

## THE RIGHT FOR FOREIGN-INVESTED ECONOMIC ORGANISATIONS TO ACCESS AND USE LAND IN VIETNAM UNDER THE LAND LAW 2024

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Foreign-invested economic organisations (“FI economic organisations”) are one of the seven groups of organisations/individuals using land (“Land Users”) in Vietnam.[1] On the basis of inheritance from and development of the regulations in previous land laws, the Land Law 2024 regulates the right for FI economic organisations to access and use land in a manner more expanded and equally accessible as to domestic economic organisations, ensuring the potential of the land is exploited the most in the market economy.

### 1. The subject using land is re-defined to be FI economic organisations

1. The concept of “**FI economic organisations**” is defined in the Land Law 2024 by way of re-determining the subjects “*foreign-invested enterprises*” in the Land Law 2013 and “*foreign organisations and individuals making investments in Vietnam*” in the Land Law 2003. Accordingly, the Land Law 2024 defines a FI economic organisation by making reference to its definition in the applicable Investment Law[2] in that “**an economic organisation, in order to perform**



**projects using land, must meet the conditions and implement investment procedures for foreign investors as stipulated by the Investment Law.**[3]

2. The phrase “***an economic organisation must meet the conditions and implement statutory investment procedures for foreign investors***” as stated in Article 23.1 of the Investment Law 2020 can be analysed as follows:

**“Article 23. For investing activities of FI economic organisations**

1. ***Economic organisations must meet the conditions and implement statutory investment procedures for foreign investors when they establish other economic organisations; contribute capital to, subscribe for shares of, or purchase capital contributions from other economic organisations; invest in the form of business cooperation contract, if they fall into one of the following cases:***
2. ***a) Have foreign investors holding more than 50% of charter capital or for partnerships, the majority of partners must be foreigners;***
3. ***b) Have an economic organisation as specified in point a) above holding more than 50% of charter capital;***
4. ***c) Have a foreign investor and an economic organization as specified in point a) above holding more than 50% of charter capital.”***

Thus, it can be understood that FI economic organisations as defined in the Land Law 2024 are only the subjects prescribed in Article 23.1 of the Investment Law 2020, that is, they are FI economic organisations with over 50% of charter capital directly held by (i) foreign investors, (ii) economic organisations in which foreign investors hold over 50% of charter capital; or (iii) foreign investor and the economic organisation referred to in cases (i) above.

c. Of note, the Investment Law 2020 simply defines a FI economic organisation as “***an economic organisation with foreign investors acting as members or shareholders.***”[4] According to this definition, as long as an enterprise has a foreign investor holding its capital (regardless of the amount of capital), such an enterprise can be considered a FI economic organisation.

Thus, by comparing the definitions of “FI economic organisation” in the Land Law 2024 to the Investment Law 2020, we see that the scope of FI economic organisations as defined under the Land Law 2024 is narrower, and includes only FI economic organisations that can be grouped into the cases analysed in Section 1(b) above.

d. The following question: the Land Law 2024 classifies those FI economic organisations that **do not** fall into the cases in Section 1(b) above (in which including economic organisations with foreign investors holding **50% of charter capital or less**) into which group of land users?

According to the Land Law 2024, an “economic organisation” is “one that is defined in the Investment Law, except for the cases specified in Clause 7 of this Article” and being one of “Domestic organisations.”[5] Meanwhile, Article 4.7 of the Land Law 2024 is referring to a FI economic organisation that is analysed in Section 1(a) above. As such, the Land Law 2024 is using the rule of elimination, that is, economic organisations that are not FI economic organisations (as defined in the Land Law 2024, instead of the Investment Law 2020) will be considered Economic organisations.

In short, it can be understood that the Land Law 2024 classifies economic organisations in which foreign investors hold 50% or less of charter capital as Domestic economic organisations.

e. Thus, in our opinion, the Land Law 2024 and the Investment Law 2020 are not completely consistent regarding the definition of “FI economic organisations.”

