



REPORT

LEGAL ISSUES AND INVESTMENT MANAGEMENT SYSTEM ISSUES OF VIETNAM RELATED TO THE PROVISIONS OF ACIA AND RECOMMENDATIONS

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I. Overview of ASEAN Comprehensive Investment Agreement (ACIA)

The ASEAN Comprehensive Investment Agreement (ACIA) was signed on the basis of inheriting and developing two existing agreements, namely the AIA and IGA, and simultaneously supplementing new regulations in accordance with new requests for development cooperation among ASEAN countries. ACIA represents three aspects: investment freedom; investment protection; and investment advantage and promotion. The aim of ACIA is to: facilitate the transformation of ASEAN into an explicit, competitive and free investment area to attract foreign investment capital from ASEAN and non-ASEAN countries; and eliminate barriers and conditions preventing investment capital to achieve investment freedom among ASEAN countries in 2010 and for all investors in 2020. With the aim of effectively implementing the ACIA, each country had a specific strategy, program and action, and ASEAN countries also operated general regulations and supervision mechanisms to implement the agreement effectively.

The ACIA was signed and implemented when Vietnam integrated its Socialist-oriented market economy, and particularly when Vietnam adopted a new Constitution (Constitution 2013). Vietnam needs to amend, implement and promulgate a number of vital economic laws to implement the Constitution.

The compatibility of Vietnamese laws and international treaties in which Vietnam participated - particularly ACIA—and the establishment of an investment management system to promote important reforms pertaining to policies and laws directed towards a market economy, explicit competition, investment capital attraction for socio-economic development.

On the basis of the aims mentioned above, this report analyses the ACIA regulations and their practical effects, how such regulations affect the legal system as well as investment in Vietnam and provides specific recommendations in the hope of contributing to resolve issues relating to the attraction of foreign investment capital from ASEAN and non-ASEAN countries.

II. The Impact of the ASEAN Comprehensive Investment Agreement (ACIA) to Law System of Vietnam

1. National Treatment (Article 5 ACIA):

No less favorable treatment of investors and investments of other ASEAN countries than that applied to Vietnamese investors and Vietnamese investments.

1.1 How do VN laws/regulations, administrative instructions regulate foreign investors and foreign investments?

Vietnamese laws regulate foreign investors and foreign investments via various regulations including, but not limited to, the provisions of the Law on Investment No. 59/2005/QH11 dated November 29, 2005 of the National Assembly (“**LOI**”).

The principles of the application of the provisions regulating foreign investors and foreign investments have been stipulated in the Art. 5 of the LOI, in particular:

- (i) Investment activities of investors within the territory of Vietnam must comply with the provisions of this Law and other relevant provisions of law;
- (ii) If specialized investment activities are regulated by other laws, the provisions of such other laws shall apply.

Within the scope of application of ACIA, it is noted that there are legal documents that may also regulate investments including:

- Law on Forest Protection and Development No. 29/2004/QH11 dated December 03, 2004 of the National Assembly (“**LFPD**”);
 - Law on Fisheries No. 17/2003/QH11 dated November 26, 2003 of the National Assembly (“**LOF**”);
 - Law on Minerals No. 60/2010/QH12 dated November 17, 2010 of the National Assembly (“**LOM**”), etc.
- (iii) If an international treaty of which the Socialist Republic of Vietnam is a member contains provisions which are different from the provisions in this Law, the provisions of such international treaty shall prevail.

Within the scope of application of ACIA, it is noted that the provisions of the WTO Commitments as well as the provisions in the Agreements between Vietnam and the USA, Vietnam and Japan would apply to the services conducted by the foreign investors.

- (iv) Foreign investors and investments would not be discriminated against in the establishment, management and operation of investment from the local investors. Vietnamese laws only restrict foreign investors/investment within the commitments of Vietnam regarding foreign investors/investment made by Vietnam in the international treaties in which Vietnam is a member.
- (v) Also applicable to foreign investment activities, where the law of Vietnam does not contain any provisions, the parties may agree in a contract on the application of foreign law and international investment customs, if the application of such foreign law and international investment custom is not contrary to the fundamental principles of the law of Vietnam.

1.2 What are the differences?

In general, according to Art.4.1 and Art.4.2 of the LOI, investors shall be permitted to invest in all sectors and in all industries and trades which are not prohibited by the law, and shall have the rights of autonomy and to make decisions on investment activities in accordance with the law of Vietnam. The State shall provide equal treatment before the law to all investors from all economic sectors, and as between domestic investment and foreign investment.

