



Land-use rights of foreign-invested enterprises according to Vietnamese law

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Abstract

Aim: The provisions of Vietnamese law are presented, with a focus on the fundamental issues directly related to the land-use rights of foreign-invested enterprises, such as how land-use rights are established and the rights of foreign-invested enterprises in using land, the trading of rights for foreign-invested enterprises, and the securing of land-use rights of foreign-invested enterprises.

Method: The term "doctrinal research" is used to describe a technique that systematically explains the rules that apply to a certain area of law, examines the connections between those rules, offers explanations for any ambiguities, and, perhaps, foresees how those rules will evolve in the future.

Findings: The value of land in economic production cannot be overstated. For all intents and purposes in Vietnam, land-use rights are equivalent to property rights in the law. Using a doctrinal research approach, this paper explains the current State of land law in Vietnam, with specific attention paid to the rights of foreign-invested enterprises to use land. For a foreign-owned business to be granted land use rights in Vietnam, it must first have an investment project in Vietnam that has been approved by the relevant Vietnamese government agency, and that requires the land in question. Both the State, acting on behalf of the landowner, and the land's actual owners can establish the land-use rights. In general, only the State can grant a foreign-invested company the legal authority to use its land. There are fewer opportunities for those who must rely on intermediaries to gain access to land use rights.

Implications/Novel Contribution: The paper offers solutions so that businesses with foreign investment can better understand the potential legal risks associated with land-use rights.

Keywords: Land-use rights, Land-use rights of foreign, Invested enterprises

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INTRODUCTION

The entire Vietnamese population is the sole subject and owner of all land. The ownership of land by individuals is illegal in Vietnam. Land ownership is not a right that any individual or group possesses. It is widely recognized in Vietnam that the right to use and develop one's land is a fundamental human right. Nonetheless, it takes work to get a handle on and correctly apply the complexities of land law regarding the land-use rights of businesses and individuals. Thus, this article presents the provisions of Vietnamese law; focuses on the fundamental issues which directly relate to the land-use rights of foreign-invested enterprises, such as methods of establishing land-use rights and rights of foreign-invested enterprises in using land, trading rights for foreign-invested enterprises, a, and a general overview of the provisions of Vietnamese land law. In particular, the article highlights the main flaws in Vietnamese law regarding land-use rights to assist foreign-invested enterprises in avoiding legal risks associated with applying the law. Thus, it aids businesses with overseas investments in spotting potential threats and devising countermeasures.

The Method of Research is Doctrinal Research

Doctrinal research is described as a method that provides a systematic exposition of the rules governing a particular legal category, analyzes the relationship between rules, explains areas of difficulty and, perhaps, predicts future development (Hutchington, 2013). A doctrinal study will answer the fundamental question: what is the law governing a particular field, through the collection, analysis, and synthesis of research sources including statutory

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law, case law, and scholarly works (Boniface, 2016; D. N. Pham, 2014). Doctrinal research is not about solving a problem arising from an actual case but instead discovering the current status of law. Specifically, whether the law in a particular field is coherent and consistent, thereby giving new explanations and insights (Pendleton, 2017).

OVERVIEW OF LAND-USE RIGHTS AND LAND-USE RIGHTS OF FOREIGN INVESTED ENTERPRISES ACCORDING TO THE VIETNAMESE LAW

Concept

Foreign-invested enterprises are understood as enterprises with contributed capital of foreign organizations and foreign individuals. In particular, foreign organizations are the organizations which established abroad. Foreign individuals are understood as foreign nationals and non-citizens. The Vietnam Land Law divides foreign-invested enterprises into three categories: Foreign-invested enterprises, including 100% foreign-invested enterprises, joint-venture enterprises, Vietnamese enterprises in which foreign investors purchase shares, merge or acquire in according to the investment law Clause 7, Art.5 of Land Law 2013 (T. T. X. Nguyen, 2019; Phyo, 2015).

Legal Facilities

Land-use rights of foreign-invested enterprises are governed by land law. Land-use rights of foreign invested enterprises were first recorded and recognized in the Land Law 1993, the Land Law 2003 and the Land Law 2013 and concretized in several legal guiding documents.

Basis of Appearance

In Vietnam, land belongs to the entire people represented by the State to exercise the ownership. Land is not allowed to be traded. Therefore, organizations and individuals only have land-use rights, but do not have land ownership rights. The land-use rights are granted by Vietnamese State as a representative of the land-owner. The methods that Vietnamese State uses to grant land-use rights to organizations and individuals includes land allocation, land leasing, recognition of land-use rights and transferring of land-use rights. In particular, land allocation, land leasing, recognition of land-use rights are direct methods from the State (the State is the person who allocates, leases land, and recognizes land-use rights). Trading of Land-use right is an indirect method (the State is not a direct transferor of land-use rights. The State only controls the transfer of rights through law provisions).

