

**DECREE NO. 38/2003/ND-CP DATED APR. 15, 2003 ON CONVERSION OF A NUMBER OF
FOREIGN INVESTED ENTERPRISES**

GOVERNMENT

SOCIALIST REPUBLIC OF VIETNAM

Independence – Freedom – Happiness

No: 38/2003/ND-CP

Hanoi, 15 April 2003

**DECREE OF THE GOVERNMENT
on the conversion of a number of Foreign Invested Enterprises
into Shareholding Companies**

THE GOVERNMENT

Pursuant to the Law on the Organisation of the Government dated 25 December 2001;

Pursuant to the Law on Enterprises dated 12 June 1999;

Pursuant to the Law on Foreign Investment in Vietnam dated 12 November 1996; the Law on Amendment and Addition to a number of Articles of the Law on Foreign Investment in Vietnam dated 9 June 2000;

Pursuant to the ideas of the Standing Committee of the National Assembly stated on the official document 08/UBTVQH dated 13 January 2003 in relation to the issuance of the Government's Decree on the conversion of a number of Foreign Invested Enterprises into Shareholding Companies; and

At the proposal of the Minister of Planning and Investment;

DECREES:

**Chapter I
GENERAL PROVISIONS**

Article 1. Scope of application

This Decree stipulates the conversion of a number of foreign invested enterprises operating under the Law on Foreign Investment in Vietnam into Shareholding Companies with foreign invested capital.

Shareholding Companies with foreign invested capital must operate in accordance with this Decree and the relevant laws.

Article 2. Objectives of the conversion

The conversion of certain foreign invested enterprises into Shareholding Companies aims to:

1. Increase the operational efficiency of foreign invested enterprises;
2. Mobilise capital from foreign and domestic investors into the investment in the renewal of technology, the creation of jobs and the development of enterprises;
3. Diversify investment forms and improve the investment environment to further attract foreign investment; and
4. Provide further product for the Vietnamese stock exchange.

Article 3. Interpretation of terms

In this Decree, the terms are interpreted as follows:

1. "Conversion of Enterprises" means the conversion of foreign invested enterprises established and operating under the Law on Foreign Investment in Vietnam into Shareholding Companies with

foreign invested capital.

2. “Shareholding Company with foreign invested capital” (hereinafter referred to as “Shareholding Company”) means an enterprise that has its chartered capital divided into many equal parts, mentioned as “shares”; in which foreign founding shareholders hold at least 30% of the chartered capital; that is organised and operating in the form of a Shareholding Company as stipulated in this Decree and is entitled to enjoy guarantees of the State of Vietnam and incentives in accordance with the provisions of the Law on Foreign Investment in Vietnam.
3. “Foreign invested enterprise with foreign invested capital” (hereinafter referred to as an “enterprise”) means a joint venture enterprise or a 100% foreign owned enterprise, established under the Law on Foreign Investment in Vietnam.
4. “Charter capital” means the amount of capital contributed by shareholders and stated in the Charter of a Shareholding Company.
5. “Voting capital” means the amount of capital contribution entitling the share owner to vote on matters decided by the General Meeting of Shareholders.
6. “Foreign shareholder” means a foreign organisation or individual that owns shares in a Shareholding Company.
7. “Vietnamese shareholder” means a Vietnamese organisation or individual that owns shares in a Shareholding Company.
8. “Founding shareholder of a Shareholding Company” means an investor who made a contribution to the legal capital of an enterprise before it was converted into a Shareholding Company, or an organisation or individual that owns shares of the founding shareholder.
9. “Dividend” means the amount of money extracted yearly from the profits of a Shareholding Company with foreign invested capital for the payment of each share.
10. “Manager of an enterprise” means a member of the Board of Management, (General) Director and other key managerial positions as stated in the Charter of a Shareholding Company.

Article 4. Form of conversion

Enterprises may be converted in accordance with the following forms:

1. Maintain the value of the enterprise and its investors;
2. Assign part of the enterprise’s value to new shareholders; or
3. Maintain the value of the enterprise or assigning part of its capital and issue further shares to attract investment capital.

Article 5. Entities purchasing shares

Entities that may purchase shares from a Shareholding Companies include:

1. Vietnamese organisations or individuals;
2. Foreign invested enterprises in Vietnam, foreign organisations or individuals; and
3. Overseas Vietnamese. This entity shall be entitled to determine whether to be a foreign shareholder or a Vietnamese shareholder. However, they must register upon purchasing shares and they shall enjoy the respective rights and implement the respective responsibilities.

