

COMMENTS ON THE NEW LAND LAW

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I. NEW AMENDMENTS AND RECOMMENDATIONS

1. Concepts of “economic organization”, “foreign organization and individual” and “joint venture economic organization”

The Draft Law has recognized the recommendations in our previous report by inserting a definition of economic organizations being “State owned enterprises, co-operatives, limited liability companies, shareholding companies, and other economic organizations satisfying all conditions provided in the civil laws except for foreign invested capital enterprises” (“**Domestic Entities**”).

Further, the Draft Law has included “foreign organizations and individuals invest in Vietnam in accordance with investment laws” (“**Foreign Entities**”) and “joint venture organizations between domestic investor and foreign investor” (“**JV Entities**”) in the provision regarding the entities being land users.

However, please note that the Draft Law does not mention to the land user being companies with foreign owned capital other than JV Entities such as a wholly foreign owned company established by a foreign investor in order to carry out investment activities in Vietnam or a local enterprises in which the foreign investor(s) purchase(s) shares or merge(s) with.

Recommendation: We therefore suggest inserting a definition of “foreign owned capital entities” which sets out the entities and the percentage threshold of foreign shareholding in such entities.

2. Rights to be allocated/leased land from the State

There is a significant improvement in the Draft Law by adjusting rights of land users so that Domestic Entities, JV Entities and Foreign Entities have more equal rights in obtaining land allocation/land lease from the State. Accordingly, the rights of the land users in obtaining land allocation/land lease from the State shall be determined based on the type and purpose of the project rather than on whether the land users being Domestic Entities or Foreign Entities. In particular, Clauses 54 and 55 of the Draft Law provide the following (i) land allocation is applicable for entities including Foreign Entities, JV Entities and Domestic Entities who invest in residential housing projects for sale or for sale and lease provided that the land allocation period shall be within the term of the project; and (ii) land lease with one-off payment/annual payment is applicable for entities including Foreign Entities, JV Entities and Domestic Entities which invest in residential project for lease, commercial projects and other agriculture and non-agriculture projects.

However, please note that according to Clause 122.3 of the Draft Law, Domestic Entities are entitled for land use right for use on a stable and long term basis upon conversion of land use purpose from non-agricultural land use right for use on a stable and long term basis to non-agricultural land use right for a definite duration or from non-agricultural

land use right for a definite duration to non-agricultural land use right for use on a stable and long term basis. This provision however is not applicable for Foreign Entities and JV Entities.

Recommendation: We therefore suggest that land users who are allocated land/leased land by the State for the same purpose shall have the same rights and obligations, including the right under clause 122.3 of the Draft Law.

3. Conditions for land allocation and land lease

Clause 51 of the Draft Law requires that investors must prove their financial capacity and make deposit in order to be allocated land or leased land by the State for investment projects. Details for such requirements however are not clear under the Draft Law.

Recommendation: Such conditions are investment requirements and should be separated from land related procedures. We therefore suggest removing such conditions from the Draft Law.

4. Inland water surface

According to Clause 134 of the Draft Law, inland water surface shall be leased to Domestic Entities, Foreign Entities and JV Entities for purposes of aquaculture, agricultural or agricultural combined with non-agricultural.

Recommendation: We note that the State authorities already have the right for land planning and zoning including inland water surface. Therefore, it is not necessary to set out in the Draft Law any limitation of the use purpose of the inland water surface. We therefore suggest removing restrictions on inland water surface use purpose. Also, we suggest setting out clearly the form of water surface lease (with one-off payment or annual payment) applicable to investors for clarity.

5. Land recovery due to the failure of investors to meet the implementation schedule

Regarding land recovery as a result of failure of investors not to use the land within a certain period of time, Article 38.12 of the Land Law 2003 provides that the State shall recover the land if “the State allocates or leases land in order to implement an investment project and the land is not used for a period of 12 consecutive months or the actual land use schedule is 24 months behind the schedule recorded in the investment project, as from the date on which the land is handed over on site, without permission from the competent State body which made the decision to allocate or lease the land”.

The Draft Law retains such provision and adds a further requirement that the extension may only be granted one time of a maximum period of 12 months. Also, there shall be no compensation/refund by the State to investors for their invested expenses and assets attached to the land as a result of land recovery in this case.

