

Vietnam

Amendment to the 1996 Law on Foreign Direct Investment

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The Vietnamese Law on Foreign Direct Investment was first promulgated in late 1987 and revised and supplemented in 1990, 1992 and 1996 ('the 1996 Law'). Long-awaited new legislation designed to reverse a collapse in foreign direct investment (FDI) in Vietnam was approved on 16 May 2000. The 20 amendments and two additions to the country's FDI law came into effect from 1 July 2000.

The Amendment to the 1996 Law on Foreign Direct Investment ('the Amendment') aims to give more incentives to foreign investors, make some adjustments in relation to other laws, legalise important regulations concerning foreign investment, and revise certain unsatisfactory regulations in order to continue reforming administrative procedures related to foreign investment.

The Amendment covers unanimity in joint venture enterprises (JVEs) and issues relating to re-organisation of enterprises, retroactive rights, foreign currency balances, capital transfers, the opening of bank accounts abroad, transfer of losses, fund establishment regulations, tax on profit transfers to foreign countries, compensation for ground clearance, mortgages linked to land and land use rights, import duty, value added tax, dissolution of enterprises with foreign-invested capital, government guarantees and application of foreign laws. The Amendment also stipulates VAT exemption for all machinery and equipment in order to create fixed assets.

INVESTMENT LICENSING

The Amendment (art. 19a) changes little concerning types of investment: enterprises with foreign-invested capital are permitted to change their forms of investment by splitting, separating, merging and uniting enterprises. The various forms of investment specified under the 1996 Law are retained as follows:

- wholly foreign-owned enterprises
- JVEs;
- business co-operation contracts;
- JVEs established by 100 per cent foreign-invested enterprises and a Vietnamese enterprise (art. 15);
- co-operation between foreigned-countries and hospitals, schools and research institutes engaged in areas of technology and science (art. 65).

Similar to the provisions of the 1996 Law, an enterprise with foreign-invested capital may establish branches and representative offices outside the province or city in which its head office is located, subject to the approval of the people's committee of the province or city in which the branch is to be located (art. 32).

AUTHORITY TO ISSUE INVESTMENT LICENCES

Through government efforts, the licensing process has been greatly simplified. The Amendment (art. 60) reduces the period for consideration of an FDI application, beginning from the date of filing, from 60 days to 45 for projects subject to the issuance of an investment licence, and 30 days for projects subject to registration of investment licences. Progress had already been made in the 1996 Law, with the Prime Minister being allowed to make decisions under the Implementation Decree of the 1996 Law (art. 93) with regard to infrastructure: construction of industrial zones and economic processing zones, build-operate-transfer (BOT), build-transfer-operate (BTO), and build-transfer (BT) projects; transportation, culture, insurance, security, exploration and related projects which comprise Group A.

According to the 1996 Law, the Prime Minister must decide on projects with invested capital of US\$40m or more in the following fields: electricity, mining, oil and gas, metallurgy, cement, chemical and related projects using five or more hectares of urban land or 50 or more hectares of land of other categories.

Consequently, the government regulates the issuing of investment licences by the Ministry of Planning and Investment (MPI) and determines the decentralisation of licence issuing. It is to select 20 cities and provinces which can grant investment licences, and each province's People's Committee will have authority to issue licences to Group B projects (i.e. all projects not identified in Group A) with invested capital of less than US\$5m, while Hanoi and Ho Chi Minh cities can authorise Group B projects with invested capital of less than US\$10m. Group B projects with invested capital of more than US\$5m (other than those in Hanoi and Ho Chi Minh cities) must be authorised by the MPI.

Apart from this, the government regulates the issue of investment licences to projects investing in industrial zones and export processing zones. However, in accordance with

the government regulations, the management committees of the industrial zones in the provinces can issue investment licences in cases where the MPI delegates this power to them.

EVALUATION OF FOREIGN INVESTMENT PROJECTS

Evaluation of foreign investment projects has not been reformed. Complaints have been received from those subjected to this evaluation (the Implementation Decree of the 1996 Law, art. 92), which includes the capacity to create new production forces, new branches of industry and new products, to expand markets, to create employment, feasibility studies such as cost/benefit analysis of the project and revenue for the budget and imported items.

In summary, Vietnam's current division of economic sectors into four groups – 'especially encouraged', 'encouraged', 'conditional' and 'prohibited' – does not accomplish the desired streamlining, since all non-prohibited investments are subject to extensive screening irrespective of which list they are on.

JVE BOARDS OF MANAGEMENT

The Amendment has made some slight improvements relating to the principle of unanimity in JVEs (art. 14), providing that the appointment of the chief accountant, along with investment loans, final annual financial statements and final financial statements of capital construction, are no longer decided by unanimity. In addition, the Amendment does not make any changes to the composition of the board of management (BOM) in JVEs, stipulating that the leading body of a JVE should be its BOM, which is composed of representatives of all the financial partners (1996 Law, art. 11); each partner must have at least two representatives on the BOM regardless of their proportional capital contribution. (Rules relating to BOM representatives differ from those applied to domestic entities in the Vietnamese *Enterprise Law* 1999, which stipulates that partners should appoint members to the BOM in proportion to their capital contribution.) However, a general or deputy general director of a joint venture must be a Vietnamese national (art. 12).

INVESTMENT GUARANTEE MEASURES

Under art. 21, where the interests of a licensed enterprise with foreign investment capital are adversely affected by a change in the law of Vietnam, the State should:

- change the objectives of the project;
- reduce/exempt taxes as provided by the law;
- regard the damage to the foreign investor as a business loss that may be carried forward to the following year.

More preferential regulations will be applied to the enterprise following licensing.