Rights

Common rights

Common rights are the rights which applied for all land-users. Common rights are including: the right to exploit and use land to implement investment projects or other permitted purposes; beneficial of investment results on the land (for example, if the investor is allowed to use land for housing construction or construction works, the investor may own the house or construction work; leasing and other transactions for houses and construction works according to the provisions of law to collect profits ...); have the right to be granted a land-use right certificate; the right to be protected by law against acts of infringing upon land-use rights through complaints, denunciations and lawsuits; be entitled to compensation when the State recovers land.

Trading rights and other rights

In addition to common rights, land-use rights holders also have the right to deal with land-use rights and other rights when meeting the conditions prescribed by law. Land-using subjects may transfer or lease (sublease in cases of land lease from the State), inherit, mortgage, contribute capital or donate land-use rights (Art.167 Land Law 2013). The right to trade land-use rights is inherited from the Land Law 1993 and has been amended to increase the rights of land-use rights holders. Indeed, in the Land Law 1987, land-users only have the right to exploit and use the land, but not have the right to transact with the land-use right. By the Land Law 1993, land-users had the right not only to exploit and use the land but also to transact with the land-use rights. Land-users have the right to exchange, transfer, lease, sublease, contribute capital, donate, or inherit the land-use rights. The Land Law 1993 also extended the scope of land-users to overseas Vietnamese and foreign-invested enterprises. However, compared with the Land Law 2003 and the Land Law 2013, land users' rights are narrower. For example, entities with foreign elements,

such as foreign-invested enterprises, can receive the land-use rights lease but not by allocation. Land-use rights play an important role in all areas of life, mainly production and business activities. Making legal provisions governing this relationship to create the most favorable conditions for business entities is an urgent task of lawmakers and land researchers. Bearing this in mind, in the past, Vietnamese lawmakers and researchers have been continually researching, discovering inconsistency of the land law, and offering solutions to overcome the shortcomings. The limitations of Vietnam's land law are hindering the efficient use of land in economic development, and they are also not encouraging foreign investment, specifically ineffective in the management of land due to the lack of an effective regime of land ownership and for implementing land ownership (Dao, 1995; T. T. Dinh, 2002; Ha, 1995; H. D. Nguyen & Pham, 1992; H. N. Pham, 1986; D. N. Pham, 2002). The true nature of land use rights has not been recognized (V. T. Le, 1997). Land use rights are not properly exercised in order to promote the real estate market (D. S. Dinh, 2002; D. B. Nguyen, 2002; M. T. Nguyen, 2004; T. N. Nguyen, 2004; D. N. Pham, 2003). Distribution and regulation of land use rights are inadequate (T. H. Y. Do, 2019; H. H. Le, 2019; T. P. Nguyen, 2019). The rights and obligations of land-users are restricted (V. Nguyen & Nguyen, 2004; D. N. Pham, 2003). Rules on the right to trade and conditions for performing transactions are not reasonable (Chau, 2018, 2019; V. D. Do, 2020; D. B. Nguyen, 2002). Consequently, many restrictions on land-use rights have been pointed out by researchers and then recognized by lawmakers in 2013. For example, recipients of land use rights have all rights of land-users, but not only in the case of capital contribution when a legal entity is established, have this right. The right to access the land-use rights of foreign-invested enterprises has also been expanded. However, the limitations in the Land Law 2013 persist. In order to help foreign-invested enterprises identify risks and avoid them, these limitations are specifically pointed out in section III of the present article.

However, the Law has not allowed land-users to use the types of transactions not listed in Article 167 of the Land Law 2013 to trade, for example: borrowing, pledge ... The practice of trial has declared that these transactions are invalid, although there are also opinions that transactions that are not listed are still allowed. Transactions of land-use rights are also allowed only for agricultural land located in the same communes, wards and townships.

However, not all land-users have the right to deal with land-use rights. Only the entity that meets the conditions of the law has the right to deal with land-use rights. Conditions for the subject to have the right to deal with land-use rights mainly based on the form of land-use. Accordingly, according to the general rule, land-use rights holders who have the right to trade land-use rights are subjects of land-use in the form of land allocation by the State with collection of land-use levies, except for cases of exemption from use of land. land; lease land with a lump sum payment, except for cases of land rent exemption; recognition of land-use rights such as land allocation with collection of land-use levies, except for cases of exemption from land-use levies; receive transfer of land-use rights. Subjects who do not have the right to trade land-use rights are those who use land in the form of land allocation without collection of land-use levies; allocation of land with collection of land-use levies but exemption of land-use levies; lease land to pay annually; renting land with one-off payment, but exempted from land rent; recognition land-use rights such as land allocation without collection of land-use levies. The form of land-use is reflected in the decision to allocate land, lease land and recognize land-use rights and is recorded on the land-use right certificate. The general rule is that, but the law still has cases that do not follow this general rule, namely: households and individuals are allocated agricultural land without collecting land-use levies within the limit and households, individuals who are assigned land with land collection but are exempted from land-use levies; renting land with one-off payment but exempted from land rent still has the right to deal with land-use rights (Clause 4 Art.179 Land Law 2013). Economic organizations, foreign-invested enterprises and overseas Vietnamese that are allocated land with collection of land-use levies, leased land with full one-off rental payment for the entire lease period by the State, but are entitled to exemption from land-use levies or land rent, still have the right to trade land-use rights if this land is used to implement a housing business project (Clause 4 Art.174; Clause 5 Art.183 Land Law 2013).

