Unresolved issues in the draft law

- I think one major strong point of the draft CIL is that it opens up a number of sectors, currently under state monopoly, to domestic investors. These include publishing, television, radio broadcasting, advertising, air transport, maritime air ports, and petroleum exploitation. If the State is really to open up these sectors, we will witness a boom in private investment in the services sector in the coming years. However, this opening will not materialize unless the National Assembly amends related special laws, so as to open these sectors to domestic investors before Vietnam's international commitments open them to foreign investment.

- Business freedom needs to go hand-in-hand with the protection of the public interest. The review of the Enterprise Law shows that we have made life easier for businesspeople, at the expense of many other people. A number of "ghost" enterprises have been set up to illegally trade VAT bills, and many fake investment projects have been formulated by people who just want to raise money and then disappear with it. There is an urgent need to restore corporate social responsibility and ensure financial security in business. The draft CIL will enable the State to better handle registration and implementation of investment projects. The introduction of investment registration procedures is a necessary measure to address these "bogus" enterprises who cheat customers. Those enterprises which exist only in paper will be inspected and punished. The draft stresses the supervisory role of independent auditors. Vietnam has a "negative list" which must only allow the State to regulate monopoly, to domestic investors. These include publishing, television, radio broadcasting, advertising, air transport, maritime and air ports, and petroleum exploitation. If the State is really to open up these sectors, we will witness a boom in private investment in the services sector in the coming years. However, this opening will not materialize unless the National Assembly amends related special laws, so as to open these sectors to domestic investors before Vietnam's international commitments open them to foreign investment.

- Incentives in Vietnam are generally granted based on a company's investment plans, usually before investment actually takes place. This is contrary to international best practice, in which investment incentives are granted on a "performance" rather than a "conditional" investment basis. This has been an ongoing debate during the drafting process of the CIL. As of mid-August 2005, there has been some capital exceeding VND 300 billion into the "conditional investment" category is groundless. Another example is that of financial services, which are very broad and span auditing, accounting, price appraisal, debt retrieval, etc. These services are very common and should not be classified as "important projects." The existence of a condition on investment registration, such as holding a professional license, should not mean that an investment project is subject to a full-scale evaluation, if it otherwise would only be subject to a "performance" rather than a "conditional" investment basis.

- The Common Investment Law (CIL) is one of the two critical business laws (together with the Unified Enterprise Law) being drafted with the goal of spurring the development of local private sector and further liberalizing investor activities. The CIL will replace both the Law on Domestic Investment Promotion and the Foreign Investment Law (FIL), with the goal of creating a unified legal framework for investment in Vietnam. It is anticipated that the draft law will be submitted to the National Assembly later this year. This bulletin identifies some of the unresolved issues in the draft law.

Creating a uniform legal framework for investment activity

One of the most important commitments Vietnam has made to accelerate the country's bid for closer international integration, including WTO membership, is to remove discrimination between investors based on their origins. To date, a number of reforms have been enacted, including removing: i) the dual pricing regime for key inputs; ii) compulsory requirements on importing/exporting, or domestic content; and iii) restrictions on technology transfer and hiring employees. These efforts, though significant, have not completely levelled the playing field for domestic and foreign investors, as a fundamental difference between those two groups remains embedded within the current legal framework--while foreign investors must obtain an investment license, which strictly defines the scope of their operations in a narrow form (under the Foreign Investment Law), domestic investors can operate more freely in any sectors not prohibited or restricted by law. The new CIL, however, will be applied to both domestic and foreign investment activities alike, thus unifying the legal framework for investment in Vietnam.

