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Indochina notes

Legal updates on investment, infrastructure and finance

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Attracting foreign investment

The government's new year resolutions – this year it was Resolution 1 dated 14 January 2005 – often signal changes that have a certain consensus, though driving these changes through the massed ranks of the bureaucracy and the vested interests often takes significantly more time than the government would like. Changes foreign investors can expect include:

- an increase in or removal of the 30 per cent share ownership limit applicable to foreign investors in Vietnamese companies – the cap will only remain in a few important economic sectors;
- a loosening of the restrictions on employing expatriates;
- (further) elimination of two-price policies applicable to domestic and foreign investors;
- a new ordinance on foreign exchange; and
- regulations opening service sectors for private and foreign investors, reflecting agreements reached with ASEAN, the US, the EU, and Japan.

Technology transfer

Technology transfers into Vietnam have been hobbled for years by onerous restrictions in Decree 45 dated 1 July 1998. To the satisfaction of many foreign investors (especially from Japan), the government finally issued a comprehensive amendment in Decree 11 dated 2 February 2005 (Decree 11).

Under Decree 11, the parties to a technology transfer contract are no longer required to comply with a long, detailed and (often) unsuitable list of mandatory clauses

when preparing a technology transfer contract. The technology transferor may now add certain restrictions on the transferee that are common in other countries (eg restrictions on post-termination use of the technology, export restrictions, requirement to use permitted suppliers, and production restrictions).

More importantly, Decree 11 has removed the cap on royalties (previously 5 per cent of the net sale price) that can be paid for use of the technology transferred, at least by projects that do not use 'state capital'. For projects that use state capital the royalty level must be sanctioned by the authority that approves the project. There are, however, two qualifications to this new provision. First, the Ministry of Science and Technology views a joint venture with a state-owned company as a project using state capital. Second, for projects under 'a list to be published by the Prime Minister', a certificate of examination from an independent technology consultant is required.

In another development, Decree 11 allows royalties to be calculated by reference to any yardstick agreed by the parties. Previously, the authority insisted on using the net sale price to calculate royalties due; now the parties can calculate royalties by reference to net revenues or the number of licensed products or other methods.

Tax reform programme

Many countries are talking about, and some are even implementing, flat tax systems. Alas, not Vietnam, where taxation promises to become ever more complicated.

In Decision 201 dated 6 December 2004 the Prime Minister (PM) approved a tax reform programme for 2005-2010 to:

- mobilise resources, promote production, encourage exports, investment and technology modernisation, ensure stable development and improve the living standards of Vietnamese people;
- contribute to the state budget an average of 20-21 per cent of GDP each year;
- be consistent with the country's progress on international integration while ensuring reasonable protection for Vietnam;
- create a level legal environment between domestic and foreign-invested businesses;
- create a simple and transparent tax system; and
- improve the capacity of the tax administration.

Under the programme, several new taxes will be issued, including anti-dumping taxes, anti-subsidy taxes, anti-discrimination taxes, environment protection taxes, asset taxes and land use taxes.

Reforms are scheduled as follows.

- Value added tax (VAT): by 2008, the items exempted from VAT will be reduced; one tax rate will be applied; and a threshold of taxable revenue for tax purposes will be applied.
- Special sale tax: by 2008, items liable to the special sale tax will be extended. This tax will be used to ensure non-discrimination between domestic and imported goods.
- Import and export tax: in 2005, the import-export tax will see amendments in tax rates, taxable prices and tax collection procedures in accordance with Vietnam's international undertakings.
- Anti-dumping tax, anti-subsidy tax and anti-discrimination tax: these new taxes will be submitted for approval to the National Assembly at the end of 2005.
- Personal income tax: a law on personal income tax will be passed in 2007. The difference in treatment between Vietnamese and foreigners (for once benefiting the foreigners) will be reduced.
- Land use tax and natural resources tax: these taxes will be broadened by 2008.
- Environment protection tax: a law on environment tax will be introduced in 2008. Goods and services

causing pollution will be taxed. The income from this tax will be reserved exclusively for environment protection activities.

- Asset tax: an asset tax law is supposed to be passed in 2008.

