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Foreign Investment in Vietnam Through Business Cooperation Contracts

I. Vietnamese Foreign Investment Law

Foreign investment in Vietnam is prescribed principally by the Foreign Investment Law of Vietnam (FIL), which is modelled on legislation developed earlier in China and first promulgated in December 1987. Vietnamese law on foreign investment is an assemblage of laws, with the FIL at its core. Other laws affecting foreign investment include those enacted by the National Assembly (such as the Land Law); ordinances, decrees, and regulations issued by the Council of State and the government; and circulars, decisions, and notices made by relevant government ministries and agencies. The law in general tends to place emphasis on good intention rather than performance and on obligations rather than rights. The law is constantly amended and changed to adapt to changing circumstances and parameters previously unknown to the lawmakers. The FIL has been amended twice since 1987, once on June 30, 1990, and again on December 23, 1992. Associated with each amended version is the Decree of the Government on Regulations for Implementation of the FIL, also known as the Implementation Decree. The decree currently in force is Decree No. 18-CP issued on April 16, 1993. The State Committee for Cooperation and Investment (SCCI), with its head office in Hanoi and branches in most major cities, is the organization in charge of foreign investments. The SCCI is responsible for providing assistance and guidance in establishing a business cooperation relationship, joint venture, or wholly foreign-owned enterprise and granting the investment license.

The FIL and Decree 18-CP create three forms of business operation that foreign enterprises may assume to conduct the primary activity of their invest-

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ments in Vietnam. These forms are: joint venture; enterprise with 100 percent foreign-owned capital; and operation under a business cooperation contract (BCC).

Of the three forms of foreign investment, the joint venture is commonly regarded as the most effective measure to attract foreign investors, since the law on joint venture has drawn principally on the experience gained from the Chinese model. Also, through joint venture foreign corporations can readily gain access to "in-house" knowledge of local politics, business customs, and cultural and language insights. Foreign investors using the form of a joint venture or an enterprise with 100 percent foreign-owned capital are required to establish a limited liability company, a legal juridical entity subject to Vietnamese law. Through the limited liability company shares can be issued at unequal values and, though they can be transferred freely among shareholders, they cannot be issued to the public. Foreign-invested enterprises trading as Vietnamese companies are also required to report to and to establish liaison directly with local government and party authorities. This procedure can cause problems in communication and administration.

In a joint venture, the minimum proportion of contribution by the foreign party must be 30 percent of the total prescribed capital,[1] and either the general director or the first deputy general director of the board of management must be a Vietnamese citizen.[2] For investments by a BCC the terms and conditions of the written contract will basically determine the rights and obligations of the parties, and the parties are personally liable for the project under Vietnamese law. Investment under a BCC is thus not attractive to newly formed Vietnamese companies, but often proves to be suitable for production-sharing contracts where the local party is well established and does not need substantial equity injection, or for large-scale projects with the Vietnamese Government or a state-owned enterprise as the local partner, such as infrastructure development projects, Build-Operate-Transfer (BOT) projects, and the like.[3]

In a BCC foreign investors are not required to establish a Vietnamese juridical entity as in joint ventures or enterprises with 100 percent foreign-owned capital. Chapter II, articles 8-18 of Decree 18-CP prescribe basic regulations for BCCs. The basic features of foreign investments under BCCs are as follows: (i) To perform jointly one or more business activities in Vietnam on the basis of assigned obligations and shared profits of the joint operation without recourse to the establishment of any new juridical entity. Commercial and other economic contracts

1. Foreign Investment Law art. 8 (amended June 30, 1990, and Dec. 23, 1992). English translations of the FIL are available in many recent publications. The official English-language version, including the 1992 Amendments, is FOREIGN INVESTMENT LAW OF VIETNAM (SCII & Phillips Fox, Melbourne and Hanoi, publ., 1993).

2. *Id.* art. 12.

3. Detailed regulations concerning BOT projects are to be provided in a separate government decree. *See id.* art. 19b.

for simple exchange of goods such as delivery of raw materials in exchange for finished products are not within the scope of the regulation for BCCs.[4] (ii) The duration of the BCC is flexible and determined by the parties in accordance with the nature of the business. In practice the duration may range from months to years, and article 15 of the FIL, amended on December 23, 1992, stipulates that the duration of the activities of enterprises with foreign-invested capital in general shall be decided by the government on a case-by-case basis. The article further states that the duration shall not exceed fifty years and for special long-term projects the duration shall be limited to seventy years.

