

C L I F F O R D  
C H A N C E

V I L A F  
VIETNAM INTERNATIONAL LAW FIRM



FOREIGN INVESTMENT

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Foreign investment continues to be the main driving force behind Vietnam's advancing economy. Since the Government's introduction of investment reforms, the Doi Moi policy, in 1986, Vietnam's economy has continued its rising trend. The current investment regime in Vietnam came into effect on 1 July 2015 and is comprised of a Law on Enterprises ("**LOE**") and a Law on Investment ("**LOI**") which laws regulate both domestic and foreign investors, for the establishment and operation of corporations and investment in projects.

In 2015, the total registered foreign invested capital was US\$22.797 billion with an increase of 12.5% year-on-year.

With the Trans Pacific Partnership treaty, Vietnam continues its world economic integration. Like its accession to the World Trade Organisation in 2007, this treaty should further stimulate Vietnam's export-driven economy providing more opportunities for foreign investment in all export sectors, including electronics, garment and textiles, wooden products, crude oil, and rice. In addition to manufacturing and trade, there is still demand for foreign direct investment in many areas, including infrastructure and power development, biotechnology, education, health care, services (banking, insurance, and so on), tourism/hospitality, and real estate development. Vietnam concluded Free Trade Agreements with South Korea in May 2015 and with the EU in December 2015. The establishment of the ASEAN Economic Community in 2015 was also a major milestone in the regional economic integration agenda in ASEAN.

In 2015, foreign investments were recorded in 19 different industry sectors, including the three main sectors as follows:

- Manufacturing (US\$15.23 billion accounting for 66.9%).
- Power generation and distribution (US\$2.8 billion accounting for 12.3%).
- Real estate and construction (US\$2.39 billion accounting for 10.5%).

## Part I: General

### 1. Forms of Foreign Investment

A foreign investor can invest in the Vietnamese market in a number of ways, including:

- Establishing a new enterprise which can be either a wholly or partly foreign-owned enterprise.
- Making capital contributions to or purchasing shares or equity capital in Vietnamese companies.
- Investing through a business co-operation contract between foreign investors and local investors.

- Investing in the form of public-private partnership (“**PPP**”) using, among others, the following contracts:
  - Build-Operate-Transfer;
  - Build-Transfer-Operate;
  - Build-Transfer;
  - Build-Own-Operate;
  - Build-Transfer-Lease; or
  - Build-Lease-Transfer.
- PPPs are mainly used for infrastructure projects or provision of public services.

#### **Branches and Representative Offices**

As an alternative to establishing or investing in a Vietnamese enterprise, certain foreign business entities may set up a branch or a representative office in Vietnam, which in both instances must be licensed by the relevant authorities.

A representative office may be established by any foreign business entity by which to seek and promote commercial opportunities for the foreign parent. Many foreign investors opt to establish representative offices in order to explore the local market before deciding to invest in Vietnam. As the name suggests, a representative office is a dependent unit of the foreign parent company and not an independent legal entity. A representative office is only permitted to engage in business development and related activities and cannot directly conduct profit generating activities in Vietnam.

A branch may only be established by a foreign business entity in specific sectors, including among others banking and insurance.

## **2. Investment Procedures**

Different ways of investment are subject to different licensing processes.

Foreign investors who wish to establish a new enterprise to implement an investment project must register the project to receive an investment registration certificate (“**IRC**”).

After obtaining the IRC, foreign investors register the establishment of the enterprise, and receive the enterprise registration certificate (“**ERC**”).

Depending on the sector, scope and impact of the project, an in-principle approval may be required from the National Assembly, the Prime Minister, or provincial People’s Committee in the process of registration of the project.

Foreign investors who wish to make capital contribution into or purchase shares or equity capital in Vietnamese companies (a) engaging in a conditional business or (b) resulting in an increase of foreign ownership to 51% or more, must obtain an acquisition approval from the provincial Department of Planning and Investment showing the satisfaction of investment conditions and specifying whether the foreign investors are qualified to make capital contribution or purchase shares.

