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Investment Law

Searching For Stamp Of Approval

By Dang Trong Hieu, Attorney at law

It is no doubt that the adoption of the CLI 2005 along with the ULE 2005 has shown Vietnam's efforts in its administration reform in the field of business management. With these twin laws, it is much expected by foreign investors that Vietnam will create an open and transparent investment environment, lessen and simplify burdensome administrative procedures on the market-entry of foreign investors in Vietnam as its commitments to attract foreign investment. As fundamental changes and developments of this CLI 2005 have been briefly introduced in our previous articles, this article will mainly discuss on the investment certificate granting procedures applied to foreign invested projects under the CLI 2005 and the latest draft Decree (Draft Decree) guiding the implementation of this Law recently circulated by the Ministry of Planning & Investment (MPI) on 26 June 2006 in comparison with the old Foreign Investment Law 1996, as amended in 2002 (FIL 1996) and Decree 24, as amended later by Decree 27 (Decree 24).

Procedures for issuance of investment certificate

According to the CLI 2005, foreign invested projects shall be subject to registration or evaluation procedures for issuance of investment certificate. In particular, foreign invested projects with investment capital of VND 300 million (roughly equal to US\$ 19 million) or more and which are not in the list of conditional investment sectors shall be subject to evaluation procedures, while the rest will be under registration procedures.

It is noted that the criteria for classification of registered or evaluated projects under the CLI 2005 are much simpler than that of the FIL 1996 where registration procedures were only applied to invested projects not on the list of Group A projects and satisfying a certain number of conditions. With this classification, it can be foreseen that many foreign investors having invested projects of less than VND 300 million and not on the list of conditional investment sectors will benefit the simple registration procedures to obtain the investment certificate.

However, the things are different under the Draft Decree 16. According to Articles 53 & 54 of the Draft Decree 16, in addition to the list of conditional investment sectors which is provided for in Appendix D of this Draft Decree 16, there is a new list of investment sectors in which foreign invested projects irrespective of investment capital must be approved by the Prime Minister prior to being granted investment certificate by the MPI (i.e. *infrastructure construction of industrial zones, export processing zones, high-tech zones, construction and operation of sea ports and airports; operation of sea and air transportation, oil and gas, post and telecommunication services, publishing, press, radio and television broadcasting, etc. those are considered important and sensitive sectors*). It could be easily realized that this list inherits from the list of Group A projects under the old Decree 24.

So the question is: if there is a foreign invested project with the investment capital of less than VND 300 million and not on the list of conditional investment sectors but belonging to the list of projects approved by the Prime Minister, shall this project be subject to registration or evaluation?

Many will easily say the answer is rather simple, this project will be under registration procedures and then submitted to provincial State administrative body for investment (that we could understand is the provincial people's committee) as it completely meets criteria set forth in Article 46 of the CLI 2005. However, how the foreign investor can register its project with the provincial People's Committee in practice when the Draft Decree 16, an implementing regulations of the CLI 2005, stipulates that MPI but not provincial people's committee will be in charge of granting investment certificate for projects subject to the Prime Minister's approval.

We all understand that in Vietnam laws themselves could not be brought into life without lower-level implementing regulations in practice. Therefore, in order to ensure foreign investors fully benefit new changes and developments of the CLI 2005, the list of projects approved by the Prime Minister stipulated in Draft Decree 16 should be revised accordingly to make Draft Decree 16 complied with the CLI 2005. Should the drafting board of the Draft Decree 16 still need to keep this list to help the Vietnamese Government strictly control and manage important and sensitive projects, then the list should only cover projects with the investment capital of VND 300 million or more. Otherwise, considering that a number of sectors in the list of projects approved by the Prime Minister are similar with those in the list of conditional investment sectors, this list should be embedded into the list of conditional investment sectors and an approval of the Prime Minister on the project may be considered as a procedural condition in addition to other conditions of that project.

State administrative bodies for investment and process for registration and evaluation:

Under the CLI 2005 and the Draft Decree 16, there will be three state administrative bodies for investment empowered to grant investment certificate under registration or evaluation procedures, which are:

- MPI with regards to (i) projects that need approval from the Prime Minister, (ii) foreign invested projects of VND 800 million (roughly equal to US\$ 50 million) or more and (iii) projects in other sectors of VND 1,500 million (roughly equal to US\$ 95 million) or more.
- Provincial People's Committees for the other projects which are not under the power of the MPI except those delegated to the Management Boards of Industrial Zones, Export-Processing Zones, High-tech Zones, Economic Zones (IZs);
- Management Boards of IZs will be in charge of the projects invested into such zones and delegated by the relevant Provincial People's Committees.