Renting land from the State to pay annual rent is entitled to sublease and take money annually from the sublease if the land is used to invest in infrastructure of industrial parks, industrial clusters, export processing zones and public parks. High-tech and economic zones (See Clause 2 Art.149 Land Law 2013). Thus, the exception mainly applied to cases of social policy or investment incentives in some areas.

In addition to trading rights with respect to land-use rights, land-use rights holders have other rights such as: the right to choose the form of payment of annual or annual rent 7; limited use of adjoining real estate (See Art.171 Land Law 2013). The right to change land-use purposes for land types does not require permission from a competent state agency (See Art.172 Land Law 2013).

Obligations

In addition to the right, the land-user has obligations. Accordingly, in addition to the obligations of the property owner, the land-user has general obligations stipulated in Article 170 of the Land Law 2013. These obligations include:

Using land for the right purpose: Using land for the right purpose is one of the important obligations set by the Vietnamese law for land-users, saying: Using land for the right purpose. Land-use purposes are specifically defined by the State when land-use rights are given to land-users. The land-use purpose is recorded in the land allocation decision, land lease decision, land-use right recognition decision and recorded on the land-use right certificate. Land-users must carry out land in accordance with the purpose stated in the certificate of land-use right for the type of land required to apply for permission when changing the land-use purpose. For land types which are not required to apply for permission when changing the purpose of use, they are entitled to change the land-use purpose but must register this conversion with a competent state agency (See Art.57 Land Law 2013).

The cases required to apply for permission to change land-use purposes mainly to protect agricultural land and some other land types. Cases of obtaining permission when changing land-use purposes include converting agricultural land into non-agricultural land types (agricultural land types are those used for cultivation purposes, animal husbandry, for example: land for planting trees and aquaculture (See Clause 1, Art.10 Land Law 2013). In case of changing land-use purpose in the same land group, no permission is required, except Cases in the same land group must apply for permission including:

For agricultural land groups: shifting rice cultivation land to land for perennial crops, afforestation land, salt-making land and aquaculture land; turning annual crop land into salt-making land, saltwater aquaculture land and aquaculture land in the form of ponds, lakes and marshes; transfer of protective forest land, special-use forests and production forests to use for other purposes For non-agricultural land groups: Changing non-agricultural land other than residential land to residential land; transfer of construction works, production and business land to commercial and service land; transfer land for professional, commercial and service works to production and non-agricultural land.

Financial obligations on land: Financial obligations on land are the amounts that the land-user must pay to the State. Land financial obligations include: land-use levies, land rent, land-use tax, levies and charges.

Obligation to register land: Land registration for the purpose of state management of land. Land-users and other land-users must register land. People who are allocated land or leased land by the State and who are using land must register land. Land registration in this case is called initial registration. In the course of land-use, if there are changes in land and land-users, these people must register these changes. Cases of registration of land changes include: changing land-users (due to transfer of land-use rights); conduct transactions for land-use rights; land-users change their names; change shape, land parcel size, change of land-use purpose; forms of land-use, land-use duration, land plots and land plots (Art.95 Land Law 2013).

Other obligations: implementing land protection measures; environmental Protection; not harming the legal rights of other land-users; re-allocate land when the State recovers land.

In summar

Although Vietnamese law does not allow private ownership of land. However, the law of Vietnam has stipulated in the direction of giving land-users the rights that land-users need to carry out production and business activities in the most effective way.

SOME SPECIFIC RIGHTS OF FOREIGN INVESTED ENTERPRISES IN LAND-USE

Right to Access Land-Use Rights

Foreign-invested enterprises need land to implement investment projects in Vietnam with the right to access

land-use rights through the following methods: Land lease by the State with annual or one-time rent payment; being allocated land by the State with collection of land-use levies in case of investment in construction of houses for sale of houses or sale of houses in combination with house renting; receive capital contribution by land-use rights of economic organizations; sub-lease of land which has invested in infrastructure in industrial parks, industrial complexes, export processing zones, economic zones, hi-tech parks of economic organizations, overseas Vietnamese and enterprises with capital Foreign investment, transfer of investment capital is the value of land-use rights (Art.149 and Art.169 Land Law 2013). In addition, foreign-invested enterprises have the right to use land through the purchase and sale of assets on land; receive the transfer of all or part of a real estate project (Art.11 Law on Real Estate Business 2014). In cases where foreign-invested enterprises receive transfer of real estate projects or foreign-invested enterprises with land allocated or leased by the State. The state allocates land if the project is transferred to an investment project to build houses for sale or for sale or lease. In the case of other projects, the State leases land-use rights to enterprises. In the case of an enterprise buying and selling property on land, the enterprise has the right to use land in the form of leasing or sub-leasing land-use rights. In cases where the seller does not have the right to trade with land-use rights due to the use of annual rent payment, foreign-invested enterprises have the right to continue leasing the land-use right (Art.174, 183 Land Law 2013).

