

**MEETING MINUTES ON DRAFT DECREE TO REPLACE DECREES 108 & 139
PROVIDING GUIDELINES FOR THE LAW ON INVESTMENT AND
ENTERPRISE LAW**

Time: 8:30 ~ 11:45, Friday, March 12, 2010

Venue: The Southern Investment Promotion Center, 178 Nguyen Dinh Chieu, District 3, Ho Chi Minh City

Participants: See Annex 1, Participant List

AGENDA

- Main amendments and supplements of draft decree to replace Decrees 108&139
- Free discussion

DRAFT DECREE TO REPLACE DECREE 108/2007

I. Main Amendments and Supplements of Draft Decree

Mr. Do Nhat Hoang, Deputy Director of Legal Department, MPI

Reasons to amend Decree 108/2007

- The Law on Investment 2005 has been implemented for the last four years during which inadequacy, inconsistency, and overlap with other laws have been found.
- In the context where the Law on Investment and Law on Enterprise cannot be amended, then the amendment to Decree 108 is necessary.
- The amendments and supplements to Decree 108 will be implemented in the issuance of a new replacement decree.

Main amendments and supplements of Draft Decree

- Amend 32 articles
- Supplement 32 articles
- Delete 4 articles
- Consider nearly 35 issues with over 20 content problems and 10 technical problems

Specific content to be amended

- The Draft Decree temporarily proposes a threshold of foreign capital contribution of 10% on the total investment capital as the basis for determination of a foreign invested project.
- Foreign investors are defined as foreign organizations or individuals invested in Vietnam. Foreign invested enterprises in which capital contributed by foreign

investors is over 49% are also considered foreign investors in case they invest in other businesses.

- There are some important viewpoints to be discussed regarding the concept of project transfer: i) transfer of a part and ii) transfer of the whole project.
- The Draft Decree suggests that investment projects in sectors that are not committed under international treaties (such as WTO) must seek opinions from relevant line ministries and be submitted to the Prime Minister for approval.
- The drafting team has proposed two options for foreign investment in the form of capital contribution and stock purchases in Vietnam: if foreign investors make capital contributions and stock purchases at less than 49% of the charter capital and their investment projects are not in sensitive or restricted areas, then the business registration procedure is applied; otherwise a joint venture is required and the procedure for granting investment certificates should be implemented.
- To establish a FDI holding company in Vietnam, at least two investment projects with a value of at least \$10 million are required. It is also necessary to restrict several functions of the holding company. For example, it is not allowed to transfer taxes among the holding company and its subsidiaries. Another issue that is under consideration is to allow the establishment of the holding company before setting up the subsidiaries.
- The re-registration of enterprises that are not State Owned Enterprises previously regulated within five years since the Law on Enterprise (LOE) took effect is now extended for another three years. For SOEs, the time limit for compulsory re-registration is four years since the LOE took effect.
- Only the regulations on conditional investment promulgated by the National Assembly (NA), the NA standing committee, the government, and the Prime Minister are valid, except in cases where the government, laws, and decrees empower the ministries to promulgate these regulations.
- A list of investment incentives has been consolidated and issued in conjunction with the decree replacing Decree 108. In the re-registration process, all investment incentives that the enterprise currently enjoys must be recorded in the Business Registration Certificate, and they will still be valid.
- There are three options for consideration regarding the authority to issue investment licenses for projects of national importance:
 - i. the Ministry of Planning and Investment issues them for sensitive and important projects (of national scale, those located in multiple provinces / cities, and the ones utilizing larger land tracks)