The Amendment (art. 66) adds that where such provisions are not provided by the law of Vietnam, the parties may agree to the application of a foreign law in the contract provided that the consequence of applying the foreign law is not contrary to the basic principles of the law of Vietnam.

FOREIGN EXCHANGE

Article 33 deletes from the list of acceptable projects those which provide substitutes for important imports, as these allow the government to maintain the foreign currency balance. New additions, however, are projects of special importance within the government's investment programme in given periods.

Article 35 will facilitate the repatriation of profits by allowing JVEs to open overseas bank accounts, subject to central bank approval.

Under the Amendment, foreign-invested enterprises are allowed to purchase foreign currency from commercial banks (in accordance with the law on foreign exchange management) to meet the demands of their current account transactions. However, art. 36 reiterates that the conversion of Vietnamese currency into foreign currency must be effected at the official exchange rate published by the State Bank at the time of conversion (although the first draft had suggested that the rate would be the buying and selling rates of commercial banks).

CAPITAL CONTRIBUTIONS

Unlike the first draft, the Amendment (art. 8) retains the provision that the minimum capital contribution made by each Vietnamese party is to be determined by the government. Furthermore, it maintains, with respect to important economic establishments as determined by the government, that the parties should agree gradually to increase the proportion of the Vietnamese party's contribution to the legal capital of the JVE. However, the Amendment removes the priority given to a Vietnamese enterprise whereby an enterprise with 100 per cent foreign investment capital may assign it capital. In addition, the Amendment removes the requirement for approval by the body in charge of management of foreign investment in the State where the assignment of capital is carried out. Moreover, there is no longer the provision that in the case of an assignment made to a Vietnamese the assigning party should be entitled to a reduction in or an exemption from tax. Nevertheless, unlike the first draft, the Amendment (art. 34) provides that such an assignment still requires the agreement of the JVE parties.

TAXATION

The Amendment (art. 40) provides that, in any tax year, profits or losses, not only of JVEs but also those of all enterprises with foreign investment capital, or any business contract comprising co-operation with a foreign

party, may be carried forward to the following year and offset against the profits of subsequent years for a maximum of five years.

Article 41 removes the stipulation that 5 per cent of the remaining profits should be used to establish a reserve fund. It permits enterprises with foreign-invested capital to set aside part of the retained profits to establish a reserve fund, a welfare fund, or a fund for expansion of production. The withholding tax rate is reduced to 3, 5 or 7 per cent for the transfer of all kinds of profit abroad by the foreign investor (art. 43). The withholding tax rate is reduced to 3 per cent for an overseas Vietnamese national investing in Vietnam (art. 44).

The Amendment grants not only foreign-invested enterprises, but also parties to business co-operation contracts, exemption from import duty on equipment and machinery, means of transport as fixed assets, their related accessories and spare-parts, materials for the manufacture of equipment and machinery as fixed assets and materials not made locally (applicable in extended projects with technology transfer). These are also not subject to VAT. Projects of special investment stimulus, or located on sites of investment stimulus, will be exempted from import duty on production materials for their first five years of operation.

LAND

When a Vietnamese party contributes capital in the form of land use rights, they will be responsible for land clearance, compensation and compliance with procedures to obtain the land use rights (art. 46). When the State of Vietnam leases land, the People's Committee of the relevant province will determine the rent and deal with the compensation, land clearance, etc. To secure loans from credit organisations, foreign-invested enterprises may mortgage assets attached to the land and the value of land use rights.

BANKRUPTCY AND TERMINATION


The Amendment has altered the conditions for termination and now permits termination in accordance with the conditions stipulated in a company contract, charter, or agreement between parties (art. 53). Article 53 adds that where a Vietnamese partner in a JVE contributes capital in the form of land use rights, the remaining value of the land use rights contributed will belong to the liquidated assets of the JVE when it is dissolved or declared bankrupt.

STATE MANAGEMENT

The Amendment states that financial investigation of an enterprise must not be conducted more than once a year (art. 64). A sudden investigation should be carried out only if there is evidence of breach of the law by the enterprise and after approval by an authorised person.

A record must be kept of the investigation and its outcome. People who make unlawful decisions to conduct investigations and its outcome, or who misuse investigations in order to seek gain, will be disciplined or liable to criminal proceedings.

Prizes will be awarded to enterprises and individuals making outstanding achievements in business.

The Amendment was designed to reverse a collapse in FDI, but the manner in which it was passed did little to boost investor confidence. Vietnam is still leaving potential investors in the dark over its much-vaunted effort to attract sorely-needed new capital. 

This article was prepared by Tran Thi Le Thuy and PhD students at Nagoya University, Japan.

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Human rights: where are we now?

LORD HOPE TO GIVE JUSTICE ANNUAL LECTURE

Lord Hope of Craighead, chairman of the Advisory Council of the Institute of Advanced Legal Studies, is delivering the Justice Annual Lecture 2000 entitled 'Human rights: where are we now?' at St Bride's Hall, St Bride's Institute (off Fleet Street) on Tuesday 3 October 2000 at 6.30pm.

The lecture will be given the day after the *Human Rights Act 1998* comes into force, and Lord Hope will draw on his considerable experience to examine the combined effects of incorporation of the European Convention on Human Rights, devolution, and proposals for an EU Charter of Human Rights. He will reflect on the fact that, as a result, four supreme judicial bodies (the House of Lords, Privy Council, European Court of Justice and European Court of Human Rights) will be able to adjudicate on human rights issues affecting people in the UK. He will also note some of the early signs that have emerged from human rights judgments in Scotland.

Lord Hope has sat as a Law Lord since 1996, and was previously Lord Justice-General and Lord President of the Court of Session in Scotland. Anyone wishing to attend is requested to contact Justice (tel: 020 7329 5100).