There is no change on the state administrative bodies for investment as formerly stipulated under the FIL 1996, however, it could be seen that the decentralization on investment activities management has been given the top priority. According to that, the power of provincial People's Committees on foreign invested projects has been considerably increased (Previously, provincial People's Committees were only empowered to grant investment licenses for certain projects with the capital size not exceeding US\$ 10 million). In addition, it is noted that provincial People's Committees shall also have the right to delegate the Management Boards of IZs power over the projects under their competence which are invested into IZs while under the FIL 1996 MPI was the one who empowered to do so.

We also see no significant changes made to the process for registration and evaluation of foreign invested projects under the CLI 2005 and the Draft Decree 16 in comparison with the old FIL 1996 and Decree 24.

Requirements on project file for registration and evaluation:

Under the CLI 2005 and the Draft Decree 16, the project files for registered projects or evaluated projects are nearly the same with that as required under the FIL 1996, except for projects under the list of conditional investment sectors an explanation of condition satisfaction will be further required. Only a slight difference with respect to foreign investors who first come to Vietnam that in addition to project file, the foreign investors shall need to submit their business registration file corresponding to the form of enterprise as required under the ULE 2005.

However, there is an omission of Draft Decree 16 when it fails to specify the number of project file of registered project submitted to the state administrative bodies for investment whilst the number of project file of evaluated project has been clearly defined.

Timing for issuance of the investment certificate:

We see no change on time period for issuance of the investment certificate of registered or evaluated projects in comparison against the FIL 1996. However, there is a worthy difference on the time period for issuance of the investment certificate of registered or evaluated projects under the CLI 2005 and Draft Decree 16. According to the CLI 2005, the investment certificate of registered or evaluated projects shall be issued within 15 days and 30 days (or 45 days in some special cases) respectively. However, with the Draft Decree 16 the time period shall be 15 and 30 working days. Definitely, 15 working days are longer than 15 days, thus in our opinion the Draft Decree 16 should stipulate the time period exactly as the CLI 2005 to protect interests of the investors. This mistake has been seen in the old foreign investment laws system (between FIL 1996 and Decree 24) and should not be repeated again.

Although the time is pressing, it is hoped that the investment certificate granting procedures in the current Draft Decree shall be thoroughly reviewed by the MPI to ensure Vietnam's commitments on an open and transparent investment environment become real.

Other Sectors

Labor – Salary

- On September 07, 2006, the Government issued Decree 94/2006/ND-CP, on the adjustment of common minimum salary.
- On September 14, 2006, the Ministry of Labor, War Invalids and Social Affairs issued Circular 12/2006/TT-BLD'TBXH, guiding the implementation of the

adjustment of salary and allowances in enterprises, according to Government's Decree 94/2006/ND-CP, dated September 07, 2006.

- Circular 13/2006/TT-BLDTBXH, dated September 15, 2006, of the Ministry of Labor, War Invalids and Social Affairs, guiding the adjustment of pension and social insurance allowance, according to Decree 93/2006/ND-CP.

Education

- The Prime Minister decides to rename Foreign Languages University into Hanoi University by his Decision 190/2006/QD-TTg, dated August 17, 2006.
- Decision 208/2006/QD-TTg, dated September 08, 2006, of the Prime Minister, on the establishment of FPT University.

Science & Technology

- On August 23, 2006, the Ministry of Sciences, Technologies and Environment promulgated Decision 15/2006/QD-BKHCHN, on issuance of the Regulation on granting, using and management of numeric and bar code.
- Government's Decree 87/2006/ND-CP, dated August 28, 2006, on the organization and operation of science and technology inspector.

Post & Telecommunication

- On September 06, 2006, the Ministry of Post & Telematics issued Decision 33/2006/QD-BBCVT, promulgating the Regulation on quality management of post & telecommunication services.

Electricity

- On August 31, 2006, the Minister of Industry issued Decision 30/2006/QD-BCN, regulating the construction investment management of independent electricity projects.

Miscellaneous

- Circular 04/2006/TT-BXD, dated August 18, 2006, of the Ministry of Construction, guiding the implementation of regulation on new urban area issued together with Government's Decree 02/2006/ND-CP, dated January 05, 2006.
- The Government issued Decree 86/2006/ND-CP, on August 21, 2006, on amendment of and supplementation to a number of articles of Government's Decree 132/2005/ND-CP, dated October 20, 2005, on the performance of rights and duties of the State owner over State companies.
- Government's Decree 88/2006/ND-CP, dated August 29, 2006, with detailed provisions on business registration.

- On August 29, 2006, the Prime Minister issued Decision 198/2006/QĐ-TTg, giving the approval of the project on establishment of National Oil and Gas Corporation of Vietnam.
- Government's Decree 89/2006/ND-CP, dated August 30, 2006, on the trademark.
- Government's Decree 90/2006/ND-CP, dated September 06, 2006, providing in detail and guiding the implementation of the Law on Housing.
- Government's Decree 95/2006/ND-CP, dated September 08, 2006, on conversion of State companies into one member limited liability company.

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