

BUSINESS ISSUES BULLETIN

Translated from original Vietnamese document

VIETNAM

THE BUSINESS INFORMATION CENTER AT THE VIETNAM CHAMBER OF COMMERCE AND INDUSTRY

No.24 (27) July 2008

VIETNAM'S INVESTMENT REGULATIONS:

Progress on improving business environment slowed by ambiguity and inconsistency

The 2005 Investment Law has been instrumental in advancing Vietnam's business environment and attracting the recent increase in both foreign and domestic investment. However, over the past two years, evidence from the provinces has exposed ambiguities in several critical areas of the law, as well as inconsistencies and conflicts with other business-related laws, including the Land Law, the Environment Law, and the Construction Law. The lack of clarity resulting from these conflicts has slowed down the investment process and has reduced the impact of the Investment Law on improving the business environment. The situation is further impeded by unclear investment application criteria and overlaps in administrative procedures and authority.

This Business Issues Bulletin summarizes recent discussions on the Investment Law, including analysis from a recent report by the Task Force for Implementing the Enterprise Law and Investment Law entitled, 'Review on the Inconsistency between the Investment Law and Other Business Related Laws'.

Simplification of investment project criteria sorely needed by authorities and investors

Under the Investment Law, multiple criteria are used to classify 'Investment Projects', including capital volume, type of ownership, business sector, investment location, and relevant authority. However, without any clear prioritization or detailed guidelines, provincial officials and investors are frequently confused as to which approval procedure applies for each investment project category. In order to rectify this situation and streamline the application approval process, a number of criteria issues need to be addressed, including:

Projects with/without construction: As most investment projects entail construction, the application process is biased towards construction. This makes it unnecessarily complicated for companies to obtain licenses for non-

construction projects.

Conditional/non-conditional projects: The specific 'conditional' business activities outlined in the law are not entirely clear to investors and there is no guidance to provide investors with clear compliance conditions.

Foreign/domestic investment: According to the Investment Law, foreign invested enterprises are considered Vietnamese entities. However, when they make an investment in or contribute capital to another enterprise, it is unclear whether they are considered foreign investors, or domestic ones.

Without clarification of these (and other) issues, the investment approval and licensing process - particularly for conditional projects - will continue to be delayed.

Effectiveness of the Investment Law weakened by discrepancies with the Land and Environment Laws

The Land Law stipulates that any decision on land allocation is conditional upon the result of the investment appraisal. This is inconsistent with the Investment Law, which attempts to simplify administrative procedures by waiving the investment licensing requirement for non-conditional projects with total investment capital less than VND 300 billion.

A similar problem exists with the Environment Law, which requires a comprehensive Environment Impact Assessment (EIA) for most projects involving construction work. This requirement is an impediment for investors, as they are not guaranteed approval of their project or its location before they acquire their investment registration certification or license. Moreover, site surveys are complicated and costly, and if the legal entity for the investment project has not been established, the investor will not be able to deduct the EIA expense from project costs. Some local authorities, attempting to facilitate investors with their

(Continued in page 4)



This bulletin is published with support from the Mekong Private Sector Development Facility (MPDF), a multi-donor funded initiative managed by the International Finance Corporation (IFC), the private-sector arm of the World Bank Group.

The "Business Issues Bulletin" provides those interested in business issues with a short summary and analysis of a particular topic affecting the business environment in Vietnam, and exposure to different opinions held by various stakeholders on the topic.

The statements and opinions presented here are only meant to provide additional reference material and do not reflect official opinion of the Vietnam Chamber of Commerce and Industry (VCCI) or the Mekong Private Sector Development Facility (MPDF)/IFC.

Readers are welcome to copy and distribute the information contained in this bulletin provided acknowledgement is given to VCCI/MPDF as the source.

(1) This Report was prepared by the Taskforce for Implementing the Enterprise Law and Investment Law in January, 2008. The Task Force was established under Decree No 1267/QĐ-TTĐ by the Prime Minister, to assist in monitoring and facilitating implementation of the two laws. The Task Force is headed by the Minister of Planning and Investment.

Simplification of investment project criteria sorely needed by authorities and investors



● Speaking from practical experience, we believe a number of the issues can be traced to the contents of the Investment Law. For example, one of the emerging issues is the “legal status” of foreign invested enterprises. According to the Investment Law and its regulations, foreign invested enterprises are considered Vietnamese

enterprises. But when they make an investment in or contribute capital to another enterprise, does this mean they should be considered foreign investors, or domestic ones? Currently, regulatory agencies do not have any specific guidelines, so they generally treat foreign invested enterprises in the same manner applied to foreign investors. Foreign investors are subject to a number of restrictions on shareholding, or are restricted from investing in certain areas. Therefore, we would like to see clear provisions on the 'legal status' that would facilitate investment particularly on the diversification of business activities of foreign invested enterprises in Vietnam.