Foreign ownership in an enterprise means the ownership of charter capital (i.e. equity) of such enterprise owned by foreign investors or by foreign investor equivalents. A foreign investor equivalent is a company incorporated in Vietnam which has 51% or

more of its charter capital owned by foreign investors and/or an enterprise that has 51% or more of their charter capital owned by foreign investors.

Foreign investors, who wish to invest through a Business Co-operation Contract (“BCC”), must register the project in order to receive an IRC. Parties to a BCC do not need to establish a new enterprise to implement the project.

Investment projects should be consistent with the Government’s policies and Vietnam’s commitments under international treaties.

Specifically, investment projects must fall within plans approved by the Government, which are called “master plans”. In practice, master plans for certain industries may not be available for foreign investors’ verification and consideration. In addition, such master plans may be subject to change from time to time. Therefore, foreign investors are advised to consult with their advisers on master plans when considering an investment.

### 3. Licensing Considerations

Foreign investors who wish to establish a new enterprise to implement an investment project should consider the following issues when deciding upon the type and scope of their investment.

#### Conditional sectors

As with all countries, Vietnam reserves its sovereign right to restrict investment in sensitive fields. This is achieved through the use of so-called “conditional sectors”. Investment projects in conditional sectors must satisfy certain conditions for reason of national defence and security, social order and security, social ethics, and public health. These conditions are applicable to both foreign investors and local investors alike. Vietnam also reserves its sovereign right to limit foreign investment in certain sectors by setting conditions, such as:

- Foreign ownership limitation;
- Form of investment and requirements of Vietnamese partners;
- Operational contents; and
- Other conditions stipulated in international treaties to which Vietnam is a party.

Regarding treaty-based conditions which Vietnam imposes, the basic conditions are found in the Schedule of Specific Commitments in Services contained in Vietnam’s WTO accession package. Less restrictive conditions for foreign investors are available to investors from ASEAN countries under the ASEAN Economic Community framework. During the licensing process, authorities review the satisfaction of the conditions for foreign investors.

#### Minimum Capital Requirements

Minimum charter capital (that is, the equity registered in the ERC) is required in certain businesses, such as banks and non-bank financial institutions, real estate business, motion picture production, air transportation, airports, auditing services, wired and wireless telecommunication networks.

In some types of investment projects, the charter capital of the project company must meet a certain percentage of the total investment capital for the project (for example,

real estate development projects, power production project and projects performed in the form of public-private partnership).

#### **Operation licences**

These licences will be required after the ERC is issued and before commencement of relevant business in Vietnam. The operation licences are required for businesses having a significant impact on the social and national economic interests, such as education, banking, insurance, securities, hospitals and clinics, newspaper and television, etc.

#### **Certificate of satisfaction of business conditions**

The certificates are for the purpose of ensuring that the enterprise already satisfies the compulsory requirements for its products or services. For example, a food manufacturer or trader may be required to have a certificate of satisfaction of conditions for food safety.

#### **Practicing certificates**

Practicing certificates are required in professional business sectors, such as legal profession, aviation, education, construction (architecture and engineering), hospitals and clinics, accounting and auditing, etc. The head of the company, or key staff, as the case may be, of companies doing business in areas that require practicing certificates would need to hold the required practicing certificates. The certificates must be issued by the relevant Vietnamese authority. Practicing certificates issued overseas may not be accepted in Vietnam, unless otherwise provided in Vietnamese laws or in an international treaty of which Vietnam is a party.

#### **Certificates of professional liability insurance**

To protect the customers' interests, certain types of insurance are compulsory for certain business sectors, such as professional indemnity insurance for legal consultancy activities.

### **4. Licensing Authorities**

The Boards of Management ("**BOM**") of industrial zones ("**IZs**"), export processing zones ("**EPZs**"), high-tech zones ("**HTZs**"), and economic zones ("**EZs**") of provinces or cities are responsible for licensing foreign investments within their zones.

PPP projects which are (i) of national importance; (ii) projects in respect of which the Ministries or authorised bodies of the Ministries are the State authorities having competence to sign the project contracts; and (iii) projects which are implemented in more than one province or city under the central authority, will be licensed by the Ministry of Planning and Investment ("**MPI**").

