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Investment Law

The Common Law on Investment 2005 Fundamental changes and developments

By Luu Tien Ngoc

On the occasion of the Unified Law on Enterprises 2005 and the Common Law on Investment to be fully effective on and from 1 July 2006, V&A would like to have some briefs on the new changes and developments of the twin laws, as well as analyses on the major influences of the twin laws to the business environment and management rules applicable to all types of companies, particularly foreign invested companies, in Vietnam.

Following the first article on the new changes and development of the Unified Law on Enterprises 2005 on VIR, this is the second article by V&A, briefing the new changes and developments of the Common Law on Investment 2005 mainly in comparison with the old Law on Domestic Investment Promotion 1998 and the Law on Foreign Investment in Vietnam 1996/ 2000.

Living along with the different and separate corporate laws on different types of companies, there exist also two regime of investment promotion, one applicable to local investment and the other applicable to foreign direct investment. While the Law on Domestic Investment Promotion 1998 (“LDIP 1998”) covers the first, the second regime is incorporated in and has played as the second and integral function of the Law on Foreign Investment in Vietnam (“FIL 1996”) for nearly 20 years since 1987.

The Common Law on Investment was passed by the National Assembly on 29 November 2005, taking full effect on and from 1 July 2006 (“CLI 2005”), in responses to the request of having a common legal regime for investment promotion in Vietnam. The CLI 2005, together with the twin, i.e. the Unified Law on Enterprises 2005 (“ULE 2005”), unifies the investment activities by and investment promotion regimes (including investment sectors, areas and incentives) to all local and foreign investors, for the first time, in Vietnam. Once fully effective, the CLI 2005 will replace the LDIP 1998 and the FIL 1996.

Continuing a series of articles by V&A on the ULE and CLI 2005 in VIR, the new changes and developments of the CLI 2005 in comparison with the LDIP 1998 and FIL 1996, can be summarized as follows:

First, the subject: The CLI 2005 (Article 1 and 2) regulates the investment activities, the right and obligations, the State guarantees and investment incentives provided to all investors to, in and from Vietnam, including local and foreign investors. It means that from the effective date of the CLI 2005, all investment activities and incentives provided shall be in accordance with the CLI 2005, instead

of the same provided by the LDIP 1998 to local investors and by the FIL 1996 to foreign investors. It means also that from the effective date of the CLI 2005, local investors who never have the same obligation before, shall be obligated, like foreign investors, to register their investment projects (i.e. ones of over VND15 billion and belongs to the conditional list).

As one of the consequences, foreign invested companies (including joint venture companies and wholly foreign owned companies) which are licensed prior to the effective date of the ULE 2005, can be either re-registered (under the ULE 2005 during the first two years from the effective date of the laws) and through which be provided with investment incentives under the CLI 2005, or keep their legal status unchanged, meaning keep their investment incentives remained in accordance with the FIL 1996.

Second, the investment policy: The CLI 2005 (Article 4) clearly stipulates the principle that investors are free to invest in all sectors except where the laws prohibit, free to decide their investment activities, and that all investors shall be equally treated by the State. It further implies to a large extent that there will be no restrictions on the business sectors applicable to foreign investors as it is under the FIL 1996 (e.g. trading, etc.). The State undertakes to implement its international and regional commitments on investment, meaning that (Article 8, CLI 2005) the restriction on business sectors shall be removed step by step by in accordance with the roadmaps upon which Vietnam has agreed. In addition to that the restrictions on the market, the quantity, the localization proportion, etc. of products/ services, shall also be removed.

Third, investment form: Unlike the LDIP 1998 and the FIL 1996, the CLI 2005 as said regulates all investment activities in Vietnam, including both direct and indirect activities.

With respect to direct investment, in addition to the investment vehicles such as setting up joint venture company, wholly foreign owned company, BCC, BOT, BTO, BT as they are in the FIL 1996, the CLI 2005 (Article 21) provides more investment vehicles including business development investment, share acquisition/ equity investment (to engage in corporate management), corporate merger and acquisition, etc.

With respect to indirect investment, the CLI 2005 (Article 26) provides legal ground for such activities as share acquisition/ equity investment (not to engage in corporate management), bond purchase, investment via investment funds, securities funds, and other financial inter-mediators.

