their assets is necessary--no discrimination. Payment of compensation in freely convertible currencies and without restriction on remittance of such payment.
  - c. Protection of intellectual properties of investors in investment activities and technology transfer under the respective laws.
  - d. Remittance of legitimate capital and assets in freely convertible currencies in accordance with FOREX control regulations.
  - e. Assurances in case of change of laws:
    - i. Investors shall be entitled to better incentives and rights under the new laws.
    - ii. If the new laws provide less favorable incentives and less rights, investors shall be entitled to:
      - Continue to enjoy previous incentives and rights.
      - Offset damages against taxable income.
      - Adjust the business objectives of the project.
      - Receive compensation in necessary cases.
9. With respect to opening the investment market, the new law simply provides that Vietnam shall comply with the committed agenda. This needs to be clarified further by the Government. Of interest, opening of retail or wholesale trading is still unknown and has not been committed by Vietnam under the bilateral trade agreement with the U.S. Retail trading may likely be opened in the next 2-3 three years.
10. The new LOI codifies elimination of trade-related investment measures to make Vietnamese investment framework consistent with WTO TRIPS. There shall be no compulsory or statutory requirements to investors regarding:

- a. Purchase of local commodities or services from designated suppliers.
  - b. Minimum requirement on export of commodities or services; limitation of quantity, value or types of commodities or services for export and for sale in local market.
  - c. Import volume within the limit of export volume, or self-balancing of foreign exchange from export revenue with import expenditure.
  - d. Localization ratio of goods manufactured locally.
  - e. Minimum level of local research and development.
  - f. Supply of goods or services at designated locations.
  - g. Opening principal place of business at a designated location.
11. The new LOI specifically allows a foreign invested enterprise to act as sales agent in Vietnam for other organizations or individuals with the same type of products as those produced or manufactured by such foreign invested enterprise.
12. The new LOI streamlines project licensing procedures. There are three categories of licensing procedures:
- a. Business registration (only):
    - i. **Who:** Domestic investment projects with invested capital below VND 15 billion (USD 943,990), excluding conditional projects.
    - ii. **Procedures:** None, unless recording of investment incentives is desired (in which case, investment registration must be carried out).
    - iii. **Investment documents:** None, only business registration certificate issued under the Law on Enterprises (10 working days).
  - b. Investment registration:
    - i. **Who:**
      - Domestic investment projects with invested capital of more than VND15 billion (USD 943,990) and less than VND 300 billion (USD 18,880,000), excluding conditional projects.
      - Foreign investment projects with invested capital below VND 300 billion (USD 18,880,000) excluding conditional projects.
    - ii. **Procedures:** Investment registration documents in prescribed form at provincial PC/DPI.
    - iii. **Investment documents:**
      - For foreign invested projects: investment certificate (which is also the business registration certificate in the case of initial establishment of economic organization to undertake first investment project) (15 days).

- For domestic projects: investment certificate, if requested (business registration under the Law on Enterprises must be carried out separately).
- c. Investment evaluation/certification:
- i. **Who:**
    - Domestic investment projects with invested capital of more than VND 300 billion (USD 18,880,000).
    - Foreign investment projects with invested capital of more than VND 300 billion (USD 18,880,000).
    - Conditional projects.
  - ii. **Procedures:** Application for investment evaluation and approval, with prescribed contents varying according to sub-category of project:
    - Projects below VND 300 (USD 18,880,000) billion which are in conditional sectors.
    - Projects over VND 300 billion (USD 18,880,000) which are in conditional sectors.
    - Projects over VND 300 billion (USD 18,880,000) which are not in conditional sectors (to be described in implementing regulations).
  - iii. **Investment documents:**
    - For foreign invested projects: investment certificate (which is also the business registration certificate in the case of initial establishment of economic organization to undertake first investment project) (30 days, extendable to 45 days).
    - For domestic projects: investment certificate, if requested (business registration under the Law on Enterprises must be carried out separately).

The effectiveness of the new registration system and details of the new requirements and documents are still unknown pending the issuance of guidelines by the Government. Slow work progress and delays can be expected for a while after the new law takes effect.

13. Under the new LOI, the granting of investment privileges will still be based on preferred investment areas and geographical locations:
- a. By investment area (details to be provided by the Government):
    - i. Manufacturing of new materials, new energy, high-tech, bio tech, IT and engineering products.
    - ii. Farming and processing of agricultural, aqua-cultural and forest products, making salt, new plant and animal breeds and varieties.
    - iii. Using high-tech, environmentally friendly, R&D.
    - iv. Using intensive labor force.
    - v. Infrastructure development and larger projects.
    - vi. Education, training, healthcare, physical training and cultural projects.
    - vii. Development of traditional industries.
    - viii. Other areas promoted by the government.

- b. By geographical location (details to be provided by the Government):
    - i. Locations of difficult and especially difficult socio-economic conditions.
    - ii. Industrial zones, high-tech zones, export processing zones, economic zones.
14. Investment incentives remain the same under the new laws.
- a. Tax-related incentives (in accordance with tax laws):
    - i. Preferential treatment on income earned from dividend distribution.
    - ii. Exemption on income earned from technology transfer in projects which fall under preferred investment projects in accordance with tax laws.
    - iii. Import tax exemption on machinery, materials, means and other goods imported to implement investment projects in accordance with import-export taxation laws.
    - iv. Carrying losses forward (for not more than 5 years).
    - v. Fast depreciation of capitalized assets (maximum two times than what is provided by regulations).
    - vi. Land use (in accordance with land laws).
      - Land lease for not more than 50 years (or 70 years for exceptional projects).
      - Land lease renewal is possible.
15. The list of investment restrictions remains the same under the new LOI and includes projects that may negatively impact on:
- a. National defense and security and public interests.
  - b. Historical relics, culture, morals and customs and traditions.
  - c. Public health, natural environment and resources.
  - d. Projects that process imported toxic substances, manufacture prohibited toxic and hazardous chemicals or use prohibited elements under international treaties.
16. The definition of conditional projects under the new LOI is broader, while that of specific conditional projects has been made more specific by the Government to include:
- a. Sectors impacting on national defense and security, social order and safety.
  - b. Banking and finance sector.
  - c. Sectors impacting on public health.
  - d. Culture, information, the press and publishing.
  - e. Entertainment services.
  - f. Real estate business.

