



Legal and Tax

FOREIGN LOANS FOR VIETNAMESE BORROWERS – Q&A

Update as of January 2023



VDB LOI IN VIETNAM

VDB Loi has been operating in Vietnam since **2013**. Our practice concentrates on the natural synergies that exist between legal and tax. We solve our clients' issues by knowing their business, their industry and seeing the broad picture of doing business in Vietnam.

A combination of Vietnamese and international experts in our team allows us to provide in-depth local law and tax advice that takes into account modern international standards and approaches, thus anticipating clients' expectations and helping them reach their goals in the most efficient manner.

Our advice is relied upon by international and development financial institutions for some of the region's largest ever financing transactions. Multinationals often choose us for multibillion dollar investment projects in a wide range of sectors.

We have particularly strong expertise in Energy and Infrastructure, Project Finance, Real Estate, TMT, and Tax. VDB Loi also provides ongoing support to its clients at all stages of their investments in Vietnam, from initial market entry, business set up, and obtaining regulatory approvals, to continued compliance with reporting and filing requirements.

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In this briefing the team of VDB Loi (Vietnam) answers to the most frequently raised questions relating to the provision of foreign loans to companies in Vietnam.

In particular, the note covers the developments that were formalized by the State Bank of Vietnam by replacing the Circular No. 03/2016/TT-NHNN, dated 26 February 2016 (“**Circular 03**”) with Circular No. 12/2022/TT-NHNN, dated 30 September 2022 (“**Circular 12**”) which provide for general procedure of foreign loans registration.

This article generally assumes that parties are looking to implement long-term financing for a company registered in Vietnam. Note that additional requirements may apply to certain specifically regulated entities (e.g., banks or state-owned enterprises). Structuring of multi-lender (syndicated) loans is also associated with additional considerations that will be addressed separately.

TOPICS:

- What is the **key specifics** of foreign loans regulation in Vietnam
- What are the **requirements applicable to a Vietnamese company** to make it capable of receiving a loan from abroad
- Which **permits** are required to receive / repay the loan and pay interest?
- Is it necessary to obtain SBV registration if the **terms of the loan are subsequently changed**
- Are there any limitations on the **interest rate**
- Would any **withholding tax** apply on interest payments
- Are there any **stamping, notarization or similar duties** applicable upon signing loan agreement
- Is there a specific **procedure for making loan-related / security-related payments**
- Are there any cases when payments do not have to be routed through **specifically designated accounts**
- Which **banks** need to be involved in loan-related / security-related monetary transfers
- Can borrower receive loan via a **facility/payment agent** and not directly from relevant lender (if this is a syndicated or a club loan transaction)? Would repayments be possible in such way too?
- What **types of security** can be offered by a Vietnamese borrower and are there any restrictions applicable to security for loans for foreign lenders?
- Can we take security over “**any and all assets**” of the debtor, like a floating charge
- What are the major **perfection requirements** for security and how difficult is the process?
- Can **guarantees** be provided by a Vietnamese company to secure a loan obtained by a Vietnamese borrower

1. What is the key specifics of foreign loans regulation in Vietnam: summary

When structuring a new financing transaction in Vietnam it is important to keep in mind certain specific rules and requirements:

- **Annual quota:** There is a general annual quota approved in relation to the total size of offshore loans of Vietnamese borrowers (without government guarantee). For 2022 the quota was set at 7,300 million US dollars. The quota for 2023 is expected to be published soon
- **Registration:** Medium- and long-term loans (i.e., those term of which exceeds 1 year) are subject to registration with the State Bank of Vietnam (“**SBV**”). Short-term loans are generally not subject to SBV registration. However, in certain cases (such as extensions to over 1 year) registration with SBV would be required.
- **Specific use of funds:** Generally, offshore loans can only be received by Vietnamese company for a limited number of purposes: namely implementation of their project or refinancing of another foreign loan.

- **Security regime:** Various types of assets can be made subject to security. However, limitations remain with respect to the availability of land and buildings as security for the benefit of foreign lenders.
- **Guarantees:** In relation to guarantees, it is important to keep in mind certain restrictions that apply specifically to publicly listed companies and to guarantees as security for obligations of offshore borrowers.

2. What are the requirements applicable to a Vietnamese company to make it capable of receiving a loan from abroad?

When structuring a loan transaction with a borrower in Vietnam, several aspects are typically verified to ensure compliance with local laws. Some of the key points to be kept in mind are summarized below:

Annual quota

There is an annual cap on foreign loans approved by the Prime Minister of Vietnam. The limit for mid- and long-term loans for 2022 was set at 7,300 million US dollars. The limit for 2023 has not been published yet (in 2022 the publication was made around April).