Forth, investment sector and area: Though the list of investment areas is not complete and without any specifications, the conditional and prohibited investment sectors for the first time, are clearly provided by such highly valid legal instrument as the CLI 2005 (though it looks basically similar with what provided under the decrees to implement the FIL 1996 (i.e. initially Decree 24 and then

Decree 27). It further means that it will have more stable legal validity compared with the previous and existing lists to implement the LDIF 1998 and FIL 1996.

In addition, it is clear under the CLI 2005 (Article 31) that only the Government (not including its agencies like ministries and people's committees of provinces and cities) will have the right to promulgate the list of investment sectors and areas.

Fifth, investment certificate: In replacement of the investment license which is familiar with foreign investors for nearly 20 years, all new projects with foreign investment under the CLI 2005 (e.g. Article 46) shall be granted with the "investment certificate", at the request of the investors. Subject to the nature of the business and the capital size, all foreign invested project of over VND300 billion and the ones belonging to the conditional list (regardless of capital size) shall be subject to the investment appraisal procedures. Basically, the investment registration and appraisal procedures are not much differentiated or to a large extent kept similar like what are provided in the FIL 1996, except the slightly change in favor of foreign investors by removing the request of having "feasibility study" with respect to investment projects of less than VND300 billion and not belonging to conditional list. (More details about the investment registration and appraisal shall be analyzed in the next publications).

As mentioned in the first article on the ULE 2005, for any new foreign investor who has the first ever investment project in Vietnam, the investment registration shall be required (Article 50, CLI 2005) to do in parallel with the business registration procedures for establishment of the new company in Vietnam. In this case, the investment certificate shall serve at the same time as the business registration certificate. For foreign investor who has their own company set up in Vietnam, only investment registration shall be required without the compulsory request for business registration for setting up new company in Vietnam.

Sixth, investment certifying agency and timing: The investment certifying agencies are not specified in the CLI 2005 (Article 47), where just a simple provision that the Government will detail the decentralization of the power of investment certification and appraisal. However, pursuant to the sprits of the recent draft decree implementing the CLI 2005, the investment certification and appraisal would base on the same structure like what it is in the FIL 1996, i.e. the Government/ Prime Minister would appraise the project decided by the National Assembly, the Ministry of Planning and Investment would appraise and certify the important investment projects, and the province-level people's committees shall appraise and certify the remaining projects.

The CLI 2005 (Article 47) provides a shorter time period for issuance of the investment certificate in comparison with the FIL 1996. As a result, the investment certificate to normal registered projects shall be granted within 15 days from the receipt of the satisfactory file, and the same to appraised projects shall be within 30 days, except the special cases where the time could be extended up to 45 days.

Not focusing on the legal and financial capacity of the foreign investors as the first amongst five key criteria as in the FIL 1996, the CLI 2005 (Article 48) lists down four key criteria for project appraisal, which vary from what are provided by the FIL 1996, but are closer to the investment project and include in turn and top down, the suitability to the planning of technical infrastructures, land use, construction; the reasonability of the request for the land use; the project implementation; and the environment protection solutions.

Seventh, public utility product and service: More fair playing field is pursuing in comparison with the laws before and the free right to do business in whichever sectors, except the prohibited areas, by all business individuals and institutions, has been recognized. Under the CLI 2005 (Article 69), it is clear that all business individuals and institutions, regardless local and foreign, and State and private owned ones, have equal right to produce and supply public utility products and services.

Eight, investment guarantee and incentive: The CLI 2005 provides (mainly re-confirms the similar which have been provided under the LDIP 1998 and the FIL 1996, but systematically) a series of measures of investment guarantees and incentives toward investors, including foreign investors, covering from capital and asset safeguard, intellectual property protection, step-by-step removal of market entry barriers, capital and asset remittance, single tariff, protection in the case of legal changes, to taxation incentives, loss carried forward, quick asset depreciation and amortization, land use, etc.. Amongst those, for the first time, such a highly valid legal instrument as the CLI 2005 confirm the single tariff applicable to products and services controlled by the State in favor of foreign investors.

Ninth, the dispute settlement: For the first time, the flexible dispute settlement mechanism is introduced in the CLI 2005, whereby not only Vietnamese court and arbitration as it is under the FIL 1996, but also foreign/ international court and arbitration can have the right to settle the disputes arising out of the investment activities to and in Vietnam.

Tenth and finally, the investment re-registration: The CLI 2005 (Article 88) provides foreign investors with option of re-registration of their investments in Vietnam. In case of re-registration, the new “investment certificate” shall be granted instead of the former “investment license” being granted under the FIL 1996.

