

LAW ON INVESTMENT 2020: A COMPARATIVE ANALYSIS

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This article¹ is a joint publication between TND Legal² and Kien Thuc Phap Ly³.

This article is designated to provide the readers with an overview of the significant changes adopted by the Law on Investment 2020. For the readers' ease of reference, this article is structured in three parts as below.

- Part 1 illustrates the changes/supplementations which are in favor of the *foreign investors* adopted by the Law on Investment 2020.
- Part 2 illustrates the changes/supplementations which are not in favor of the *foreign investors* adopted by the Law on Investment 2020.
- Part 3 illustrates other changes/supplementations adopted by the Law on Investment 2020.

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NOTES

[Newly added] : The provisions / requirements newly added by the Law on Investment 2020 which cannot be found in the Law on Investment 2014

¹ The Vietnamese version of this article can be found on <<https://kienthucphaply.com/2021/01/28/luat-dau-tu-2020-so-sanh-chi-tiet/>>

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³ Kien Thuc Phap Ly is a legal knowledge center with free open access <www.kienthucphaply.com>

[Changed] : The provisions / requirements already governed by the Law on Investment 2014 but is changed under the Law on Investment 2020

[Removed] : The provisions / requirements specified in Law on Investment 2014 but is removed under the Law on Investment 2020.

No.	Law on Investment 2020	Law on Investment 2014
1.	Favorable Changes for Foreign Investors	
1.1	Conditional business lines	
	<p>[Art. 7] [Changed] Reduced to 227 conditional business lines.</p> <p>Several business lines are no longer classified as conditional ones including (but not limited to):</p> <ul style="list-style-type: none"> ▪ Commercial franchising; ▪ Logistics services; ▪ Shipping agency services; ▪ Services provided by commercial arbitrations. 	<p>[Art. 7] 243 conditional business lines in total.</p>
1.2	Market Access Conditions Applicable to Foreign Investors	
	<p>[Art. 9] The market access applicable to foreign investors has now been formalized and clarified in quite detail in a domestic legislation instead of wholly relying on the WTO Commitment under which Vietnam is a signatory party.</p>	<p>[Not Applicable]</p>

	<p>The market access conditions are classified into 3 categories as below:</p> <ul style="list-style-type: none"> ▪ Industries and trades with the conditions similar to those applicable to domestic investor; ▪ Industries and trades which have not yet been opened for market access – this shall be clarified by a legal instrument to be issued by the Government ▪ Industries and trades for which market access is conditional – this shall be clarified by a legal instrument to be issued by the Government. <p>[Comment]</p> <p>This provision of the Law on Investment 2020 is deemed more favorable to the foreign investors in the sense that it provides the foreign investor with a clearer overview of how market access is conceptualized under the relevant laws of Vietnam. As of the date of this Legal Update, only a draft decree governing the categories above has been proposed by the Government. However, it is expected that once such decree is formally enacted, the prospect of market access would be much clearer and could reduce the cases which must be subject to further opinion from relevant Ministries.</p>	
1.3	Investment Incentives	
	<p>[Art. 15.1.d] [Newly added] There are 4 forms of investment incentives (with the last one being newly added):</p>	<p>[Art. 15.1] Investment incentives embrace only the first 3 forms as specified in Law on Investment 2020 (<i>See</i> the left column)</p>

	<ul style="list-style-type: none"> ▪ Corporate income tax (CIT) incentives (lower applicable rate of CIT, CIT exemption, CIT holiday or otherwise prescribed by the CIT laws) ▪ Import tax exemption applicable to particular kind of commodities as prescribed by the laws on import and export. ▪ Land rent and land levy exemption or reduction. ▪ <i>Accelerated depreciation, increase in deductible expenses when calculating taxable income.</i> 	
	<p>[Art. 15.2] [Newly Added] Start-ups and SMEs related activities are added to the subject of investment incentives, particularly as below:</p> <ul style="list-style-type: none"> ▪ Innovative start-up investment projects, innovative renovation centers and R&D centers; ▪ Investment in SME's production chain; investment in technical facility of SMEs, incubators and co-working spaces for supporting innovative start-ups as per the laws on SMEs⁴. 	<p>[Art. 15.2] No clear investment incentives applicable to Start-ups and SMEs related activities.</p>
	<p>[Art. 15.5] [Newly Added] In addition to <u>automobiles</u>, the manufacture of <u>aircrafts</u> and <u>yachts</u> (which are subject to Special Sales Tax) are also entitled to investment incentives.</p>	<p>[Art. 15.4] With respect to the commodities subject to Special Sales Tax, <i>only</i> the manufacture of <u>automobiles</u> is entitled to investment incentives.</p>
	<p>[Art. 16.1] [Newly Added] Several new business lines eligible for investment incentives are added:</p> <ul style="list-style-type: none"> ▪ High-tech activities, industrial products which support high-tech, R&D activities, manufacture of products formed from 	<p>[Not Applicable]</p>

⁴ Kindly refer to the texts of Art. 15.2 of the Law on Investment 2020 for details.