Right to Trade Land-Use Rights

Foreign-invested enterprises may transfer, lease, sublease, mortgage, contribute capital or donate land-use rights in cases permitted by law. Under the Land Law 2013, foreign-invested enterprises have the right to transact land-use rights in the following cases: being allocated land by the State with collection of land-use and land lease levies of the State pay the land rent once for the entire lease term, but not in the case of exemption from land-use levies or land rent exemption, except for cases of exemption from land-use levies and land rents to implement economic investment projects. housing business; receive capital contribution with the land-use right of a domestic economic organization, but the land-use right originating from the land allocated by the State with the collection of land-use levies and land lease shall be paid in lump sum for the whole lease term. , where the land-use levies and land rent are not from the state budget origin, due to the transfer of the land-use right not the leased land of the State; receive capital contribution by land-use right of State-owned enterprises leasing land from the State before July 1, 2004, but to use the value of land-use rights such as state budget allocated to enterprises, not to be recognized debt, not repayment of land rent.

In addition to the land-users who have the right to transfer the land-use rights above, the Land Law 2013 allows foreign-invested enterprises to transfer land-use rights even if they are not the holder of the land-user rights. Accordingly, foreign-invested enterprises have the right to transfer land-use rights in case of subleasing land associated with infrastructure of other economic organizations, Vietnamese residing overseas and enterprises having foreign investment in infrastructure construction and business, which pays a lump sum for the whole lease term. Particularly for the case of renting land with one-off payment of rent for the whole term of the infrastructure investor's investment in an industrial park or an industrial park in an export processing zone before July 1, 2014 (the effective date of the 2013 Land Law), if an investor uses land in the form of leasing land from the State to pay annual rent, foreign-invested enterprises may only transfer the land-use right if the investor has paid in full land rent into the state budget.

In order to exercise the right to trade land-use rights, in addition to the conditions under the general provisions of the Civil Code 2015 (parties to transactions must be allowed to trade and be completely voluntary, agreements The transaction must not violate the prohibition or contrary to social ethics), the enterprise must meet the conditions prescribed by the Land Law 2013. Accordingly, the enterprise must have a certificate of land and land-use right not being disputed, land-use rights are not distrained for judgment execution; In the land-use term, enterprises have fulfilled their financial obligations. In case the enterprise has a dispute over land-use rights, the enterprise is only entitled to carry out transactions when there is an effective decision of a competent state agency and this decision defines the land-use right about enterprises (Art.168 and Art. 188 Land Law 2013). In addition, the land-use right of the enterprise is the land-use right of the project and the project implementation. Therefore, in principle, the implementation of land-use right transactions of enterprises must not affect the project implementation

of enterprises. Therefore, in addition to the above conditions, enterprises only have the right to conduct land-use right transactions when conducting transactions on real estate on land, except for the case where enterprises are allowed to use the land for investment infrastructure on the land or the right to transfer all or part of the project. However, the general conditions for all these cases are the land-use right of the enterprise which has been invested in the corresponding technical infrastructure according to the approved schedule (Articles 183-187, 194 Land Law 2013; Article 11 Law on Real Estate Business 2014).

Foreign-invested enterprises only have the right to transact land-use rights with persons allowed to participate in transactions. According to the Land Law 2013, only domestic households and individuals (who are Vietnamese nationals living in Vietnam, economic organizations (enterprises without investment capital) foreign countries, cooperatives) Vietnamese people residing abroad are allowed to receive and transfer land-use rights, however, Vietnamese residing overseas only have the right to receive transfer of land-use rights in industrial parks, industrial clusters, export processing zones, hi-tech parks and economic zones to implement investment projects, receive transfer of residential land-use rights to live in. Capital contributors are legal entities in economic or business sectors, individuals and Vietnamese people residing in a foreign country. The person who is granted a mortgage of land-use rights is a credit institution authorized to operate in Vietnam. Person donation of land-use rights is the state, the community and the recipients of charitable housing. institution authorized to operate the land in Vietnam. Person donation of land-use rights is the state, the community and the recipients of charitable housing.

IDENTIFYING SOME OF THE SHORTCOMINGS OF VIETNAMESE LAWS FOR FOREIGN-INVESTED ENTERPRISES TO LIMIT RISKS WHEN EXERCISING LAND-USE RIGHTS

Shortcomings in Determining the Land-Use Rights Permitted to Participate in Transactions

In principle, the transferee of a land-use right can only become the land-use owner right and has the rights to the land as described above if the land-use right subject to the transaction is a lawful land-use right. Therefore, Vietnam's land law is increasingly improved to condition land-use rights' legality to facilitate the parties to participate in transactions effectively and accurately. However, the legal provisions of Vietnam on this issue still have limitations.