Accounting

Anyone who wants to know about Vietnam accounting should consult Hugh Adams' second edition of the seminal work on this subject, a massive tome about to be published. Foreign investors of a more general bent of mind should at least be familiar with Circular 122 of the Ministry of Finance (MOF) dated 22 December 2004 on the accounting and auditing regimes applicable to (i) foreign-invested companies and foreign parties to business co-operation contracts, (ii) foreign law firms, branches of foreign business entities and foreign investors in oil and gas production sharing contracts and (iii) other permanent establishments of foreign companies operating in Vietnam (foreign entities).

- Foreign entities are required to apply Vietnamese accounting standards. Any modification to the Vietnamese accounting regime must be approved in writing by the MOF.
- Financial statements of foreign entities must be audited for tax purposes.
- Foreign entities are required to appoint or hire a chief accountant who must satisfy certain conditions contemplated by the Accounting Law.
- The accounts must be kept in Vietnamese (together with a foreign language if so desired).
- Foreign entities are permitted to use accounting software that complies with the Vietnamese accounting regime and do not have to register it with the MOF.

Auctions

The rigidity of the auction rules has been a thorn in the side of secured lenders for some time. A new Decree 5 on auction of property was issued on 18 January 2005 to replace the old decree, which dated back to 1996. The new decree specifically covers auctions of (i) assets for enforcement of judgments, (ii) assets used as security in accordance with the laws on secured transactions and (iii) goods in custody being kept in Vietnam by maritime transporters, air transporters and land transporters.

Infrastructure

Restructuring of telecoms companies

In Decision 58 of the PM dated 23 March 2005 the PM approved a project to establish the Vietnam Post and Telecommunications Group (VPTG) by restructuring the existing Vietnam Post and Telecommunications Corporation (VNPT) and its member companies.

The parent company will be VPTG and the subsidiaries will include: (i) Vietnam Post Corporation; (ii) Vietnam Telecoms Corporations No. I, II, and III located in the northern, central and southern regions respectively; (iii) companies in which VPTG owns 100 per cent of the charter capital, such as Vietnam Datacommunication Company and VASC Software and Media Company; (iv) companies in which VPTG holds more than 50 per cent of the charter capital, including the Vietnam Mobile Services Company and Vietnam Telecom Services Company; (v) companies in which VPTG holds less than 50 per cent of the charter capital; and (vi) other joint ventures in the telecoms and information industry.

In a separate document, Decision 43 dated 2 March 2005, the PM also approved the establishment of the Military Telecoms Corporation, better known as Viettel Corporation. Viettel Corporation comprises six dependent accounting companies and six other independent accounting companies.

Mining

The mining industry has never been an easy one. In Vietnam, a few projects have been advancing over the years despite the odds, so the Prime Minister's Directive 10 dated 5 April 2005 will no doubt be seen as little more than another pothole on a poor road. In Directive 10:

- the PM requests a temporary halt on granting licences for the mining of gold, silver, gemstones and other metals except for (i) individual mining activities at waste areas and (ii) re-exploitation of closed mines;
- exports of minerals under legitimate contracts will be allowed to continue but improperly issued licences will be withdrawn – the signing of new export contracts relating to unprocessed minerals is temporarily suspended until new regulations are issued (special cases can still be separately decided by the PM); and

- pending a new law on minerals, scheduled for May 2005, the Ministry of Natural Resources and the Environment will issue licences only to projects with a high value-added element, such as the processing of raw materials that are mined.

Mineral licence issuance fee

The MOF issued Circular 20 dated 16 March 2005 to replace Circular 96 dated 31 December 1997 prescribing mineral licence issuance fees as follows.

For the initial issuance:

- mineral exploration licence – 2m dong;
- mining licence – 4m dong; and
- mineral processing licence – 2m dong.

For a renewal of mineral licences (or reissuance in case of transfer or inheritance) a fee equal to 50 per cent of the fee for the initial issuance is payable.

