



February 2004

# Indochina notes

Legal updates on investment, infrastructure and finance

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## Investment

### Party plenum

The Communist Party in its recent mid-term plenum issued guidelines that presage some of the changes to occur in Vietnam over the next few years. The focus was resolutely progressive.

- Accelerating the removal of privileges and business monopolies. The Party regards the issuance of laws and policies on competition, anti-dumping and encouragement of investment, among other things, as vital.
- Development of multinational and high-tech investment. The plenum noted that 'it is imperative we make basic changes in attracting foreign direct investment, especially from multinationals, to centre on the key sectors of the national economy, particularly high-tech and original-tech areas. Simultaneously, necessary measures are diversifying of investment forms in line with the country's international economic integration roadmap, speeding disbursement and effectively using ODA'.
- Development of the stock, financial, credit, property and labour markets. In respect of the financial markets 'it is crucial to overcome the current issue of thinly-spread credit, enhance non-cash transactions, help shape market-based interests, and raise the convertibility of Vietnamese dong'. The Party is also encouraging equitised state-owned companies to list on the stock market.
- Preparation for World Trade Organization membership.

### Casino projects

Gambling is popular in Asia. This popularity has attracted a raft of casino developers to Vietnam over the years. Very few of these projects have been allowed. New policies suggest that such licences may now be even harder to obtain. Official Correspondence 6167 of the Government Office dated 12 December 2003 expresses the view that 'prize-winning recreation and entertainment services' should be regarded as gambling activities. Investors are encouraged to exclude such services from luxury tourism and resort development projects. In all likelihood, this means that applications for investment licences for projects including such activities will be turned down.

### Corporate income tax

A number of changes to the corporate income tax (CIT) regime were introduced by the new Law on Corporate Income Tax and its implementing regulations, Decree 164 of the Government dated 22 December 2003 and Circular 128 of the Ministry of Finance dated 22 December 2003. As tends to happen when tax rates change, those adversely affected have complained bitterly.

### Background

Until 1 January 2004, under the Law on Foreign Investment in Vietnam (the FIL), the standard CIT rate applicable to FIEs was 25 per cent. In comparison, domestic enterprises and branches of foreign organisations not subject to the FIL (such as law firms) were taxed at the rate of 32 per cent. Foreign-invested oil and gas companies were taxed at 50 per cent.

In addition to CIT, foreign investors in FIEs also had to pay profit remittance tax at 3 per cent, 5 per cent or 7 per cent, depending on the amount of their contribution to the legal capital of the relevant FIE.

#### **Changes in tax rates**

In order to create a level playing field for domestic and foreign investors, the National Assembly passed a new law on CIT, effective on 1 January 2004. Under the new law, a single standard tax rate of 28 per cent applies to domestic enterprises and new FIEs. This represents a 4 per cent reduction in CIT for domestic businesses and branches of foreign organisations, and a 3 per cent increase for new FIEs. However, the effect on new FIEs is offset by the abolition of the profit remittance tax. Despite this, new FIEs are complaining about the inbuilt advantage available to competitors who happened to arrive earlier.

Preferential rates of 20 per cent, 15 per cent and 10 per cent will be available when certain requirements are met. Hardest hit are some of the industrial zones in provinces near Ho Chi Minh City, whose preferential rates have gone up.

Existing FIEs will continue to be entitled to any preferential tax treatment already approved in their investment licences. Again, this will cause competitive disparities depending on when a business arrived in Vietnam.

The tax rates applicable to foreign-invested oil and gas companies will vary from 28 per cent to 50 per cent, as decided by the Prime Minister upon the recommendation of the Minister of Finance.

#### **Calculation of taxable profits arising from leases of assets**

Where a business leases property and the lessee prepays rent for more than one year in advance, the taxable profit can be calculated by either (1) dividing the lump sum paid by the total number of years paid in advance to determine the annual amount of rent received or (2) accounting for all of the prepaid rent as revenue and profit for the year in which payment is made.

#### **Deductible expenses**

Circular 128 increases the cap on deductible expenses for advertising, marketing, corporate entertainment and

certain other promotional expenses incurred by FIEs to 10 per cent of the total deductible expenses. The cap under the old law was 7 per cent.