## 2. LURs obtained by FI economic organisations

To receive LURs, FI economic organisations can choose to receive LURs (i) from the State via land allocation or land lease; (ii) from the market via LUR transfer transactions; or (iii) by other ways such as on the basis of successful results of conciliation on land disputes, effective Court decisions, awards of commercial arbitrations in Vietnam, etc.

### 2.1 How to access land from the State

FI economic organisations can obtain LURs from the State in one of the following ways:

1. The State allocates land to implement housing projects for sale or for combined sale and lease; or access land from the transfer of real estate projects by the law on real estate business, in which the State allocates land and collects land use levies.[6]
2. The State leases land and collects annual land rent, or collects land rent in one-off payment for cases other than land allocation with or without collection of

land rent according to the Land Law 2024.[7]

3. The State allocates land to FI economic organisations in compensation for land recovery.[8]

## 2.2 How to access land from the market

To access land from the market, FI economic organisations can achieve this in one of the following ways: [9]

1. receive the transfer of investment capital in the form of LURs;
2. receive capital contribution in the form of LURs;
3. receive transfer of LURs in industrial parks, industrial clusters, and high-tech parks.

In addition to the ways above, for commercial and service land, and land for non-agricultural production premises, FI economic organisations can also access land via such forms as (i) leasing land, subleasing land from Vietnamese economic organisations or people who are residing abroad; (ii) subleasing land attached to infrastructure from FI economic organisations.[10]

## 2.3 Other ways to access land

FI economic organisations can obtain LURs under a decision or award of the Vietnamese Commercial Arbitration, which is a new point recognised in the Land Law 2024, in addition to inheriting other ways of access to land use rights stipulated in the Land Law 2013: (i) according to successful results of conciliation of land disputes, recognised by the competent People's Committee; (ii) agreement in a mortgage contract to pay debts; (iii) decisions of competent state agencies on resolving land disputes, complaints and denunciations about land, judgments, and decisions of a Court, executed decisions of judgment enforcement agencies; (iv) written confirmation of the auction results of LURs consistent with law; (v) for groups of land users sharing common LURs, documents on division and separation of LURs consistent with the law.[11]

## 3. Rights and obligations of FI economic organisations

In the Land Law 2024, the rights of FI economic organisations go hand in hand with the obligations they must fulfill, which are prescribed from Article 41 to Article 43. In addition

to the general rights for all land users, the Land Law 2024 also stipulates the rights particularly applicable to FI economic organisations depending on the form of land use, land use purpose, etc.

### **3.1 Some general rights and obligations of FI economic organisations are similar to other land users**

#### **a. General rights and obligations of land users**

Without consideration of the type of subject, forms of land use, or purpose of land use, FI economic organisations, similar to other land users, also have general rights of a land user, such as:[12] (i) be granted a LURC when meeting all conditions stipulated by land law; (ii) enjoy the profits from labor and investment on the land; (iii) enjoy benefits from State investments to protect, improve and develop agricultural land; and other general rights.

In addition, FI economic organisations also have general obligations of a land user, such as: [13] (i) using land for the right purpose and within its boundaries; (ii) making land declaration and registration; fully performing procedures for converting, transferring, leasing, subleasing, inheriting, donating LURs, mortgaging, contributing capital in form of LURs; (iii) fulfilling financial obligations related to land; and other obligations as stipulated by law.

#### **b. Right to select the form of paying land rent**

Demonstrating the State's respect for the right to freely choose the form of land rent payment depending on financial capacity of land users, the Land Law 2024 inherits and develops the right to choose and convert the form of land rent payment for FI economic organisations. Accordingly, (i) FI economic organisations which are leasing land from the State with annual land rent payment but fall into the case of lease land with a one-off payment of rent for the entire lease period can **convert to the form of land lease with a one-off payment of rent for the remaining lease period**:[14] or vice versa, (ii) FI economic organisations which are leasing land from the State with a one-off payment of rent for the entire lease period can **convert to the form of land lease with annual land rent payment**. Land rent already paid will be deducted from the payable annual land rent as stipulated by the Government.[15]



With the regulation that when a FI economic organisation switches from a land lease with a one-off payment of rent for the entire lease period to the form of the land lease with annual land rent payment, “*the land rent already paid will be deducted from the payable annual land rent*” can be interpreted that the paid land rent is still retained by the State (without refunding the difference to enterprises) to gradually set off against annual land use levies for the remaining lease term. If in the coming time guiding documents of the Land Law 2024 provide guidelines that align with the aforementioned interpretation, enterprises (including FI economic organisations) may have their flexibility compromised in terms of investment cash flows for their business plans.

