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Legal aspects on right to access to land of investors through land use rights transactions in Vietnam

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Abstract. “Access to land and the stability in land use” is one of 10 indicators to measure the competitiveness of the localities in attracting investment in Vietnam. Until the present time, the access to land through land use rights transactions of investors is still discriminated, especially for foreign-invested enterprises. Therefore, this article will discuss the “opportunities” to access to land (or land use rights) of investors, through the land use right transactions (in the secondary market) in the Vietnamese current Land law to point out the limitations of the Vietnamese land laws.

Keywords. access, land use rights, Vietnam, transaction, Land law 2013

“Access to land and stability in land use” is one of 10 indicators to measure competitiveness (PCI) of localities in attracting investment in Vietnam.¹ According to research by the Chamber of Commerce and Industry of Vietnam (VCCI), land is one of the most difficult areas for enterprises to implement administrative procedures to have land use rights for production and business². Apart from the reason of administrative procedures, the ability to acquire land use rights of investors is also affected by the discriminatory policy in law. Till the present time, the land laws almost have created the fundamental “fairness” in the allocation and lease of land for implementation of investment projects for the business entities. Therefore, this article will only discuss the “opportunity” access to land (or land use rights)³ of investors, not through the “State channel” (in the primary market), but through land use right transactions (in the secondary market) in the current land legislation of Vietnam.

¹ The remaining indicators include: Market entry costs; transparency; time cost;; unofficial costs; dynamism of provincial leaders; labor training; business support services; legal institutions; fair and effective dispute resolution procedures.

² VCCI (Vietnam Chamber of Commerce and Industry), *Gỡ vướng cho doanh nghiệp trong việc tiếp cận và sử dụng đất đai (Troubleshooting for businesses in accessing and using land)*, <https://www.pcvietnam.vn/tin-tuc-su-kien/go-vuong-cho-doanh-nghiep-trong-viec-tiep-can-va-su-dung-dat-dai-ct3217.html>, (accessed at 9:40 on Jan 4, 2021).

³ In Vietnam, all land belongs to the State (under the entire people ownership of land regime), so no one can own land except the State. See Article 53 of the Vietnamese Constitution 2013.

1. The concept of right to access to land of investors through the land use right transactions

1.1. Definition of Investor in Vietnamese law

According to Clause 8, Article 3 of the Vietnamese Law on Investment 2020: “*Business investment* means an investor investing capital to do business” (Clause 5, Article 3 of the Vietnamese Law on Investment 2014 stipulated that: “*Business investment* means an investor’s investing capital to do business by establishing a business organization; making capital contribution, buying shares or capital contributions to a business organization; making investments in the form of contracts or execution of investment projects”). And *Investor* means an organization or individual that makes business investments. Investors include Vietnamese investors, foreign investors, and foreign-invested business organizations (Clause 5, Article 3 of the Vietnamese Law on Investment 2014; Clause 18, Article 3 of the Vietnamese Law on Investment 2020).

In Vietnamese land law⁴, the term “investor” was first used in the Land Law 2003 (Clause 2, Article 40) and then in the Land Law 2013 (paragraph 7 of Article 5) but still has not been defined specifically. So, we shall consider “investors” in the Land law are also the mentioned investors stipulated in the Law on Investment, although in some perspectives, the consider subject (person) stipulated in the Law on Investments 2014 and 2020 and the Land Law still have not “compatible” in the name for these subjects. For example, according to Land law 2013, “Economic organizations include enterprises, cooperatives or other economic organizations as prescribed by the civil law, excluding foreign-invested enterprises” (Clause 27 Article 3). However, within the framework of this article, the concept of investors mentioned will only include “economic organization”, “The Vietnamese residing abroad” (Overseas Vietnamese) and “enterprise with foreign investment” - the common investors are stipulated in the Land Law 2013 as land users - which does not cover all kinds of subjects mentioned above. So, the mentioned investors in this article are:

- Economic organizations include enterprises, cooperatives or other economic organizations as prescribed by the civil law, excluding foreign-invested enterprises (Clause 27 Article 3 Land law 2013).
- Overseas Vietnamese as prescribed by the nationality law (Clause 6 Article 5 Land law 2013).⁵
- Foreign-invested enterprises, including 100% foreign-invested enterprises, joint-venture enterprises, Vietnamese enterprises in which foreign investors purchase shares, merge or acquire in accordance with investment law (Clause 7 Article 5 Land law 2013).