More freedom for foreign investors

Under the current FIL, the investment licenses issued to foreign investors strictly limit the scope of their activities. The new CIL will eliminate most of these limitations, giving foreign investors the same kinds of rights that domestic investors already enjoy--the right to decide where to invest, under what legal forms, and how to mobilize capital. Furthermore, the CIL will allow foreign investors to conduct business in all sectors not prohibited or restricted by the law, as defined in a "negative list" and a "restricted list." The new law will also allow foreign investors to register their activities in multiple business lines, with the freedom to choose the most appropriate legal form for their enterprise. They will also be allowed to conduct indirect investment in company shares, bonds, through onshore investment funds and financial intermediaries. Nevertheless, some conditions for domestic investors remain.

The most current draft of the new CIL creates new definitions of types of investment, and requires additional registration and licensing procedures that, to date, have not existed for domestic investors. In addition to registering their company under the Enterprise Law, domestic investors will now need to register any new investment project. Moreover, any investment with a value over VND 5 billion in the "ordinary" projects category will require an investment license and a license for investment certificate; investment projects falling under any of the other three categories will need to be appraised before an investment license is granted.

In the debate on the CIL, in the last few months, this is the biggest issue of concern among the local business community. Questions revolve around the lack of clarity behind the definitions of the various types of investment. In addition, investors would like a more effective measure to address these "bogus" enterprises who cheat customers. Those enterprises which exist only in paper will be inspected and punished. The draft stresses the supervisory role of independent auditors. Vietnam has a "negative list" which must only allow the State to regulate monopoly, to domestic investors. These include publishing, television, radio broadcasting, advertising, air transport, maritime and air ports, and petroleum exploitation. If the State is really to open up these sectors, we will witness a boom in private investment in the services sector in the coming years. However, this opening will not materialize unless the National Assembly amends related special laws, so as to open these sectors to domestic investors before Vietnam's international commitments open them to foreign investment.
The draft CIL states that foreign investors can set up a level playing field for businesses, regardless of their nationality. Less favorable treatment of foreign investors remains, but only in provisions related to some conditional sectors.

The big issue for domestic investors is the fact that overall, the “level playing field” is actually less favorable for them. The new CIL conveys a sense of more control similar to the more restrictive FIL. Instead, the CIL should apply some of the investment-friendly provisions of the existing Law on Domestic Investment Promotion.

Mr. Vu Tien Loc, President and Chairman, Vietnam Chamber of Commerce and Industry

Initially, the CIL was planned to replace the Law on Domestic Investment Promotion and the Foreign Investment Law, so as to create (together with the UEL) a conducive and equitable business environment for all types of enterprises. In other words, the CIL was originally designed to regulate investment activity of private investors. But in Vietnam “investment” encompasses both private investment and state-funded investment, and as a result, state-funded investment activities were included in the CIL.

I believe that this is a big mistake, as state investment needs to be strictly regulated and under a different set of rules. Private investment—both domestic and foreign—needs to be promoted, and therefore would benefit from more regulations. Under the two opposing approaches of “more control” and “simplified procedures” cannot co-exist in a single law. Thus, the “more control” approach contained in the draft CIL. We suggest designing a law on investment promotion that unifies the legal framework for enterprises in different economic sectors.

More freedom for foreign investors

The draft CIL states that foreign investors can set up their company under the Unified Enterprise Law. The business creation process is therefore simplified, with the initial capital requirement removed, which is an improvement on the current FIL. Some people find this move a bit too liberal because business creation is no longer tied to the availability of initial capital, and thus at odds with the national objective to keep foreign investment inflows. Many countries in the region (such as Thailand, Malaysia, Indonesia, Philippines and China), and even some EU countries, require foreign investors to submit a project proposal and demonstrate adequate financial capacity, before setting up their enterprise. The MPI advocates for business simplification because the CIL (as well as the UEL) is deliberately designed to create a conducive regulatory environment for all economic sectors, and to comply with Vietnam’s international commitments.