Other Sectors

Finance

- Circular 51/2006/TT-BTC, dated June 12, 2006, of the Ministry of Finance, guiding a number of articles of the Regulation on auction of State companies.
- Circular 55/2006/TT-BTC, dated June 22, 2006, of the Ministry of Finance, guiding a number of articles on assets assessment committee in criminal procedure stipulated in Decree 26/2005/ND-CP.
- Circular 56/2006/TT-BTC, dated June 23, 2006, of the Ministry of Finance, providing guidelines for the building up State budget estimations in 2007.
- On June 26, 2006, the Ministry of Finance and the Ministry of Labor, War Invalids and Social Affairs issued Interministerial Circular 59/2006/TTLT-BTC-BLDTBXH, on the fee for broker of labor export.
- On June 28, 2006, the Ministry of Finance issued Circular 60/2006/TT-BTC, guiding the requirements, conditions for establishment and operation of auditing enterprises.

Banking

- On June 26, 2006, the State Bank of Vietnam issued Decision 26/2006/QD-NHNN, promulgating the Regulation on banking guaranty.
- Circular 04/2006/TT-NHNN, dated July 03, 2006, of the State Bank of Vietnam, guiding the implementation of Decree 12/2006/ND-CP, dated January 23, 2006, with detailed regulation on the implementation of the Commercial Law in respect of international trade and purchase, sale, processing and transit of goods, which are under the management of the State Bank of Vietnam.
- On July 11, 2006, the State Bank issued Decision 30/2006/QD-NHNN, on the Regulation on supplying and using of cheque.

Import – Export

- Decision 156/2006/QD-TTg, dated June 30, 2006, of the Prime Minister, on the approval of the Project on the development of export for the period of 2006-2010.

Health care

- The Prime Minister issued Decision 153/2006/QD-TTg, dated June 30, 2006, on the approval of overall project on the development of Vietnam healthcare system for the period of 2010 and orientation to 2020.

Labor

- Interministerial Circular 06/2006/TTLT-BLDTBXH-BTP, dated July 07, 2006, of the Ministry of Labor, War Invalids and Social Affairs and the Ministry of Justice, guiding the guaranty for employees working overseas.

Maritime

- The Government issued Decree 62/2006/ND-CP, on June 21, 2006, dealing with administrative violations in the field of maritime.

Post and Telecommunication

- Circular 03/2006/TT-BBCVT, dated June 29, 2006, of the Ministry of Post and Telematics, on amendment of and supplementation to a number of articles of Circular 05/2004/TT-BBCVT, dated December 16, 2004, guiding the implementation of the dealing with administrative violations and complaint, denouncement regulated at Chapter IV of Government's Decree 55/2001/ND-CP, on the management, supplying and using of Internet.

Electricity

- The Prime Minister issued Decision 147/2006/QD-TTg, on June 22, 2006, on the approval of the pilot project on the establishment of Vietnam Electricity Corporation.

Miscellaneous

- On June 23, 2006, the Prime Minister issued Decision 150/2006/QD-TTg, promulgating the action plan of the Government for the implementation of national strategy on borrow, settlement of foreign debt to the year of 2010.
- Decision 154/2006/QD-TTg, dated June 30, 2006, of the Prime Minister, on the approval of Project "State management on medicine, food safety, cosmetics for the period of 2006-2015".
- The Government issued Decree 66/2006/ND-CP, on July 07, 2006, on the development of professions and occupation in rural areas.

On July 12, 2006, the President issued the following documents:

- Order 03/2006/L-CTN, promulgating the Law on Real estate business.
- Order 06/2006/L-CTN, promulgating the Law on Lawyer profession.
- Order 07/2006/L-CTN, promulgating the Resolution on the implementation of the Law on Lawyer profession.

- Order 08/2006/L-CTN, promulgating Vietnamese Civil Aviation Law.
- Order 09/2006/L-CTN, promulgating Law on Information Technology.
- Order 11/2006/L-CTN, promulgating the Law on Legal assistance.
- Order 12/2006/L-CTN, promulgating Law on Securities.
- Order 13/2006/L-CTN, promulgating Law on Social Insurance.
- Decision 168/2006/QĐ-TTg, dated July 17, 2006, of the Prime Minister, on the establishment of Aviation Academy of Vietnam.

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