As such, it would be no less favorable to investors and investments of other ASEAN countries than that applied to Vietnamese investors and Vietnamese investments under the relevant specialized laws such as the LFPD, LOF, and LOM.

The LOI and other legal documents issued after the membership of Vietnam to the WTO allow foreign investors to invest in all economic sectors, except prohibited sectors applicable to all investors and the restricted sectors under WTO Commitments. Basically, the sectors restricted from foreign investments are compliant with the Vietnam's WTO Commitments and other bilateral treaties, which are generally related to business under the special management of the Government such as banking, finance, insurance, security, telecommunication, distribution...

For example, in response to the services under ACIA, for services related to agriculture, forestry (CPC 881), foreign investors would be restricted to investing under a joint venture or business cooperation contract. Furthermore, foreign investors would hold a maximum of 51% of the charter capital of the joint venture as it is required under the WTO Commitments and commitments in other investment agreements.

It is generally noted that the restrictions mainly apply to the form of investment, ownership limitation, capital, experience, etc.

In practice, the conditions and requirements on foreign investors and investments are more strictly applied. In a few cases, foreign investors and investments are subject to the guidance and the policy of the local authorities which may go beyond the provisions of the law, and be less favorable than domestic investors, especially in relation to services, distribution, and small projects sector. Furthermore, in the absence of transparency in management, foreign investors may face more difficulties than domestic investors in gaining information.

1.3 Which provisions provide less favorable treatment?

In general, the LOI does not set forth any provisions providing less favorable treatment.

Foreign investors and investments are subject to other provisions in international treaties (e.g. WTO Commitments) and relevant specialized laws which mainly require qualifications for such matters as the form of investment, ownership limitation, capital, experience, etc.

The unofficial guidance from the local authorities provides and requires further qualifications comparing to the same projects invested by domestic investors. These requirements may be practically applied during the process on carrying out the investments even if they have not been officially stipulated.

The differences among the commitments of Vietnam in ACIA, WTO and other bilateral agreements.

- (i) According to ACIA (Article 9), the reserved areas would be proposed and submitted by each country to AIA Council for approval which would be restricted or cancelled under the three-step route (Article 46 – ACIA).
- (ii) Generally, under the ACIA and WTO Commitments and other bilateral agreements, the principles on NT, MFN, and Performance Requirements would be applied at the same level.
- (iii) A settlement of dispute between the investors and the nation invested in, arising out of or in relation to ACIA, would apply only for investments conducted after the establishment of the Agreement, while the agreements between Vietnam-USA and Vietnam-Japan will apply for both post-establishment and pre-establishment investments.

1.4 What is the rationale (policy purpose) of those provisions?

The Government will retain its policies on investment protection for domestic investors and State management in some certain sectors.

Furthermore, based on compliance with different situations in each locality, local authorities will apply for further requirements and qualifications to investors and investments. This would also be based on the fact that some investors from some countries have unproductive projects (engaging in the matters of labour, environment, debt, etc.). Furthermore, some localities already have a high density in foreign investment; therefore, they would apply stricter policies on foreign investment, such as not encouraging projects with low technology or using large land area, etc.

2. List of reservations:

The US-VN BTA contains NT obligations similar to ACIA. Other agreements (BITs and/or trade agreements) may also contain NT obligations for investments.

2.1 How are the exceptions in the ACIA Reserve List different from those in Annex H of the BTA?

In general, the differences are as follows:

- (i) Vietnam's reserved list in ACIA is limited to 05 sectors and services related to those 05 committed sectors.

- (ii) Reservations under VN-US BTA are mainly focused on services activities, such as banking, finance, insurance, security, transportation, and real estate. However, reservations under ACIA are mainly focused on manufacturing activities.
- (iii) ACIA provides more a detailed and broader list of reservations. Accordingly, there are various sectors that have been reserved and which reservations continue to be effective; (Vietnam reserved 05 sectors and more than 70 sub-sectors in ACIA). The reservation under ACIA is under the principle of a “negative list”, while reservations under WTO Commitments are under the principle of a “positive list”).
- (iv) VN-US BTA provides for a specific and short-term reservation while the term of the reservation is generally absent under ACIA. In this regard, it is noted that various sectors under VN-US BTA have been reserved for only a short term of 3 to 5 years from the effective date of the BTA. Therefore, various restrictions have been consequently abolished such as the conditions on investment capital, management, etc.
- (v) Generally, VN-US BTA may provide more favorable treatment to investors than ACIA.
- (vi) A number of sectors in the reservation list of Vietnam would be currently not necessary for the development of the economy. Also, the description of reservation measures may not be clear leading the difficulty in enforceability of application in practice.