### **3.2 Rights and obligations of FI economic organisations using land to implement projects in Vietnam**

Based on the origin or form of land use, the Land Law 2024 specifically stipulates the rights for FI economic organisations with respect to land and assets attached to the land, particularly:

#### **a. For FI economic organisations **leasing land from the State with annual land rent payment****

As land users have not paid rent for LURs for the entire land lease period, the rights of land users, in this case, are therefore limited, and users do not have additional rights to land as when they lease land with a one-off payment of rent or use land via paid allocation (*except for subleasing land use rights for land plots attached to completed infrastructure in industrial parks, industrial clusters, and high-tech zones.*) Accordingly, FI economic organisations leasing land from the State with annual land rent payments have the following rights to **assets attached to leased land**:<sup>[16]</sup>

1. Mortgage the land-attached assets that they own at credit institutions licensed in Vietnam;
2. Contribute capital in the form of land-attached assets during the land lease term; The recipient of capital contribution in the form of assets will be entitled to lease land from the State for the intended purpose for the remaining term;
3. Sell land-attached assets, or sell the assets that they own and are attached to land and land lease rights under land lease contracts<sup>[17]</sup> provided that the legal conditions are met.<sup>[18]</sup>



4. Lease out the assets that they own and are attached to land and land lease rights under land lease contracts; and
5. Sublease land use rights in the form of annual land rent payment for land plots with completed infrastructure for the cases where it is allowed to construct and exploit infrastructure on land in industrial parks, industrial clusters, and high-tech parks; The sublessee of land use rights must use the land for the right purpose and fulfill financial obligations as stipulated by law.

b. For FI economic organisations that are **land leased by the State with one-off land rent paid for the entire lease period**; or eligible for a **land allocation by the State with land use levies collected to implement the project**

Upon meeting the respective conditions according to the land law,[19] FI economic organisations that are land leased by the State with one-off land rent paid for the entire lease period, or eligible for State land allocation with land use levies collected to implement the project, will have the rights to **LURs and land-attached assets**, including: [20]

1. Transfer LURs and land-attached assets under their ownership during the land use term;
2. Lease or sublease LURs, land-attached assets under their ownership during the land use term;
3. Mortgage their LURs and land-attached assets at the credit institutions with operation licence in Vietnam; and
4. Contribute capital in the form of LURs and land-attached assets under their ownership.

c. FI economic organisations that use **the land formed by foreign investors purchasing shares or capital contributions** also have the rights specified in Section (a) or Section (b) above respective to their form of paying land use levies and land rent. [21]

### **3.3 Rights and obligations of FI economic organisations that use land by receiving capital contributions in the form of LURs**

a. In case a FI economic organisation **receives a capital contribution in the form of LURs where the State allocates the land with the collection of land use levies, or the land is leased with a one-off land rent paid for the entire lease period**, it will have the rights and

obligations similar to the case of FI economic organisation that is land leased by the State with one-off land rent paid for the entire lease period; or eligible for a land allocation by the State with land use levies collected to implement the project, as analysed in Section 3.2(b) above. [22]

b. FI economic organisations are converted from **joint venture enterprises** in which the Vietnamese party contributes capital in the form of LURs:

We believe that the use of the term “**joint venture enterprise**”[23] in the Land Law 2024 is inherited from previous Land Laws and the history of forming land-use enterprises in the past, even though the investment law and enterprises no longer use this term for the time being. According to the Land Law 2024, FI economic organisations converted from joint venture enterprises to which the Vietnamese party contributes capital in the form of LURs have the following rights and obligations:

1. In the case where LURs received from previous capital contributions are not used to implement commercial housing investment projects and FI economic organisations are land leased by the State with annual land rent collected according to the Land Law 2024, the rights and obligations of FI economic organisations are similar to those analysed in Section 3.2(a) above (*in case of the State leasing land with annual land rent collection*); [24]
2. In the case of (A) where LURs received from previous capital contributions are **not** used to implement commercial housing investment projects and FI economic organisations are **land leased** by the State **with a one-off land rent paid for the entire lease period** according to regulations;[25] or (B) where LUR received from previous capital contributions are used to implement commercial housing investment projects and FI economic organisations are **eligible for land allocation** by the State **with the collection of land use levies** according to regulations[26], then the right and the obligations of FI economic organisations are similar to those analysed in Section 3.2(b) above (*in case of the State leasing land with one-off land rent paid for the entire lease period; or the State allocating land with collection of land use levies to implement the project*).

### 3.4 Rights and obligations of FI economic organisations that are land leased or subleased in industrial parks, industrial clusters, and high-tech zones





a. In case FI economic organisation pays one-off land rent for the entire lease period, or pays one-off land sub-rent for the entire sublease period, it has the same rights and obligations as in case of being eligible for a land allocation by the State with the collection of land use levies, or a land lease with one-off land rent paid for the entire lease period outside of industrial parks, industrial clusters, and high-tech zones.[27]

b. In case FI economic organisation pays annual land rent or sub-rent, it has the rights and obligations as in case of that it is land leased by the State with collection of annual land rent outside of industrial parks, industrial clusters, and high-tech zones. [28]

#### 4. Conclusion

The said regulations have basically contributed to establishing more equality and narrowing the gap related to the right to access the land and LURs of FI economic organisations as opposed to domestic economic organisations, creating favorable conditions for stable, long-term land use to implement investment projects of this group of subjects. However, the land law and related legislation (especially foreign investment law) still need to create a synchronous, uniform, and stable legal environment for the activities related to LURs of FI economic organisations. The Land Law 2024 will take effect from 1 January 2025, so the Government needs to soon issue the documents guiding the Land Law 2024 in a clear, consistent, and appropriate manner in all current legal systems.

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#### Footnotes

[1] Article 4.7 of the Land Law 2024

[2] Investment Law 2020, passed by the National Assembly on 17 June 2020, effective from 01 January 2021

[3] Article 3.46 of the Land Law 2024

[4] Article 3.22 of the Investment Law 2020



[5] Article 4.1(b) of the Investment Law 2020

[6] Articles 28.1(i) and 119.3 of the Land Law 2024

[7] Article 28.1(k) and Article 120 of Land Law 2024

[8] Article 119.4 of the Land Law 2024

[9] Articles 28.1(c),(d) and (dd) of the Land Law 2024

[10] Article 206.3 of the Land Law 2024

[11] Article 28.1(m) of the Land Law 2024

[12] Article 26 of the Land Law 2024

[13] Article 31 of the Land Law 2024

[14] Article 30.1 of the Land Law 2024

[15] Article 30.2 of the Land Law 2024

[16] Article 41.2 of the Land Law 2024

[17] Article 3.37 of the Land Law 2024

[18] Article 46 of the Land Law 2024

[19] Article 45 of the Land law 2024

[20] Article 41.3 of the Land law 2024

[21] Article 41.4 of the Land law 2024

[22] Article 42.1 of the Land law 2024

[23] According to Article 2.7 of the Law on Foreign Investment in Vietnam 1996, *“A joint venture enterprise is an enterprise established in Vietnam by two or more parties*



*cooperating on the basis of a joint venture contract or an agreement signed between the Government of the Socialist Republic of Vietnam and that of a foreign country or an enterprise formed through the cooperation between a foreign invested enterprise and a Vietnamese enterprise or a joint venture enterprise cooperating with foreign investors on the basis of a joint venture contract.”*

[24] Article 42.2(a) of the Land Law 2024

[25] Article 42.2(b) of the Land Law 2024

[26] Article 42.2(c) of the Land Law 2024

[27] Articles 43.2(a), 33.1 and 33.3 of the Land Law 2024

[28] Article 43.2(b) of the Land law 2024

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