- g. Exploration, survey, and exploitation of natural resources; the ecological environment.
- h. Development of education and training.
- i. A number of other sectors in accordance with the law.

## **ENTERPRISE LAW**

1. The new 2005 Law on Enterprises (“LOE”) provides a uniform legal framework for domestic and foreign invested companies and regulates the establishment, organization, management, and operations of:
  - a. Limited liability companies (“LLCs”).
  - b. Limited liability shareholding companies (“SCs”).
  - c. (Unlimited liability) partnerships.
  - d. Private enterprises in Vietnam.
  - e. Both foreign and domestic invested enterprises, i.e. enterprises established in forms (a)-(d) above.
2. It is mandatory for state-owned enterprises which were established before the effective date of the 2005 LOE, i.e. July 1, 2006, to be converted into LLCs or SCs. The conversion must be completed within 4 years from the effective date of the 2005 LOE, i.e. by July 1, 2010.
3. Foreign invested enterprises, i.e. joint venture enterprises (“JVEs”) and 100% foreign owned enterprises, which were licensed before the effective date of the 2005 LOE have the option to re-register their business and investment in accordance with the new law, i.e. most likely as either LLCs or SCs, depending on the number of investors and their objectives. The re-registration must be completed within 2 years from the effective date of the 2005 LOE, i.e. by July 1, 2008. If a foreign invested enterprise licensed before July 1, 2006 chooses not to re-register their business and investment in accordance with the new law, the management of such enterprises shall have to follow their existing charter and Investment License.
4. Foreign investors now have more choices of legal form for their subsidiary in Vietnam which could be any of the following.
  - a. Limited liability company (“LLC”), which includes:
    - i. 2-member LLC, which must have 2 and not more than 50 members.
    - ii. 1-member LLC, which is wholly owned by an individual or organization.
  - b. Limited liability joint stock or shareholding company (“SC”), which must have more than 3 shareholders.

- c. Unlimited liability partnership which must have at least 2 individual partners

Under the current Law on Foreign Investment, the only legal form of company available to foreign investors is the LLC.

5. Under the new law, voting requirements will be as follows:
  - a. In a LLC, a 65% majority will be required for all matters as decided by the Board of Members of the LLC, except that a decision of the Board of Members with respect to (i) revision of and supplements to the Charter of the company, (ii) reorganization or dissolution of the company, and (iii) investment or sale of company assets valued 50% or more of the total asset value of the company as recorded in the most recent audited report, shall require a 75% majority.
  - b. In a joint stock company, a decision of the Shareholders Meeting shall be lawful if it is approved by shareholders representing at least 65% of the total voting shares present at the meeting, except that a decision of the Shareholders Meeting with respect to (i) type of shares, total amount of shares and each type of shares to be issued, (ii) revision of and supplements to the Charter of the company, (iii) reorganization or dissolution of the company, and (iv) investment or sale of company assets valued 50% or more of the total asset value of the company as recorded in the most recent audited report, must be approved by shareholders representing at least 75% the total voting shares present at the meeting.

Under the current Law on Foreign Investment, all matters of a joint venture enterprise can be decided by the board of management by simple majority (i.e. 51% of the vote), except for the appointment/dismissal of the General Director and Deputy General Director and amendment of the JVE's charter, which requires unanimous approval.

Therefore, if the foreign investor in a joint venture enterprise wishes to convert the joint venture enterprise into a LLC or SC under the new LOE, the foreign investor will generally need to hold at least 65% of the interest/shares in the LCC or SC if it wants substantial management control.

6. There is no longer a minimum requirement on the contribution of foreign investors. In contrast, under the current Law on Foreign Investment, foreign investors are required to contribute at least 30% of the legal capital of a JVE.
7. There is no longer a minimum capitalization requirement. In contrast, under the current Law on Foreign Investment, foreign invested enterprises have to maintain a minimum 30% of total investment capital. This change shall be very much welcomed by real estate developers since they will not have to bury huge legal capital in the company after completion of sale of the developed properties.



8. Reduction of equity is permitted. Under the current Law on Foreign Investment, the equity of a foreign invested enterprise cannot be reduced.
9. The legal representative of a LLC and SC must reside in Vietnam. If he/she is absent from Vietnam for more than 30 days, he/she must authorize in writing another person to carry out his powers and obligations. The current Law on Foreign Investment does not require the General Director of a foreign invested enterprise to reside in Vietnam.
10. A holding company is now available to foreign invested enterprises. The law defines a holding company as one that:
  - a. Owns more than 50% of the charter capital or issued shares, or
  - b. Has direct or indirect rights to appoint majority or all members of the board of directors or General Manager, or
  - c. Has the right to modify the Charter.

The holding company form will be convenient for those foreign investors which have different projects in Vietnam. Under the current Law on Foreign Investment, this is not available.