II. Establishment Procedures and Organization

A. ESTABLISHMENT

Establishment of a business operation based on a BCC in Vietnam essentially requires the approval of an application for license by the SCCI. Article 9 of Decree 18-CP provides the documentation required in the application for a license to establish a BCC project, comprising: (i) the BCC already executed by the parties involved; (ii) a technical and cost-benefit analysis of the contract; and (iii) information on the contractual parties, such as articles of association or charter of the company, juridical status of individuals participating in the contract, financial standing of the parties, and the like.

Of these requirements the technical and cost-benefit analysis is considered to be most effectively undertaken with the help of local consultants given the wide range of economic and policy considerations that require up-to-date knowledge and expertise. Essentially such analysis has to demonstrate clearly: (a) an establishment plan including timetable, installation and equipment, materials, supply sources, electricity, fuel and water requirements; (b) a production program, sources of supply of materials and equipment; and (c) a market for the products, especially export market and capacity for import-substitution if any.

The list of basic items required for the contract is provided in article 10 of Decree 18-CP and includes, among others: disclosure of management personnel; current activities of the parties; lists of equipment and materials required in the project; the consumer market; rights and obligations of the parties; profit sharing arrangements; transfer of rights, benefits, and obligations; duration of agreement; variation of the contract; termination; and dispute resolution.

An application for investment under any form at the SCCI requires a fee in U.S. currency equal to 0.01 percent of the total investment capital, but not under

4. DECREE OF THE GOVERNMENT ON REGULATIONS FOR IMPLEMENTATION OF THE FOREIGN INVESTMENT LAW (IMPLEMENTATION DECREE) No. 18-CP art. 8.1 (Apr. 16, 1993) [hereinafter DECREE 18-CP] (available in English translation in VIETNAM TRADE INFORMATION CENTER, DECREE OF THE GOVERNMENT ON IMPLEMENTING REGULATIONS OF THE LAW ON FOREIGN INVESTMENT IN VIETNAM (1993)).

US$50 or over US$10,000.[5] If the capital is not finalized, a temporary fee of US$10,000 will apply.

B. Organization

While foreign investments in Vietnam in the form of a BCC are not required to establish a limited liability company, the parties to a BCC are personally liable for the project under Vietnamese law.

Article 17 of the FIL provides that joint ventures or foreign-invested enterprises, including those under BCCs, may open borrowing accounts with overseas banks for flexibility in acquiring investment capital. Article 62 of Decree 18-CP stipulates that parties to a BCC have full freedom to arrange their investment plan and program. Article 15 provides that a BCC operation may be terminated before the term of the contract if all the conditions for its termination as specified in the contract have been met. The SCCI on the other hand has the power to terminate a BCC project or withdraw its license prior to its expiry if the project commits a serious offense against the law or contravenes the objectives and obligations as provided in the contract or the business license.

III. Land and Labor

A. Land

Under the Vietnamese Land Law land used for foreign investments is administered by the Council of Ministers unless otherwise stated in international treaties acceded to by Vietnam.[6] Decree 366 HDBT (1991) and associated regulations stipulate that assessment of projects involving foreign capital is the responsibility of the Council of Ministers through the SCCI, by frequent delegation. The valuation of land to be leased to a foreign investor takes account of submissions by local governments concerning valuation of real estate rates,[7] and once the license application is approved, land rental rates will be fixed for a period of five years before revaluation. The Ministry of Finance determines land rates,[8] which under the 1990 Determination are as follows:

Category 1, Land: US$200-1000/hectare/year, except: for rocky mountains, bare hills, unexplored land: US$50-700/hectare/year; for cities, towns, districts, tourist, and industrial areas: US$0.5-18/square meter/year;

Category 2, Water surfaces (lakes, rivers): US$100-700/hectare/year;

Category 3, Sea surfaces: US$200-800/square kilometer/year.