2.2 Is any adaptation needed for the treatment of US investors/investments or other countries with BIT or trade agreements with NT obligation for investments?

Under current Vietnamese laws, restrictions applicable to foreign investors and investments would be governed by various documents including but not limited to:

- (i) Law on Investment and Decree No. 108/2006/ND-CP dated September 22, 2006, detailing and guiding implementation of a number of Articles of Law on Investment;
- (ii) Circular No. 34/2013/TT-BCT dated December 24, 2013 for roadmaps for goods trading and goods trading directly related activities of foreign-invested enterprises in Vietnam; and
- (iii) Other relevant specialized laws.

There are cases where Vietnamese laws provide more favorable treatment than international treaties (e.g. BTA, BIT, etc.). Under the LOI, a general principle is that **if an international treaty of which Vietnam is a member contains provisions which are different from the provisions of this Law, the provisions of such international treaty shall prevail.**

In light of the above, it is suggested to clearly provide that if Vietnamese laws provide more favorable treatment to foreign investors than international treaties (e.g. less conditions or requirements, etc.), the provisions under Vietnamese laws will prevail. In addition, when Vietnamese laws provide less favorable treatment to foreign investors than international regulations, the provisions stipulated by the international treaties will prevail.

Furthermore, reservations which are unnecessary due to the new economic, politic and social conditions should be removed in order to create a more equal investment environment between foreign investors and domestic investors.

On the other hand, reviewing the provisions for the purpose of amending and supplementing the Vietnamese laws consistently in accordance with the international treaties should occur frequently. The activities regarding training, providing information, etc. should be more focused.

3. Most-Favored-Nation Treatment (Article 6 ACIA):

No less favorable treatment of investors and investments by another ASEAN countries than that applied to investors of any other Member State or a non-Member State.

Are there any differences in the treatment of foreign investors or investments?

In general, there is no difference in the treatment of foreign investors or investments, especially in relation to the sectors under ACIA. However, as a note, for a specific sector applying to specific investors, there would be a different treatment subject to the bilateral treaties between Vietnam and other Governments.

If so, what are they?

(Especially in reference to Article 6, sub-paragraphs 3 (a) and (b).)

Currently, Vietnam has entered various bilateral treaties with other Governments such as BTAs between Vietnam– Japan and Vietnam – USA, etc. Vietnam has entered into treaties in specific sectors with other Government, such as the bilateral treaty between Vietnam and Russia in gas and oil. There would be more favorable treatment for foreign investors from these treaty countries.

4. Prohibition of Performance Requirements (Article 7 ACIA)

What are, if any, the Vietnamese laws/regulations, administrative instructions AND concrete (ad hoc) measures requiring performance requiring particular performance from national or foreign investors or investments?

The current Vietnamese laws have abolished the provisions and measures that violate the provisions of TRIMs on exports (forcing/encouraging exports or requesting exports for

specific areas...), foreign exchange balancing, requirements on localization, technology transfer, etc.

However, in particularized laws, there may remain certain requirements on imports and exports. For example, the Law on Minerals stipulates that “the State adopts policies on the export of minerals in each period in accordance with sustainable socio-economic development objectives and on the principle of prioritizing raw materials for domestic production” (Article 3.7).

In practice, the above matters would still be considered as positive criteria for certain projects when the State authorities evaluate and decide to issue the investment certificate for projects.

Furthermore, for investors and projects that have applied the provisions and measures on TRIMs stipulated in their investment certificate, there are currently difficulties for requesting the abolishment of these measures.

5. Management and Board of Directors (Article 8 ACIA)

5.1 What are VN laws/regulations, administrative instructions, which relate to management and board of directors? (Please list them)

Law on Enterprises No. 60/2005/QH11 dated November 29, 2005 of the National Assembly (“LOE”) is the legal document regulating the general issues on management and board of directors.

For the case of specialized investment activities, the management and board of directors would also be subject to relevant laws such as the LFPD, LOF, and LOM.

5.2 What are the current conditions applying to FIEs?

As per the LOE, the conditions which relate to management and board of directors applicable to FIEs would be similar to the domestic enterprises.

The LFPD, LOF, and LOM do not provide for further conditions relating the management and board of directors between domestic enterprises and FIEs.

