

FOREIGN DIRECT INVESTMENT – THE LEGAL ENVIRONMENT

Oliver Massmann
Baker & McKenzie, Hanoi

The purpose of this presentation is to highlight some of the most critical issues relating to FDI in Vietnam. It is not intended to serve as a comprehensive legal analysis, but rather to provide a ‘snapshot’ of the questions that are at the forefront of an investor’s mind throughout the lifecycle of their investment in Vietnam, as a basis for encouraging discussion and debate.

The Lifecycle of an FDI Project

In broad terms, any FDI project can be divided into four phases:

- Pre-establishment;
- Establishment;
- Operational; and
- Termination.

The ‘critical questions’ for investors are set out under the relevant headings below.

Pre-establishment Phase

Issue	Comments
Restrictions on Investment Sectors	<ul style="list-style-type: none">➤ Are the restrictions transparent and easy to ascertain?➤ What impact do bilateral agreements have on this point?➤ How frequently are they subject to change?➤ Is the list subject to negotiation by some parties and not by others?
Restrictions on Business Structures	<ul style="list-style-type: none">➤ Are all investors treated equally in their choice of investment structures?➤ Do bilateral commitments impact on this and how can investors take advantages?➤ Is the government taking credible steps to give investors the widest possible range of options?
Difficulties of carrying out a risk analysis in accordance with Western standards	<ul style="list-style-type: none">➤ Will I have access to valid and up-to-date statistical data?➤ Are written explanations of policy and other important factors available, so that I can evaluate the para-legal risks?➤ Can I rely on information from Government departments/offices?



Establishment Phase

Issue	Comments
Tax Planning and Concessions	<ul style="list-style-type: none"> ➤ Is tax reform imminent? How will it impact on my bottom line? ➤ Are the taxes far reasonable? ➤ What are the criteria for concessions? Are concessions realistic and attractive for investors? ➤ What bilateral taxation arrangements does Vietnam have with my country of origin?
Licensing Requirements	<ul style="list-style-type: none"> ➤ Are licensing requirements transparent, consistently and impartially applied? ➤ Is the scope of delegated licensing authority clearly defined? ➤ Are licensing laws and policies being progressively revised to be brought into line with international standards? ➤ Can I rely on my licence once issued?
Capital Requirements	<ul style="list-style-type: none"> ➤ Are the capital requirements clear? ➤ What is the difference between investment capital and legal capital? ➤ Are the regulations on technology transfer restrictive? ➤ How are non-cash assets valued for the purposes of capital contributions?
Collateral / Land Use Rights	<ul style="list-style-type: none"> ➤ What types of collateral can I utilise? ➤ Are the available options for collateral comparative with internationally accepted standards? ➤ How trustworthy is collateral based on the mortgage of a land use right? ➤ Is there a register to search and record charges over assets? ➤ Are the procedures for acquiring land use rights practical? ➤ Are land clearance procedures workable?



Operational Phase

Issue	Comments
Labor Law	<ul style="list-style-type: none"> ➤ Can I recruit my own employees? ➤ Do local labor laws comply with international standards? ➤ How much flexibility will I have with my labor needs? ➤ Can I offer my employees an Employee Stock Option Plan or other forms of non-cash incentive?
FOREX / Repatriation of Profits	<ul style="list-style-type: none"> ➤ What steps are being taken to liberalize foreign exchange restrictions? ➤ Can I get access to hard currency? ➤ Is there an additional or hidden tax on repatriation of profits?
Antitrust and Competition Issues	<ul style="list-style-type: none"> ➤ What rights do I have against anti-competitive actions by my business competitors? ➤ Are there restrictions on mergers and acquisitions?
Corruption and Liability for Bribes	<ul style="list-style-type: none"> ➤ Is the government committed to eliminating corruption in my target country? ➤ Am I able to report solicitation of bribes without risking being prosecuted for offering a bribe (where the bribe was solicited and not offered?) ➤ Will I be prosecuted in my own country – such as under the Foreign Corrupt Practices Act in the United States?

Termination Phase

Issue	Comments
Termination by Authorities	<ul style="list-style-type: none"> ➤ Under what circumstances can the government terminate my investment licence? ➤ Are the conditions discretionary or arbitrary? Do I have the opportunity for appeal by a court or tribunal? ➤ Am I legally protected against appropriation of my investment?
Termination Procedures	<ul style="list-style-type: none"> ➤ Am I able to terminate my investment? ➤ Will I be able to recover all of the assets to which I am legitimately entitled?
Insolvency Issues	<ul style="list-style-type: none"> ➤ Do the insolvency laws allow an investment to be voluntarily dissolved? ➤ Is there a procedure for applying to have insolvent debtors wound up, in order to recover debts that are owed to me?



Recovery of Intellectual Property	➤ Are there effective judicial or administrative measures to prevent my intellectual property being misappropriated?
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Dispute Resolution

Issue	Comments
Speed, Accessibility and Transparency of Dispute Resolution Options	<ul style="list-style-type: none"> ➤ Are dispute resolution measures available and accessible to foreigners? ➤ Is there a choice of qualified mediators, arbitrators, and other professionals to assist in resolving my dispute? ➤ Is the process transparent, ethical and reasonably quick?
Government Immunity	➤ In what situation is the government immune from legal proceedings?
Enforceability of Dispute Resolution Agreements	<ul style="list-style-type: none"> ➤ Will a court or other body uphold my decision to use mediation or arbitration and stay court proceedings pending an outcome? ➤ Do I have a practical range of remedies available to me?
Appeal against Administrative Decisions	<ul style="list-style-type: none"> ➤ Am I able to appeal an improper or illegal decision by an authority? ➤ Is there practical recourse against an authority that is acting outside the scope of its powers, or that is refusing to carry out its duties? ➤ Is there an independent court or tribunal to review administrative actions?
Recognition and Enforcement of Foreign Arbitral Awards	<ul style="list-style-type: none"> ➤ Is the country a signatory to the New York Convention on the Recognition and Enforcement of Arbitral Awards? ➤ Will a foreign arbitral award be recognized as of right, without the need to rehear the dispute? ➤ Are there effective procedures in place to enforce monetary and other judgments?

Please do not hesitate to contact Mr. Oliver Massmann of Baker & McKenzie Hanoi Office via e-mail: oliver.massmann@bakernet.com or telephone: (+84-4) 825-1428, should you have any questions related to this material.