Article 79 of Decree 18-CP provides that enterprises with foreign-invested

5. Ministry of Finance, Notice No. 47 TC/TCDN (Oct. 21, 1989).

6. Land Law art. 51.

7. State Committee for Cooperation and Investment, Notice No. 608 (1990).

8. Decree 18-CP, *supra* note 4, art. 79 & Ministry of Finance, 1990 Determination 210a TC/VP (Apr. 1, 1990) [hereinafter 1990 Determination].

capital and parties to a BCC shall pay royalties and rents for land, water surface, and sea surface in the event that such royalties and rents are not part of the capital contribution of the Vietnamese party as provided for in article 7 of the FIL. Article 79 is intended to maximize the contribution from the foreign party in every possible way, including rents of land and water surface. As such the law can be seen to operate against the spirit of "freedom to contract" inherent in the Western legal framework.

The 1990 Determination of the Ministry of Finance includes discounted rates for rent payment in lump sum covering three to five years or for investment activities requiring encouragement or carried out in remote and difficult areas.[9] Enterprises involving foreign capital may also rent private houses and properties for establishment of offices. The Regulations on House Renting and Labor Hiring by Foreigners issued in conjunction with Decree 389-HDBT of the Council of Ministers include the relevant conditions and criteria for such transactions. Administration of such activities is the responsibility of local governments at the provincial or city level.

B. Labor

The Ordinance for Labor Contracts issued on September 10, 1990, and the Regulations for Labor in Enterprises with Foreign-Invested Capital (Regulations) issued under the Council of Ministers' Decree 233-HDBT on June 22, 1990, cover industrial relations in respect of labor for investment projects involving foreign capital. Article 3 of the Regulations allows foreign-invested enterprises to employ Vietnamese citizens over seventeen years of age in any of the following ways: through introduction by a local labor agency; by engaging a labor supply company or an investment services company to recruit employees on its behalf according to the selection criteria required by the enterprise; or by advertising widely to recruit employees from other localities if candidates for the jobs referred by the foregoing methods do not meet the criteria required by the management of the enterprise.

The Regulations allow employment of foreign personnel for technical and managerial positions only if Vietnamese citizens do not meet the standards required, but such employment should be definite in duration as determined by the Vietnamese Government, and the enterprise must devise a plan to train Vietnamese to replace foreign personnel as soon as practicable.[10] Even though article 6 suggests the cooperation and coordination assistance of local government agencies in the training of Vietnamese personnel for eventual replacement of foreigners in foreign-invested enterprises, in reality it is difficult to see how this can be implemented without the availability of an implementation decree in this respect.

9. 1990 DETERMINATION-Schedule, *supra* note 8, arts. 5-6.

10. COUNCIL OF MINISTERS, REGULATIONS FOR LABOR IN ENTERPRISES WITH FOREIGN-INVESTED CAPITAL, DECREE NO. 233-HDBT art. 5 (June 22, 1990) [hereinafter DECREE 233-HDBT].

Articles 7-27 of the Regulations provide details of the employment contract between a foreign-invested enterprise and local Vietnamese. Basically, an employment contract may assume one of the following types: indefinite period; definite period; or seasonal. The contract is executed on a standard form provided by the Ministry of Labor. The wages must conform to a minimum-wage level with allowances for overtime (150 percent) and holidays (200 percent), determined annually by the Ministry of Labor. Additionally, the wages must be compatible with collective employment contracts entered by the Local Labor Agency. Besides wages, the Regulations require foreign employers to pay into a government insurance fund a monthly levy equal to 10 percent of total wage payments for various workers' insurance benefits.[11]

IV. Technology Transfer

A BCC project may involve the transfer of technology from the foreign investor to the Vietnamese partner, and the laws prescribing technology transfer can be found in the Ordinance on Technology Transfer issued by the Council of State on December 5, 1988, and Decree 49-HDBT by the Council of Ministers on March 4, 1991. Other legal documents relating to technology transfer include Ordinance on the Protection of Industrial Property Rights (1989), Decree 201-HDBT on License (1988) and the Regulations, and Ordinance on the Quality and Control of Goods (1990).

Technology transfer essentially can assume the form of a capital contribution by the foreign investor, and under article 4 of the Ordinance on Technology Transfer it must meet one of the following requirements: it must raise the local industry standard, production efficiency, or quality of products, or make new or import-substitution products; it should not jeopardize safety measures in production processes or harm the environment; or it should utilize effectively all the natural, energy, and human resources.