The provisions on requiring all members of the board of directors to vote and approve major issues of the FIEs have been basically abolished. However, as a practical issue, for projects that have been issued investment certificates before 2005, instances remain where major issues of the FIEs must be approved by all members of the board of directors of FIEs. Since this issue has not been clearly guided, it would be pose difficulties for the FIEs’ operation in certain situations (e.g. re-registration of the enterprises, transfer, etc.).

5.3 Which laws/regulations, administrative instructions need to be amended to conform to ACIA?

The Law on Investment (LOI) is a general law stipulating Vietnam's investment policies for investors (including foreign investors and domestic investors). In essence, the LOI is consistent with the international commitments of Vietnam.

However, Vietnam is currently circulating an amended LOI due to inconsistencies and discrepancies between the LOI and the international commitments and ACIA (Please refer to recommendations in Part II herein).

Some other laws which may also govern the investment such as: Land Law, Competition Law, Labour Code, Commercial Law, Intellectual Property Law, Bidding Law, etc. have been recently amended to meet the requirements on integration.

As a general note, one of the most important matters is that the Government needs to provide more specific and transparent legal documents to guide the laws in a manner of unity, equality and non-discrimination.

6. Scope of Application (Article 3:1 ACIA):
Scope of measures to which ACIA applies.

Does VN intend to limit the benefit of ACIA liberalization measures to investors and investment of ACIA or to one or more 3rd countries?

We do not think Vietnam intends to limit the benefits of ACIA's liberalization measures to investors and investment of ACIA.

7. Scope of Application (Article 3:3)

7.1 Are there sectoral laws/regulations, administrative instructions regulating specifically FDI in the 5 sectors?

There are LFPD, LOF, and LOM which regulates the activities regarding forestry, fisheries and minerals. However, these documents do not specifically provide for FDI.

7.2 If so, which are they (list) and how do they regulate foreign investment differently or additionally (1) in comparison with generally applicable FDI laws/regulations, administrative instructions, and (2) in comparison with laws/regulations, administrative instructions relating to investments by nationals?

As a principle under Vietnamese law, there would be no discrimination against the investors from any countries from ASEAN. However, in practice, investment in mining sector would be considered and shall be approved by the State authorities based on the experience and capacity of investors in this sector (technology, financial capability, experience).

8. Treatment of investment (Article 11)

The principles of fair, equitable treatment, full protection and safety are stated in ACIA. The Law on Investment 2005 (Article 3) also ensures the equal treatment of investors. The State ensures the application of consistent fees, costs and rates; stable, equitable, favorable and transparent conditions; and investor's rights which changes in policy and law may affect. The investor shall be entitled to access the law and policy system; economic information; and exercise complaints, denunciations and lawsuits under the laws of Vietnam. The necessary requirements to ensure security and safety on investment under ACIA are also stated in the Law on Investment 2005 and the Law on Enterprises 2005.

However, since the Vietnamese legal system is in the process of improvement, a number of laws are amended and supplemented many times. Therefore, it may lead to a lack of consistency and transparency that may affect the investor's rights. The investor's rights may not be secured in the legal proceedings process.

Example: Article 3 of the Law on Commercial Arbitration No. 54/2010/QH12 provides: "Disputing parties means Vietnamese and foreign individuals, agencies or organizations that participate in arbitral proceedings in the capacity as plaintiffs and defendants." As the dispute settlement by arbitration may not be disclosed, other relevant parties such as lenders, insurers, damaged parties... may not be allowed to participate in the hearing to protect their legitimate rights and interests. From our perspective, this clause should be amended.

9. Compensation in cases of strife

Regulations of compensation for investors in damage suffered from armed conflict, civil protests, and emergencies have been provided in ACIA with the principle of non-discrimination.

This commitment has been executed fairly well in Vietnam.

10. Regulations on remittance of money

The principle of money transfer is stated in Article 13 of ACIA as well as Article 9 - Remittance of capital and assets abroad of the Law on Investment 2005.

Procedures for money remittance related to investment activities are clearly specified in the regulations on foreign exchange management.

11. Expropriation and Compensation

The principles of expropriation, nationalization and compensation have been provided in Article 6 of the Law on Investment 2005 consistently with provisions of the Constitution.

Since Vietnam is still in the process of development, several plans (i.e. development, land and urban planning) have not been detailed. The lack of clear plans and prediction may

affect investors whom investment projects would fall into the State plans in which they have to be cancelled or relocated. The compensation is usually impractical and prolonged.

From our perspective, the regulations on “methods and conditions for compulsory purchase and expropriation” should be clearly provided and guided as soon as possible.

