- Right to autonomy in investment/business ie to select the sector in which to make an investment, form of the investment, method of raising capital, geographical location and scale of the investment, and to decide on and select an investment partner and the term of operation of the project (though the restrictions on term of operation described above will apply to foreign-invested projects) (article 13).
- Equality in access to and use of sources of credit and aid funds, and in use of land and natural resources, although this is qualified by what must be the favourite words in the Vietnamese draftsmen's lexicon: 'in accordance with law' (article 14.1).
- To lease or purchase equipment and machinery either domestically or overseas to carry out an investment project (article 14.2).
- To recruit foreign employees to fulfill management tasks, provide technical labour and provide expertise in accordance with production and business requirements, unless otherwise provided in an international treaty of which Vietnam is a member (article 14.3).
- To import directly or indirectly equipment, machinery, raw materials, supplies and goods for investment activities, and to export directly or indirectly and to sell its products (article 15.1).
- To process or reprocess products (apparently for third parties), to place orders for processing or reprocessing of goods domestically or to place orders for processing of goods overseas, although again this must be 'in accordance with the commercial law' (article 15.3).
- To purchase foreign currency from credit institutions. The government will provide guarantees for important projects in energy, construction of traffic infrastructure facilities and waste treatment (article 16).
- To assign or adjust investment capital or the investment project itself, although any profits from such assignment will be subject to income tax (article 17).
- To mortgage land use rights to credit institutions operating in Vietnam (but not, despite many pleas, foreign banks) (article 18).

Offshore investment
For the first time, the law covers investment by Vietnamese companies outside Vietnam. Investors may make direct investments overseas if they satisfy certain conditions. Offshore indirect investments must comply with the relevant banking and securities laws (article 76.2).

Restrictions on the level of capital contribution and purchase of shares by foreign investors
Currently, the level of capital contribution into a Vietnamese enterprise by foreign investors is limited to 30 per cent (article 4 of Decision 36 issuing Regulations on Capital Contribution and Purchase of Shares by Foreign Investors in Vietnamese Enterprises dated 11 March 2003). This limit was expected to be revised upwards under the new Investment Law, but no such provision has been made. The Investment Law merely provides that the government issue regulations on the ratio of capital contribution and purchase of shares by foreign investors (article 25.1).

Legal capital
Under article 16 of the FIL, the legal capital of an enterprise with foreign-owned capital had to constitute at least 30 per cent of its invested capital. The new Investment Law imposes no required debt to equity ratio. It remains to be seen what, if any, requirements may slip in through future implementing regulations.

Similarly, reduction of the legal capital of a foreign-invested enterprise was prohibited under article 16 of the FIL. The Investment Law contains no such restriction.

Requirement for unanimous approval lifted
Under article 14 of the FIL, the most important matters regarding the organisation and operation of a joint venture enterprise, including the appointment and dismissal of the general director and amendments of and additions to the joint venture charter, could be decided only by unanimous vote of the members of the board of management. This requirement, which has been a burden for some foreign investors, does not appear in the Investment Law.

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Status of existing foreign-invested enterprises under the Enterprise Law

Before the introduction of the Investment Law and the Enterprise Law, there were separate systems of corporate governance in Vietnam for domestic companies and foreign-invested enterprises. Domestic companies were regulated under the 1999 Law on Enterprises, while corporate governance requirements for foreign-invested enterprises were set under the FIL. With the passage of the Enterprise Law, both domestic companies and foreign-invested enterprises should in theory be subject to a uniform system of corporate governance. However, the peculiar operation of certain transitional provisions in the Investment Law and the Enterprise Law may mean that in practice Vietnam may still have a dual system of corporate governance after 1 July 2006.

The Enterprise Law gives foreign-invested enterprises the choice of either re-registering and converting into the form of an enterprise governed under the Enterprise Law, or not re-registering and continuing to 'conduct business operations within the scope of the lines of business and period stated in its investment licence' and continuing to 'enjoy investment incentives in accordance with the regulations of the Government'. There is only a two-year window in which to make this decision.