The capital contribution component of technology transfer in a BCC or joint venture must be clearly written in the application for an investment license submitted to the SCCI, whereas the technology transfer itself must be effected through a separate agreement between the parties as stipulated in article 6 of Decree 49. The procedure and applicable law for the resolution of disputes arising from technology transfer must be included in the technology transfer agreement. The agreement is valid for a maximum period of seven years with possible approval for extension by the State Committee for Science,[12] the government body responsible for matters concerning technology transfer.

In general, the law considers the following activities to be technology transfers: (i) transfer of ownership or property rights in inventions, patents, trademarks,

11. *Id.* art. 46.
12. COUNCIL OF MINISTERS, DECREE NO. 49-HDBT art. 11 (Mar. 4, 1991).

and other industrial property rights; (ii) transfer through trading or supply of (with or without equipment) industrial know-how, designs, technical specifications, formulas, drawings, preliminary plans, specialized knowledge, and the like; and (iii) provision of support and consultancy services in installation of equipment, feasibility studies, cost-benefit assessment, training of staff, management, market research, supply of information, and the like.[13]

The technology transfer agreement must not, on the other hand: (i) Require the recipient party to purchase or to receive with conditions attached from the foreign party items in the transfer such as materials; production utilities such as equipment, machinery, or vehicles; intermediate products; and unskilled labor. Any request for exception to this condition must be supported by detailed analysis and agreed by the two sides. (ii) Require the recipient party to accept a definite level of production in a set time period, relating to pricing, quantity, and amount of consumption in the market, or accept the appointment of a sales or marketing agent, including the techniques involved or the existing relationship between the agent and the recipient party. (iii) Limit the export market of the recipient party. (iv) Restrict and prevent the recipient party from carrying out further research and development work on the technology transferred, or receiving similar transfers from other sources. (v) Terminate the recipient party's right to continue to enjoy the products of transfer once the technology transfer agreement expires.[14] However, the relevant laws stipulate that under special circumstances and depending on the nature of the technology the government may allow the foregoing restrictive provisions to be included in the agreement.

Vietnam has participated in the International Convention on Industrial Property Rights since 1981, is a party to the Madrid Agreement on Trade Mark Registration, and is a member of the World Intellectual Property Organization (WIPO). Some agencies in Vietnam, such as Investip and the Vietnam Chamber of Commerce, deal exclusively with protection of industrial property rights (like patents).

V. Disputes and Resolution

One important source of disputes that an enterprise involving foreign capital may encounter in Vietnam concerns disagreement between management and local employees. The parties resolve labor disputes by negotiation and mediation through a local mediation council comprising equal representatives from both sides, or through an arbitration organization chaired by the local labor agency, or by an arbitrator appointed by the Ministry of Labor.[15] If the dispute is not resolved, either party can bring the matter to court.

The necessary conditions and procedures for resolving disputes between parties

13. *Id.* art. 3.
14. *Id.* art. 8.
15. DECREE 233-HDBT, *supra* note 10, art. 57.

to a BCC or termination of a BCC must be stipulated in the contract as required by article 10 of Decree 18-CP. The parties may nominate in the contract the forum for resolving disputes and the applicable law.[16] Under article 15, even after the contract has expired, all provisions concerning the resolution of disputes and rights of action will remain effective within the limitation period under Vietnamese law or by prior agreement between the parties.

Article 100 of Decree 18-CP provides the procedure for resolving disputes between parties of foreign-invested enterprises, the first step being negotiation and mediation. If the parties cannot resolve a dispute through negotiation and mediation, they can choose, by agreement, arbitration by (i) a Vietnamese arbitrator, an arbitrator from a third country, or an international arbitration organization, or (ii) an arbitration council set up for such purpose by the parties.

Article 101 stipulates that disputes between different foreign-invested enterprises or among foreign parties to an investment project, or other disputes between an enterprise with a BCC and local economic entities, such as those arising from subcontracts and supply arrangements, must be resolved in Vietnam by Vietnamese law. In practice the parties resolve these disputes through the procedures set down in the Ordinance on Economic Arbitration issued by the Council of State (1990). Under this ordinance only State Economic Arbitration Organizations at the provincial or city level have the authority to deal with disputes involving foreign-invested enterprises. These organizations report directly to the Council of Ministers, and decisions by one economic arbitration organization can be appealed and heard by another economic arbitration organization at a higher level.