12. Regulations on Entry, Temporary Stay and Work of Investors and Key Personnel (Article 22)

The provisions relating to the entry of investors and key personnel for working have been mentioned in the ACIA and further guided consistently under the Law on Investment 2005 (Article 14 of the Law on Investment 2005), Labor Code (Article 170) and the laws on immigration.

To facilitate the implementation of investment projects, the abovementioned laws have been amended to consist with the factual requirements and conditions. In particular, the regulations on employment of foreigners in Vietnam have been clearly guided such as the procedures on granting working permit, etc.

13. Dispute Resolution between investors and the member States

Dispute resolution between an investor and a member State is clearly provided in ACIA from Articles 28 to Article 41.

However, to attract more investments and to ensure the rights and obligations of investors, it is recommended that Vietnam should join the ICSID Convention, which facilitates the resolution of disputes between investors and the investment receiving countries. Moreover, under the provisions of ACIA on dispute settlement, there are certain provisions which are inconsistent with the laws of Vietnam. For example, the statute of limitations as provided in Clause 1, Article 34 of ACIA is 3 years. However, under Vietnamese law, the general statute of limitations is 2 years. For some certain type of disputes, the dispute resolution may not be subject to the statute of limitation, etc. Generally, Vietnam should provide more clear regulations guiding the application of the content of the ACIA on this matter.

III. Foreign Investment Management in Vietnam

1. How are foreign investors and foreign investments treated/processed in the FDI management system?

Foreign investors and foreign investments are processed and managed by the State authorities. In general:

- (i) The Government shall exercise uniform State administration of investment throughout the whole country;

- (ii) The Ministry of Planning and Investment (MPI) shall be responsible before the Government for State administration of investment activities;
- (iii) Ministries, ministerial equivalent bodies and Government bodies shall, within the scope of their respective duties and powers, be responsible for undertaking State administration of investment within the respective sectors delegated to them;
- (iv) People's committees at all levels shall be responsible to exercise State administration of investment within their respective localities in accordance with the authority delegated to them by the Government.

As a general requirement, a foreign investor investing in Vietnam for the first time must have an investment project and perform the procedures for investment registration or evaluation of the investment at the relevant State administrative body in order to be issued an investment certificate. The investment certificate shall act concurrently as the business registration certificate (Art. 50.1, LOI).

The procedures for investment registration or evaluation of investment at the relevant State administrative body will depend on the scale of investment capital, its business activities, etc.

2. Is there a management system applicable to national investors and national investments?

The management system applicable to national investors and investments is mostly similar to the management system applicable to foreign investors and investments.

For State-owned companies, there is a separate management system which would involve more authorities in the management.

3. How is this system different from the FDI management system?

What are the particular differences between the two systems?

There is not a clear distinction within the management system applied to the domestic investors/investment and FDI.

However, within certain authorities, there are different bodies in charge of these matters. At the central level, the Foreign Investment Agency (FIA) under MPI is predominantly in charge of the management of FDI. However, the Agency of Enterprise Development (AED) under MPI is largely responsible for the management of national investors and investments. At the local level, there are business registration offices under the Department of Planning and Investment (DPI) in charge of the business registration in each locality.

Regarding the procedure, the criteria on projects required for investment registration or evaluation of investment at the State administrative body for investment applicable to national investors and investments are slightly different.

For example, in terms of investment registration at the State administrative body for investment, domestic investment projects which have an invested capital of below VND15 billion and which are not included in the list of sectors for which investment is conditional, the investors shall not be required to perform the procedures for investment registration. Domestic investment projects which have an invested capital of between VND15 billion and below VND300 billion and which are not included into the list of sectors for which investment is conditional, the investors shall perform the procedures for investment registration (Art. 45, LOI). For foreign investments, foreign investment projects which have an invested capital of below VND300 billion and which are not included in the list of sectors in which investment is conditional, the investors shall perform the procedures for investment registration in order to be issued an investment certificate (Art. 46.1, LOI).

As a general application, the State authorities may retain policies or measures which are more favorable to domestic enterprises, especially small and medium enterprises.

4. Are there sector-specific FDI management systems for these sectors?

The Ministry of Agriculture and Rural Development (MARD) is in charge of the management of the forestry, fisheries, and agriculture in general.

The Ministry of Natural Resources and Environment (MONRE) is in charge in the management of minerals.

The Ministry of Industry and Trade (MOIT) is mainly in charge of trading, services, and manufacturing.

As to the matter of the Vietnamese management system, the State authorities will jointly coordinate and manage business and investment activities. In this regard, these authorities would coordinate to evaluate the project before issuing an investment certificate for the foreign investors.