- ii. MPI only gives opinions on the appraisal of the application and the provincial government will issue the investment license.
 - iii. MPI leads the application appraisal process to submit to the Prime Minister for review and then the provincial government will issue the investment license. The drafting team is leaning toward the second option.
- There is currently some overlap in the allocation of land use rights to investors. The drafting team proposes adding a project site recommendation letter from provincial government to the application dossier for granting investment licenses.
 - Regulations on the project implementation schedule will be added so that it can be adjusted once underway. Criteria for reporting financial capacity will also be added.
 - The information on required land usage that is recorded in the investment license must be in line with the appraisal result of the Department of Natural Resources and Environment.
 - The LOE requests the application dossier for the investment license to include the professional practicing certificate of the general director or other key personnel if the business in which the company invests requires this document. However, the LOE also stipulates that the general director is appointed by the Board of Directors. Before the establishment of an enterprise, the Board of Directors cannot be established. The draft therefore proposes that at the time of application, along with the business registration, if these key personnel cannot be defined, then it is not obliged to submit the certificate. But before the enterprise goes into operation, it must provide the required professional practicing certificate.
 - The Department of Planning and Investment Director will have the authority to amend the investment licenses by issuing an official letter, of which its contents will take effect immediately.
 - An enterprise wanting to invest in a new project has to approach the province / city where it wishes to open a new location to apply for a branch establishment. After the new project has been licensed, then the company can ask for an amendment to its current investment license.
 - When an investor is unable to liquidate or the project has not been deployed after a period of over 12 months and there is no other interested foreign or domestic investor, then the government will take the lead on setting up the liquidation board. The dissolution process must be done before the liquidation process which will be delegated to the investment-license issuing agency or project-application receiving agency.

II. Comments and Contributions from Companies

Mr. Yoshida Sakue, JETRO HCMC

- Is a Vietnamese enterprise having 10% or more of foreign capital in the future considered a foreign invested project?
- Foreign retailers and distributors can open an initial store without any conditions, but if they open a second store, they must meet some financial requirements and the economic-need test. Currently, there has no clear understanding among state agencies relating to foreign retailers and distributors. Local agencies consider a business having one percent of foreign capital a FIE; however, according to the Ministry of Industry and Trade (MOIT), foreign retailers and distributors are 100 percent foreign owned. Thus, the new threshold of 10 percent of total investment capital will cause a difference in understanding among agencies or can it be clarified for the purpose of state management?

Answers from Mr. Do Nhat Hoang, Deputy Director of Legal Department, MPI

- The 10% threshold is applicable to the concept of *foreign invested projects*, not to the concept of *foreign investor*. An investment project with 10 percent foreign invested capital or more is considered a foreign invested project. For the foreign investor, a threshold of 49% will be applied, so an enterprise has a foreign invested capital at or greater than this level will be considered a foreign investor. There is currently a discussion on whether the two concepts cause any conflict. Enterprises are welcome to give comments on this issue.
- If a foreign enterprise purchases even only one percent of a chain of retail outlets from a Vietnamese entity, a permit from MOIT is required. In short, MOIT will be the lead agency to appraise these applications. In the appraisal process, the ministry will seek the opinion from the provincial governments where these outlets are located in order to ensure that they meet socioeconomic demand in those provinces. Therefore the foreign investor should obtain the support of the provinces.

Mr Bui Ngoc Hong, Indochine Counsel

- Currently, the purchase by a foreign investor of a Vietnamese enterprise which has a retail chain has to be approved by MOIT as requested by the economic-need test regulations. However, the fact that such a retail chain is currently operating proves that they are in line with local economic demand, so what is MOIT supposed to approve? Should MOIT approve the purchase of each retail outlet or all the outlets?
- According to the draft, if foreign investment takes place in sectors outside the scope of Vietnam's commitments under WTO, these projects will be submitted to the Prime Minister for approval. However, according to WTO regulations, if a member country opens its domestic market in a sector outside the scope of commitments for another country, then in accordance with Most Favored Nation rules, the opening will apply for the rest of the countries. Has the drafting team taken this issue into account?

- What is the meaning of the two concepts, foreign invested project and foreign investor?
- Current regulations state that an enterprise can only transfer a project if that project has an investment certificate. However, in many cases, there is lack of the certificate and this causes many difficulties in project transfers. Please consider this issue.
- Will a foreign investor have full rights to decide the project duration? The current draft has not clarified this.