For all other foreign investment projects, including PPP projects that do not fall under the authority of the MPI, the relevant People's Committee of a province or city is the responsible authority. Licensing applications should be submitted to the responsible body, which will consult with other relevant governmental authorities (when so required) before issuing final approval.

It should be noted that the Prime Minister must approve certain projects, although if specific categories of projects are already included in "master plans" approved by the Prime Minister and comply with the conditions specified in the laws, the relevant licensing authority may issue the IRC.



## 5. Foreign Investment Guarantees

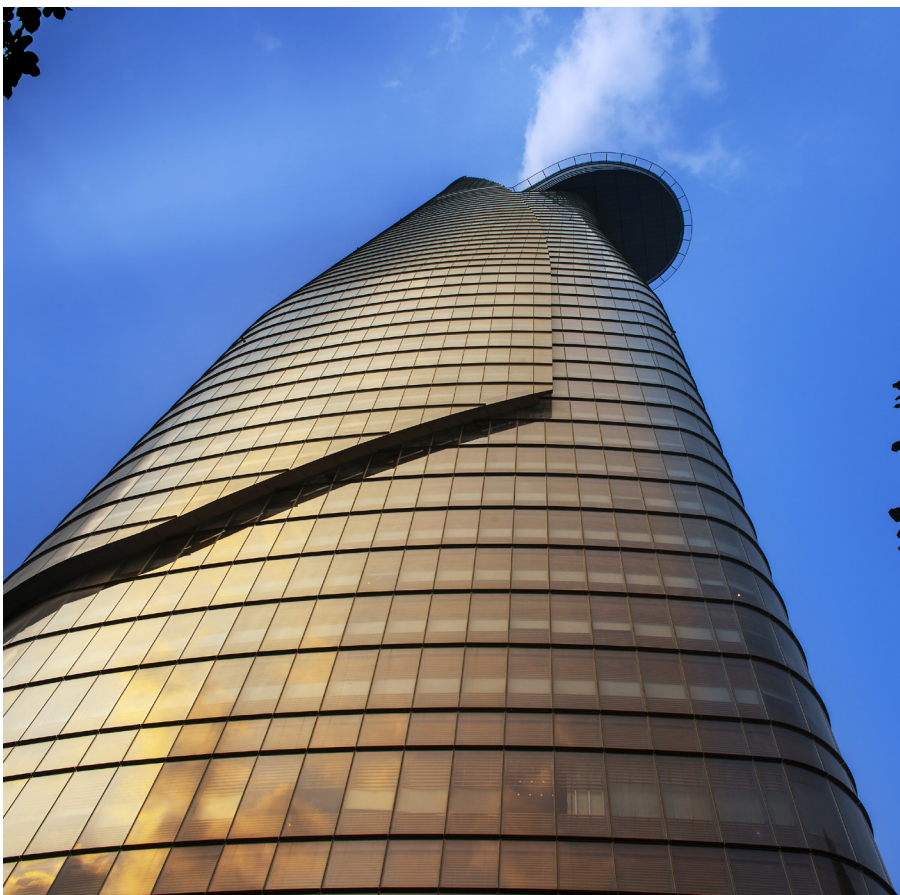
Under the LOI, the government provides foreign investors with guarantees in respect of the following:

- Asset ownership;
- Business investment activities;
- Remittance of assets of foreign investors overseas;
- Government guarantees for a number of important projects; and
- Investment guarantees in the event of a change in law.

## 6. Foreign Investors' Incentives

In Vietnam, incentives are given to both foreign and domestic investment projects in certain business sectors and locations. Investment incentives include:

- Lower corporate income tax rates for a definite term or for the whole project life (10% or 17%), exemption and reduction of corporate income tax.
- Import duties exemption.
- Exemption or reduction of land use fees/land rental.