The analysis and assessment of the legal status of land rights access of investors will also focus on these three types of entities.

1.2. Right to access to land of investors

The term “access to land” or “access to land use rights” has never been recognized in land legislation although in practice it has become popular and is officially used by state agencies and organizations in economic and legal research.⁶ According to the open encyclopedia, “*Access is a generic term used to describe the level of a product, equipment,*

⁵ In fact, the land user in this case is an enterprise established by overseas Vietnamese to implement an investment project in Vietnam. See Point e, Clause 1, Article 5 of Circular 23/2014/TT-BTNMT dated May 19, 2015 providing for the issuance of land use right certificates, ownership of houses and other assets attached to land.

⁶ “Land access” is one of the PCI indicators as mentioned; Some articles on websites of local Departments of Natural Resources and Environment also used this term.

*service, or environment can be used by as many people as possible. Access may be viewed as accessibility and the ability to benefit from a system or material”.*⁷

Thus, “access to land” or “access to land use rights” is the ability of entities to use and benefit from land. The right to access the land use rights can then be considered as the right (ability) that the law provides for certain entities to become a user under the land law or at least can directly and legally use the land for its purposes. Under current regulations, entities can access land use rights through two ways: (i) Acquisite land use rights from the State in the form of land allocation or land lease và (ii) Acquisite land use rights from another land users that has been recognized as a legal land use rights through various forms of land use right transfer (land use right transaction).

2. Vietnamese current laws on investors' access to land through land use right transactions

Land use right transactions are the activities of the secondary land use right market, where land users put their land use rights into civil and commercial transactions as other assets. In land use right transactions, some types of transactions can change (shift) land use right from one subject to another which the Land Law calls “shifting of land use rights”. These are the transfers of land use rights from one person to another through the forms of exchange, transfer, inheritance and donation of land use rights and capital contribution with land use rights.⁸

In the above land use rights transactions, the form of land use exchange is only applied to households and individuals (Article 179, 190 Land Law 2013). For land use right inheritance transactions, the land use right recipient may be an economic organization (Point c, Clause 1, Article 169 of the Land Law 2013) but economic organizations are rarely to be the land use right inheritance due to the special nature of this type of transaction (usually are households and individuals). For transactions of donation of land use rights, the recipient of the land use rights according to the law can not be economic organizations as well as foreign-invested enterprises. Thus, the receipt of land use rights transfer through land use right transactions of investors can only be done through two forms: these are transfer and receiving capital contribution by land use rights.

Thus, the two remaining land use right transactions, “land use right lease” and “land use right mortgage” are not considered to be land use right transfer under the Land Law 2013. However, if land use right mortgage (a type of security transaction) is certainly not a form of land use right transfer so that investors can access the land use right through this form, the land use right lease can bring actual land use right to those in need, specifically if renting the land use right in the industrial zone of the infrastructure business, the tenant will become the owner of the land use right (Clause 3 Article 149 Land Law 2013). Therefore, this article will consider opportunities to access land use rights⁹ of investors through 3 types of transactions: leasing, transferring and contributing capital with land use rights.

⁷ Wikipedia, *access* (Sự tiếp cận), https://vi.wikipedia.org/wiki/S%E1%BB%B1_t%E1%BA%BFp_c%E1%BA%ADn, (accessed at 9:40 on May 13, 2019). The concept of “Access” explained in paragraph 8 Article 2 of the Law on Persons with Disabilities 2010 has the same meaning.

⁸ Clause 10 Article 3 of the Land Law 2013.

⁹ In the context of “the entire people land ownership”, the concept of “access to land” and “access to land use rights” can be used interchangeably.