Answers from Mr. Do Nhat Hoang, Deputy Director of Legal Department, MPI

- According to Decree 23/2000, a foreign investor who purchases a Vietnamese enterprise which owns a retail and distribution system must ask for approval from MOIT and local governments to ensure the consistency with the provincial master plan. The drafting team has taken the MFN rule into account for foreign investment in sectors outside the scope of Vietnam's commitments with WTO.
- The concept of a foreign investor is defined only for the purpose of when a foreign enterprise purchases shares. The threshold of 49% determines the issuance of an investment certificate in case of purchasing shares. Foreign investment projects and the threshold of 10% are proposed to resolve the cases of investment projects in sensitive sectors such as forest planting and mineral mining. It also serves **statistical** purpose.
- As defined in the LOI, an investment project is an investment of long-and medium-term capital in a defined duration at a specific location. If a domestic enterprise wants to transfer a project, then it has to separate that project beforehand. Alternatively, it can sell its shares in accordance with the LOE. For example, when selling 10% of shares to a foreign investor then obviously that foreign investor owns 10% of each project that such enterprise has under its control, and it will participate in the management of such a Vietnamese enterprise in accordance with the LOE.
- The right to decide the project duration is regulated in Article 5, LOI. However, in fact, it is restricted because it depends on the land rental duration.

Mr. Pham Hong Ky, Deputy Director of Southern Institute of Science and Technology

- It is proposed to remove the concept of foreign invested project as this concept will unnecessarily complicated the implementation phase.
- The decree should be amended so that the enterprise fulfills the professional certificate requirement before operation, not when submitting its application to the Business Registration Authority.

Mr. Nguyen Quoc Dzong, Director of Indochina Land

- What is the percentage range of foreign-investor share purchases of a domestic enterprise in the real estate sector and where will it be regulated?

- Can subsidiaries that do not have a monetary / credit business function provide loans to each other? Can a subsidiary that has excess funds transfer to one lacking capital and be reimbursed later? Is this case considered an increase or decrease of investment capital?
- The requirement from the Ministry of Construction (Circular 13/2008 providing guidelines for Decree 153/2007) that foreign enterprises investing in real estate in Vietnam must have a capital account at a bank in Vietnam is inappropriate. Furthermore, the request for evaluation and verification of assets used for capital contribution in the real estate sector is only necessary for State Owned Enterprises. The application of this requirement to private enterprises is not appropriate. How do LOI and specific law deal with this issue?
- For real estate projects, investors are requested to guarantee all products for five years. Can the investors liquidate their projects before the end of five years?

Mr. Nguyen Quoc Bao, Chairman of Thanh Cong Mobile

The regulation of legal capital of six billion VND applying to real estate enterprises is difficult to monitor, and thus should it be abolished?

Representative from Amcham

The requirement of the minimum charter capital of six billion VND applying to real estate enterprises is irrelevant. Real estate projects are usually capital intensive, and many of them reach hundreds of millions of dollars, so this amount is insignificant. A more effective measure is required to prove the financial capacity of the investor.

Answers from Mr. Do Nhat Hoang, Deputy Director of Legal Department, MPI

- There is no restriction on foreign investment in real estate.
- There is a mutual financial support mechanism between the parent company and its subsidiaries, but among subsidiaries, it is just a normal legal relationship that has to be in accordance with credit regulations.
- Project appraisal still has many shortcomings and lacks regulations that stipulate a specific authority to confirm legal capital. It should be reconsidered.
- During negotiation, asset evaluation in real estate projects may be evaluated higher than the true value.
- In case the investor liquidates, sells, or transfers a real estate project before the five-year term, the buyer inherits the guarantee obligation.
- As real estate businesses have great impact on socioeconomic life, legal capital is required so as real estate enterprises have a higher financial responsibility. In case the business goes bankruptcy or problems arise, then six billion VND can be used to address consequences. The consideration of this requirement is outside the scope of

this Decree, therefore, the drafting team will share the above information with the drafting team of the Law on Real Estate and the Ministry of Construction.

Answers from Mr. Phan Duc Hieu, Head of Business Environment and Competitiveness – CIEM

According to international practice, the monitoring of legal capital is based on the enterprise's balance sheets which allows the authentic assessment of legal capital and prevents superficial assessments. The requirement on legal capital applicable to some sectors is necessary to mitigate risks for the society.