IRC cap

For the company, that is a holder of an Investment Registration Certificate, it is necessary to check that the new mid- or long-term loan will be within the approved total investment size (as reduced by the amount of contributed equity investment and of the earlier obtained long-term loans).

Debt-to-Equity Ratio (real estate developers)

For borrowers who are developing real estate projects, there is an additional requirement that their equity capital shall not be less than 20% of the total investment capital (if its land area under development is less than 20 hectares). If the land exceeds 20 hectares, the share of equity shall be not less than 15% of the total investment capital.

Purpose

There are specific requirements with respect to the purpose for which foreign loans can be obtained.

In practice, in order to register the loan, Circular 12 requires the borrower to submit a dossier of documents including “**written proof of borrowing purposes**”. Circular 12 lists the following options of using the foreign loan:

1. to implement an investment project of a foreign-invested company.
2. for other (locally owned) companies – to implement production and business plans, as such plans were approved by relevant authorities.
3. to restructure foreign debts.



Parties should note that compliance with these requirements can be verified by authorities on continued basis, and deviation from permitted purpose of using loan proceeds may result in substantial penalties.

3. Which permits are required to receive / repay the loan and pay interest?

Under the current regulations, certain foreign loans are subject to registration with SBV. This includes, among others:

- Medium- and long-term foreign loans (with a term of over 1 year). The loan duration is generally determined from the expected date of the first disbursement to the last expected date of repayment.
- Short-term foreign loans for which the loan term has been extended and the total duration of the loan is more than one year.

Registration procedure can be completed by making submission of a hardcopy application or online (through a registered online account of the borrower with SBV). Submission of a copy of loan agreement with translation into Vietnamese language is required.

Recent development:

Circular 12 in many cases replaced reference to “**days**” with “**business days**” when describing various deadlines. In particular dossier for registering new foreign loan shall now be submitted for registration withing 30 business days from signing the loan agreement.

Upon completion of registration, SBV would issue a certification (ruling) confirming that the loan has been registered.

4. Is it necessary to obtain SBV registration if the terms of the loan are subsequently changed?

Generally, yes.

Circular 12 lists a number of cases when changes do not have to be registered and can just be notified to SBV. However, these generally relate to rather minor and insubstantial modification of the terms of the loan and its disbursement / repayment schedule.

5. Are there any limitations on the interest rate?

Based on available legal regulations, the lender and borrower can agree on the cost of the loan in their contract. SBV has the authority to set a cap from time to time, if it deems necessary. In practice, loans where interest rate could be considered unreasonably high compared with what is the market range, could potentially face challenges at the stage of registration with SBV.



6. Would any withholding tax apply on interest payments?

As a general rule, borrower would be required to withhold 5% income tax from the interest or any associated fees paid to the offshore lender. Tax gross-up provisions are frequently included into the finance documentation. It should be noted that in loans from related parties, the borrower will be limited to deduction of interest cost in the amount not exceeding 30% EBITDA for the year. The surplus, however, can still be carried forward to a maximum of five subsequent years.

7. Are there any stamping, notarization or similar duties applicable upon signing loan agreement?

There is no stamp duty in Vietnam for execution or registration of the loan agreement. Notarization fees (in relation to the security documents) typically depend on the value of the charged property or the value of the transaction.

8. Is there a specific procedure for making loan-related / security-related payments?

Yes, the procedure is regulated in substantial detail by Circular 12 and has to be followed accordingly.

In order to receive and repay the loan, the borrower must open a special bank account.

Foreign-invested companies

For foreign-invested companies that hold Investment Registration Certificate this is referred to as Direct Investment Capital Account (“**DICA**”). If the currency of loan is different from currency of DICA, then the borrower can open another account in the loan currency *with the same bank that maintains the DICA account*.

One DICA can be used for one or several foreign loans.

Locally owned companies

For other companies (locally owned) such accounts are usually referred to as Foreign Loan Account.

A Vietnamese corporate borrower can open an offshore bank account, however, this requires special approval from SBV.

9. Are there any cases when payments do not have to be routed through specifically designated accounts

Recent development:

Yes! Some exemptions were already provided before, and Circular 12 continues and expands on the regime for such payments in line with some of the structures frequently used in international practice. The exemptions include the following cases:

- a. Direct payment to non-resident supplier of goods or services;
- b. Where payments are made via borrower’s account abroad (opened with SBV’s permission);
- c. Set-offs of obligations between lender and borrower.