Article 102 provides that disputes between foreign-invested enterprises including BCCs and a Vietnamese government organization will be resolved through mediation, or if mediation is unsuccessful, will be referred to a relevant state authority for resolution.

Under the government Decision No. 204/TTG (Decision) of April 28, 1993,[17] a new arbitration body called the International Arbitration Center (IAC) was established with authority to settle disputes arising from international trade, tourism and insurance contracts, technology transfer, international banking and finance, and the like. Article 3 of the Decision provides that before and after the dispute the parties involved must agree or be bound by the agreement to bring the matter to the IAC. Membership of the IAC includes arbitrators nominated by

16. At the time of writing, the government had announced that a new Presidential Ordinance will be issued in the near future to recognize and enforce in Vietnam judgments and awards made by civil courts in foreign countries. THE LAW WEEKLY (Ho Chi Minh City), May 10, 1993, at 5 (in Vietnamese).

17. Decision No. 204/TTG is a modern-day offshoot of the old regulations to establish the Foreign Trade Arbitration Council issued under Decree 59/CP on April 30, 1963. The old Foreign Trade Arbitration Council was set up under the auspices of the Chamber of Commerce, like the present International Arbitration Center. Decision No. 204/TTG comprises a total of 11 articles in comparison with 12 articles in the old Regulations, and does not conform to UNCITRAL Rules.

the Vietnamese Chamber of Commerce and Industry and may include foreign arbitration experts. The decision of the IAC on a dispute is final and cannot be appealed.[18]

VI. Taxation and Repatriation of Profits

The Vietnamese financial year is based on the calendar year, from January 1st to December 31st. Foreign companies in Vietnam can, however, apply to the Ministry of Finance to alter the financial year to suit the accounting practice in their home country.[19] As for a BCC, each party will pay tax in accordance with the law applicable with the party.[20]

Taxation of foreign investors is governed principally by Decree 18-CP, the Vietnamese Tax Law, and other decrees and circulars issued by the Ministry of Finance. The taxes are wide ranging and nonuniform, and sometimes interwoven with a good degree of discretion.

A. Corporate Income Tax

Corporate income tax or profits tax applied to profits of enterprises involving foreign capital varies according to many influencing factors such as the type of investment activity (for example, import substitution on infrastructure development), location of the business, or capital outlay.[21] Corporate income tax is collected provisionally on a quarterly basis, with final adjustments at the end of the year.

In general, corporate income tax ranges from 10 percent to 25 percent of the total share of BCC profits; but for projects concerning the extraction of oil and gas and other rare natural resources, the tax rate may exceed 25 percent.[22] The SCCI normally determines the tax rate at the time the investment or business license is granted to the foreign-invested enterprise. This factor is important, and the foreign investor should ensure that the applicable tax rate is recorded in the investment license from the SCCI. Several tax incentives relating to projects involving foreign capital not only meet the criteria of high priority, but also satisfy the need for vital economic development of the country, such as projects involving infrastructure development, the tourism industry, exploitation of natural resources, and those with locations in difficult and remote areas. If foreigners reinvest the share of profits for three or more years, they can have a full rebate of the income tax paid on the amount of profits reinvested.[23]

18. Decision No. 204/TTG art. 8 (Apr. 28, 1993).
19. Decree 18-CP, *supra* note 4, art. 73.
20. *Id.* art. 17.
21. A general guideline of the tax regime applied to foreigners and foreign-invested enterprises is given in Circular 55-TC/TCT/TT of the Ministry of Finance, published in October 1991.
22. Decree 18-CP, *supra* note 4, art. 66.
23. *Id.* art. 72.