2.1. Access to land use rights through land use right leasing

The lease of land use rights attached to infrastructure in industrial zones has been uniformly stipulated for both economic organizations, overseas Vietnamese and foreign invested enterprises. However, in case of leasing land use right outside industrial zones, the provisions of the law still have certain limitations and shortcomings. Specifically, foreign-invested enterprises are not allowed to lease land use rights of households or individuals. According to Point d, Clause 1, Article 179 of the 2013 Land Law, households and individuals can only “lease land use rights to other organizations, households, individuals or overseas Vietnamese investing in Vietnam”. Thus, the ability to access land use rights among investors through this form is discriminatory. Economic organizations and overseas Vietnamese are allowed to hire land use rights from households and individuals but foreign invested enterprises are not. This discrimination is “inherited” from previous Land Laws. However, before the Land Law 2013, foreign-invested enterprises still had the opportunity to lease land use right of households and individuals under the provisions of Article 108 of Decree 181/2004/ND-CP (regulated implementing the Land Law 2003 which was expired). In the spirit of the provisions of this Article, foreign-invested joint-venture enterprises (and domestic capital) may lease land use rights of households or individuals. If after the lease of the land use right that joint-venture enterprise is converted into a 100% foreign-owned enterprise, such enterprise may continue to perform the signed land-lease contract and must use the land for the determined purpose. “The Ministry of Natural Resources and Environment is regulated to monitor the effectiveness of land use in cases where an enterprise has one hundred percent (100%) of foreign capital leased land use right from households or individuals as a test model experiment and review to report to the Government”.

This provision, despite the inconsistency with the 2003 Land Law, may be considered reasonable. However, this rationality did not continue to be “upgraded” to become a law expressed in the Land Law 2013 as other provisions in Decree 181/2004 /ND-CP. This is an unfortunate shortcoming to reduce discrimination in land use among investors. If foreign investors are allowed to lease land use rights of households and individuals to do business, the opportunity to access their land will be better, the cost and time for land use can be reduced, thereby encouraging foreign investment into Vietnam.

2.2. Access to land use rights through receipt of transfer of land use rights

According to Article 169 of the Land Law 2013, investors may access to land use rights of investors through the form of land use right transfer as follows:

* Economic organizations may acquire land use rights through receipt of transfer of land use rights, except the cases prescribed in Article 191 of this Law (Economic organizations may not acquire the rights to use paddy land, protective forest land or special-use forest land from households or individuals, except the case of change in land use purpose in accordance with the master plans, plans on land use approved by competent state agencies).

* Overseas Vietnamese may acquire land use rights through receipt of transfer of land use rights in industrial parks, industrial clusters, export processing zones, hi-tech zones or economic zones.

* Foreign-invested enterprises may acquire investment capital which is the value of land use rights in accordance with the Government’s regulations. According to Article 1 Article 39 of Decree 43/2014 /ND-CP dated May 15, 2014 (**Detailing a number of articles of the Land Law**): “*Foreign-invested enterprises may acquire investment capital being the value of land use rights transferred from enterprises that are currently using land originating from land allocated by the State with collection of land use levy or lease by the State with full one-off*

rental payment for the entire lease period while the value of the land use right has been capitalized into the enterprise's capital, except for the case of transfer of investment capital is the value of the agricultural production land and forestry land.”

In addition to the above cases, investors (irrespective of the type of entity) can access the land use rights through the purchase of assets attached to leased land with annual rental payment (Article 189 Land Law 2013) and receive part or total of the investment project associated with the land use rights (Article 194 Land Law 2013, Article 42 Decree 43/2014/ND-CP).

Through the above provisions, we can see that the access to land use rights through the transfer of land use rights by investors is more or less limited. Specifically:

(i). Economic organizations may not acquire the rights to use paddy land, protective forest land or special-use forest land from households or individuals, except the case of change in land use purpose in accordance with the master plans, plans on land use approved by competent state agencies.

This provision aims to protect important types of land belonging to agricultural land groups from the risk of arbitrary purposes of land use by business entities. Only agricultural land areas specialized in wet rice cultivation, protective forest land and special-use forest land of households and individuals already have approved land use plans and plans allowed to change land use purposes then the economic organization may be transferred to serve its production and business needs. In contrast, the economic organization will not receive land use right by transfer even if they will not change land use purposes after receiving the land use right.