In relation to repayment of loans, the exemptions also include:

- a. Debt discharge by providing goods/services to lender;
- b. Debt-to-equity conversion;
- c. Set-offs of obligations between lender and borrower
- d. Where payments are made via borrower’s account abroad (opened with SBV’s permission).

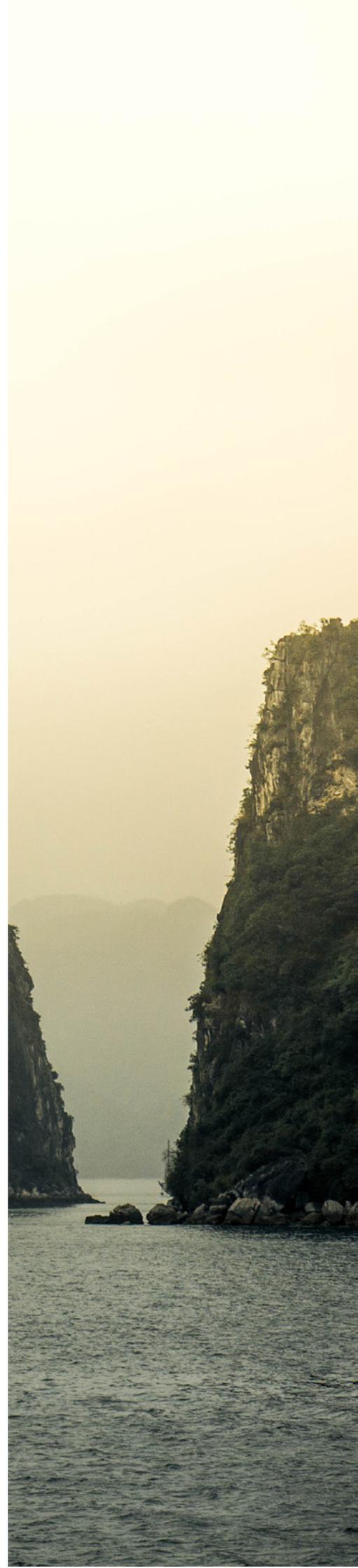
10. Which banks need to be involved in loan-related / security-related monetary transfers?

“**Account services bank**” (in Vietnamese: Ngân hàng cung ứng dịch vụ tài khoản) undertakes such operations as fund withdrawal, repayments, payment of fees.

In doing so, the account services bank reviews and verifies consistency of the operations with the details of the loan as it was registered by SBV.

Recent development:

Circular 12 also introduced the concept of “**bank servicing transaction security**” or “**security supporting bank**” (in Vietnamese: Ngân hàng phục vụ giao dịch bảo đảm).



In particular:

1. Under Article 35.2 of Circular 12, a Vietnamese guarantor shall generally make money transfers under the guarantee through such security supporting bank.
2. Under Article 36.2 of Circular 12, proceeds obtained from the realization of security in Vietnam, shall also be transferred abroad via the security supporting bank.

There is a detailed list of documents that need to be submitted to the security supporting bank in order to make payment of proceeds under guarantee or security documents (Article 37.4 of Circular 12):

- Loan agreement and relevant guarantee/security document;
- Request from the lender for performance of the secured obligation;
- Confirmation from the borrower's account service bank related to the loan withdrawal and loan repayment up to the time of the request for money transfer to perform security obligations.

As it can be inferred from Article 37.3 of the Circular 12, the account services bank and the security bank may or may not be the same financial institution.

11. Can Borrower receive loan via a facility/payment agent and not directly from relevant lender (if this is a syndicated or a club loan transaction)? Would repayments be possible in such way too?

Yes. Circular 12 (Article 32.3) mentioned the possibility to receive loans and make debt service payments to a payment bank agent of the lenders. Goes without saying, this should be described as such in the loan agreement registered with SBV.

12. What types of security can be offered by a Vietnamese borrower and are there any restrictions applicable to security for loans for foreign lenders?

Variety of assets can be used as security in projects in Vietnam, including shares, equipment and contractual rights. Given that enforcement process may potentially require resort to court proceedings (in particular, where

the borrower is not cooperating), the security is generally regarded to be more of defensive nature for the lenders. Significance of share pledge is particularly high, taking into account limitations on availability of security over immovables for the benefit of foreign lenders.

When structuring a deal, parties also consider whether additional governmental approvals would need to be obtained at the enforcement stage (e.g., due to change of control in the company upon enforcement of the share pledge).