#### **Other taxable profits and incomes**

Profits derived from a transfer of land use or land lease rights are subject to CIT, regardless of whether the land has any structures on it. The profit on such a transfer will be subject to 28 per cent corporate income tax plus an additional tax if profit on the transfer exceeds a certain amount.

Businesses are not required to pay CIT on profits arising from the transfer of land use or land lease rights in certain circumstances, including:

- where land is returned to or confiscated by the state;
- where a business is required by the government to move its facilities;
- in the case of a capital contribution in the form of land use rights; and
- where a business transfers its land in connection with a separation, de-merger, merger or bankruptcy.

#### **Foreign ownership of listed companies**

There is currently substantial interest in portfolio or strategic investment in Vietnamese companies. Such investments have to weave their way around numerous obstacles. The position of some of these obstacles became clearer on 12 December 2003, when the Ministry of Finance issued Circular 121 to guide the implementation of Decision 146 of the Prime Minister on foreign ownership of listed companies. Under Decision 146 and Circular 121:

- foreign investors (whether individuals or organisations) can hold up to 30 per cent of a listed company's issued shares; if a foreign investor holds more than 30 per cent of a company's shares, it must sell shares to reduce its holding to 30 per cent;
- there is no limit on the bonds of a listed company that may be held by foreign investors; however, in the case of convertible bonds, foreign investors cannot hold more than 30 per cent of the company's shares after conversion; and
- the capital contribution that a foreign investor can make to a joint venture securities company or fund management company was increased from 30 per cent to 49 per cent.

### **Automobile manufacturing industry**

No one can accuse officialdom of failing to plan in advance. The latest offering is from the Ministry of Industry. Its Official Correspondence 5905 dated 26 December 2003 proposed a Scheme on and Solutions for the Development of the Automobile Manufacturing Industry until 2010, with a vision to the year 2020. It sets out the roadmap for the localisation of the automobile industry in Vietnam.

### **Motorbikes**

On 31 December 2003, the Ministry of Science and Technology promulgated Decision 37 on quality control, industrial property and technology transfer in respect of motorcycles, whether manufactured locally or imported. Decision 37 provides guidance on quality requirements for importers of motorcycles, motorcycle engines and spare parts.

### **Competition law – the prologue**

The Ordinance on Prices, which was effective on 1 July 2002, provides among other things for control of price monopoly co-operation (price-fixing agreements).

Decree 170, which became effective as of 14 January 2004, elaborates on the measures to control price-fixing, which apply to anyone doing business in Vietnam. This is a temporary measure pending the Law on Competition, which should be passed later this year.

Decree 170 refines the definition of ‘price monopoly co-operation’ to price-fixing agreements between businesses aimed at dominating the market and exceeding the market share stipulated by law. The new pricing regulations do not stipulate the relevant market share, though the current draft of the Law on Competition prescribes a market share threshold of 30 per cent.

The new pricing regulations prohibit the following ‘price monopoly cooperation’:

- agreements between businesses to fix prices, control prices or change prices for sale of products in order to restrain competition;
- sudden sale of one type of product at the same price and at the same time by several businesses;
- agreements between businesses to create shortages by limiting production, distribution, transportation or sales;

- agreements between businesses to apply conditions of sale or purchase of goods and supply of after-sale services that affect prices; and
- agreements between businesses to change prices of sale and purchase of goods and services to eliminate or force other enterprises to co-operate with them or become their affiliates.

### **Draft competition law – the sequel**

A governmental committee was established to draft a competition law in March 2000 and the law is expected to be passed in 2004. The 9th draft of the competition law (Draft 9) makes certain changes from the previous draft.

#### **Agreements restraining competition**

Eight types of agreements were listed as anti-competitive under Draft 8. Draft 9 adds resale price fixing agreements.

#### **Abuse of dominant or monopoly market position**

Abuse of a dominant market position was prohibited in Draft 8. Draft 9 defines a group of businesses with a dominant market position as:

- two businesses having a total market share of 50 per cent or more; or
- three businesses having a total market share of 75 per cent or more.