The main concern of foreign businesses is that the CIL could slow down economic growth in Vietnam and be bad for business. For foreign investors, the CIL will add another layer of bureaucracy, because foreign investors will have to get a business registration certificate, under the UEL. If the draft CIL is to go to the Ministry of Natural Resources and Environment to get environmental approval, and they already have to go to the Ministry of Construction to get construction permits, and they need to apply to MPI to get an investment license approval? If MPI were to act as a one-stop-shop, coordinating all those government agencies, that would be a better investment environment. But if the MPI is just another approval agency, it will create a worse investment environment. If people who come up with new business ideas, and they need to apply to MPI, they will go elsewhere. Of course, the Government should have some flexibility to make changes, if it finds that they hurt the economy, but the basic principle is to allow people to be creative and entrepreneurial within the framework of the law. If people

Less favorable conditions for domestic investors

Some people complain that the classification of projects into four categories is too complex. I don’t think this is true. If you look at the draft CIL in detail, you will find that the classification of projects is not too complex. The classification of projects—ordinary, conditional, ordinary, important and nationally important—is the same for investors, whether they are domestic or foreign. For example, the draft CIL will require an appraisal, licensing, and decision-making process for projects more than VND 100 billion. For foreign projects, investors are responsible for their own environmental and financial feasibility. For projects using state funds for business purposes, the State conducts an appraisal, prior to the investment decision, so as to avoid waste and inefficiency. However, the appraisal, licensing, and decision-making process will be decentralized into the hands of Ministries and localities.

Investment procedures will be simplified, as most investment projects will fall under the category of “ordinary projects”, for which investors will only need to apply for an investment registration certificate. A limited number of projects (including conditional ordinary projects, important projects, and very few nationally important projects) will require prior approval, prior to issuance of an investment license. In particular, ordinary projects by domestic investors, who do not apply for investment incentives and require capital of less than VND 1 billion, will be simplified.

Perhaps the inclusion of less investment-friendly provisions, taken from the current FIL, into the CIL explains the increased State interference in investment activities. The appraisal, licensing, and decision-making process will be decentralized into the hands of Ministries and localities. According to the draft law, all investment projects require an investment registration or license. Why do investors need to undertake registration? For what purpose does the State need registrations? I don’t see a clear answer. The requirement that ordinary projects be registered does not make investment easier, and provides opportunities for corruption. In my opinion, registration and investment registration certificates may be necessary only in the following cases: 1) when a contribution to capital comes from abroad; or 2) when investors apply for incentives; or 3) when investors need State support for land rental. In all remaining cases (except conditional projects subject to approval), the CIL should remove these registration requirements, and the investment registration certificates.

In addition, the draft also sets forth a number of new sub-licenses for domestic enterprises with private investment. For example, projects with over 30% of state capital, or projects with 100% private investment exceeding VND3 billion, require a license. This is confusing because most projects which receive loans from state-owned commercial banks or investment funds

Viewpoints

Unifying the legal framework for enterprises in different economic sectors

● I think the draft CIL has indeed been designed to create a level playing field for businesses, regardless of their nationality. Less favorable treatment of foreign investors remains, but only in provisions related to some conditional sectors.

● The draft CIL states that foreign investors can set up a level playing field for businesses, regardless of their nationality. Less favorable treatment of foreign investors remains, but only in provisions related to some conditional sectors.

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● I believe that the draft does not promote investment. On the contrary, it hinders investment, and limits business freedom through the licensing procedures for investment, and investment incentives. The draft CIL does not follow the Prime Minister’s guiding principles on the formulation of the CIL. It takes over the Law on Domestic Investment Promotion, despite its shortcomings, is more conducive to investment than the current FIL. VAFI’s concern is that if the
More freedom for foreign investors

- The draft CIL states that foreign investors can set up their company under the Unified Enterprise Law. The business creation process is therefore simplified, with the initial capital requirement removed, which is an improvement on the current FIL. Some people find this move a bit too liberal because business creation is no longer tied to the availability of initial capital, and thus can have an effect on the national business environment. However, foreign investment inflows in many countries in the region (such as Thailand, Malaysia, Indonesia, Philippines and China) have shown that de-linking foreign investment inflows can diversify sources of finance and reduce the volatility of foreign exchange inflows.