First, it is difficult to determine which land-use rights are prohibited from transactions

According to the provisions of the land law of Vietnam (Art.174, 179,183 Land Law 2013), the land-use rights prohibited from transactions are determined mainly based on the form of land-use. The form of land-use has an impact on whether land-use rights are permitted for a transaction or not, similar to the effect on whether a land-user can transact her land-use right. Accordingly, as mentioned above, a land-use right is basically transactional when a user obtains the land-use right under the land allocation subject to the land-use levies and not exempted from the land-use levies, or under the lease from the State subject to lump-sum rent for the entire lease term and not exempted from the land-use rent, or under recognition of land-use right as land allocation with the collection of land-use levies and not exempted from land-use levies, or under a transfer of land-use rights.

The approach based on the form of land-use to determine which types of land is allowed to be traded is not appropriate because, for the purpose of managing and protecting the land, the land is divided into many categories subject to various regimes of use. Thus, the appropriate determination of the right to trade land-use rights is the land category, not the form of land-use. The approach relying on the form of land-use, in which the decisive condition of whether or not the land-use levies or rent is paid, negatively affects the protection of certain types of land. For example, in order to protect agricultural land of residential communities and avoid the transfer of this land category to other parties who may not exploit it for agricultural purposes, the law should stipulate that the respective and-use rights are not allowed to transfer. Therefore, the form of use concerning agricultural land should also be determined in compliance with the prohibition of transferring land-use rights. Relying on the form of land-use to determine whether the land-use right can be traded or not will make the land-use right dependent on the decision-maker. This approach can be abused in practice, causing difficulties and costs for law enforcement to determine the right to trade accompanying land-use rights. On the other hand, it is even unable to determine which land-use right is prohibited from trading, leading to trading risks.

This limitation has been figured out by researchers and also adopted by lawmakers. Therefore, the reliance

on land categories to determine whether land-use rights are prohibited from transactions has been recognized. Accordingly, it is provided that the land-use rights banned from transactions are respecting to the following land categories: forest land for preservation, forest land for particular purposes, land for construction of governmental headquarters, land-use for defense and security purposes, land-used by the public for non-commercial purposes, graveyard land, cemetery land for the purpose of not trading the land-use rights concerning cemeteries or graveyards, land for construction of state-owned works belonging to organizations that are not self-financed, agricultural land-used by residential communities, land belonging to churches, chapels, shrines, cathedrals, Buddhist temples, monasteries, religious training schools, headquarters of religious organizations, and other religious institutions, rivers, streams, and specialized water surfaces, airport land, and civil airports (Article 100 of the 2013 Land Law).

It is a satisfactory approach to rely on land categories to determine which land-use rights do not facilitate the right to trade. Unfortunately, however, Vietnamese lawmakers have not yet applied this criterion to all land types. As a result, there is no substantial legal ground to determine the land-use rights accompanying which land category are prohibited from transactions. It is also argued that Article 188 of the 2013 Land Law provides for which land-use rights are prohibited from transactions (Luu, 2016; World Bank, 2015). Correspondingly, the land-use rights are prohibited from trading when they are subject to judgment execution or not within the land-use term. However, according to the present author, these requirements stipulated in the said provision and other requirements specified in the Civil Code (including that the land-use rights are not collateral to secure any obligation unless the secured creditor agrees) are not for the land-use rights to be traded but bound the parties who would like to enter into such transactions.

In order to overcome the above situation, Vietnamese lawmakers certainly need to rely on the land categories to determine which land-use rights are banned from transactions, and this provision should be written in a simple, recognizable, and understandable way. Ideally, it should be presented in a separate statutory article providing a substantially clear and detailed declaration of the given matter.

Second, there are still divergent opinions about whether the right to use in a part of the land plot is sufficient to trade or not. Accordingly, it could be found in practice that there are two opposing views. On the one hand, it is arguable that the transaction's subject matter can only be the land plot (the right to use the land plot to be exact). The subject matter of a land-use right transaction must be clearly and specifically identified. A part of the land plot does not meet this criterion. Therefore, if the land plot is ineligible for splitting, the land-user does not have the right to enter any transaction concerning the given part of the land plot. On the other hand, the argument is that ownership is also amounting to joint ownership in part. Therefore, a part of the land plot is also subject to land-use right transactions. Otherwise, the holder of the joint land-use rights cannot exercise his right to disposition. The ambiguous provisions on the above issue lead to different ways of understanding and application in practice. In particular, when dealing with a part of the land plot, some local agencies accept the registration of the respective land-use right, but others do not allow.

Researchers have also indicated this situation. That the transaction for a part of the land plot does not affect the joint land-use rights because the co land-users still exercise their right to disposition (Chau and Nguyen 2019). However, the transaction's subject matter is the land-use rights in part concerning the land lot in which the party has the joint land-use rights rather than the land plot in part. In contrast, if the boundary and location cannot clearly define a part of the land plot, namely, the transaction's subject matter cannot be identified, the respective transaction in a part of the land plot cannot be formed. It could be said that it is necessary to identify the land-use rights with regard to the part of the land plot that is not subject to the transaction.