Article 6. State guarantees for shareholders and Shareholding Companies with foreign invested capital

The ownership of capital and other legitimate rights and interests of shareholders and Shareholding

Companies are protected by the Government of Vietnam in accordance with the regulations of the law.

Where the Government of Vietnam enters into an International Agreement on investment encouragement and protection with other countries, which is different from the regulations of this Decree, the regulations of that International Agreement will apply.

Chapter II

CONDITIONS FOR CONVERSION

Article 7. Conditions for conversion

Enterprises that are eligible for conversion must satisfy the following conditions:

1. Contributed full legal capital in accordance with the provisions of the Investment Licence;
2. Officially operated for at least 3 years, and the last year prior to the conversion is a profit-making year; and
3. Submitted a proposal for conversion.

The Ministry of Planning and Investment shall assume the primary responsibility of coordinating with the Ministry of Finance and related State bodies to select foreign invested enterprises operating in the **fields of industry, agriculture and services** who satisfy the above conditions, for submission to the Prime Minister for consideration and decision.

Article 8. Responsibilities and rights of the enterprise during the conversion process:

1. The enterprise shall continue to maintain its organisational structure and operations in accordance with the provisions of the Law on Foreign Investment in Vietnam until it is issued with an amended Investment Licence approving the conversion.
2. The enterprise must ensure that its business and production activities are in order, and that the rights and interests of its employees are maintained in accordance with provisions of the labour law.
3. The Government of Vietnam encourages enterprises to sell their shares under preferential conditions to managers, employees and workers of the enterprise depending on each employee's respective contributions and the business operation results of the enterprise.

Article 9. Value of the enterprise to be converted into a Shareholding Company

1. The value of an enterprise to be converted into a Shareholding Company is the total value of assets shown on the enterprise's accounting books which have been audited within 6 months before the time when the enterprise submits the application file for conversion. This value is the basis for the determination of the minimum price of shares sold and issued by the company.
2. With respect to a joint venture enterprise, the ratio of capital held by the joint venture parties after the value of the enterprise has been re-determined is the ratio of legal capital contributed by the parties as stipulated in the Investment Licence.
3. With respect to a joint venture enterprise to which the Vietnamese party makes a capital contribution in the form of the value of land use rights, the value of the land use rights and the duration of such a capital contribution shall be maintained in accordance with the provisions of the Investment Licence and calculated into the enterprise's value for conversion. When the duration of the land use rights contributed as capital by the Vietnamese party expires, the Shareholding Company shall switch to leasing land from the Government of Vietnam.

The enterprise shall be allowed to hire domestic or foreign Consultancy Firms, Financial Companies, Auditing Companies and Securities Companies to determine the enterprise's value, the selling price or the issuing price of shares.

Chapter III

ORGANISATION OF THE ACTIVITIES OF SHAREHOLDING COMPANIES WITH FOREIGN INVESTED CAPITAL

Article 10. Capital contribution by foreign shareholders

1. A Shareholding Company must have at least one foreign founding shareholder and the total value of the foreign founding shareholders' shares must be at least equal to 30% of the Chartered capital during the company's operation.
2. A shareholder of a Shareholding Company shall be liable for the debts and other property obligations of the Shareholding Company to the extent of the amount of the capital contributed to the Company by the shareholder.
3. A shareholder is entitled to assign his/her share in accordance with the provisions of this Decree.
4. A shareholder may be an organisation or an individual. The minimum number of shareholders is three and there is no limit on the maximum number.
5. Foreign shareholders are entitled to take part in the management of a Shareholding Company.

Article 11. Register of Shareholders

1. A Shareholding Company shall establish and maintain a register of shareholders. The register of shareholders may be in the form of a document or an electronic file, or both.
2. A register of shareholders must contain the following main particulars:
 - a) Name and office of the Shareholding Company;
 - b) Total number of shares to be offered for sale, classes of shares to be offered for sale, the number of shares of each class to be offered for sale and the total number of shares held by foreign shareholders;
 - c) Total number of the shares of each class already sold and the value of the equity already contributed; and
 - d) Name of the shareholders, their nationality and address, the number of shares of each class held by each shareholder and the date of share registration.
3. The register of shareholders may be retained at the office of the Shareholding Company or a different location, provided that the Ministry of Planning and Investment and all shareholders are informed of the location in writing.