Although the purpose of limiting the transfer of these land use rights to economic organizations is absolutely correct, this regulation still has a heavy sense of prohibition, which is difficult to match the conditions of the professional commodity economy. Assuming that economic organizations that need real land use for rice cultivation purposes, the above limitation will be a “barrier” for agricultural “industrialization” and “modernization”. In fact, with great financial potential, investment capacity and high technology access of economic organizations will make agricultural production (including rice cultivation) will become more quality and effective. Thus, Vietnamese agricultural products are expected to have a brand and compete with agricultural products in the world. Experience has shown that, in developed countries, agricultural enterprises have formed for a long time and solved many socio-economic problems.¹⁰ In addition, it should be noted that the law does not prohibit large-scale agricultural households and individuals (agricultural farms), including the establishment of enterprises to use land for agricultural production, so there is no reasons to prohibit businesses from receiving agricultural land use rights for efficient agricultural production and trading.¹¹

(ii). Overseas Vietnamese: Current laws do not allow overseas Vietnamese to receive land use rights in form of transfer to carry out investment projects outside industrial zones, industrial clusters, export processing zones, high-tech zones and economic zones. Thus, if investing outside these areas, overseas Vietnamese do not have much choice to acquire land use rights. This unnecessary restriction may cause policy to attract “overseas Vietnamese people” to bring foreign currencies back to the country for investment to face many obstacles because the access to land will be more limited than domestic individuals.

¹⁰ For example, the US Cargill Company is an agricultural and food producer founded in 1865 and has become a large international company with more than 142,000 employees in 65 countries. See <https://www.cargill.com/worldwide/united-states>

¹¹ See also Luu Quoc Thai, *Perfecting the law on transfer of land use rights in market economy conditions*, Journal of Legal Science No. 04 (83) / 2014, pages 14 – 24 (Luu Quốc Thái, Hoàn thiện pháp luật về chuyển nhượng quyền sử dụng đất trong điều kiện kinh tế thị trường, Tạp chí Khoa học pháp lý số 04 (83)/2014, trang 14 – 24).

(iii). Foreign-invested enterprises cannot access to land by directly transferring land use rights to implement investment projects in Vietnam

As mentioned above, foreign-invested enterprises may receive land use rights by receiving total or part investment project associated with land use rights from domestic economic organizations but cannot access to land by directly transferring land use rights. This restriction not only makes difficult for foreign investors to access to land use rights, but it can also cause negative impacts. Foreign investors wishing to receive land use rights through investment projects must have legal entities (enterprises) that have existed and operated in Vietnam. So, their land using after the transfer will be “tied” to the investment project they have been transferred, which they do not expect because it is difficult to match their strategy, scale and purpose, business. In addition, the transfer of land use rights under this “detour” will give rise to the situation that enterprises specializing in “running” projects to sell to earn profits without investing, thanks to easy “relationships” for accessing to land.¹² This situation not only increases investment costs due to the difference in the transfer of projects (actually land use rights) but also makes the real estate market become distorted and legitimate benefits of the whole commune to be affected badly.

Regarding the issue of “acquisition of land use rights”, the Land Law 2013 stipulates that “Foreign-invested enterprises may acquire investment capital which is the value of land use rights in accordance with the Government’s regulations” (Point b, Clause 1, Article 169). This provision seems to indicate that the Land Law 2013 has expanded the chance to access to land use rights of foreign investors but is still quite conservative in using words. However, the phrase “acquiring investment capital which is the value of land use rights” will make us wonder about the legal status of foreign investors for this type of “invested capital” to be transferred, when Decree 43/2014 /ND-CP sets out the condition that “the value of land use right must be capitalized into the capital of the enterprise” which they acquire by transferring (clause 1 Article 39). And if so, the transfer of investment capital which is “value of land use rights” will be no different from the transfer of other types of investment capital: Investors cannot become land users if they do not receive the entire investment (including the value of land use rights of an enterprise). In fact, there was a case between the Vietnamese development investment limited company (named Son Kim) and an English company (named Citycrest Limited). In this case, Son Kim contributed the land value of 4.448,5 m² with Citycrest Limited to establish the Limited Company named Nassim JV. After that, Son Kim had transferred the value of 4.448,5 m² to Nassim JV and accepted by the competent government¹³.