Under the December 1992 Amendments to the FIL, enterprises with foreign-invested capital could be exempted from profits tax for a period of one to four years starting from the first profit-making year and a 50 percent tax reduction in the following two to four years depending on the type of investment project.[24] Previously, this preferential treatment was only available to joint ventures. In the case of a BCC investment involving production sharing, all benefits enjoyed by the Vietnamese party, such as the right to use land, water surface, and any royalty received, may be aggregated with the Vietnamese share of the production cost for the purpose of assessing profits tax payable.[25]

B. Tax on Profits Repatriated

Under Notice 01/TT-NH7 of the State Bank of Vietnam an enterprise with foreign-invested capital can repatriate profits out of Vietnam only after the year the enterprise starts making profits and after the enterprise has met all its financial obligations to the government, including payment of all taxes due.[26] If the investor dissolves or terminates the foreign enterprise, remaining capital can be repatriated abroad after payment of all debts.[27] Article 70 of Decree 18-CP provides that profits transferred out of Vietnam by foreign economic organizations or individuals will be taxed in accordance with a scale ranging from 5-10 percent, the lower limit being applicable to foreign-invested enterprises with foreign contribution capital in excess of US$10 million.

C. Royalties

Projects concerning the extraction of natural resources are subjected to royalties under the Ordinance on Royalties (1990) issued by the Council of State. According to this ordinance, the applicable royalties are lowest for nonmetallic minerals (1-12 percent) and highest for forestry products (10-40 percent), with precious stones (3-15 percent), oil and gas (6-20 percent), and fisheries (3-10 percent) in between.

D. Import and Export Tax

Goods crossing the borders of Vietnam will be subjected to import and export tax, which is paid normally through agencies that have import and export licenses. This tax has two levels—the minimum rate and the standard rate. The former is applicable to goods exported to and imported from countries having agreements concerning favorable trade with Vietnam, and the latter will apply to goods traded with other countries. Export tax currently ranges from 0-35 percent for minimum

24. *Id.* art. 69.
25. *Id.* art. 75.
26. State Bank of Vietnam, Notice No. 01/TT-NH7 art. 18.
27. *Id.* art. 19.

rates and 0-45 percent for standard rates. Import tax is more wide ranging and varies between 0-80 percent for minimum rates and 0-100 percent for standard rates, with the exception of liquor and cigarettes (80-150 percent minimum rates, 100-200 percent standard rates).[28] In general minimum rates involve a 30 percent reduction from standard rates,[29] and both sets of rates may be changed from time to time to reflect changes in supply and demand.[30]

The law provides several exemptions on import tax applied to enterprises with foreign-invested capital, these being mainly imported equipment, machinery, transport vehicles, spare parts, and other materials forming part of the capital, and raw materials and components required in the production of goods for export. Equipment, machinery, materials, and other items involved in a foreign investment operation that would otherwise be exempt from import tax will be subject to import tax and other taxes if they are resold on the Vietnamese market.[31] The December 1992 Amendments to the FIL exempt foreign enterprises located in the Export Processing Zones from import-export taxes and duties.

E. Personal Income Tax

The Ordinance on Personal Income Tax for High Income Earners issued by the Council of State on March 26, 1991, Decree 119-HDBT issued by the Council of Ministers on April 17, 1991, and Circular 22-TC/TCT issued by the Ministry of Finance on April 22, 1992, provide for personal income tax applicable to foreigners working in foreign-invested enterprises. Foreigners' incomes subject to this tax are classified into (i) regular incomes, such as salaries, wages, allowances, and bonuses, and (ii) irregular incomes, such as lottery winnings, income derived from technology transfer, design work, and other services.[32] In the event the personal income tax conflicts with tax determinations according to an international treaty to which Vietnam is a signatory, the latter will prevail. Personal income tax for both regular and irregular incomes has a scale of six steps and is calculated on income converted to Vietnamese currency, the dông (VND), which in early 1993 had an exchange rate of approximately VND10,000 to US$1. The tax rates range from 0-50 percent for regular income and 0-30 percent for irregular income, with some exceptions. The law also includes a provision for adjustments due to movements in prices and costs.

Personal income tax is provisionally collected on a monthly basis and readjusted and finalized at the end of the year. Article 23 of the FIL provides that incomes

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28. Hoa Thuong & Xuan Hoang, Laws on Import and Export (1991) (text in Vietnamese).

29. Council of Ministers, Decree No. 110/HDBT art. 11 (1992).

30. Decision No. 326 TC/TCT of the Ministry of Finance, effective June 16, 1993, provides a list of minimum prices for most common import and export goods for calculating import and export duties.