Article 12. Share certificates

1. Share certificates of a Shareholding Company are certificates issued by the Shareholding Company, certifying the ownership of one or more shares of the shareholders who contribute capital to such a company.
2. The par value of shares of a Shareholding Company will be recorded in Vietnamese Dong or in a generally used freely convertible foreign currency. All shares transacted in Vietnam must be recorded in Vietnamese Dong. The exchange rate between Vietnamese Dong and the foreign currency will be the average trading exchange rate of the inter-bank foreign currency market announced by the State Bank of Vietnam at the time of conversion.
3. Foreign founding shareholders must hold share certificates that indicate the name of at least the value equal to the share value as stipulated in Clause 1 of Article 10 of this Decree.
4. A share certificate must contain the following main particulars:
 - a) Name and office of the company;

- b) Number and date of issuance of the amended investment licence approving the conversion;
- c) Number of shares;
- d) Classes of shares;
- e) Par value of each share and the total par value of shares included in the share certificate;
- f) Name and nationality of the shareholder in cases where the share certificate indicates the name;
- g) Summary of the procedures for share assignment;
- h) Specimen signatures of the legal representative and the seal of the company;
- i) Registration number noted in the register of shareholders of the company and the date of issuance of the share certificate; and
- j) Preference share certificates shall include other details as stipulated in Clause 3 of Article 19 of this Decree.

Article 13. Rights and obligations of the Shareholding Company with foreign invested capital

The Shareholding Company shall:

1. Be exempted from the registration fee for the transfer of the ownership of assets from the foreign invested enterprise to the Shareholding Company;
2. Inherit and fulfil the rights and obligations of the converted enterprise to the State of Vietnam, third parties and employees;
3. Continue to implement the approved investment project, settle outstanding debts and fulfil other financial obligations of the converted enterprise; and
4. The shareholders of the Shareholding Company shall fulfil their tax obligations in accordance with the regulations of the law.
5. The Shareholding Company shall be entitled to enjoy business income tax incentives, resolve disputes that arise and perform other rights and obligations as stipulated in the Law on Foreign Investment in Vietnam and in the Investment Licence which was issued before the conversion.

Article 14. Listing on the Stock Exchange

1. The Shareholding Company is to be listed on the domestic stock exchange in accordance with the regulations of the law on the stock exchange.
2. The Shareholding Company shall be listed on the foreign stock exchange after it has been approved by the competent State agency of Vietnam.

Article 15. Assignment of foreign founder shareholders' shares

1. During the course of operation, foreign founding shareholders are allowed to assign their founding shares to foreign organisations or individuals.
2. The assignment of shares held by foreign founding shareholders to Vietnamese organisations or individuals must be approved by the Ministry of Planning and Investment, and must be in accordance with the provisions of Clause 1 of Article 10 and Clause 3 of Article 12 of this Decree. Foreign founding shareholders must use the proceeds from the assignment of the foreign founding shareholders' shares for reinvestment in Vietnam. Where the proceeds from the assignment of the shares of the foreign founding shareholder are remitted out of Vietnam, the approval from the competent authority must be obtained.

Article 16. Dissolution of the Shareholding Company with foreign invested capital

A Shareholding Company will be dissolved in the following circumstances:

1. At the expiration of the duration of operation stated in the Charter and there is no decision to extend the operation;
2. According to the decision of the General Meeting of Shareholders;
3. Where the Shareholding Company has not had the minimum number of shareholders for 6 consecutive months; and
4. The Shareholding Company's investment licence is withdrawn.

Article 17. Procedures for termination of operations, liquidation of assets and dissolution of Shareholding Companies

The termination of operations, liquidation of assets and dissolution of a Shareholding Company shall be carried out in accordance with the following procedures:

1. The Ministry of Planning and Investment shall issue a decision on the termination of operations of the Shareholding Company;
2. The Shareholding Company shall be responsible for the establishment of a Liquidation Board that will conduct the liquidation of the Shareholding Company's assets; and
3. After the liquidation process is completed, the Shareholding Company shall submit the liquidation file to the Ministry of Planning and Investment for its consideration and decision.

Article 18. Bankruptcy Procedure for Shareholding Companies

The bankruptcy procedure for a Shareholding Company will be carried out in accordance with the provisions of the Vietnamese Law on Business Bankruptcy.