The two most common forms of security over assets are mortgages and pledges. In a mortgage, property is used as security without the actual transfer of property to the creditor. In a pledge, property is transferred from the pledgor to the pledgee for the purposes of securing an obligation.

Recent development:

New Circular 12 in its terminology more frequently refers to more general term **"security"** (in Vietnamese: bảo đảm), as compared to previous Circular 03 which used the term that could be translated as **"guarantee"** (in Vietnamese: bảo lãnh).

This is positive development, in particular from the perspective of international lenders who make assessment as to the bankability of the security arrangements in the country and possibility of repatriating enforcement proceeds.

13. Can we take security over "any and all assets" of the debtor, like a floating charge?

Vietnam, consistently with the approach often followed in jurisdictions based on civil law principles, does not envisage the generic floating charges, which are sometimes used in common law countries.

As a result the prevailing practice is to take security over respective classes of assets and preferably describe mortgaged assets clearly in the relevant security instrument.

Decree 21/2021/ND-CP, dated 19 March 2021, which is major source of regulation of security arrangements, also allows to take security over **"goods in circulation"** as part of the production/business process or at warehouses. Such goods can be described based on their value, type and location.



14. What are the major perfection requirements for security and how difficult is the process?

For both mortgage and pledge form of security, the major perfection requirement is its registration in Vietnam. Registration of security over land (in the cases when it is possible to take it) is carried out with the Department of Natural Resources and Environment (or its authorized agency). Such security over immovables is also subject to notarization.

Security over assets other than immovables is, as a matter of practice, registered with the National Registration Agency for Security Transactions (NRAST) this is by way of additional protection for the secured Lenders. The registration process is relatively straightforward.

15. Can guarantees be provided by a Vietnamese company to secure a loan obtained by a Vietnamese borrower?

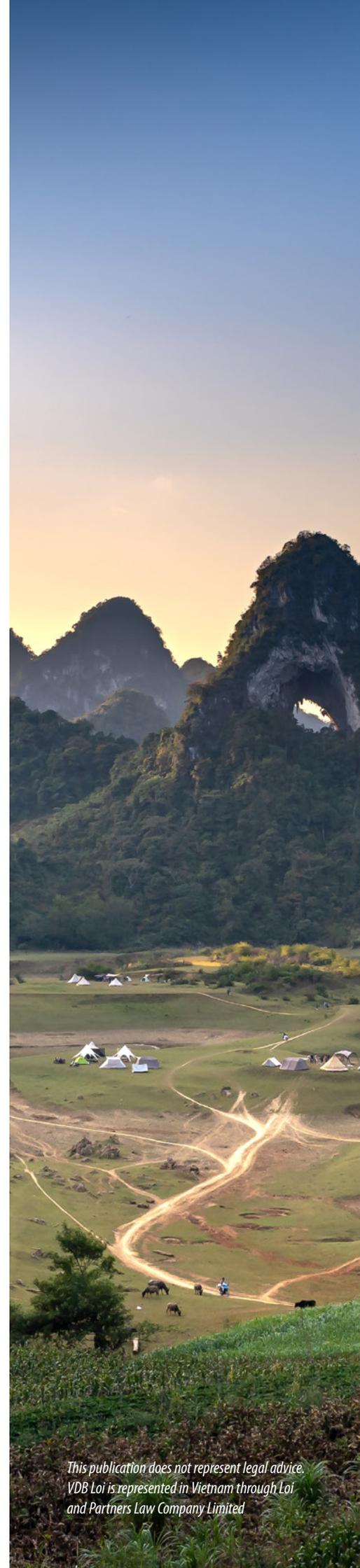
Guarantees by one Vietnamese company to secure obligations under a foreign loan of another Vietnamese company are provided. Registration with SBV is required, and it is usually done when applying to register the underlying loan.

Note that a company in Vietnam cannot provide a security or guarantee to a foreign lender in respect of an offshore loan to a foreign borrower, without prior approval of the Prime Minister of Vietnam. The detailed guidance on how such approval can be obtained is being developed.

As a matter of practice, such approvals are so far usually limited to projects of state-owned enterprises investing overseas in accordance with government policies.