5. Are all foreign investors and foreign investments treated/processed in the FDI management system in the same way?

In general, foreign investors and foreign investments are treated/processed in the same way for the FDI management system.

If not, what are the differences?

In practice, there are differences in regulatory and procedure issues. For example, the conditions and evaluation for issuing the investment certificate applied to different investors are slightly different on a case-by-case basis.

What is the reason for the differential treatment?

Due to the matter on productivity of projects (discussed above), there may be a difference in unofficial treatment applied to investors from different countries as a matter of practice.

6. How are performance requirements imposed and their implementation monitored by the FDI management system?

The FDI management system monitors the implementation of the performance requirements.

Which bodies are entrusted by the application of performance requirements?

The bodies under the management system, in particular, the Government, Ministry of Planning and Investment, Ministry of Industry and Trade, Ministry of Finance are entrusted by the application of performance requirements. These State authorities will jointly coordinate to apply these requirements.

IV. Recommendations

In consideration of the current legal system and the foreign-invested management system in Vietnam as well as the investors' opinions in practice and in parallel with the provisions of ACIA, our Study Report provides specific recommendations with the expectation that they would be useful for resolving the remaining problems in attracting foreign investment from investors from both ASEAN and other regions.

1. Equitizing the State enterprises for a fair competitive market

1.1 Discussion

Based on some estimation, State enterprises hold up to 40% of total social investment capital. Basically, it may not be a serious matter that such investment capital is held by State enterprises. However, State enterprises may generally receive a lot of preferential treatment from the State including loans, access to natural resources, land, etc. while many State enterprises do not operate effectively. As a result, the existence of State enterprises may hinder economic development, or create non-competitive markets and discrimination between State enterprises and other private enterprises including foreign-invested companies.

There may be discrimination between domestic enterprises and foreign enterprises in many fields. For example, in manufacturing and provision of building materials, it has been said that domestic private enterprises and State enterprises would be entitled to enjoy more preferential conditions, such as access to capital sources for investment projects. Those

enterprises may lower the price below the cost of production to create cash flow which may result in deficit and oversupply in practice.¹

In a conference dated February 18, 2014 on the restructuring of State enterprises within the period 2014 – 2015, the Prime Minister opined that the equitization of State enterprises is a central political task of the Government, and added that within two years, 432 State enterprises should be equitized as a target.

1.2 Recommendations

- (i) Strictly implement the NT principle committed in the ACIA;
- (ii) Accelerate the equitization process of State enterprises;
- (iii) Create an equal legal framework for foreign-invested enterprises for access to the Vietnam market;
- (iv) Limit the guarantee of the State Bank of Vietnam;
- (v) Limit the participation of state enterprises in public investment, especially investment project PPP to let private economy and foreign investment participate.

2. Mergers and acquisitions (M&A) and barriers related to antitrust

2.1 Discussion

M&A has been more active in recent years. According to an available unofficial statistic, the total value of M&A business affairs in Vietnam reached US\$5 billion in 2012 and around US\$4.5 billion in 2013. It is also forecasted that the value of M&A deals will continue to increase by around 25–30% to 2017. M&A will be focused on industry, consumption, banking-finance and real estate.

However M&A is entangled by barriers under the Enterprise Law and Competition Law. Accordingly, if the aggregated market share of the parties to an M&A is from 30% to 50% of the relevant market, the parties must notify the competition administration body prior to the merger. M&A shall only be carried out if it is approved by the competition authority. Also, an M&A event is prohibited if the aggregated market shares of the parties to the M&A is 50% or more of the relevant market.

Similarly, the requirements for domestic investors and foreign investors related to M&A are also different. As a matter of practice, M&A between domestic enterprises requires carrying out a quite simple registration process or amending or updating their shareholder book. However, investors in the same situation, but involved in foreign investment, are required to obtain both an investment certificate and business registration certificate for the company under a more complicated process. In some localities, there is a notice of

¹ The commercial/investment issues and the proposals in 2014.

stopping temporarily to receive M&A dossiers and process signed ones. The intermission has lasted for one year and made caused a dearth of investment opportunities, money and has wasted the time of investors.

2.2 Recommendation

- (i) Promptly provide specific and clear regulations guiding M&A activities in consideration of equal treatment between investors.
- (ii) Clearly define the criteria and grounds of calculating the market share to determine whether the M&A activities lead to economic concentration. Therefore, it is necessary to set forth an equal, unified and specific process so that the Vietnam Competition Authority (VCA) can provide its conclusions and decisions on a specific case in a timely fashion.
- (iii) No distinctions between domestic and foreign investors.