2.3. Acquire land use rights through receipt of contribution of land use rights as capital

According to Point e, Clause 1, Article 169 of the Land Law 2013: “Economic organizations and joint ventures may acquire land use rights through receipt of contribution of land use rights as capital”. Thus, among investors who can access to land use rights through the

¹² See also: Phuong Thao (Central Committee for Internal Affairs), Overcoming "loopholes" in land allocation and land lease in the 2003 Land Law, General Information Board of the Central Internal Affairs Committee, <http://noichinh.vn/ho-so-tu-lieu/201310/other-program-in-delivery-for-your-life-in-dat-dat-dai-2003-292554/>, accessed at 10 am 03/5/2021 (Phuong Thảo (Ban Nội Chính Trung Ương), Khắc phục “kẻ hở” trong giao đất, cho thuê đất trong Luật Đất đai 2003, **Trang thông tin tổng hợp Ban Nội chính Trung ương**, <http://noichinh.vn/ho-so-tu-lieu/201310/khac-phuc-ke-ho-trong-giao-dat-cho-thue-dat-trong-luat-dat-dai-2003-292554/>).

¹³ See: Document No. 3688/TNMT-QLSDĐ of the Department of Natural Resources and Environment, dated 5 June 2015.

form of capital contribution under this regulation can only be “economic organization” and “joint venture enterprise”.

Concerning transactions of contribution of land use rights as capital, the law also has the following provisions:

- Domestic organizations that are allocated land with land use levy by the State, or leased land with full one-off rental payment for the entire lease period may “contribute land use rights and land-attached assets under their ownership as capital for cooperation in production and business with organizations, individuals, overseas Vietnamese or foreign-invested enterprises in accordance with law” (point đ clause 2 Article 174 Land law 2013).

- Households or individuals that use agricultural land allocated by the State within land use quotas, are allocated land with land use levy or leased with full one-off rental payment for the entire lease period, have land use rights recognized by the State, or obtain land through exchange, transfer, inheritance or donation, have the may “contribute land use rights as capital to organizations, households, individuals or overseas Vietnamese for cooperation in production or business” (point h clause 1 Article 179 Land law 2013).

Through the above provisions, we found that the regulations on contributing land use rights as capital have the following unsuitabilities:

- **Legislative unsuitability:** According to Point e, Clause 1, Article 169 of the 2013 Land Law, only “economic organizations” and “joint-venture enterprises” may acquire land use rights through receipt of contribution of land use rights as capital, while investors are Vietnamese residing overseas and enterprises 100% can not. However, Article 174, Article 179 of the Land Law 2013 allows households and individuals to contribute land use rights as capital to overseas Vietnamese for cooperation in production or business (do not specify joint venture or 100% foreign capital).

- **Discrimination:** Article 169 of the Land Law 2013 allows investors as economic organizations and joint-venture enterprises to acquire land use rights through receipt of contribution of land use rights as capital but not regulating this right for overseas Vietnamese. In addition, Article 179 of this Law provides for households and individuals to contribute land use rights as capital to organizations and overseas Vietnamese but does not allow them to do the same thing with foreign-invested enterprises.

In addition, being a foreign invested enterprise but different ways of establishment, the proportion of capital contribution of different parties may also have different rights to land use rights and the right to access to land use rights. Specifically, Clause 4 of Article 183 of the Land Law 2013 (Regulations on Rights and obligations of overseas Vietnamese and foreign-invested enterprises using land for implementation of investment projects in Vietnam) stipulates: “Foreign-invested enterprises using land formed through the purchase of shares of Vietnamese enterprises have the following rights and obligations:

a) In case the foreign-invested enterprise formed through the purchase of shares of Vietnamese enterprises is a wholly foreign-invested enterprise or a foreign-invested enterprise in which the foreign investor is the dominant shareholder in accordance with the law on enterprises, that foreign-invested enterprise has the rights and obligations prescribed in Clauses 2 and 3 of this Article corresponding to the form of payment of land use levy or land rental;

b) In case the foreign-invested enterprise formed through the purchase of shares of Vietnamese enterprises is an enterprise in which the Vietnamese party is the dominant shareholder in accordance with the law on enterprises, that foreign-invested enterprise has the rights and obligations as economic organizations as prescribed in Articles 174 and 175 of this Law (*Regulations on rights and obligations of economic organizations*)”.