*Mr. Luong Hai Binh, Lawyer
NHQuang & Associates*

● One example of the ambiguity of the Investment Law provisions is the requirement for an investor financial capability report. Existing provisions do not specify who should file the report. It is not clear whether it should be the institutional or individual investor establishing the enterprise who should file the report, or both. Nor does it specify what information should be included in the report, what format it should take or what purpose it serves. There are many unanswered questions, including whether a project can be rejected if an investor is loss-making and how an individual investor or institutional investor establishing the enterprise can show their financial capacity.

*Mr. Le Thanh Son, Deputy Director
DPI Hai Phong*

● As we can see, for conditional investment activities, the legal framework requires the investor to comply with sector law and regulations. However, because the sector laws and regulations are unclear, both the investors and the licensing authorities are confused. Furthermore, in addition to the general provisions on the legal entity and status of investors, sector regulations often have requirements regarding owner equity and the financial capability of investors to carry out their investment projects. This is problematic, as both the Investment Law and sector laws do not provide a clear definition of 'owner equity' and 'financial capability'. Due to this lack of clear guidelines, licensing authorities at the sub-national level have differing interpretations and applications of the laws and criteria. This results in delays in the process. Consultation by subordinate agencies of central agencies also delays project implementation.

*Ms Phan Thi Thuy Duong, Lawyer/Senior Manager
PricewaterhouseCoopers Legal, HCM Branch*



● The biggest complication in the investment process is the lack of specific guidelines and conditions for conditional business activities, and the procedures required for the application to be considered eligible. In all these cases, the Department of Planning and Investment (DPI), as the application processing agency, must ask for guidance from relevant central ministries through its People's Committee (e.g. asking guidance from Health Ministry officials for specific conditions related to establishing a hospital, or training for medical staff). This consultation process is time-consuming and means that conditional projects require much longer to obtain a license than the 15-day timeframe stipulated by the law. Moreover, responses from relevant ministries are done on a case-by-case basis, and are therefore not as effective as regulations. In most cases, sub-national agencies ask for guidance and are unable to simply follow precedent.

*Mr. Phan Canh Huy, Head of Division
External Economic Affairs, DPI ThuaThien Hue*

Effectiveness of the Investment Law weakened by discrepancies with the Land and Environment Laws

● One difficulty relating to investment registration procedures is the issue of project location. An investor is not guaranteed nor does he receive formal approval, from the relevant authority of the specific location for the project at the time of his/her project application. However, investment project approval, in the form of an investment registration or certificate, is a necessary condition for obtaining a land allocation. In practice then, the investor is always forced to go through an informal process of

acquiring an agreement on the land use right first and then carrying out formal procedures for investment approval and land allocation. This informal agreement on the allocation of land is complex and inefficient. It would be better if the investment procedure was facilitated by a one-stop shop for project appraisal, which included land allocation.

*Mr. Luong Hai Binh, Lawyer
NHQuang & Associates*



- According to the land allocation procedure in Vietnam, the issuance of an investment license or certificate is a condition for acquiring land in primary transactions with the state. A curious aspect of the law is that it seems to assume that specific land for the investment has already been identified, while at the same time the land allocation regulations assume that the investment license has already been granted when the land allocation application is submitted. Also, it may be difficult to provide technical solutions to environmental issues, a requirement of the investment license, unless a specific location has been identified. So, it is prudent for investors requiring investment licenses to pursue land acquisition and issuance of the investment license on simultaneous and parallel tracks. Experience with the same issue in other developing countries, where the process of acquiring investment approval is integrated into the land application process, also shows that this is a cause of delay, as well as an opportunity for local officials to discriminate against some investors, protect local industry against competition or engage in unauthorized economic planning.

*Mr. Steve Butler, Land Policy expert
Consultant to IFC*

The current environmental regulations usually require the investor to carry out an Environmental Impact Assessment (EIA) in order to obtain an investment approval. This requirement can make it difficult for investors, because the legal entity for the investment project has not yet been established and therefore the investor cannot technically sign a service contract for carrying out an EIA. If the investor enters into the contract as a legal person, it may not be possible to deduct the cost of the EIA later. To resolve this, the investment authority has the flexibility to issue the investment registration or certificate to investors on the basis of an agreement between the

investor and the environment authority, in which the investor commits to performing an EIA and to follow environmental requirements and regulations after establishing a legal entity through the investment registration. However, in those cases where the investment authority rigidly applies environmental regulations for the investment approval, the investor is forced to risk the high extra cost of the EIA for their project implementation. (In case that the project is not approved, the EIA cost would be a sunk-cost of investors. But even in the case that the project is approved, the EIA cost would not be deductible as an operational cost to reduce tax liability).