Businesses permitted to apply for incentives include those engaged in the following activities:

- High-tech production of high-tech ancillary products, research and development.
- Production of new materials, new energy, clean energy, renewable energy, production of products with at least 30% value added, energy-saving products.
- Production of key electronic, mechanical products, agricultural machinery, automobiles and parts, shipbuilding.
- Production of ancillary products serving textile and garment, leather and footwear, key electronic, mechanical products, agricultural machinery, automobiles and parts, shipbuilding industry.
- Production of IT products, software, products with digital content.
- Cultivation and processing of agriculture products, forestry products, aquaculture products, afforestation and forest protection, salt production, fishing and ancillary fishing services, production of plant varieties, animal breeds, and biotechnology products.
- Collection, treatment and recycling of waste.
- Development, operation, management of infrastructural works, development of public passenger transportation in urban areas.





- Preschool, elementary and high school education, vocational education.
- Medical examination and treatment, production of medicines, materials for medicine production, principal medicines, essential medicines and medicines for prevention and treatment of social diseases, vaccines, medical biological products, medicines from pharmaceutical materials, oriental medicines, scientific research for pharmaceutical manufacturing.
- Investment in sport facilities for the disabled or professional athletes, protection and development of cultural heritage.
- Investment in geriatric centres, mental health centres, treatment for agent orange patients, care centres for the elderly, disabled, orphans, homeless children.
- People's credit funds, microfinance institutions.

Investments can also receive incentives if they are located in the following areas:

- Areas having disadvantageous or extremely disadvantageous socio-economic conditions as per the list announced by the Government.
- IZs, EPZs, EZs and HTZs.

Incentives are also available for projects having a total investment capital of at least VND6,000 billion (approximately US\$270 million) disbursable within three years from the project registration, projects in rural areas employing 500 employees or more, high-tech enterprises, and scientific and technological enterprises or organisations.

## 7. Incorporation Forms

Under the LOE, the following are the four main forms of corporate structures:

- limited liability companies (“**LLCs**”);
- joint stock companies (“**JSCs**”);
- incorporated partnerships; and
- private enterprises (i.e. sole proprietorships).

All of these structures are known as “enterprises”.

An LLC or a JSC is likely to be the most appropriate structure for foreign investors who want to set up a joint venture company with a local partner or wholly foreign-owned enterprise.

## 8. Corporate Governance

### Shareholding limit for foreigners

Under the LOE, there is no limit on foreign ownership in an enterprise. There are some exceptions to this general rule under regulations dealing with conditional sectors or WTO commitments.

### Legal representatives

Subject to the charter of the company, JSCs and LLCs may have more than one legal representative; one of whom must reside in Vietnam.

However, if a company has only one legal representative, he or she must reside in Vietnam, and when he or she exits Vietnam, he or she must authorise another person

in writing to perform the rights and obligations of the legal representative whose authorisation will be effective until the legal representative returns or authorises another person to replace him or her. A legal representative must be replaced if he or she is absent from Vietnam for more than 30 days, or is otherwise incapacitated, without authorising another person to perform his or her rights and obligations as legal representative of the company.

#### **General Director**

Under the LOE, the criteria for becoming a Director or a General Director are as follows:

- having sufficient “civil conduct capacity” (the capacity to enter into a contract on behalf of the company);
- not prohibited from managing a business under the LOE; and
- having expertise and experience in corporate management, unless the company’s charter provides otherwise.

In a subsidiary of a company with State-owned capital contribution portion or shareholding of more than 50%, in addition to the aforementioned criteria, the General Director must also not be related to: (a) any person on the management team of the parent company; or (b) the representative of the State owned capital portion in the parent company.

#### **Management of an LLC**

There are two types of LLC: a single-member LLC and a multi-member LLC.

A single-member LLC is a company owned by one organisation or individual called the owner. The owner is liable for debts and other liabilities of the company within the amount of the LLC’s charter capital. The owner has complete control of the LLC.

A multi-member LLC is a company owned by at least two, but no more than 50, individuals and/or organisations. The members run the company via the members’ council which is the highest decision making body in the LLC. Each member of the LLC may participate in the members’ council or appoint their authorised representative to be a member of the members’ council. In meetings of the members’ council, each member or their authorised representative also possesses the number of votes in proportion to his/her capital contribution.