16. Glossary of key terms:

ENGLISH	VIETNAMESE
Account Services Bank	Ngân hàng cung ứng dịch vụ tài khoản
Bank	Ngân hàng
Bank account	Tài khoản ngân hàng
Borrower	Bên đi vay / Bên vay
Debt	Nợ
Direct Investment Capital Account (DICA)	Tài khoản vốn đầu tư trực tiếp
Equity	Vốn chủ sở hữu
Equipment	Trang thiết bị
Guarantee	Bảo lãnh
Land	Đất đai
Lender	Bên cho vay
Loan	Khoản vay
Mortgage	Thế chấp
Pledge	Cầm cố
Project	Dự án
Security	Bảo đảm
Security Supporting Bank	Ngân hàng phục vụ giao dịch bảo đảm
Shares	Cổ phần





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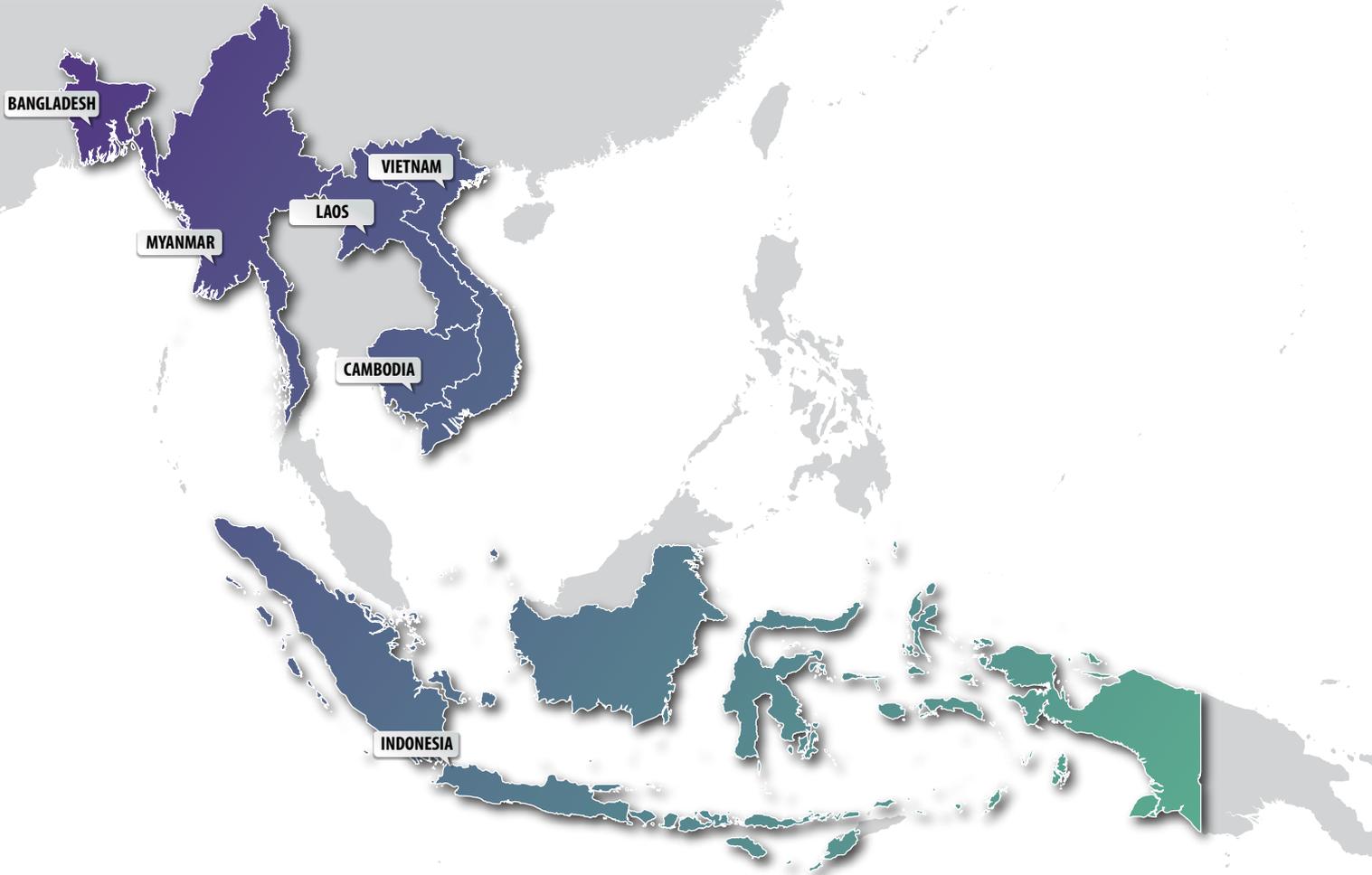
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