3. Accessing the market for investment projects in the reserved sectors under the provisions of Article 5 and Article 9 of the ACIA.

3.1 Discussion

Article 5 and Article 8 on the national treatment and Article 9 of ACIA have indicated the reserved fields and the process of amending and supplementing the reservation list. The reservation list of Vietnam consists of 5 sectors including manufacturing, agriculture, fisheries, forests, mines and relevant services, with over 73 reserved fields.

However, in the process of implementing the foreign investment management activities, there are certain reserved areas that may be not necessary for economic development. Furthermore, there may be a lack of information on the reserved areas at competent agencies and the different management mechanisms at provinces and cities and economic zones management board. This may cause the following situations:

- (i) There are certain investment projects under the reserved sectors being granted investment certificates by competent authorities. However, a lot of projects having the same nature with the granted investment projects may not be approved and granted with investment certificates. This means with the same projects, the authority may provide different opinions and their approvals would be given on a case-by-case basis.
- (ii) In reality, prior to granting investment certificate for a specific investment project, the relevant authorities would normally evaluate the project and consult with each other. Actually, the evaluation process on a specific case would be dependent on their opinions from time to time. It would be common that the authorities provide their different evaluation opinions on the same issues while the main authority's decision would be subject to the other authorities. As a result, the process on issuing

the investment certificate for a specific project would be prolonged with different outcomes.

3.2 Recommendation

- (i) For new investment projects with the same nature as existing projects, it is recommended that they should also be accepted and granted with an investment certificate. In fact, there should be no distinction between these projects in being granted investment certificate. In this regard, the licensing authority would solely decide on issuing the investment certificate for such new projects without consulting with and relying on other authorities.
- (ii) As a suggestion, there should be a central authority having the authority to accept investment projects under the reservation list of the ACIA and other international treaties in which Vietnam is a member. As a matter of fact, there is not yet a clear mechanism on accepting a specific project reserved or restricted under the treaties. Therefore, it would be common that the authorities may accept or reject for the specific projects inconsistently. In fact, for the sectors unnecessary to be reserved and/or restricted, they should be equally opened for creating economic development.

4. Imposing the minimum investment capital for foreign investment projects

4.1 Discussion

The Law on Investment 2005 abolished the requirement on minimum investment capital for foreign investment projects. In fact, this has created an equal treatment between foreign investors and local investors in terms of investment capital. However, the requirement on investment capital is applied differently between authorities. In reality, the Department of Planning and Investment (DPI) in each province may set different minimum investment capital amounts. For instance, for the same project, Hanoi's DPI may require minimum investment capital of 2 billion VND (approximately USD100,000) while Ho Chi Minh's DPI may require minimum investment capital of 1 billion VND (approximately USD50,000).

In addition, there are different requirements on the capacity of investors and discrepancies in the interpretation of the provisions of the law. There is also an inconsistency in determining and distinguishing between the conditions for granting an investment certificate and the conditions for the actual operation of the established company. Therefore, the authorities may require the qualification of various conditions differently for the same projects conducted by different investors.

4.2 Recommendation

The provisions of ACIA and the current laws should be public and strictly applied. Therefore, the training on these regulations should be taken as a priority measure.

5. The right of foreign-invested enterprises which have less than 49% held or controlled by foreign investors

5.1 Discussion

The Law on Investment 2005 allows foreign-invested enterprises established and operating in Vietnam to expand their investment business. However, for joint ventures with less than 49% held and controlled by foreign investors, they may still not be licensed to operate in the sectors reserved by Vietnam in the ACIA or other investment and trade agreements.

As a matter of law, there is currently not a clear definition of a foreign-invested enterprise. However, the law only provides a general provision that enterprises invested with foreign capital and having foreign investors participating are considered as foreign-invested enterprises.

Actually, the unclear regulations above have also limited the business rights of Vietnam enterprises and caused discrimination amongst investors.

5.2 Recommendation

- (i) To supplement into the amended Law on Investment a clear definition of a foreign-invested enterprise.
- (ii) For joint ventures with less than 49% held and controlled by foreign investors, they should be free to expand their business in the sectors reserved and/or restricted under the ACIA.