This means: if an enterprise with foreign invested capital is directly established in Vietnam by a foreign investor, regardless of the ratio of capital contribution of domestic investors in this enterprise (if any), it has all rights and obligations on land use rights of foreign invested enterprises, including the right to access land use rights. While the foreign-invested enterprise formed through the purchase of shares of Vietnamese enterprises, land rights and obligations are determined depending on the capital contribution ratio of the parties.

In addition to discrimination on the ability to access land use rights through the forms of land use right transfer among the above investors, all investors face common difficulties from the mechanism of accessing land use rights through. Article 16 Decree 43/2014/NĐ-CP stipulates: “Use of land for production and business purposes through purchase of land attached assets, receipt of transferred or leased land use rights or receipt of land use rights contributed as capital, the use of land for production and business purposes through purchase of land-attached assets, receipt of transferred or leased land use rights or receipt of land use rights contributed as capital must adhere to the following principles:

1. It is conformable with approved and publicized district-level annual land use plans.
2. Localities no longer have clear ground areas for use for proper production and business purposes, except for projects in the sectors or areas eligible for investment incentives.
3. In case investors receive transferred land use rights but have to change the land use purpose, they may do so only after competent People's Committees permit in writing the land use purpose change and land use term adjustment suitable to the use of land for production and business”.

If the first condition has nothing to discuss, the second condition needs to be reviewed. Obviously, this condition "forces" investors to use land according to the State's desire, not create conditions for them to choose a more favorable location for their business activities. From here, the “visible hand” in land management in particular and economic management in general seems still to be the favorite tool of the State.

3. Conclusions and recommendations

Policy mechanisms to create fairness and convenience for investors to access land (land use rights) for production - business through land use rights transactions have not yet had a real positive change in Land law 2013 in comparison with previous land laws. In addition to the ambiguity and the general lack of consistency, land laws still have many discriminatory regulations among investors, especially between domestic economic organizations and foreign investors. According to the author, for land to be used in the most effective way, apart from the transparent, fair and healthy business environment, the opportunity of land access for investors must be clearly established most conveniently. To achieve this criteria, access to land in general and access to land through land use right transactions in particular must be regulated in the most convenient way for investors, as long as the implementation of the investment project is appropriate with planning land use that have been approved by competent State agencies. In addition, it is necessary to ensure consistency in the regulations on how to access land use right between domestic and foreign investors through land use rights transactions. Specifically, as soon as possible, the 2013 Land Law needs to have the following adjustments:

- Allowing foreign-invested enterprises to hire land use rights, acquire land use rights through receipt of contribution of land use rights as capital of households and individuals like domestic economic organizations.
- Allowing overseas Vietnamese and foreign invested enterprises acquire land use rights through receipt of transfer of land use rights to implement investment projects in accordance

with approved land use planning (including cases of receiving transfer of land use rights outside industrial zones, high-tech zones, economic zones).

In addition, to facilitate and at the same time to enhance the ability to attract foreign capital into Vietnam, access to land use rights through land use transactions should not be limited to foreign-invested enterprises established in Vietnam but should be open to foreign enterprises established abroad under foreign law.¹⁴ Currently, the 2013 Land Law has removed discrimination in the form of land distribution between domestic economic organizations and foreign invested enterprises. Under current regulations, the allocation or lease of land to these entities by the State is no longer based on the type of subject as before but only on the purpose of land using. Foreign investors trading in houses in the form of construction investment for sale or for sale in combination with leasing may be in the form of land allocated by the State with land use as economic organizations (Article 55 of Land Law 2013). Therefore, discrimination in the way of accessing and acquiring land use rights through land use rights transactions between these entities has also become unnecessary.

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- [4] Vietnamese Investment Law 2014; Vietnamese Investment Law 2020.
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¹⁴ The Vietnamese Investment Law 2014, 2020 also noted a type of foreign investor who is a foreign individual and an organization established by foreign law conducting business investment activities in Vietnam (Article 3).