It is likely that some 100 per cent foreign-invested entities with no further fund-raising requirements will choose to avoid the expense and trouble of converting to a more sophisticated and complex corporate governance regime under the Enterprise Law. Furthermore, enterprises under certain BOT structures may convert only with the permission of the appropriate government authority. It is conceivable that a substantial number of foreign-invested enterprises will therefore not convert. Pending the publication of the implementing regulations, a plausible reading of the Enterprise Law and the Investment Law is that at least some of those unconverted enterprises will in effect continue to be governed by the FIL. Therefore, rather than creating a level playing field, the post-1 July 2006 regime may see the co-existence of two different classes of foreign-invested enterprise, one operating under the Investment Law and the Enterprise Law, and one operating under the FIL.

Conclusion

The Investment Law takes some steps forward and some steps backwards. The legal community is withholding judgement until the implementing regulations are issued.

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BRIEFING

Vietnam – new investment law

Summary

Vietnam's new Law on Investment and new Law on Enterprises come into effect on 1 July 2006. Both laws represent an attempt to unify the investment landscape in Vietnam for foreign and domestic investors. However, a truly common legal framework has not yet been achieved in all areas.

Vietnam's new Law on Investment (Investment Law) comes into effect on 1 July 2006. Foreign and domestic investments are currently governed by two separate laws: the Law on Foreign Investment in Vietnam (FIL) and the Law on Domestic Investments. As part of Vietnam's efforts to meet the criteria for accession to the World Trade Organization, the National Assembly has attempted to unify principles relating to investment in Vietnam by foreign and domestic investors. The National Assembly has also passed a new Law on Enterprises (Enterprise Law), also effective from 1 July 2006, which is intended to apply equally to domestic and foreign-invested enterprises. However, as this briefing outlines, a truly common legal framework has not yet been achieved in all areas.

Unless otherwise stated, articles cited in this briefing refer to the Investment Law.

Forms of investment

The Investment Law provides a broader range of methods of investment than the FIL. It groups these methods into the two broad categories of 'direct investment' and 'indirect investment'.

Direct investment

Article 3.2 defines direct investment as 'a form of investment whereby the investor invests its invested capital and participates in the management of the investment activity'. Article 21 provides that direct investment can be made in the following forms:

- establishment of wholly foreign- or domestic-owned companies;
- establishment of joint venture companies between foreign and domestic investors;
- investment in contractual forms, including business co-operation contracts, build-operate-transfer (BOT) contracts, build-transfer-operate contracts and build-transfer contracts;
- investment in business development;
- purchasing shares or contributing capital to participate in the management of investment activities;
- mergers and acquisitions; and
- other (unspecified) forms of direct investment.

Only the first three categories were directly contemplated under the FIL, which suggests that structuring possibilities for investors and their lawyers should become rather more interesting in the future.

Indirect investment

Article 3.3 defines indirect investment as 'a form of investment by way of the purchase of shares, share certificates, bonds, other valuable papers or a securities investment fund and by way of intermediary financial institutions and whereby the investor does not participate directly in the management of the investment activity'. Article 26 provides that indirect investment can be made in the following forms:

- purchase of shares, bonds and other valuable papers;
- investment through securities investment funds; and
- investment through other intermediary financial institutions.

Such indirect investment is not governed by the Investment Law but by the securities laws.

Direct versus indirect investment
It appears that the key factor in distinguishing between direct and indirect investment is whether or not the investor participates directly in the management of the investment activity. Unfortunately the Investment Law provides no guidance as to what level of control of the relevant company constitutes 'participating directly in the management of the investment activity'.

The consequences of this distinction are important, as indirect investments do not appear to be subject to the procedures for registration, evaluation and conduct of investment activities contained in chapter 6 of the Investment Law (according to its heading, chapter 6 applies only to 'direct investment activities'). Instead indirect investment will be 'implemented in accordance with the law on securities'.

Until the distinction between direct and indirect investment is clarified, there is likely to be uncertainty in some contexts as to whether an investor who purchases shares in a Vietnamese company is required to submit to the registration and evaluation procedures under the Investment Law.