THE DRAFT DECREEE REPLACING DECREE 139/2007

I. Main Amendments and Supplements of the Draft Decree to Replace Decree 139

Mr. Phan Duc Hieu, Head of Business Environment and Competitiveness – CIEM

- This Draft Decree removes the regulation requiring an enterprise's legal representative who is a foreigner to have temporary residence registration and to inform the Business Registration Authority prior to his / her absence in Vietnam. As per this draft, this legal representative must be a permanent resident in Vietnam and must authorize another person to perform his / her rights and obligations in the event of being away from Vietnam for over 30 consecutive days.
- The Draft Decree provides a stricter supervision of capital contributions to a limited liability company.
- The company's legal representative has to report the capital contribution schedule to the BRA within 15 days after capital contributions are made. If he / she fails to do so, the Chairman of the Members' Council, Director, or the major owner with the greatest equity percentage of the company has to fulfill this reporting requirement. The drafting team would like to receive comments from meeting participants on this matter.
- After the final commitment date, if a member still fails to provide the entire committed capital contribution, then one of the three following resolutions will be applied: invite new capital contributors, require the default member to make further capital contribution to maintain the proportion, or ask other members to contribute the missing capital.
- The Draft Decree also provides a registration procedure for the change in member in the event of a default member who fails to make full capital contributions as committed. If the dossier lacks confirmation signatures of related members whose capital contribution decreased or who have lost the right of making capital contribution, then the Business Registration Authority will send notice to those members for confirmation of information stated in the dossier. If the related members have no answer within the time limit, then the BRA will change the dossier of business registration, but if they have any disagreement, it will refuse the dossier of registering a change in member until the dispute is resolved.

- Under the LOE, a joint stock company must have founding shareholders and have at least three shareholders. However, it does not specify how many founding shareholders a joint stock company must have. The Draft Decree suggests that a joint stock company should have at least three founding shareholders. However, this issue is still opened for comments from businesses.
- The Draft Decree provides specific resolution in the case where shareholders do not make capital contributions or do not make full capital contribution within 90 days. The approach is similar to the one applicable to the limited liability company.
- Joint stock companies are not allowed to increase the number of shares issued while the existing number of shares is not sold out.
- The Draft Decree provides some clarification on the definition of charter capital.
 - Charter capital of a limited liability company is the total value of the capital that the owner or members commit.
 - Charter capital of a joint stock company is the total value of the capital contributed by its shareholders.
 - The capital that is allowed to be issued in a joint stock company is the total value of the available shares to sell.
 - Charter capital is only registered to rise after each batch of share placements has been sold. The decision on issuing new shares of the general shareholders' meeting does not mean an increase in charter capital. Although the new regulation on charter capital has not exerted a great implication on company operations, it causes some disadvantages for bidding activities due to charter capital requirements.
- The Draft Decree states that the seal is a company asset which must be kept and secured in the company's head office. The company's legal representative shall be personally responsible for damages to the company and other people caused by wrong keeping and use of the seal.
- The Draft Decree stipulates clearly that members have the right to complain and prosecute the Director and Chairman of the Members' Council in case company management breaches obligations of loyalty, honesty, and care as stipulated in the LOE. With regards to joint stock companies, the draft proposes a separate mechanism for shareholders to execute these rights to avoid cases where the rights are abused by "bothersome" shareholders. In this regards, a shareholder or a group of shareholders who own more than one percent of the total capital have the right to complain and prosecute. Shareholders can prosecute on behalf of themselves or the company.
- The decision on private placement of shares is under the authority of the shareholders' general meeting. Many procedures stated in Decree 1/2010 on private placement of

shares, according to the drafting team, violate the rights of an enterprise. Therefore, the Draft Decree to replace Decree 139 will promote simplification and assure the rights of the Shareholder General Meeting.

II. Comments from Businesses

Mr. Pham Hong Ky, Deputy Director of Southern Institute of Science and Technology

- When is a decision of the Members' Council valid, in case there is difficulty in reaching a consensus in the company? In many cases, the percentage rate of consensus as regulated in LOE cannot address this problem. Should we therefore reference international practices (51/49) or use another mechanism?
- What is the resolution for deadlock when minority members strongly disagree?