Article 19. Application of certain provisions of the Law on Enterprises to Shareholding Companies with foreign invested capital

1. Shares are classified in accordance with the provisions of Article 52 of the Law on Enterprises.
2. The rights and obligations of ordinary shareholders shall be implemented in accordance with the provisions of Articles 53 and 54 of the Law on Enterprises.
3. The rights of preferential shareholders shall be implemented in accordance with Articles 55, 56 and 57 of the Law on Enterprises.
4. The offering, assignment, purchase and repurchase of shares, the conditions for settlement and dealings with repurchased shares, the payment of dividends and the recovery of payments for repurchased shares or dividends shall be implemented in accordance with the provisions of Articles 61, 63, 64, 65, 66, 67 and 68 of the Law on Enterprises and Article 15 of this Decree.
5. The organisational and managerial structure of the Shareholding Company and the General Meeting of Shareholders, and the conduct of the General Meeting of Shareholders shall comply with the provisions of Articles 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79 and 87 of the Law on Enterprises.
6. The organisation, powers, duties and activities of the Board of Management of a Shareholding Company shall comply with Articles 80, 81, 83, 84 and 87 of the Law on Enterprises.
7. The rights and obligations of the (General) Director and managers of the Shareholding Company, and the appointment procedure for these positions, shall be in accordance with the provisions of Article 85 and 86 of the Law on Enterprises.

8. The rights and duties of the Inspection Committee of the Shareholding Company shall be in accordance with Articles 88, 89, 90 and 91 of the Law on Enterprises.
9. The auditing, disclosure of information and retaining of documents for records by the Shareholding Company shall comply with the provisions of Articles 92, 93 and 94 of the Law on Enterprises.

Chapter IV ORGANISATION OF THE IMPLEMENTATION

Article 20. Application file for the conversion into a Shareholding Company

8 (eight) sets of the application file for the conversion into a Shareholding Company shall be submitted to the Ministry of Planning and Investment, in which at least 1 (one) set is the original. Each set shall include:

1. An application for conversion into a Shareholding Company, signed by the Director of the enterprise;
2. The conversion plan;
3. A report on the enterprise's operation prior to conversion;
4. A draft Charter of the Shareholding Company; and
5. A resolution of the enterprise's Board of Management or of the investors providing approval for the conversion plan.

Article 21. Contents of the conversion plan and report on the enterprise's operation

1. The plan for the conversion of the enterprise into a Shareholding Company shall include the following contents:
 - a) Objectives and requirements of the conversion;
 - b) Anticipated scale and form of the conversion including the chartered capital, number of shares, value of each share, ratio of shares held by founding shareholders and ratio of shares held by other shareholders;
 - c) The time expected to carry out the conversion, the time to issue shares and the place to sell shares (if any);
 - d) A plan in relation to the use of employees and the preferential policy (if any) on the sale of the enterprise's shares to employees working for the enterprise (such as a reduction of the price of shares, sale of shares on a deferred payment basis and deduction of the share purchase amount from employee salaries and bonuses, etc.);
 - e) The anticipated issuance of shares into the domestic and foreign stock exchange, including the quantity of shares and the control and management mechanism; and
 - f) Results of the determination of the enterprise's value.
2. The report on the enterprise's operations shall include the following contents:
 - a) The implementation of the project including the contribution of investment capital and legal capital, the enterprise's business and/or production activities for each operational year;
 - b) The enterprise's liabilities, assets, materials and stock situation, and an analysis of problems and strategies to deal with them;
 - c) The labour situation;

- d) Inventory of the enterprise's assets, materials, capital and liabilities; and
 - e) The audited financial statements for the last 3 years prior to the time the proposal for the conversion into a Shareholding Company is submitted.
3. Draft Charter of the Shareholding Company includes the following main contents:
- a) Name, address of the head office, branch or representative office (if any);
 - b) Objectives of the company and its business activities;
 - c) Chartered capital;
 - d) Name, nationality and address of all founding shareholders;
 - e) The number of shares that the founding shareholders commit to buy, the kinds of shares, the par value of each share and the total shares in each category allowed to be offered;
 - f) The rights and obligations of shareholders;
 - g) Organisational and managerial structure;
 - h) The legal representative of the company;
 - i) Procedures for making decisions of the Shareholding Company and the principles for the settlement of internal disputes;
 - j) Circumstances where shareholders may request the Shareholding Company to repurchase shares;
 - k) The kinds of funds, and the limited amount for each kind of fund, which may be set up by the Shareholding Company and the principles for the distribution of profits, paying dividends and suffering business losses;
 - l) Circumstances when the Shareholding Company will be dissolved and procedures for the dissolution of the company and liquidation of the company's assets;
 - m) Procedures for the amendment of, and addition to, the Charter of the Shareholding Company; and
 - n) Signature(s) of the company's legal representative or of all founding shareholders.