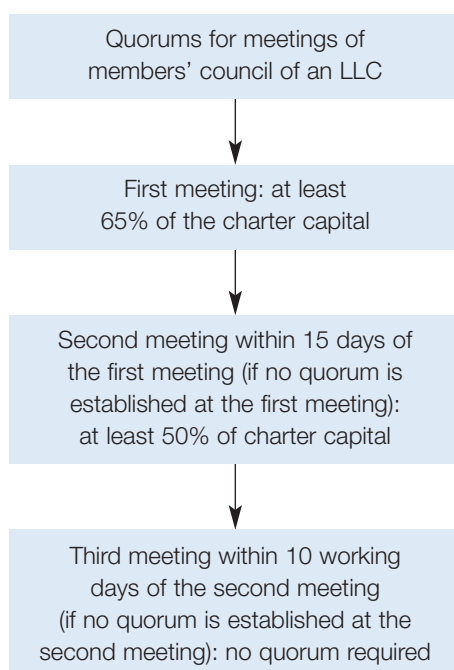
The LOE sets out the following default rules applied to a multi-member LLC regarding the quorum and voting procedures:

- *Quorum*: Under the LOE, the members’ council can meet up to three times in order to eliminate quorum deadlocks. For a quorum to be present at the first meeting, the attendance of members or their authorised representatives representing at least 65% of the LLC’s charter capital is required. If there is no quorum, a second meeting will be held within 15 days where a quorum is reached if at least 50% of the LLC’s charter capital is present. If there is still no quorum, a third meeting will be held within 10 working days regardless of the number of attending members or their authorised representatives and the percentage of the charter capital they represent.

- *Voting*: Most decisions shall be passed in a meeting if they are approved by members of the members' council or their authorised representatives representing at least 65% of the capital contribution of all attending members or their authorised representatives. This means that in order to control an LLC under the LOE's default rules, the majority investor must own at least 65% (and not just a majority of 51%) of the charter capital of the LLC.

Notwithstanding the above, where a resolution concerns the sale of 50% or more of the total assets of the LLC recorded in its latest financial statements (or a smaller ratio as stipulated in its charter), the amendment or supplement to the charter of the LLC, or the reorganisation or dissolution of the LLC, the decisions regarding such matters shall be passed in a meeting if they are approved by the members or their authorised representatives representing at least 75% of the capital contribution of all attending members or their authorised representatives.

Certain decisions of the members' council may be approved without convening a meeting if the relevant decision is approved in writing by the members or their authorised representatives representing at least 65% of the charter capital of the LLC.



### Management of a JSC

A JSC is a company in which the charter capital is divided into shares. Shareholders are liable for debts and other property liabilities of a JSC up to the amount of their respective capital contributions to the JSC. Although a JSC must have a minimum of three shareholders, there is no restriction on the maximum number of shareholders. However, once there are 100 shareholders or more the JSC becomes a "Public Company".

A JSC can opt to structure its governance following one of these options:

**Option 1:**

- General Meeting of Shareholders (“**GMS**”);
- Board of management; and
- A Director or General Director;
- Where there are 11 shareholders or more or one institutional shareholder owning 50% or more of the total shares of the JSC, there must be an Inspection Committee.

**Option 2:**

- **GMS**;
- Board of management with 20% of its members being independent members;
- Internal audit committee under the authority of the board of management; and
- A Director or General Director.

A Director or General Director who is appointed by the board of management is responsible for the daily operation of the JSC.