Although the present author agrees with the first argument that a part of the land plot cannot be considered as the transaction's subject matter, it does not mean that in the case of the land plot ineligible for splitting, the land-user does not have the right to transfer the land-use right in part with respect to the land plot. This argument is reasonable in theory and supportive under Vietnamese law that primarily allows a person to have joint ownership and the joint right to use in part (Clause 1 Art. 217 of the Civil Code 2005, Article 207 of the 2015 Civil Code; Point c, Clause 6, Section of Circular 23/2014 / TT-BTNMT). A person having joint ownership or the joint right to use in part is entitled to exercise the right to dispose of the ownership or the right to use of their own. Therefore, in this case, a land-user can still transfer land-use rights in part in the land plot. A person who receives the transfer

will become a joint land-user holding the joint land-use rights in part.

Second, Shortcomings in determining the legal owner of land-use rights

The determination of legal owners is vital to the purchaser, capital contributor, and any transactions concerning the property in general and land-use rights in particular. If the seller, or the contributor of land-use rights, is not legal owners, the property transactions are not recognized and protected by law. However, due to real estate's fixable nature, real estate goes through many owners, and identifying the true owner is not easy and even impossible. It creates instability in real estate transactions. To overcome this shortcoming, lawmakers from different countries have come up with different solutions. Vietnamese lawmakers are well aware of this and have made considerable efforts to overcome this situation. However, stemming from different causes, this situation, although significantly improved, is still limited. This shortcoming is explained by the author below.

A legal land-use right holder is the person establishing the land-use right in accordance with the law. Under Vietnamese law, ownership in real estate in general and ownership in land-use rights in particular are established according to facts, not according to registration. Indeed, the registration to establish rights is also mentioned in the Land Law 2013 concerning the transfer of land-use rights. However, since the Vietnamese legal approach to the purpose of registration is not the same as that of the Torrens registration, it does not really make sense in overcoming the instability caused by registration because it is difficult to determine the exact owner of the land-use rights.

Basically, there are four modes to obtain land-use rights: the land is allocated by the State, leased by the State, recognized by the State, and transferred by persons who have received land-use rights from the State under land allocation, lease, or recognition. Of course, the establishment of land-use rights must comply with the law. In case the establishment of the land-use right is not in compliance with the law, the land-use rights shall not be recognized to the person to whom the land is allocated, leased, or recognized.

In this case, if the land-use right is in the transaction, the question is how the land-use right will be handled. According to the previous Vietnamese law, the land-use rights are still recovered to the true owner in principle. The land-use right is not revoked only if the purchase and sale transaction is conducted through an auction, or the land-use right is decided for the seller or the transferor according to a court judgment or the agency's decision that has jurisdiction over land dispute. Therefore, in the latter situation, the purchaser has determined the seller's rights based on this judgment to enter the transaction confidently, even though it may be turn out later not to be a true owner under a court decision (H. B. Nguyen, 2006). Vietnamese lawmakers have adopted this proposal in formulating and enacting new rules on this issue. Accordingly, in the past, the Vietnamese land law adopted the principle, that is to say, a transaction with the transferor unduly established land-use rights would not be recognized. Transactions of land-use rights are only recognized under a few exceptions as mentioned above. Transaction of the transfer of land-use rights is made through auction or land-use rights are recognized to the transferee in accordance with court judgments, or the decision of agencies having jurisdiction over land disputes. Now, Vietnamese law has approached in the opposite direction. Accordingly, in principle, transactions with people establishing unlawful land-use rights are recognized (Article of Civil Code 2015 and Land Law 2013). This change promotes the real estate market and helps businesses levies secure and less expensive in establishing land-use rights.

However, Vietnamese law still has limitations in ensuring the stability of land-use rights transactions. Indeed, the issue of land-use right transactions when the seller, the capital contributor, or the owner of land-use rights are not the legal or true owner of the land-use right is governed by the Civil Code 2015 and the Law Land in 2013. Meanwhile, the conditions for the transaction not to be invalidated in these two documents have some differences. Specifically, according to the Civil Code 2015, for the transaction of land-use rights is recognized in the context that the land-use right transferor is not the true owner, the transferee of the land-use right must be a bona fide person, and the land-use right acquired by the transferor is also due to the transfer of the rights. In cases where the land-use rights are obtained from other bases, such as being allocated by the State, leased by the State, or recognized by the State, but the allocation, lease, or recognition is not in accordance with the law, the land-use right transfer is not recognized. For example, A receives the transfer of land-use rights from B. However, A is determined by the court not to be the legal owner, and the owner is C. In this case, B's land-use rights are only recognized when A

obtained the land-use rights from a person who had the land-use rights under the allocation, lease or recognition by the State, or the person receiving the transfer of land-use rights from the owner of the land-use rights. In other words, the transferor does not receive the land-use rights directly from the State, but from the owner of the land-use right. For example, the land-use rights of A must be acquired by purchase between A and D. In case A's land-use rights are not due to a transfer of rights, but because the State recognizes the land-use rights. Also, the recognition does not comply with the law, B, the transferee does not have the right to use the land. The transaction to transfer the land-use rights between A and B is not recognized by law even though B does not know and cannot know that A is not the legal owner of the land-use rights.