Other contents of the Shareholding Company's Charter may be agreed to by the shareholders provided that they are not contrary to the regulations of the law.

Article 22. Authority to make decisions regarding the conversion into a Shareholding Company

1. Based on the provisions of this Decree the Ministry of Planning and Investment shall guide foreign invested enterprises with respect to the preparation and submission of application files for the conversion into Shareholding Companies.

Within 30 days from receipt of the complete and legitimate application file, the Ministry of Planning and Investment shall assume the prime responsibility for obtaining opinions from the relevant ministries and branches and submitting the file to the Prime Minister for consideration and approval.

2. After the application file is approved by the Prime Minister, the Ministry of Planning and Investment shall notify the enterprise to perform the implementation of tasks stipulated in Article 23 of this Decree. It must then report the results to the Ministry of Planning and Investment in order to be issued with the amended Investment Licence approving of the conversion of the enterprise. The amended Investment Licence will be valid as a Business Registration Certificate.

Article 23. Implementation of the conversion

After the enterprise's conversion plan has been approved by the Ministry of Planning and Investment, the enterprise shall conduct the following tasks:

1. To publicly notify its conversion into a Shareholding Company through the mass media and to its creditors;
2. To organise the sale of shares or the issuance of share certificates;
3. To convene the first General Meeting of Shareholders to pass the company's Charter and vote in the Shareholding Company's Board of Management;
4. The Board of Management will appoint the (General) Director; and
5. To organise the hand-over of capital, assets, employees and liabilities from the Board of Management or the investors of the enterprise to the Board of Management of the Shareholding Company.

Article 24. Announcement of the operations as a Shareholding Company

1. Within 30 days from the date of issuance of the amended investment licence for the conversion of the enterprise, the Shareholding Company must publish the following main information in three consecutive issues of a local newspaper or a daily newspaper of the central Government:
 - a) Name of Shareholding Company;
 - b) The number and issuing date of the amended Investment Licence;
 - c) Address of the Shareholding Company's head office, branch or representative office (if any);
 - d) Objectives of the Shareholding Company and its business activities;
 - e) Chartered capital;
 - f) Full name and address of founding shareholders; and
 - g) Full name and resident address of the legal representative of the Shareholding Company's representative.
2. When there is any change in the above items, the Shareholding Company must announce such change without delay in accordance with the provisions in clause 1 of this Article.

Article 25. Responsibilities of State management agencies

The State management agencies shall perform their functions to manage the conversion into, and operation of, Shareholding Companies in accordance with their jurisdiction and the regulations of the law.

On a 6 months periodical basis, the Ministry of Planning and Investment shall report to the Government and shall also act on the mandate of the Government to report to the Standing Committee of the National Assembly on the status of the conversion of foreign invested enterprises into Shareholding Companies.

Chapter V IMPLEMENTING PROVISIONS

Article 26. Implementing effect

This Decree shall have full force and effect after 15 (fifteen) days from the date it is published in the Official Gazette.

The selection of enterprises for conversion into Shareholding Companies shall be carried out within 1 year from the effective date of this Decree.

After 2 years from the date when this Decree comes into effect, the Ministry of Planning and Investment shall, together with relevant ministries and branches, review the implementation of this Decree and report on the results to the Government, so that the Government can report to the Standing Committee of the National Assembly and the National Assembly.

Article 27. Organisation of the implementation

1. The Ministry of Planning and Investment, the Ministry of Finance, the State Bank of Vietnam and other relevant State agencies shall have the responsibility of providing guidelines on the implementation of this Decree.
2. The Ministers, Heads of ministerial equivalent agencies and State agencies and chairmen of people's committees of provinces and cities under the control of the Government shall be responsible for the implementation of this Decree.

ON BEHALF OF THE GOVERNMENT
THE PRIME MINISTER
Phan Van Khai