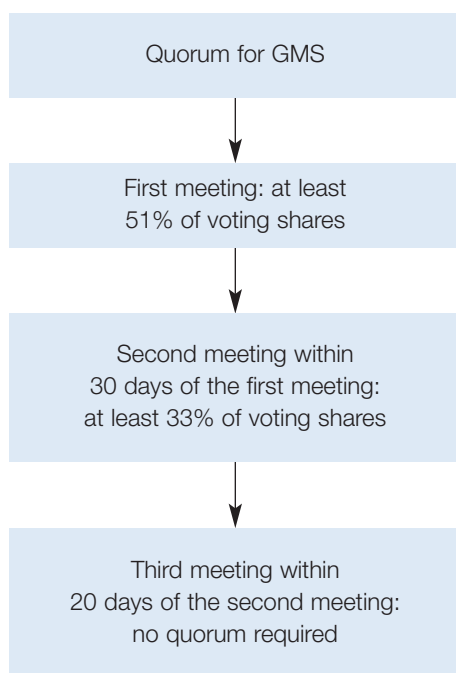
A board of management is comprised of between three to 11 members elected by the **GMS**. The board of management has the right to manage all decisions of a JSC, except for the matters that must be approved by the **GMS**. The meeting of the board of management is conducted when at least three-quarters of the total members of the board of management are present. Where the quorum for the first meeting is not met, the second meeting shall be convened within seven days after the date of the first meeting and the quorum for the second meeting must be more than one-half of the total members of the board of management. Unless otherwise provided under the charter of the company, resolutions are passed by a simple majority of members, with the chairperson holding the casting vote.

The LOE also provides default rules regarding the conduct of a **GMS**, particularly quorum and voting requirements:

- *Quorum*: The first meeting needs shareholders or their authorised representatives holding at least 51% of voting shares of the JSC in order to reach a quorum. If there is no quorum, within 30 days of the first meeting, a second meeting will be held. The second meeting needs shareholders or their authorised representatives holding at least 33% of voting shares of the JSC to reach a quorum. If there is still no quorum, a third meeting will be held within 20 days regardless of the number of attending shareholders or their authorised representatives and the percentage of voting shares they represent.
- *Voting*: Resolutions of the **GMS** require different majorities depending on the matter under consideration. Generally, a resolution will be passed if it is approved by at least 51% of the voting shares held by the shareholders or their authorised representatives present at the meeting.

To pass resolutions proposing the issue of shares, changing business lines or organisational structure, reorganising or dissolving the JSC, or investing or selling 35% or more of the JSC’s assets (or otherwise provided under the JSC’s charter), approval by at least 65% of the voting shares held by the shareholders or their authorised representatives present at the meeting is required.

When the shareholders wish to pass a written resolution without organising a GMS, the minimum majority needed to pass the vote is 51% of the total voting shares of the JSC.



### Choosing between an LLC and a JSC

When choosing a corporate structure, investors should take into account the advantages and disadvantages of LLCs and JSCs.

Advantages of JSCs include:

- The company can issue shares in order to raise capital.
- JSCs can also issue preference shares in order to alter quorum and voting requirements and profit entitlement.
- Purchasing minority shares in existing JSCs may also be preferable to foreign investors who are interested in testing the market before fully establishing themselves in Vietnam.

### 9. Related Party Transactions

In general, contracts/transactions between a company and any of its management team, a member (LLC) or a significant (more than 10%) shareholder (JSC) or their related persons must be approved by the members' council (single or multi-member LLC), or the GMS or board of management (JSC). If a single-member LLC does not have a members' council, the approval of a panel of the President, General Director and Inspector is required.

The relevant transaction will be null and void if the approval is not given as mentioned above.



## **10. Restrictions on foreign investment**

Under the LOI, foreign investors can invest in all sectors not prohibited by law. Areas prohibited by law include:

- Trading of drugs prescribed in an appendix to the LOI.
- Trading of chemicals or minerals prescribed in an appendix to the LOI.
- Trading of specimens of wild fauna or flora as set out in Schedule 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora and specimens of endangered species and rare wild fauna or flora as listed in an appendix attached to the LOI.
- Business dealing with prostitution.
- Purchase and/or sale of humans, tissues and/or parts of the human body.
- Business activities relating to human asexual reproduction.

## **11. Foreign Exchange**

Foreign exchange is heavily regulated in Vietnam. The remittance of foreign currencies offshore is permitted in a limited number of circumstances, including:

- Remittance of the invested capital and profits.
- Repayment of offshore loans and payment of interest and fees relating to the loan.
- Payment for import.
- Funding the permitted activities such as expenses of offshore office or offshore investment.