Van Phong Bay development master plan

Van Phong Bay is currently a delightful tropical bay, ideally suited for tourism, in the central coastal province of Khanh Hoa. The forces of progress have decreed that it should not simply cater to itinerant beachgoers but to commerce. The PM approved the master plan to develop the Van Phong Bay Economic Zone into an important economic hub with a major petroleum and container depot by 2020 in Decision 51 dated 11 March 2005. The zone will be home to a large swathe of industries, including manufacturing, fish farming, tourism, and international container transshipment services. In the first stage (2005-2010) of the master plan, the planners dream of:

- an international transshipment port with an annual capacity of 500,000 20 foot-equivalent units (TEU);
- an oil transshipment port with an annual capacity of 1.5-2m tons;
- a road linking National Highway No. 1A and Dam Mon and a railway;
- three water reservoirs in Hoa Son, Dong Dien Nam and Tien Du lakes; and
- My Giang General Oil Warehouse, the Dam Mon Passenger Seaport, and other telecoms, tourism and commercial facilities.

Foreign investment in the construction and operation of Van Phong international transshipment port is welcome but, given the distance to Ho Chi Minh City, is perhaps unlikely to be provided with alacrity.

Banking and finance

Foreign loan

To control more effectively the borrowing and repayment of foreign loans, the State Bank of Vietnam (SBV) promulgated Circular 9 dated 21 December 2004, under which a Vietnamese or foreign-invested company borrowing a long and medium-term foreign loan, but not a short-term loan, has to register the loan with the SBV.

Circular 9 does not add much of substance to Circular 3 of 12 August 1999.

- Foreign bank branches, foreign branches, foreign parties to business co-operation contracts and foreign contractors are no longer specified in the list of borrowers. It appears that loans obtained by these entities from overseas are not regarded as foreign loans and are therefore not governed by Circular 9.
- A short-term loan to supplement working capital (after the project has been put into operation and after all legal capital has been contributed) is no longer considered part of the investment capital prescribed in a foreign-invested company's investment licence.
- Circular 9 provides for new forms of (i) application for registration of foreign loans, (ii) application for registration of amendments and (iii) periodic reports. Such forms are much more detailed than those required by Circular 3.

Mutual insurance

Mutual insurance has existed since at least the 17th century. On 24 February 2005 a legal framework for it came into effect in Vietnam with the issuance of Decree 18 of the Government. Decree 18 allows a mutual insurance organisation (MIO) to be established to provide insurance to members who are Vietnamese organisations or individuals operating within the same sector or industry or located/residing within the same geographical area and who have the same type of insurance risks.

The charter and the appointment of the chairman of the board of management and of the director of a MIO must be approved by the MOF. The minimum number of members of a MIO is 10. Its legal capital must be at least 10bn dong (less in the case of an agricultural mutual insurer). Founding members must pay their premiums in advance and make up the legal capital with capital contributions. The founders must remain in the MIO for at least three years.

Dong deposit limit

As of 1 March 2005, a foreign bank branch from an EU country may accept dong deposits from Vietnamese legal entities with which it does not have a credit relationship up to 400 per cent of its charter capital and from Vietnamese natural persons with which it does not have a credit relationship up to 350 per cent of its charter capital. This increase from 250 per cent is an effort to keep the banks on a level with their US counterparts. Decision 210 of the SBV dated 28 February 2005.

Amended lending regulations

The SBV issued Decision 127 dated 3 February 2005 to amend the lending regulations issued in Decision 1627 of December 2001. The main changes made by Decision 127 relate to the rescheduling of loans and reclassification of overdue debt.

Previously, a short-term loan could be extended for a maximum of 12 months, and a medium and long-term loan could be extended for an additional term equal to 50 per cent of the initial term. If the loan was rescheduled (eg technically no payment default occurred) then the SBV loan loss provisioning requirements did not apply.

By contrast, Decision 127 treats rescheduling of loans and reclassification of overdue debt as two separate issues. On the one hand, it permits banks to agree on the adjustment or extension of loan terms based on the payment ability of its customers. On the other hand, it requires that banks record any such extended loan as an overdue debt as soon as the borrower does not pay on the agreed payment date, regardless of whether or not a rescheduling arrangement is in place. It is expected that the SBV will issue regulations to provide guidelines for calculation and classification of overdue debt and loan

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loss provisioning, incorporating the new provisions of Decision 127 and other prudential requirements, to comply with core Basel recommendations. The effect of these requirements on credit institutions in Vietnam is difficult to foresee.

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