	<p>the results of science and technology (S&T) as prescribed by the S&T laws.</p> <ul style="list-style-type: none"> ▪ Production of products on the List of supportive industrial products for which development is prioritized; ▪ Higher education; ▪ Storage of medicinal products; ▪ Manufacturing of medical equipment; ▪ Production of goods or supply of services which create or participate in a value chain or industry linkage cluster. 	
	<p>[Art. 20] [Newly Added] The Government can grant “special investment incentives and assistance” to several particular projects to the extent that it greatly affects the socio-economic status, including⁵:</p> <ul style="list-style-type: none"> ▪ Those related to innovative renovation centers or R&D centers with the total investment capital amounting to VND3,000 billion and above (subject to certain conditions); ▪ Those in specially preferential investment industries with the total investment capital amounting VND30,000 billion and above (subject to certain conditions). 	[Not Applicable]
1.4	Establishment of Economic Organization	
	<p>[Art. 22.1.c] [Changed] All economic organization set up by the foreign investor(s) are required to firstly have an investment project, except for the establishment of:</p>	<p>[Art. 22] No exceptions are provided. All cases of establishment of economic organization involving the foreign investor shall be subject to the requirement on obtaining the Investment Registration Certificate.</p>

⁵ Kindly refer to the texts of Art. 20.2 of the Law on Investment 2020 for details

	<ul style="list-style-type: none"> ▪ The innovative start-ups SMEs; and ▪ The creative start-ups investment funds. <p>[Comment]</p> <p>With the adoption of this provision, it is expected that the establishment of innovative start-ups SMEs and creative start-ups investment funds shall not require the foreign investors to firstly obtain the Investment Registration Certificate. However, it is worth noting that the credentials for identifying the same under the laws on SMEs remain unclear⁶.</p>	
1.5	M&A Approval	
	<p>[Art. 26.2] If there is no increase in the foreign ownership of a target company prior or subsequent to the M&A transaction (except for the case that target company operates in industries and trade not yet opened for market access), it is likely that the M&A approval shall not be required to be obtained.</p>	<p>[Art. 26.1] The literature of the Law on Investment 2014 is unclear.</p>
1.6	The Authority of Prime Minister to Grant In-principle Approval for Investment Projects	
	<p>[Art. 31] [Removed]</p> <ul style="list-style-type: none"> ▪ The total investment capital (i.e. VND5,000 billion) is no longer used to locate the authority of the Prime Minister to grant the in-principle investment project. 	<p>[Art. 31] The authority of the Prime Minister is classified into, <i>inter alia</i>, (i) those particular projects regardless of size of investment capital and (ii) those projects not falling under (i) with the size of investment being VND5,000 billion or more). With respect to (i), the Prime Minister is authorized to</p>

⁶ See more: <<https://kienthucphaply.com/2020/06/30/luat-dau-tu-sua-doi-2020-truong-hop-nha-dau-tu-nuoc-ngoai-thanh-lap-cong-ty-nhung-khong-can-giay-chung-nhan-dang-ky-dau-tu/>> To note that this article is only available in Vietnamese.

	<ul style="list-style-type: none"> The Prime Minister is no longer authorized to issue in-principle investment approval in relation to the project of petroleum exploration and extraction. 	decide on the in-principle investment approval for the project of petroleum <u>exploration</u> , <u>extraction</u> and processing.
1.7	The Authority of Provincial People’s Committees to Grant In-principle Approvals for Investment Projects	
	[Art. 32] [Changed] Project on construction and commercial operation of gold courses is now under the approval authority of the Provincial People’s Committee, instead of the Prime Minister	[Art. 32] Gold courses construction and commercial operation investment projects are subject to the in-principle approval of the Prime Minister.
1.8	Amendment to the Investment Project	
	<p>[Art. 41] [Changed] The substances in relation to the amendment to the investment project clarified, particularly as below.</p> <p>Amendment to the investment project comprises of:</p> <ul style="list-style-type: none"> The objectives of the project; The transfer of the project in part or in full; The merging of multiple projects into single one or the otherwise division of the one project into multiple ones; The use of land use right of the land under a project as the “contributed asset” for setting up an enterprise; and Other matters. 	[Art. 40] No detailed matter subject to the procedure for the amendment to the investment project is provided.
1.9	Applicable Guarantee Measure	