- The main concern of foreign businesses is that the CIL will add new so-called “baby permits” to the investment environment. The classification of projects under the UEL is one major weakness of the draft CIL. The Unified Enterprise Law (UEL) is deliberately designed to create a conducive regulatory environment for all economic sectors, and to comply with Vietnam’s international commitments. However, for foreign investors, the principle of non-discrimination and investment freedom will not be applied 100%. Rather, it will follow the integration roadmap that Vietnam is committed to. The signing and implementation of international agreements commit Vietnam to open up its market, and remove investment-related obstacles, customs and non-tariff barriers, and any subsidies incompatible with international practice, while at the same time, permitting it to maintain protection of domestic production for as long as the agreed timetable allows.

The unification of the FIL and the Law for Domestic Investment Promotion into the Common Investment Law, will eliminate discrimination and create a level playing field for businesses in all economic sectors. This move aligns Vietnam with its international commitments. However, for foreign investors, the principle of non-discrimination and investment freedom will not be applied 100%. Rather, it will follow the integration roadmap that Vietnam is committed to. The signing and implementation of international agreements commit Vietnam to open up its market, and remove investment-related obstacles, customs and non-tariff barriers, and any subsidies incompatible with international practice, while at the same time, permitting it to maintain protection of domestic production for as long as the agreed timetable allows.

Views

Unifying the legal framework for enterprises in different economic sectors

- I think the draft CIL has indeed been designed to create a level playing field. Many of its provisions are applicable to all investors and businesses, regardless of their nationality. Less favorable treatment of foreign investors remains, but only in provisions related to some conditional sectors.

- The big issue for domestic investors is the fact that overall, the “level playing field” is actually less favorable for them. The new draft CIL conveys a sense of more control similar to the more restrictive FIL. Instead, the CIL should apply some of the investment-friendly provisions from the existing law, such as the Law on Domestic Investment Promotion.

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- Initially, the CIL was planned to replace the Law on Domestic Investment Promotion and the Foreign Investment Law, so as to create (together with the UEL) a conducive and equitable business environment for all types of enterprises. In other words, the CIL was originally designed to regulate investment activity of private investors. But in Vietnam “investment” encompasses both private investment and state-funded investment, and a result, state-funded investment activities were included in the CIL.

- I believe that this is a big mistake, as state investment needs to be strictly regulated and subject to different set of rules. Private investment—both domestic and foreign—needs to be promoted, and therefore would benefit from a more investment-friendly environment. The two opposing approaches of “more control” and “simplified procedures” cannot co-exist in a single law. Thus, the “more control” approach in the current draft CIL. We suggest designing a law on investment promotion that is more SME-friendly.

- The unification of investment regulations, aiming to create an equitable business environment for different players, has a number of advantages. These include, first, explaining clearly what the regulations are, and how procedures are, and second, consolidating the state management agencies. This is a welcome change. But the basic question is whether the new law will provide people with more business freedom. Moreover, for amendments of the investment and enterprise laws to be really effective in creating a better and more equal business environment, there is a need to reform regulations in related sectors such as banking, taxation, land, labor, social security, and so on.

- Frankly, I think most of us in the business community are a little concerned that the CIL will add new so-called “baby permits” to the investment environment. Because most of what the old FIL covered is addressed in the draft UEL. As a corporate law, the UEL is addressing the issue of only one level playing field, and seems to cover the basic corporate governance framework for all companies. That would be sufficient. The original purpose for the CIL, as I understood it, was to set forth investment guarantees that applied equally to all businesses. A second purpose was to set forth the tax incentives rate standards—i.e. who would be eligible for tax incentives–on an equal basis for all businesses, both foreign and domestic.

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The draft CIL has a whole section on investment incentives, which is already under regulations. In this case, if the two laws overlap, or if the Government or the state later amends one of them, it will make the situation even more confusing. The same concern implicates project appraisal criteria, which are also covered by other laws.

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