Publishing or quoting prices (including in contracts) by Vietnamese enterprises in foreign currencies is not permitted even in case of enterprises established by foreign investors.

Foreign investors are free to remit profits abroad after paying corporate income tax and dividend tax (applicable only to investors being natural person) in Vietnam.

## **12. Government Monopolies**

The Government maintains monopoly over certain goods and services, including:

- Performance of national defence and security tasks.
- Production and supply of industrial explosives.
- Production and supply of toxic chemicals.
- National electricity transmission, multi-purpose hydropower and nuclear power of extreme socio-economic importance associated with national defence and security.
- Management and operation of national and urban railways, national and urban railway transport control.
- Management and operation of airports which play an important role in national defence and security and flight control.
- Maritime safety assurance.
- Public postal services.

- Lotteries.
- Publishing (excluding printing and distribution of publications).
- Money printing and minting.
- Cartography serving national defence and security.
- Management and exploitation of inter-provincial and inter-district irrigation works and sea walls.
- Planting and protection of upstream forests, protective forests or specialised forests.
- Provision of credit loans for socio-economic development.
- Member enterprises of State-owned groups/corporations which play a key role in production and business activities, development strategies or hold business and technological know-how.

The Government is drafting a new list of monopoly areas which include 16 goods and services. Gold bar production and exportation of gold materials are proposed to be added to the list.

### 13. Tax Obligations

Foreign investors doing business in Vietnam, either through enterprises, permitted project offices or branches in Vietnam or cross-border, are subject to Vietnamese tax.

Enterprises or branches established in Vietnam are subject to business taxes, such as:

- Business registration tax;
- Value added tax;
- Corporate income tax;
- Special consumption tax;
- Land use fees or land rental; and
- Natural resources taxes if the business is involved in natural resources exploitation.

Foreign companies or organisations doing business in Vietnam or having business income from Vietnam (for example, cross-border services provider) are required to pay value added tax and corporate income tax in Vietnam. The taxes will be withheld and paid by the service users, unless foreign companies or organisations (or contractors) are qualified to register tax payment by themselves.

As from 1 January 2016, the corporate income tax rate was reduced from 22% to 20%. Lower tax rates are available as incentives for certain businesses (see section 6 above).

Standard value added tax rate is 10% while the rate of 5% is applicable to 14 groups of goods and services and 0% is applicable to international transportation, exported goods and services (except for credit provision service, capital transfer and some other goods and services). There are 25 groups of goods and services that are not subject to value added tax.



Business registration tax varies from approximately US\$45 to US\$135 depending on the registered charter capital (or the total investment capital with respect to foreign invested companies).

Special consumption tax varies from 7% to 75%.

#### **Transfer pricing**

All enterprises must conduct transactions with related parties on an arm's length basis. The tax authorities can make adjustments if they have reasons to believe that the transactions were not conducted on arm's length basis (that is, at a price lower than the market price). The market prices are determined by a number methods using:

- Comparison of prices in independent transactions;
- Reselling prices;
- Prime cost plus profits;
- Profit comparison; and
- Profit division.

#### **14. Dispute resolution in Vietnam**

For settlement of their disputes involving investment in Vietnam, foreign investors can choose:

- Vietnamese court;
- Vietnamese arbitration; or
- Foreign or international arbitration.

However, disputes with a State authority of Vietnam can only be submitted to the Vietnamese court or Vietnamese arbitration unless otherwise agreed in the agreement or provided in the international treaties to which Vietnam is a party.

Disputes involving rights to immovable assets, such as land use rights, within the territory of Vietnam will be under the exclusive jurisdiction of Vietnamese courts.

Vietnam is a member of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). Accordingly, the arbitral awards rendered through arbitration in any country which is a member of the New York Convention can be recognised for enforcement in Vietnam. An application for recognition and enforcement of a foreign arbitral award must be filed with the Ministry of Justice before it is submitted to the courts of Vietnam for recognition and enforcement.

Foreign court judgments are recognised and enforced in Vietnam on reciprocal basis only.