Recommendation: Please note that according to the current regulations, the competent State authorities are entitled to consider and decide not to accept the request for extension if the reason given by the investors for the delay is not reasonable and persuadable. Therefore, the additional requirements under the Draft Law are unnecessary and unfavorable for the investors. We therefore suggest removing the additional requirements

added in the Draft Law.

6. Compensation plan

Clause 73.5 of the Draft Law lists out types of land users to be compensated for recovery of land leased with one-off payment. Please note that such clause does not include the JV Entities.

Recommendation: We suggest that the compensation for recovery of land leased with one-off payment should be applicable for JV Entities as well.

7. Participation of investor in process of land compensation

According to Clauses 69.2 and 70.2 of the Draft Law, investors shall not be involved in the process of compensation, in particular the collection by the authorities of opinions of land users having land to be compensated for compensation plan.

Recommendation: Investors who are determined and approved in-principle by the State authorities as the investor for a specific investment project should be entitled to attend to the compensation process so that they can observe the process and make complains/recommendations if their rights and benefits are affected.

8. Options for determination of compensation prices, land use fees/land rentals and other land taxes/fees

Clause 109 of The Draft Law proposes that one of the following two options shall be considered for determination of the compensation price, land use fees/ land rentals and other land taxes/fees:

- Option 1: The compensation price shall be calculated according to the price list issued by the authorities which shall be amended only when market price varies 20% in comparison with such price list. This option is more preferable to investors since they could estimate the compensation price and land use fee/land rental before making an investment.; and
- Option 2: The compensation price shall be determined by the authorities on a case by case basis according to the price list issued by the authorities each five years. The price set out in the price list shall be used for calculation of land use fees for recognition of land use rights of individuals and households, land use taxes and other taxes, administrative penalties. The price determined by the authorities shall be applied for compensation price for land recovery and land use fees/land rentals.

Recommendation: We suggest choosing the Option 1 which helps to avoid unnecessary and burdensome additional procedures for price determination and gives more certainty for investors. However, as previously suggested, a clear and transparent procedure for calculation of market prices should be set out clearly.

9. Difference in land compensation prices

According to Clause 74.2 of the Draft Law, the difference between the compensation prices as set out in the land recovery decision and the compensation price as of the time of payment of compensation shall be dealt with as follows:

- If the cause of the difference is due to fault(s) of the entities in charge of compensation, the higher price shall be used for payment of compensation.
- If the cause of the difference is due to fault(s) of the land user having land to be recovered, the lower price shall be used for payment of compensation.

Recommendation: It is not clear under the Draft Law which entities shall have the right to determine who is at fault and how this will be done. We would recommend clear procedures for this.

10. Rights to receipt of land use right

Unlike the amendment of the Draft Law for land allocation/land lease as to give more equal rights in obtaining land allocation/land lease from the State between the Domestic Entities and Foreign Entities/JV Entities, the discrimination between the Domestic Entities and Foreign Entities/JV Entities still remains in the new provision regarding the receipt of the land use right.

In particular, according to the Draft Law, Domestic Entities can receive the land use rights in the following cases: (i) receipt of assignment of land use right, (ii) receipt of land use right by way of inheritance or donation, (iii) receipt of land use right as capital contribution, (iv) receipt of land use right pursuant to an agreement in a mortgage contract for debt settlement, pursuant to an administrative decision of a competent State body resolving a complaint or denunciation relating to land; pursuant to a judgment or decision of a people's court or decision on enforcement of a judgment enforcement body; pursuant to a legal document recognizing the results of auction of a land use right in accordance with the law, or pursuant to a legal instrument on division of the land use right in accordance with law; or (v) receipt of land use right as a result of a division or merger.

Meanwhile, the Foreign Entities/JV Entities can only receive land use right in the situation as set out in (iv) above. The Draft Law however does not set out the rights of Foreign Entities/JV Entities in respect of the land use right received and what they can do to deal with such land use right.