The above issue is stipulated differently by the Land Law 2013. Under the Land Law 2013, the condition for a recognized land-use right transaction is only a transaction to transfer the land-use rights. Thus, the Land Law does not require determining the basis for establishing land-use rights of the transferor. Therefore, the land-use rights are always recognized in favor of B, no matter what A obtained the land-use rights under the transfer of rights or allocation, lease, or recognition by the State.

Differences between two statutes issued by the same authority, when they govern the same issues, cause several interpretations and implications. There is an opinion that the Civil Code 2015 should apply. This argument relies on Article 156 of the Law on promulgating legal documents. On the contrary, it is argued that it is necessary to apply the Land Law 2013 because this is a specialized law, and the Land Law 2013 Article 1 and also stipulates so.

In practice, courts do not seem to apply the Land Law 2013. The non-application of the Land Law 2013 is probably because its provisions are inconsistent with the principle. In general, under Vietnamese law, as mentioned above, property ownership in general and land-use rights in particular are not established by registration, except in case of transfer of land-use rights. On the other hand, the nature and principles of the registration of land-use rights in Vietnam are not as accessible as registering for the establishment of ownership rights under the Torrens system (Chau & Nguyen, 2020). For that reason, even in cases where the land-use rights are established under registration in case of transfer of rights, it is not intended to ensure the certainty of the seller's status to the buyer.

Thus, the Land Law 2013 on this matter has made progress in creating stability in land-use right transactions. However, because Vietnamese relevant rules have not been changed to agree with the Land Law 2013 provisions, this Land law solution has not been effective. The above-mentioned limitation has also been identified and proposed by the researchers, as mentioned above. Therefore, perhaps shortly, the lawmakers should accept the shortcomings of the rules on land-use rights transactions and make the adjustment to protect the interests and benefits of participants in the transaction and other related persons when the party conducting the transaction (ie, the seller, the capital contributor ...) is not the true owner, but at the time of the transaction, the party participating in the transaction (the buyer, the capital contributor) does not know and ought not to know about this.

In the short term, foreign-invested enterprises and related persons need to identify these legal risks to avoid them when implementing this regulation in practice.

Third, the concept of bona fide when participating in transactions is not clearly defined

According to the law, a transaction between a party who takes transfer of the land-use rights (transferee, capital contributor, and the like) with a party who is not eligible to conduct the transaction or in which the land-use rights are not allowed to trade is enforceable if the former is determined as a bona fide party. However, there are no criteria to determine the concept of bona fide in this case. Indeed, a bona fide party is a person participating in a transaction without the knowledge or who is not ought to know at the time of the transaction that a transaction is inconsistent with the law, that is to say, the other party is not entitled to enter such transaction. In other words, when entering into a transaction, a bona fide party fully believes that the transferor is the one who has the authority to trade and that the transaction meets the conditions for the trade to take effect. Otherwise, a party who knows or ought to know that the counter-party in their transaction is not entitled to the transaction is not considered a party in good faith and is not protected against the property's true owner.

However, the critical question is what is the ground to determine a bona fide party relying on her belief in a transferor party as the legitimate holder of the land-use rights remains a question with many different assumptions.

These assumptions will be discussed in detail as follows.

In the first assumption, the information on land-use right certificates is sufficient.

In the second assumption, it is not only the land-use right certificate but also information directly related to the identification of the transferor (the owner of the property). It relies on the law on certificates of land-use rights and the law on establishing land-use rights. In Vietnamese law, a certificate of land-use rights aims to confirm land-use rights, not establish land-use rights. The establishment of land-use rights is, in principle, based on documentation evidencing the establishment. With this setting, the information documented is the basis for determining who duly has the land-use rights, not the information on the land-use right certificate, or even information in the Land Register Record carried out by public authorities. The information in the Land Register Record and the information on the land-use right certificate can still be modified according to the information provided in the land documentation. Bearing in mind that the land-use right certificate can still be abolished under Article 106 of the Land Law 2013. On the other hand, there is no rule that a party of a transaction concerning the land-use rights is required to rely only on the certificate of land-use rights to determine who has the right to use land. Therefore, determining who is the holder of land-use rights and other requirements of an enforceable transaction is based not only on the land-use right certificate but also on information bearing in any documentation establishing land-use rights.

The third assumption is based on the decision to resolve the dispute over land-use rights by the state authority with respect to the auction. It has a legal ground from Clause 2, Article 133 of the Civil Code 2015. However, this provision is certainly not sufficiently determine good faith because it aims at supplementing a condition for a transaction in general and a transaction of the land-use rights in particular to be not nullified just in case the other party of the transactions is not a true owner. The condition reads as "a third party in good faith who receives this property through auction conducted by a competent organization from a party, according to a judgment or decision of a competent state agency is the owner of the property, but then the latter turns out not to be the property's owner due to the abolishment or modification of the given judgment or decision .