Investment sectors

Under article 4.1, investors are permitted to invest in all sectors and in all industries not prohibited by law. The Investment Law lists the sectors in which investments are prohibited and in which investments are conditional.

Under article 30, sectors in which investment is prohibited (the Prohibited List) include:
- projects detrimental to national defence and security, and the public interest;
- projects detrimental to historical and cultural traditions and ethics, and Vietnamese fine customs;
- projects that harm people's health or destroy natural resources and the environment; and
- projects for the treatment of toxic waste brought into Vietnam, for the manufacture of toxic chemicals or for the use of chemical agents prohibited by international treaties.

The Conditional List is generally the same as in the FIL, but in a number of instances broader. Article 29.1 lists these sectors (without further definition) as:
- sectors affecting national defence and security, and social order and safety;
- the banking and finance sector;
- sectors affecting public health;
- culture, information, the press and publishing;
- entertainment services;
- real estate business;
- surveying, prospecting, exploration and mining of natural resources, and the ecological environment;
- development of education and training; and
- 'other sectors in accordance with law'.

In addition to the Conditional List, under article 29.2 foreign investors may be subject to conditions in further sectors according to international commitments. However, article 29.4 provides that foreign investors investing in companies in which Vietnamese investors hold more than 51 per cent of the charter capital will be subject to the same conditions as domestic investors.

As described below, projects on the Conditional List will have more rigorous establishment standards than those that are unconditional.

Article 31.1 provides that the government may amend the Prohibited List and the Conditional List from time to time.

Investment incentives

Certain investment sectors and geographical areas give rise to tax, accounting and land incentives, under articles 33-37.

Encouraged investment sectors include: (i) the manufacture of new materials and production of new energy, manufacture of high-tech products, bio-technology, IT and mechanical manufacturing; (ii) the breeding, rearing, growing and processing of agricultural, forestry and aquaculture products, production of salt, and creation of new plant and animal varieties; (iii) the use of high technology and advanced techniques, protection of the ecological environment, and investment in research, development and creation of high-technology; (iv) labour intensive industries; (v) the construction and development of infrastructure facilities and important industrial projects on a large scale; (vi) the professional development of education, training, health, sports, physical education and Vietnamese culture; (vii) the development of traditional crafts and industries; and (viii) other manufacturing and service sectors that require encouragement (article 27).

Encouraged geographical areas include: (i) those where socioeconomic conditions are either difficult or especially difficult (such areas will presumably be stipulated in future implementing regulations for the Investment Law); and (ii) industrial zones, export-processing zones, high technology zones and economic zones (article 28).

Investment incentives will be recorded in the Investment Certificate of all foreign projects and domestic investment projects that require investment certification (article 38).

Registration and licensing system

Before the introduction of the Investment Law, domestic and foreign companies were established under two separate legal regimes. Domestic companies simply registered their business to obtain a Business Registration Certificate. By contrast, with very limited exceptions, foreign-invested companies were required to carry out a feasibility study and to present a voluminous file to the licensing authority, which had discretion over whether or not to issue an Investment Licence.

The Investment Law's stated aim was to integrate both domestic and foreign-invested companies under one common system. This has not been achieved. Following the introduction of the Investment Law, all investment projects, with one exception for small-scale domestic investment projects, will be required to carry out either evaluation or registration procedures. However, domestic investors, unlike foreign ones, will face the additional burden of having to simultaneously register their business under the Enterprise Law to obtain a Business Registration Certificate (article 50(3)).

Therefore, it cannot be said that following the introduction of the Investment Law, both domestic and foreign-invested companies will be regulated in the same manner. In some instances, the regulatory burden to establish a business will actually be greater for domestic investors.

Registration under the Investment Law

Domestic investment projects with investment capital less than 15bn dong (approximately US$0.95m) and not on the Conditional List are not required to register their investments at all (article 45.1). Nevertheless, such investment projects still have to register and obtain a Business Registration Certificate under the Enterprise Law.