Recommendation: the Draft Law should include the right of JV Entities being new legal entity formed from a capital contribution using a land use right to receive the land use right from the capital contributor. Generally, we suggest that the discrimination between the Domestic Entities and Foreign Entities/JV Entities should be eliminated by giving the Foreign Entities/JV Entities the same rights to receive the land use right as the Domestic Entities. Also, the Draft Law should set out the rights of Foreign Entities/JV Entities in respect of the land use right received and what they can do to deal with such land use right.

11. Mortgage

The Draft Law has recognized our previous recommendations by removing the restriction on the purpose of mortgaging land for borrowing which was for production or business purposes only. However, the Draft Law still limits the mortgagee as being credit institutions authorised to operate in Vietnam.

Recommendation: We suggest that the land users should be permitted to mortgage land use rights to domestic economic organisation or individual and not just a credit institution. This creates a more flexible investment mechanism and reflects the reality that such a land user may wish to mortgage its land use right to an entity other than a credit institution to act as security in a business arrangement. Further, the land use rights and assets attached to land can be mortgaged to offshore lenders. Any power of sale by that offshore lender may be exercised in favour of only persons under Vietnamese law eligible to receive such land use right and assets attached to land.

12. Notarization and certification of agreements

Clause 161.2 of the Draft Law proposes two options to be considered for notarization/certification of the transactions involving land use right as follows:

- Option 1: Notarization/certification shall be compulsory for transactions regarding assignment, bequeathal, donation, mortgage, and capital contribution of land use right/asset attached to the land. Such requirement however shall be optional to transactions regarding exchange of agricultural land use right, lease/ sub-lease land use right/assets attached to land;
- Option 2: Notarization/certification shall be optional of all transactions involving land use rights.

Recommendation: We suggest applying Option 2 which would be more favourable and convenient for investors.

II. ISSUES RAISED IN THE PAST WHICH ARE STILL PENDING

1. Land allocation/land lease procedures:

The Draft Law does not set out clearly clear procedures and required documents for issuance of land allocation/land lease decision applicable for land with and without completion of clearance and compensation. In practice, the lack of clarity and consistency between land allocation/land lease procedures and investment procedures have caused obstacles and delays to many projects. For example, whereby investment project (which will normally be prepared after the investor obtaining the investment certificate) is a required document for issuance of the land allocation decision, the land use right certificate (which can only be issued after the issuance of the land allocation decision and payment of all financial obligations) is required for the issuance of the investment certificate.

Recommendation: there should be specific procedures and required documents for land allocation/land lease applicable for land with and without completion of clearance and compensation in the Draft Law. Such procedures should separate the requirement on investment procedures from land procedures to avoid confusion and unnecessary delays.

2. Procedure of land clearance and land compensation without involvement of the State

The Draft Law only provides the procedures for land clearance and land compensation

involving the State. It however is still silent for the procedures where an investor undertakes the compensation process without involvement of the State.

Recommendation: there should be specific procedure for land clearance and land compensation process without involvement of the State. It is also recommended that the compensation of projects without involvement of the State for compensation and clearance shall be treated the same as for projects involving the State. In particular, land use fees may be subtracted from advances for compensation, support, resettlement etc. If the advances paid are higher than the payable land use levies, only the amount equal to land use levy may be subtracted. The remainder shall be a project investment expense.

3. Land dispute resolution procedure:

Pursuant to Clause 196 of the Draft Law, disputes relating to land must first be submitted to the relevant commune or ward or township People's Committee for conciliation. If one disagrees with the result the dispute may then be referred to a court or the provincial/district People's Committee (depending on the type of case) for final resolution.

The result of the initial conciliation by the commune or ward or township People's Committee must be minuted and signed by the parties to the dispute. In practice, however, there may be instances where one of the parties does not co-operate and does not attend the conciliation session. This means there is no minuted decision to use as the basis for referring the dispute to a court or the provincial/district People's Committee for resolution. However, the Draft Law does not set out a procedure for such a situation.

Recommendation: We suggest amending the Draft Law so that there is a clear mechanism for taking matters forward in this case where one party does not co-operate. Such mechanism could be that where a party to a dispute fails to attend the conciliation session (having been served notice twice) the conciliation process shall be regarded as unsuccessful and the participating party(ies) may then refer the dispute to a court or the provincial/district People's Committee for settlement. This would be regardless of absence of the non-participating party's signature to the minutes of the conciliation.