Mr. Bui Ngoc Hong, Indochine Counsel

The certificate of capital contribution in a limited liability company with one member has not been regulated. What is the measure to address the case where capital contribution fails to be made in full? In the process of capital contribution, if a member wants to transfer a part of their contribution capital, then what is the resolution?

Business Representatives

Will the regulation of the draft on the right to prosecute only apply to members who own more than one percent of the total capital of an enterprise have any impact on the civil rights of the other members because they also contribute capital and have ownership of the enterprise?

III. Answers from the Drafting Team

Mr. Phan Duc Hieu, Head of Business Environment and Competitiveness – CIEM

- Normally, shareholders do not sign the meeting minutes or pass decisions, making it impossible to determine the rate of meeting participants and the rate of upholders. The Draft Decree also proposes a solution based on the list of participant signatures to define the percentage of upholders for having a resolution adoption or not.
- The LOE stated three required cases in order to call for meeting to address situations that shareholders oppose.
- The Business Registration Certificate is a proof of capital contribution, so it can substitute the certificate of capital contribution. It is requested that the largest capital contributor of a company has to report the progress of capital contribution to the Business Registration Authority following each phase of capital contribution. The drafting team will pay more attention to this problem for clarification.
- The equality principle in business should be based on the rate of capital contribution. Only shareholders or group of shareholders who own more than one percent of the total capital of a joint stock company have the right to prosecute.

Conclusion

The two drafts above are still in the completion process. The drafting teams look forward to receiving comments and contributions from enterprises. Businesses can contact the drafting teams or the VBF secretariat to make comments or submit comments to the website Vib-online of the VCCI.

Annex 1 - Participants List

	<i>Full name</i>		<i>Title</i>	<i>Organization</i>
Ministry of Planning & Investment				
1	Do Nhat	Hoang	Deputy Director	Legal Dept
2	Dang Xuan	Quang	Deputy Director	FIA
3	Phan Duc	Hieu	Manager	CIEM
4	Le Nguyet	Anh	Officer	FIA
5	Ho Quoc	Anh	Officer	FIA
6	Nguyen The	Hung	Director	Southern Investment Promotion
7	Le Huong	Giang	Manager	Southern Investment Promotion
HCM Department of Planning & Investment				
1	Huynh Vinh	Thanh		
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3	Nguyen Thi	Thanh		
4	Nguyen Thi Hong	Nhung		
5	Nguyen Ngoc	Bang		
6	Nguyen Le	Ngoc		
7	Nguyen Khoa	Phong		
VBF Business Community				
1	Bui Ngoc	Hong	Lawyer	Indochine Counsel
2	Tran Vo Quoc	Son	Lawyer	Indochine Counsel
3	Nguyen Quoc	Dzung	Director	Indochina Land
4	Tran Bao	Khue	Lawyer	Indochina Land
5	Nguyen Chi	Nguyen	Deputy Chairman	HCM Association of Food
6	Pham Hong	Ky	Deputy Director	Southern Institute of Technology
7	Nguyen Thi Hong	Trang	Office Manager	Imm Neo Investment
8	Nguyen Quoc	Bao	Chairman	Thanh Cong Investment
9	Nguyen Thi Lan	Huong	Assistant To	KinderWorld
10	Yoshida	Sakue	Director	JETRO HCMC
11	Tran Thi	Phuong	Office Manager	Thai Bussiness Association
12	Bui Thuy	Kieu	Assistant	Acset Indonusa
13	Matthew	Schwarz		Fulbright Program
14	Dang Ngoc	Huong	Lawyer	Vilaf Hong Duc
15	Vu Minh	Ha	Head of Legal	Sanofi Aventis
16	Nguyen Thu	Huong	Reporter	Investment Newspaper
17	Tran Kim	Oanh	Head of Legal	Dai Dong Toien JSC
18	Pham Lien	Anh	Coordinator	VBF