*Mr. Phan Canh Huy, Head of Division
External Economic Affairs, DPI Thua Thien Hue*



- Inconsistencies in investment-related procedures are highlighted by the degree of difficulty faced by investors when applying for investment licenses and land for implementing projects. The inconsistencies are due to the lack of specific regulations or guidelines on investment procedures and the procedures for obtaining land freehold/leasehold. Thus, it falls on investors to walk a tightrope between these two procedures since in order to register and receive an investment certificate, investors must already have an agreement or approval for land allocation. Paradoxically, in order to get the land lease from the state, the investment project must already have investment approval. Therefore, investors must proceed with the two procedures simultaneously and check back and forth to see if the land-related applications and documents are acceptable for the investment authorities, and vice versa. In short, it is a complicated and protracted process.

*Ms Phan Thi Thuy Duong, Lawyer/Senior Manager
PricewaterhouseCoopers Legal, HCM Branch*

Inconsistent investment and construction procedures have led to an overlap in project documentation requirements and the approval procedures



- To comply with the Investment Law, the investor must apply for project registration or certification before project implementation. However, the Construction Law does not mention or have any link with this requirement. To observe both laws investment registration in a construction project must precede project implementation - but the exact timing is unclear. The Investment Law allows for a non-conditional project with a capital investment of less than VND 300 billion to forego the appraisal requirement. With the Construction Law, construction projects (except state budget

funded projects) are not subject to project appraisal, but are subject to technical design approval and a construction permit from the Construction Department. If we observe both laws, it is impossible for the regulatory agencies to administer all project criteria for non-conditional construction projects under 300 billion VND (except for state budget funded projects). In my opinion, this creates a loophole in the state management of investment projects. Simplification and reform is necessary but should be implemented in a prudent manner to ensure proper state management on investment-construction projects.

*Mr. Cao Van Ha, Vice-Director
Construction Department, Bac Ninh*



● To implement an investment project, investors need to carry out various approval procedures from various state management entities. These include defining the investment condition and location, preparing project documents, applying for investment registration or certification, doing assessments on environmental impacts, applying for land allocation, and understanding the construction appraisal process. Among these procedures, there are numerous conflicts, inconsistencies, and overlaps in both the approval process and the project documents themselves. This is due to unclear regulations and a lack of guidance for co-ordination among state entities. For example, the construction regulation requires that an investment project be appraised by relevant authorities. However, it fails to clarify whether an “investment registration” or “investment certification” under the Investment Law is a basis for meeting the above requirement under the Construction Law. In reality, the investment registration or certification does not require any appraisal work from the investment authority. Our own experience with local management for a construction-investment project (in Hai Phong City), shows how difficult it is to offer investors a simplified “one-stop shop” approval process due to the lack of relevant regulations and clear guidance for co-ordination among relevant approval authorities. We therefore suggest that the relevant ministries and government review and revise the legal system so that investors can operate within a synchronized appraisal process and a unified form of project documentation.

*Mr. Le Thanh Son, Vice Director
DPI Haiphong*

(Continued from page 1)
application procedures, have allowed investors to carry out EIAs after obtaining the investment approval. While this is helpful, it is a risky practice for both investors and authorities as they have not followed a proper approval procedure as stipulated by the law.

Inconsistent investment and construction procedures have led to an overlap in project documentation requirements and approval procedures

Construction and investment licensing procedures are not synchronized. Furthermore, there are no proper links between the two that would help clarify the application process. It is therefore unsurprising that investors are confused as to whether to begin the construction licensing process prior to, simultaneously, or after the investment licensing process especially since approved project documents are not necessarily

● If the project documents prepared under investment registration procedures and documents prepared under construction appraisal procedures were integrated, it would greatly reduce the burden of paperwork. For large enterprises with capable staff, this may not be a big problem. But, small and medium enterprises, and first-time applicants lacking the relevant capacity and experience, may be unable to handle the process. In such a case, a single document that can be processed by different state authorities would greatly help enterprises complete all administrative requirements without unnecessary delays.

*Mr. Phan Canh Huy, Head of Division
External Economic Affairs, DPI Thua Thien Hue*



● Investors always need to prepare at least three different project dossiers: one for the investment authority, one for land authorities, and one for construction authorities. A dossier approved by one authority is not considered the basis for an appraisal process by another authority. As project contents are subject to different appraisal criteria from different authorities, there is a high risk of contradictory decisions among the related authorities. There is also overlap. Therefore, to better facilitate investors, related laws and regulations should be further amended to synchronize different appraisal processes especially for the introduction of a unified project dossier for all related procedures.

*Mr. Nguyen Dinh Cung, Director
Department for Research on Macroeconomic Policies, CIEM*

considered the basis for construction appraisal. Furthermore, the Construction Law fails to prioritize its many different planning categories, including sectoral planning, security planning, and local socio-economic development master planning, whereas the Investment Law sets public infrastructure planning and natural resources use planning as top priorities. It should also be noted that the construction licensing process requires large projects to justify their economic impact in terms of project need, investment form, capital source(s), schedule of repayment, project efficiency, and expected profit. Such requirements appear beyond the expertise of most construction management offices.

To alleviate of these bottlenecks, harmonization of conflicting project appraisal decisions, the reduction of paperwork, and better coordination of the two approval processes would greatly help administrators and investors alike.