A state-owned enterprise operating in a state monopoly sector may carry out the following acts only after approval from the Prime Minister is obtained:

- fixing purchase or sale prices;
- limiting production or distribution or restricting the market; and
- applying dissimilar commercial conditions to the same transactions with different enterprises.

#### **Economic concentration**

Draft 9 treats the establishment of a joint venture company as a form of economic concentration no different from a merger, consolidation or acquisition.

#### **Complaints and handling of violations**

Under Draft 9, businesses can be fined up to 10 per cent of their annual revenue for violations. A five year limitations period is allowed for making a complaint about anti-competitive conduct.

## Infrastructure

### US – Vietnam Air Services Agreement

Ten years after the US embargo of Vietnam was lifted, it may become possible to fly from one country to the other. The Air Services Agreement between the United States of America and Vietnam was signed in December 2003. In Decision 04 on 8 January 2004, the Prime Minister officially approved the Air Services Agreement, which serves as the legal basis for airlines to introduce direct air services between the US and Vietnam.

### Seaports

Decree 160 of the Government dated 18 December 2003 has amended the legal framework governing the establishment of seaports in Vietnam. Seaports are defined in the Maritime Code as ports established for the entry and exit of maritime vessels, consisting of port complexes (depots, yards, wharves, premises, maritime administrative and service compounds) and port waters (the waters in front of wharves, anchoring and lightering areas, port entrances and exits, and weather break areas).

The previous regulations drew no distinction between establishing an entire seaport and establishing part of it. Under the new regulations, the establishment of a seaport requires the prior approval of the Prime Minister; previously the Ministry of Transport had the authority at the request of Vinamarine.

Responsibility for projects involving the construction of wharves and lightering areas has now been devolved to Vinamarine, including approval for development, supervision of construction and decisions to put the infrastructure into use.

Vinamarine is also required by the new Decree to approve and supervise other construction projects relating to ports.

### Vinamarine

Vinamarine, the authority administering the maritime sector in Vietnam, was established in 1992. Its organisation and functions were codified by Decision 269 of the Prime Minister dated 22 December 2003. This Decision has officially given the authority the English name 'Vietnam Maritime Administration', though its abbreviation continues to be Vinamarine.

Besides the usual responsibilities of a specialised administrative authority, the Decision subdivides Vinamarine's responsibilities in the maritime sector into administration of different sub-sectors, including (i) seaport, shipping channels and mooring and anchoring areas; (ii) vessels and crews; (iii) maritime transportation and services; (iv) maritime safety; and (v) investment projects in the maritime industry.

Vinamarine's structure now comprises 14 departments and three local branches.

### Electrical safety

Safety is not a word that springs to mind when one thinks of Vietnam, much less its electrical systems. Perhaps in the fullness of time Decree 169 of the Government issued on 24 December 2003 will change our way of thinking. This Decree regulates the safety rules applicable to the production, transportation and use of electricity. Vietnamese technical standards, or international technical standards accepted by the Vietnamese authorities, are to apply. The Ministry of Science and Technology has already issued a number of electricity safety standards, which are available at [www.tcvn.gov.vn](http://www.tcvn.gov.vn).

Under Decree 169, a power plant must, among other things, have a protective fence and comply with fire prevention regulations. In addition, a number of specific safety rules applicable to the installation of electricity cables, electrical equipment rooms and electrical equipment have been introduced.

Decree 169 requires the owner of transmission lines to apply certain safety measures, including installing safety notice boards. The grid owner or operator must also maintain complete technical documents and documents relating to site clearance for the construction of the grid.

The use of electricity for security purposes (such as electric fences?) is prohibited except where used for security or national defence purposes.

### Telecoms

The incumbents at the Ministry of Post and Telecommunications (MPT) are educated men with a broad knowledge of poetry and have demonstrated the wisdom of Milton's words that: 'None can love freedom heartily, but good men; the rest love not freedom, but

licence'. The government's Decision 217 of October 2003 provided generally that telecommunications enterprises were to have freedom to determine their fees and charges. Official Correspondence 16 of 6 January 2004 qualifies such freedom.