In the fourth assumption, a party is considered in good faith if the transaction has been notarized or authenticated and the court has no evidence that she knew that the other party of the transaction was not the land-user. It takes the purpose of notarization and authentication as the primary justification. Accordingly, notarization and authentication aim to ensure that the transaction meets requirements conditioned upon the parties and other requirements prescribed by law. For this purpose, it is reasonable for the parties to be released from the obligation to find out information about whether the party to the transaction is the land-user or not.

As discussed above, the law does not clearly and in detail stipulate when a party is considered as bona fide. Meanwhile, different assumptions are suggested to determine a bona fide party in a transaction. The second and fourth assumptions are likely to be satisfactory.

The ambiguity of the rules on bona fide party concerning land-use rights transactions leads to difficult implementation, costly search for information, the expense of dispute settlement, and restrains parties from entering transactions due to the fear of risk. Scholars have been recognized and recommended to modify the respective law for years.

According to the recommendations of [Chau and Nguyen \(2020\)](#), the Vietnamese law should clearly stipulate what information a party ought to know about the other party of a transaction in particular and a transaction itself in general for the purpose of determination of bona fide party. Besides, there should also be regulations to ensure owners and related persons can access information related to transactions to take timely action to protect the main interests at the lowest possible cost.

With this goal, it is difficult to identify the owner in practice because it is necessary to find out all information relating to the establishment of the land-use rights of the party for at least 30 years (the prescriptive period to establish ownership under possession), considering the policy to protect the benefit of bona fide parties, owners, and related persons. The cost and time spent searching for this information are not small. Therefore, it does not encourage participation in a transaction due to the waiting time to verify the information and the afraid of risk.

To avoid the above disadvantage, the Torrens registration system was born (Torrens system for land registration was initiated in Australia and so far has been accepted in many countries). With this registration system's

primary purpose of ensuring that land could be sold freely, the registration system aims that holders of land rights can be easily identified and their relationship to the land must be known in advance. All other property rights take priority subordinate to the new registered owners in order to protect potential buyers. This registration system introduces a special priority rule. Accordingly, the parties are only bound by the information in the Register (Dixon, 2016). Parties can easily access this information through the electronic system. Thus, with its goals and operations, the Torrens registration system ensures that participants in transactions avoid the risk of trading with non-real owners at lower costs compared to the other registration system. Vietnamese law can adopt the registration of land-use rights under the Torrens registration system mentioned above. Currently, it seems that Vietnamese law has also partially approached this system by implanting some of the Torrens registry system principles. However, this amendment is not clear and does not go to the basic principles. Article 106 of the Land Law 2013 and Article 133 of the Civil Code 2015 provide for recognizing the transfer of land-use rights. Then, this transaction is recognized if it was registered at the Land Registration Office.

The legal transplant does not guarantee the rights of the real owner and the person involved. It should be noticed that Vietnam still follows a registration system of land-use rights for the purpose of confirming ownership rights. In contrast, the nature of registration under the Torrens registry system is to establish land-use rights. Therefore, the legal transplant of the Torrens system does not adopt the nature of this registration policy. This law does not seem to be applied in practice. In fact, some cases need to refer to the provisions of Article 106 of the Land Law, but have not seen a court or competent authority apply the rule of Article 106 of the Land Law as the authority for judgment. To promote land-use rights transactions, protect the benefit of bona fide party, true owners, and related persons, the authors mentioned above have suggested that Vietnam apply the Torrens system registration model. Today, when this system has not been applied, a bona fide party should be determined based on the fact that this person has identified the person conducting the land-use right transaction through a certificate issued by the competent authority. In the event that the real land-user is not the person whose name is on the land-use right certificate, the bona fide party's land-use rights should be recognized. The true land-user cannot reclaim the land-use rights but claim for compensation of damages.

CONCLUSION, RECOMMENDATIONS AND IMPLICATIONS

In more than thirty years, Vietnam has led to law and policy on investment incentives, which significantly inspires foreign direct investments. Incredibly, the provisions on land-use take a vital role. It could be noted that Vietnam has been eliminating inconsistent rules on rights to land-use as much as possible. It thereby sends excellent services to foreign investors in their execution of investment projects.

Vietnam persistently imposes the entire citizens ownership of land, which, however, could not hinder the individuals as well as enterprises in using the land (V. V. Pham, 2014; V. Nguyen & Nguyen, 2004); Moreover, the maintenance of land ownership that belongs to the entire people can stabilize Vietnamese political, social, and economic conditions in which the foreign investors promptly seek the rights to land-use in Vietnam. In detail, for the land contributed to the foreign investors, the State acting as the owners representative and uniformly managing land acts to acquire land and supply the compensation to the precedent land-users. It appears that the investors could prevent unreasonable costs in using the land. In other words, foreign investors avoid to waste time to negotiate with the previous land-users for their investment projects. Accordingly, they could prevent their land-use for the high price the users impose for its monopoly abuse of current land-use or other risks.

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