	<p>[Art. 43] Investor can now be able to select either guarantee measures for its investment project as below:</p> <ul style="list-style-type: none"> ▪ Security deposit ▪ Bank guarantee 	<p>[Art. 42] The only guarantee measure available to the investor is security deposit.</p>
2.	Unfavorable Changes for Foreign Investors	
2.1	Conditional Business Lines	
	<p>[Art. 7] [Newly added] Multiple new conditional business lines are added including but not limited:</p> <ul style="list-style-type: none"> ▪ Clean water (domestic water) trading; ▪ Architectural business services; ▪ Data center services; ▪ Electronic identification and authentication services; ▪ Imported newspaper distribution services; ▪ Registration of fishing vessels. 	<p>[Not Applicable]</p>
2.2	Beneficiaries of investment incentives:	
	<p>[Art 15.2.c] [Newly Added] Added conditions for beneficiaries of investment incentives in case of:</p> <p><i>Any project in which the capital investment is at least VND 6,000 billion, or at least VND 6,000 billion is disbursed within 03 years from the day on which the Certificate of investment registration or the approval for investment guidelines and <u>which</u></i></p>	<p>[Art. 15.2.c] Beneficiaries of investment incentives:</p> <p><i>Any project in which the capital investment is at least VND 6,000 billion, or at least VND 6,000 billion is disbursed within 03 years from the day on which the Certificate of investment registration or decision on investment policies is issued;</i></p>

	<i>satisfies any of the following criteria: the total revenue is at least VND 10,000 billion per year within 03 years from the year in which the revenue is earned or the project has more than 3,000 employees;</i>	
	[Art. 15.5] [Newly Added] Investment incentives shall not be applicable to “commercial housing construction projects prescribed by the Law on Housing.”	[Not Applicable]
2.4	Investment conducted by Foreign-invested Enterprises (FIE) (F1)	
	[Art. 23] [Changed] FIE that has 50% or more of its charter capital being held by foreign investor(s) shall be treated as foreign investor when conducting investment procedures in Vietnam.	[Art. 23] The applicable rate to identify an FIE being treated as foreign investor is 51% or more .
2.5	Issues on National Defense and Security	
	[Art. 32.1.d] [Newly Added] Investment projects to be implemented by foreign investor(s) or FIE on <u>islands</u> or <u>in boundary or coastal areas</u> or other “sensitive” areas affecting the <u>national defense and security</u> must be subject to prior in-principle investment approval from the Provincial People’s Committee. [Comment] No specific guidelines have been issued (other than those related to boundary areas or islands partially governed by Decree 34/2014/ND-CP) to precisely identify which areas should be	[Not Applicable]

	considered as “coastal areas” or which one should be “other sensitive areas for national defense and security”.	
	<p>[Art. 24] [Newly Added] Investment made by the foreign investor(s) or FIE in the form of M&A transactions has now further been required to meet the requirement on ensuring <u>national defense and security</u>.</p> <p>[Comment]</p> <p>This pose a concern that any M&A transaction, regardless of its value, when carrying out the procedure for obtaining the M&A approval shall need to be verified by the Ministry of Defense and Ministry of National Security⁷.</p>	[Not Applicable]
	[Art. 26.2.c] [Newly Added] M&A approval must be obtained if the target company of an M&A transaction has the land use right certificates for land on an island or a coastal or border areas or in another area affecting the national security and defense.	[Not Applicable]
2.6	Guarantee Applicable to Execution of Investment Projects	
	[Art. 43] [Removed] There are only 4 cases where investors do NOT have to deposit or have a bank guarantee for assurance of investment project execution. ⁸	[Art. 42] There are 5 cases where investors do NOT have to deposit or have a bank guarantee for assurance of investment project execution, including ⁹ :

⁷ See more: <<https://kienthucphaply.com/2021/01/01/luat-dau-tu-2020-va-noi-lo-lien-quan-den-van-de-bao-dam-an-ninh-quoc-phong/>> To note that this article is only available in Vietnamese.

⁸ Kindly refer to the texts of Art. 43 of the Law on Investment 2020 for details.