6. The registration for operation of projects under the Law on Investment 2005

6.1 Discussion

According to Law No. 37/2013/QH13 on amending and supplementing Article 170 of the Law on Enterprises, foreign-invested enterprises established before July 01, 2006 are entitled to re-register to manage their organization and operation under the provisions of Law on Enterprises and other related legal documents. In case of non-registration, the organization, management and operation of the enterprises must comply with their investment licenses and charters. For the contents not being provided in investment license and charter, the enterprises must carry them out in accordance with the provisions of the Law on Enterprises and other related legal documents.

Interests and concerns:

In practice, the re-registration of the joint venture companies established before 2006 may not be enforceable. The joint venture was established on the basis of a joint venture agreement with the mandatory requirements on the members of the management board and

the principle of consensus in voting for the issues related to the organization and operation of the joint venture.

As a matter of fact, there is a difficulty in re-registration for the joint venture due to the requirement of consensus among the members of the management board. In many cases, a Vietnamese party may not want to re-register the company while a foreign party may wish to do so. However, since consensus is required and voting rights are given to both parties based on the capital contribution, such re-registration would not occur.

6.2 Recommendation

The amended Law on Investment and Law on Enterprises should allow enterprises established before July 01, 2006 to re-register subject to a decision of the members contributing capital.

However, if the Vietnamese party contributes 30% or less of capital by the value of land use rights assigned by the state, re-registration of the company would be allowed without relying on the consensus of parties.

7. The regulations for management and administrative reform of investment

Vietnam has put a lot of effort into reforming administrative and investment formalities. However, there are still significant barriers related to investment formalities as follows:

- (i) Regulations of laws and documents guiding implementation are promulgated slowly and lack clarity and unity. Explanations of such regulations are different among localities. Even though there is only one issue, many opinions are presented. In investment management, there is a lack of agencies to synthesize and resolve issues. Even though the issue is clear, it still needs absolute approval, which makes it passed.
- (ii) The appearance of licenses promulgated under the Circular “Decision of localities”, and Regulation “which should preexist, which should not” is a popular phenomenon in investment implementation.
- (iii) Systematization, synthesis, amendment, supplement of regulations, investment policies are usually made slowly by state agencies.
- (iv) Embezzlement and complications are normal amongst state agencies. Financial lubrication exists, to the detriment of investors.

There are some recommendations as follows: continue to reform administrative formalities of investment, especially regulations of legal documents in the direction of clarity and explicitness; minimize licenses setting standards for enterprises; implement mechanisms to supervise the affairs of civil servants and investment implementation agencies.

8. Other legal issues

8.1 Discussion

As a matter of practice, the application of a law is subject to other guiding documents such as Decrees, Circulars which will be enacted later. In addition, application and interpretation of a regulation can be inconsistent amongst different authorities.

In addition, there are difficulties in the recognition and enforcement of foreign arbitration awards in Vietnam. Foreign investors complain that the provisions and practices of Vietnam in recognizing and enforcing foreign arbitration awards provisions do not comply with the provisions of the New York Convention 1958 and Vietnam's Civil Procedure Code. There are not many foreign arbitral awards recognized and enforced in Vietnam as a matter of fact.

8.2 Recommendation

- (i) To promulgate the guiding legal documents simultaneously with the laws with the effect at the same time.
- (ii) To ensure that the courts comply with the provisions of the New York Convention 1958 and Civil Procedure Code, and to minimize the non-recognition of foreign arbitral awards.²

V. Reviewed documents

- (i) Law on Investment No. 59/2005/QH11 dated November 29, 2005 of the National Assembly;
- (ii) Law on Enterprises No. 60/2005/QH11 dated November 29, 2005 of the National Assembly;
- (iii) Law on Commerce No. 36/2005/QH11 dated April 16, 2005 of the National Assembly;
- (iv) Law on Forest Protection and Development No. 29/2004/QH11 dated December 03, 2004 of the National Assembly;
- (v) Law on Fisheries No. 17/2003/QH11 dated November 26, 2003 of the National Assembly;
- (vi) Law on Minerals No. 60/2010/QH12 dated November 17, 2010 of the National Assembly;

² Eurocham Position Paper at Vietnam Business Forum, 3 June 2013, Hanoi.

- (vii) Law on Telecommunication No. 41/2009/QH12 dated November 23, 2009 of the National Assembly;
- (viii) Law on Credit Institutions No. 47/2010/QH12 dated June 16, 2010 of the National Assembly;
- (ix) Other relevant documents of Vietnamese laws;
- (x) Asian Comprehensive Investment Agreement (ACIA);
- (xi) Vietnam's Commitments to WTO;
- (xii) Agreement on Trade Relation between Vietnam and United States of America;
- (xiii) Agreement on Trade-Related Investment Measures (TRIMs)