Enforcement of judgments and arbitral awards in Vietnam would be a time-consuming and inefficient process due to shortcomings in verification of the conditions and assets of the obligors against whom the judgments and awards were issued.

Vietnam allows private bailiffs to participate in the enforcement of judgments and arbitral awards. However, the lack of authority to use coercive enforcement methods limits the efficiency of the enforcement by bailiffs.

## Part II: Vietnam's Treaty Commitments and New Developments

Vietnam has been a member of the World Trade Organisation ("**WTO**") since 11 January 2007. As part of its WTO accession, Vietnam made commitments to grant market access to foreign investors in 11 service sectors.

### New and ongoing Treaties in Vietnam

Vietnam signed the free trade pact with the European Union (EU FTA) on 2 December 2015, and the Trans Pacific Partnership ("**TPP**") on 2 February 2016. The Korean Free Trade Agreement ("**FTA**") came into effect from 20 December 2015. While the TPP is yet to be ratified and the EU FTA is yet to come into effect, Vietnam is already reaping the benefits of increased investor interest as a result of its participation in these agreements. The rules of origin requirements in the TPP have pushed foreign manufacturers to consider investing in technology for production in Vietnam rather than just sourcing materials from other countries. Coupled with Vietnam's other FTAs, WTO membership and ASEAN integration, Vietnam has been broadening its appeal to foreign investors, especially those looking for alternative delivery channels for their products.

### Developments of SEZs

Another potential development is the establishment of special economic zones ("**SEZs**") in Vietnam. There are already three formally-approved SEZs:

- Van Don (Quang Ninh Province).
- Van Phong (Khanh Hoa Province).
- Phu Quoc (Kien Giang Province).

Another SEZ has recently been proposed by Ho Chi Minh City to further the city's economic development. While some economists agree that Vietnam needs SEZs and this model has succeeded in the United States and China, they do not always agree on the number, location and form of the SEZ. Others criticise the delay in establishing the already approved SEZs because the Government is excessively concerned about the special policies that would be implemented in such SEZs, particularly in terms of land ownership, gambling and foreign exchange controls. It may take time for the Government to become more accepting and supportive of the development of the SEZ model in one or more locations in Vietnam.

### **Part III: Other Strategic Considerations**

Vietnam's emerging economy and developing legal system means more attention needs to be paid to ensuring the efficiency and certainty of transactions. Some important considerations that often arise are discussed below.

#### **Baby licences**

In addition to an IRC, investments in many sectors and industries in Vietnam will require additional operational licences. Such "baby licences" (as they are referred to colloquially) often result in delays because licensing authorities have more discretion in approving such licences. An investor should be thoroughly aware of the necessary baby licences needed for its project in Vietnam. If joining with a local investor, it is usually best for the local investor to secure these baby licences first in order to avoid any unnecessary delays or complications.

#### **Anti-competition**

Vietnam's anti-competition rules may require filings if an acquisition results in an economic concentration from 30% to 50% in the relevant market. If the acquisition results in an economic concentration greater than 50% (in the relevant market) then the transaction is generally prohibited unless it meets one of the few listed exceptions. A further consideration in this regard is that the rule includes permanent establishments, which may also capture the markets of any representative office and/or branch as well. Knowing the market share in advance of a transaction will allow for the necessary steps to be taken.

#### **Choice of law**

It is a common request by foreign investors to have contracts governed by a foreign governing law when possible. However, the problem in that respect is that even when such choice of law is legally permissible, it may not be the best practice. First, if the resolving jurisdiction is a foreign court, Vietnam will not recognise a foreign court judgment unless there is a specific bilateral treaty requiring it to do so. Second, if the resolving jurisdiction is a foreign arbitral body, then the arbitration award is only enforceable in Vietnam if it does not violate the basic principles of Vietnamese law. Similarly, if the Vietnamese courts are resolving the dispute under a foreign law, the foreign law principles must not be contrary to Vietnamese law. In such a situation, the best practice is often to use Vietnamese law as governing law and then perhaps a foreign jurisdiction for arbitration, thus avoiding the public policy exception to enforcement of arbitral awards.



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