31. Decree 18-CP, *supra* note 4, art. 76.

32. Council of Ministers, Decree No. 119-HDBT art. 2 (1991) & Circular 22-TC/TCT art. 1.2.

of foreigners working in Vietnam, after payment of tax, can be transferred abroad in accordance with the foreign exchange control regulations of Vietnam.

F. Sales Tax and Special Consumption Tax

Enterprises involving foreign capital in Vietnam that provide services to the local public or sell products in the Vietnamese market must pay sales tax[33] or a special consumption tax.[34] Sales tax varies from 0-40 percent, and applies to all areas of trade, services, transport, construction, and manufacturing, and is tabulated in Notice 59 TC/TCT/CS (1991) of the Ministry of Finance. The special consumption tax covers tobacco and cigarettes (20-50 percent); spirits (55-65 percent); beer (50 percent); and fireworks, playing cards, and joss-paper (70 percent).

Tax rates on foreign investors, along with the FIL, have changed frequently to reflect realities and experience gained with foreign investors. To ensure foreign investors protection in the face of changes in the law, article 21, chapter III of the December 1992 Amendments to the FIL includes the following clause:

> In cases where the benefits of the parties to a licensed business cooperation contract or in a licensed enterprise with foreign invested capital are reduced as a result of any change in the law of Vietnam, the government shall take appropriate measures to satisfactorily protect the interests of the investors.

The details of this guarantee are given in article 99 of Decree 18-CP, whereby the SCCI may by agreement with the foreign investor allow the following: (i) variation in the objectives of the foreign-invested project; or (ii) reduction or waiver of profits tax payable; or (iii) damages to be treated as losses in the profit-and-loss account in accordance with article 27 of the FIL, whereby the losses in any year may be carried forward to the following year and set off against the profits of that year, for a maximum period of five successive years; or (iv) continuation of the investment project in accordance with the original investment license. Like many decrees and decisions on foreign investment currently in force, however, the new article 99 remains to be tested, especially with regard to the meaning of loss of benefits due to changes in the law.

The tax system as a whole is complex to foreign parties, especially those establishing business in the region for the first time. In addition, a good degree of discretion inherent in the system may make it difficult for decision-making based on preliminary cost-benefit or feasibility studies. In this respect the investor should verify that every taxation detail has been clearly written in the investment license granted by the SCCI, since the license is in essence an agreement between the foreign investor and the Vietnamese government, embodying every important aspect of the investment, including taxation.

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33. Sales Tax Law art. 1 (1990).
34. Special Consumption Tax Law arts. 1, 9 (1990).

VII. Concluding Remarks

Foreign investments in Vietnam have gone through changing phases as the country ventures further along the path of market-oriented reforms. In the first few years of the open-door policy, the joint venture was the most popular form of foreign investment. Many of the early joint-venture enterprises, however, failed to generate economic expansion due to differences and disagreements over objectives, styles of management, and operation strategies between the foreign and local parties. Against this background and in light of progress and growth made by many state and privately owned enterprises in Vietnam, investment under a BCC may prove to be increasingly attractive and appropriate for many foreign corporations planning to invest in Vietnam.

One of the major drawbacks of foreign investment under a BCC, and foreign investment in Vietnam in general, is the Vietnamese system of law on foreign investment itself, which has been constantly amended to adapt to higher levels of sophistication and diversity in foreign investments and to draw on experience gained daily from on-going projects. In the process of change and development of the law, some of the decrees and decisions concerning BCCs and foreign investment in general at times were issued quickly and in an ad-hoc fashion to respond to criticism and to make adjustments for operational impasses. In many instances practical application of the law on foreign investment may nevertheless be achieved, with some acceptable "black letter" standard, through careful scrutiny of the details written in the investment license granted by the government at the commencement of investment activities.

The most encouraging sign in the continuing development of the law on foreign investment, as reflected by its state of flux, is the genuine desire and effort of the Vietnamese authorities to bring the regime of foreign investment into some internationally acceptable standard. With the current pace of change, therefore, the investor can expect that a more effective and fairer legal framework will be in place to ensure economic success of foreign investments in Vietnam in the near future.