- In certain cases, telecoms businesses may only determine their fees within the price framework promulgated by the government.
- Telecoms businesses that do not hold a dominant market share may determine their fees for services, including long-distance domestic calls, international calls, channel leasing, mobile telephone services (including subscription fees, interconnection fees, mobile phone information fees), internet and Inmarsat services; however, such determination must be based on the government's socio-economic development policies, the objectives of telecoms development at the relevant time, and international treaties to which Vietnam is a party, all after taking into account production costs, supply and demand and the fees for such services in regional countries.
- Telecoms businesses must respect regulations on service fees in order to avoid 'dumping'.
- Telecoms businesses must register their service fees with the MPT every six months.

### **Refund of VAT on BOT projects**

On 22 December 2003 the General Department of Taxation issued Official Correspondence 4549 on the refund of value added tax (VAT) to pre-operational BOT projects. Referring to Circular 122 of the Ministry of Finance dated 29 December 2000 (the relevant provision has now been reiterated by a new circular on VAT), Official Correspondence 4549 confirms that a BOT company that has registered to pay VAT by the tax credit method but has not yet generated any revenue will be considered for refund of input tax on an annual basis. If the amount of input VAT to be refunded is higher than 200m dong per quarter, it may be eligible for a quarterly refund.

### **Civil Aviation Administration of Vietnam**

The authority of the Civil Aviation Administration of Vietnam (CAAV) has been clarified by Decision 267 of the Prime Minister dated 19 December 2003. This specifies that the CAAV is in charge of regulating airports, transportation by air and aircraft, and is responsible for:

- preparing the development strategy for the aviation sector;
- opening and closing airports;
- issuing permits such as those for operating airports, aircraft and other aviation technical facilities;
- registering aircraft and secured transactions relating to aircraft;
- monitoring the leasing, purchase, sale, liquidation, repair and maintenance of aircraft and other related equipment;
- monitoring safety measures relating to aviation transport; and
- providing opinions on investment projects in the aviation sector.

### **Construction of private sector infrastructure**

Construction contracts in private sector infrastructure projects need to state clearly what part of the work is conducted outside of Vietnam (such as design and transport of equipment) in order not to be subject to withholding tax under Circular 169.

Similarly, the contract has to state clearly what imported machinery, equipment and construction materials are exempt from VAT on the grounds that they are not yet domestically produced. If they are not separated out in the contract, the contractor's entire turnover will be subject to VAT and the infrastructure developer will have to withhold tax due even though the items would have been exempt had they been imported directly by the developer.

Official Correspondence 148 of the General Department of Taxation dated 19 January 2004.

## **Banking and finance**

### **Cheque issuance and usage**

Cheques have never been particularly popular in Vietnam, in part because they are complicated to use, in part because they expire if not cashed in 15 days and in part because many people do not want their financial dealings to be traceable. The new Decree 159 on cheques dated 10 December 2003 (Decree 159) may assist in overcoming the first two objections, but the third will remain. Decree 159 makes the following provisions.

- The form of a cheque and the details that have to be in a cheque have been simplified.
- The period for presentation of a cheque has been extended from 15 days to 30 days. Payment within six months after the drawing date is permitted in certain circumstances as long as the payer has not received a stop payment order.
- A cheque can be drawn in a foreign currency if the cheque specifies the name of the payee and is non-transferable. Cheques may be drawn to the order of another person (with or without rights to transfer) or to the bearer.
- Under the old regulations, the bank was responsible for stopping payment upon receipt of notice of loss of a cheque. Under Decree 159, if a cheque is presented to the payer after receiving notice of the loss of a cheque, the payer must postpone payment for five days and inform the person who gave the notice that the cheque has been presented for payment. If the person who lost the cheque cannot produce evidence within that period that the person presenting the cheque has committed an illegal act, the payer must make payment.
- An entity is not responsible for cheques signed by a representative who does not have authority to sign or if the cheque fails to specify his authority. Given that Vietnamese law on authorisation tends to be restrictive (for example, only the legal representative of a company is authorised to sign a legal document unless he specifically authorises another person in writing), the above represents a potential trap for the unwary.
- For the first time, Decree 159 permits the guaranteeing of payment by a third party that is not the payer. In this case, the word 'guaranteed', the guaranteed amount, the signature and the name of the guarantor must be identified on the cheque or a document attached to the cheque.

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