Domestic investment projects with investment capital from 15bn dong to 300bn dong (approximately US$19m) and not included in the Conditional List are subject to investment registration procedures. Such projects will be granted an Investment Certificate if the investor so requests (article 45.2).

Foreign-invested projects with investment capital below 300bn dong and not included in the Conditional List are also subject to investment registration procedures. The investors should be issued with an Investment Certificate (article 46).

Article 46(3) requires the registration of foreign-invested projects within 15 days after the registration authority receives the proper registration documents.

Evaluation under the Investment Law

Projects subject to the more burdensome evaluation process include: (i) domestic and foreign-invested projects with investment capital less than 300bn dong but that are on the Conditional List; (ii) domestic and foreign-invested projects with investment capital of 300bn dong or more and that are included on the Conditional List; and (iii) domestic and foreign-invested projects with investment capital of 300bn dong or more but that are not included on the Conditional List (articles 47-49).

The contents of the investment file to be submitted and the criteria for evaluation will differ slightly according to which of the above three criteria applies. However, in all cases the time limit for evaluation must not exceed 30 days, or where necessary 45 days, from the date of receipt of a complete and valid investment file (article 47.2). The investor will be granted an Investment Certificate upon completion of a satisfactory evaluation.

Government guarantees

After a late-draft change, the Investment Law maintains the position that existed under the FIL. Government guarantees are available for projects deemed to be important. Under article 66, guarantees may be given for loans, the supply of raw materials, the sale of products, payments and the performance of other contractual obligations. The government will have the discretion to decide which projects qualify as important projects.

Investment guarantees

As is the case under the FIL, the Investment Law includes provisions to guarantee the interests of investors in cases where a change in laws or policies adversely affects investors' interests (article 11). Unlike the FIL, the remedies under such guarantees no longer appear to include tax reductions or exemptions (although deductions from taxable income may still be made).

Dispute resolution and governing law

Dispute resolution

Disputes between domestic investors or between domestic investors and Vietnamese state authorities must be referred to either Vietnamese arbitrators or Vietnamese courts (article 12.2). In a welcome advance on the FIL, article 12.3 provides that disputes involving a foreign-invested company may be referred to foreign or international arbitrators, or ad hoc arbitrators. However, disputes between foreign investors and Vietnamese state authorities must be referred to either Vietnamese arbitrators or Vietnamese courts, except where provided otherwise in a contract between the foreign investor and a Vietnamese state body or in an international treaty to which Vietnam is a party (article 12.4).

Governing law

In general, investment activities in Vietnam must be governed by Vietnamese law. Article 5 provides that in the case of foreign investment, foreign law may be chosen as a gap filler, provided that the choice of foreign law is not contrary to fundamental principles of Vietnamese law. It may be expected that the question of whether Vietnamese law contains a relevant provision, or whether foreign law is required as a gap filler, will remain as troublesome as ever.

Article 5(3) stipulates that the provisions of any international treaty to which Vietnam is a party will prevail over the provisions of the Investment Law.

Term of investment projects

While there are no restrictions applicable to domestic investment projects, the maximum investment duration of foreign-invested projects remains at 50 years or, in special circumstances determined by the government, 70 years (article 52).

Termination of investment projects

Article 65 provides that investment projects can be terminated in the following cases:

- on expiry of any term of operation contained in the investment certificate;
- in accordance with any provisions on termination contained in the relevant contract, the charter or the agreements or undertakings of investors in the project implementation schedule;
- where the investor decides to terminate the operation of the project; and
- where the operation is terminated according to a decision of the state administrative body for investment or a judgment or decision of a court or arbitral tribunal due to a breach of law.

Regarding the last bullet, the equivalent provision in the FIL refers to 'a serious breach of the law'. The omission of the word 'serious' in the Investment Law suggests that a project may be terminated even for a trivial infraction. The Investment Law also differs from the FIL in allowing an arbitral body to order the termination of an investment project. These new provisions may raise concerns about the predictability of Vietnam's investment environment.

Other issues

Investors' rights

Investors in Vietnam are entitled to the following rights, among others.