⁹ See more: Decree No. 118/2015/ND-CP

		<i>“Investor as a non-business unit with revenue or a hi-tech zone development company established under a decision of a state agency, execute an investment project that is allocated or leased land by the State for to develop infrastructures of industrial zones, export processing zones, hi-tech zones and functional zones in economic zones.”</i>
3.	Other Regulations	
3.1.	Investment Capital	
	[Art. 3.23] [Changed] Added the definition of <i>“Investment capital”</i> which means <i>money and other assets in accordance with civil laws and international treaties to which the Socialist Republic of Vietnam is a signatory to conduct business investment activities.</i>	[Art. 3.18] <i>Capital means money and other assets used invested in business.</i>
3.2	The Scope Of The Law On Investment	
	[Art. 4.3] [Newly added] Clarified the rule of application of the Law on Investment in case there are differences between the Law on Investment and another law that was enacted before the effective date of the Law on Investment regarding the procedures for business investment and investment assurance: <i>Regulations of Law on Investment shall apply, except for the cases in Points a, b, c, d, đ, e.</i> ¹⁰	[Not Applicable]
3.3	Prohibited Business Lines	

¹⁰ Kindly refer to the texts of Art. 4.3 of the Law on Investment 2020 for details.

	[Art. 6.1.h] [Changed] Debt collection service is no longer permitted as of the effective date of the Law on Investment 2020.	[Art. 6] Debt collection service belongs to the list of conditional business lines.
3.4	Investment in The Form of PPP Contract	
	[Removed] The form of investment as the Public – Private Partnership contract (PPP contract) is governed by Law on Public – Private Partnership Investment	[Art 27] Investors or project enterprises shall sign PPP contracts with competent state agencies to implement investment projects to build or renovate, upgrade, extend, manage and operate infrastructure works or to provide public services.
3.5	The Authority of Prime Minister to Grant In-principle Approval for Investment Projects	
	[Art. 31] [Newly Added] In case foreign investors have investment projects which at the same time fall within the power of at least two provincial People's Committees to grant in-principle investment approval, such projects must be approved by The Prime Minister.	[Not Applicable]
	[Art. 31] [Changed/Newly Added] Added and detailed to projects which must be approved by the Prime Minister, such as: <i>new construction investment projects related to airports and harbors; housing construction investment projects.</i> ¹¹	[Art. 31] Projects falling into one of the following cases, regardless of their capital sources: <ul style="list-style-type: none"> ▪ Relocation and resettlement of 10,000 or more people in mountainous regions or 20,000 or more people in other regions; ▪ Building and commercial operation of airports; air transport; ▪ Building and commercial operation of national harbors;

¹¹ Kindly refer to the texts of Art. 31 of the Law on Investment 2020 for details.

		<ul style="list-style-type: none"> ▪ Petroleum prospection, exploitation and processing; ▪ Betting and casino business; ▪ Cigarette production; ▪ Development of infrastructure of industrial zones, export-processing zones and functional sub-zones in economic zones; ▪ Building and commercial operation of golf courses.
3.6	Competent Authority to Receive the Application Dossiers	
	[Art. 34 and Art. 35] [Changed] In terms of projects falling under the authority of the National Assembly/Prime Minister to grant in-principle investment approval, the application dossiers shall be submitted to the Ministry of Planning and Investment.	[Art. 34] All application dossiers to be firstly submitted to the local investment registration authority.
3.7	Extension of Investment Project Duration	
	<p>[Art. 44] [Newly Added] The duration of the investment project may NOT be extended in cases:</p> <ul style="list-style-type: none"> ▪ Investment projects using obsolete technology, potentially causing environmental pollution or natural-resource intensive projects; ▪ Investment projects in which the investor must transfer assets without refund to the State of Vietnam or the Vietnamese side. 	[Not Applicable]
3.8	Determination of Value of Investment Capital; Assessment of Value of Investment Capital	

	[Art. 45] [Newly Added] The investor shall self-determine the value of the investment capital of the investment project after the project is put into operation.	[Not Applicable]
	[Art. 45] [Newly Added] The investor must bear any expenses for assessment if the assessment results lead to an increase in the tax obligations discharged to the State.	[Not Applicable]
3.9	Suspension of Investment Projects	
	<p>[Art. 47] The Prime Minister is entitled to suspend an investment project in part or in full if such investment project jeopardizes or may jeopardize the national defense and security.</p> <p>[Comment]</p> <p>This is an “umbrella clause” to ensure that the protection of national defense and security is upheld in its entirety.</p>	[Not Applicable]
3.9	Termination of Investment Projects	
	<p>[Art. 48.2] [Newly Added] Added some new cases that the investment registration authority terminates an investment project in part or in full:</p> <ul style="list-style-type: none"> ▪ Land reserved for the investment project is expropriated by the State for the reason that the land is not used or the land use is delayed in accordance with the law on land; 	[Not Applicable]

	<ul style="list-style-type: none">▪ The investor fails to pay the security deposit or obtain a bank guarantee as prescribed by law if project execution security is required.▪ The investor conducted the investment activities on the basis of a falsified civil transaction in accordance with the civil law.	
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