



# Indochina notes

LEGAL UPDATES ON INVESTMENT, INFRASTRUCTURE AND FINANCE

**Investment**  
**Infrastructure**  
**Banking and capital markets**

## Investment

### Private placements

Thoughts about private placements do not lie around silently in the privacy of the heads of scheming entrepreneurs. Entrepreneurs, as the name implies, like action not thinking. So they have been chafing at the bit during the year since Decree 1 of the government on private placements was issued (see [Indochina notes April 2010](#)). As no implementing regulations have been issued, they have been chafing while state authorities have been ruminating about its meaning. In the meantime, some provincial departments of planning and investment (DPI) are even refusing to accept applications for capital increases, which naturally raises the blood pressure of said entrepreneurs. Rising interest rates, which have cut off access to borrowed capital, have further increased the sphygmomanometer readings. In an attempt to avoid the problems associated with the unintended extinction of the tycoon class, the Ho Chi Minh City DPI invoked the assistance of the oracles at the Ministry of Planning and Investment (the MPI) and the State Securities Commission (the SSC).

The gnomonic MPI responded with Official Correspondence 608 on 28 January 2011 (OC 608) stating that (i) Decree 1 does not apply to the issuance of shares by non-public companies to all existing shareholders pro rata, but (ii) other private placements of shares by non-public companies must be approved by provincial DPIs.

The laconic SSC by contrast, in its response – Official Correspondence 350 – does not distinguish between the issuance of shares to existing shareholders and private placements to less than all shareholders.

Given the differences in the responses and the additional confusion created by these responses, some provincial DPIs are continuing to refuse to accept applications to increase charter capital.

### Reporting regime applicable to foreign-invested enterprises

Apophenia is the experience of seeing meaningful patterns or connections in random or meaningless data. Swarms of apophenic officials are expected, following the introduction of a new reporting regime for foreign-invested enterprises (FIEs).

Under Decision 77 of the prime minister dated 30 November 2011, FIEs must submit monthly, quarterly, six-monthly or annual reports depending on the sector in which they operate. The reports must be submitted to the provincial statistical authorities or the provincial DPI. The obligations to report are set out in the table overleaf.

Basis of reports	FIEs covered	Content of report	Due date
Monthly	FIEs in mining, industrial processing, electricity, natural gas, water supply, solid and/or water waste treatment, information and communications, real estate business, transportation, warehousing, commerce and services.	Contents include: charter capital and implemented invested capital, broken down by source; and employment, taxes and other items paid to the state budget.	12th day of each calendar month.
Quarterly reports	FIEs operating in agriculture, forestry and aquaculture; construction; enterprises making or receiving payment for provision of services from or to foreign parties and enterprises; and FIEs acting as investors.	Contents include: (i) for construction businesses, the value of construction output; (ii) for enterprises making or receiving payment for provision of services from or to foreign parties, the value of receipts and disbursements for each type of service; and (iii) for investors, the implemented invested capital according to each capital source and each investment item.	12th day of the last month of the quarter.
Half-year reports	All FIEs.	Contents include employment and income of employees.	12 June and 12 December each year.
Annual reports	All FIEs.	Contents include: results of production and business of the FIEs, employees and their income; contributions made by the FIEs to social insurance, medical insurance, job loss, insurance and trade union funding, implemented invested capital according to each capital source, other payments for scientific research, environmental protection, waste treatment, etc. In addition, depending on the industry, the FIEs have to make reports on special items.	31 March of the following year.

### Environmental protection

In a bid to reduce consumption of environmentally unfriendly products, Vietnam is attempting to persuade consumers through their rapidly expanding wallets. On 15 November 2010, the National Assembly passed a new Environmental Protection Tax Law, under which certain goods will attract an environmental protection tax. Certain types of petrol, oil and lubricants, coal, hydrochlorofluorocarbons, plastic bags and certain herbicides and insecticides are all targeted. The prize goes to plastic bags, with a tax rate of between VND30,000 (\$1.4) and VND50,000 (\$2.3) per kilogram. Petroleum will be subject to a tax rate of VND1,000 to VND4,000 per litre.

### Tobacco

Everyone knows the story of the man who insured his expensive cigars against fire, smoked them, recovered under the insurance policy and then was sued by his insurance company for arson. Tobacco manufacturers

in Vietnam are likewise finding themselves stymied at every turn when trying to make an honest dong. On 28 January 2011, the Ministry of Trade and Industry issued Circular 2 to implement Decree 119 of the government dated 18 July 2007 on manufacturing and trading tobacco. Although the new rules do not change much of the substance in the decree, which was already restrictive, under Circular 02, foreign investment in the manufacturing of tobacco products will only be permitted in the form of a joint venture with licensed local company (with the state having a controlling interest in such company) or in the form of an industrial property licensing agreement with a licensed local company. Former investment structures, such as processing agreements and manufacturing co-operation agreements are no longer contemplated. Investments have to be approved by the Ministry of Industry and Trade, but such approvals are only issued after approval from the prime minister.

## Steel

In September 2007, the government approved a national master plan for the steel industry. It foresaw annual production of 20m tons of steel by 2025. Then each province decided it needed a pet steel project. The capacity of steel projects now on the books has already shot up to almost 40m tons. Provincial governments are continuing to approve more steel projects even though the future capacity of registered steelmaking projects far exceeds demand for steel in the domestic market, and even though several multi-billion dollar steel projects have stalled.

Against this backdrop, the central government is having a go at reining in the provinces. Official Correspondence 710 dated 30 January 2011 asks the people's committees to strictly follow the steel master plan before deciding to issue investment certificates. They have also been requested to examine all steel production projects and to withdraw investment certificates of those that are not being implemented without a proper reason.

## Real estate

If the best collective decisions are the product of disagreement and contest, not consensus or compromise, then there is some hope yet. Differing points of view between different government authorities are not uncommon in Vietnam. Another one has recently surfaced between the MPI and the Ministry of Construction (the MOC). It arises out of the fact that Decree 153 of the government dated 15 October 2007 requires a company to have legal capital of at least VND6bn to conduct real estate business.

The MOC, in Circular 13 dated 21 May 2008, required existing enterprises applying to add real estate business as an additional business line to obtain a certificate from an independent auditor regarding its capital. However, Decree 102 of the government dated 1 October 2010 does not require such certification if the equity of the company is at least equal to the legal capital requirement. The MOC, in its Official Correspondence 287 dated 2 March 2011, has now accepted the Decree 102 position.

## Abolition of construction charge

Under previous regulations, a construction charge was imposed on investors in construction projects. The construction charge was calculated as a percentage of

the costs of construction (excluding equipment costs) and was theoretically used to assist investment in public infrastructure facilities in the surrounding area. The construction charge would be in the range 0.5 per cent to 2 per cent of the costs of construction, as determined by the local peoples' councils, depending on the type of works and the residential zone. On 9 November 2010, the prime minister issued Decision 80 abolishing the construction charge from 1 February 2011.

## Infrastructure

### BOT projects

Virgil's bleak description of Aeneas heading for the underworld – *Ibant obscure sola sub nocte per umbras* – springs to mind as one contemplates the darkness, the night skies and the shadows that await us if the BOT (build-operate-transfer) regulations become any more unhelpful to the development of a few more power facilities. The recent Circular 3 of the MPI, issued on 27 January 2011 to implement Decree 108, illustrates the point.

- Investors will henceforth have to set up a new project company for each BOT project. Existing companies cannot, as before, simply apply for an investment certificate. This will cause unnecessary costs and difficulties for no discernable advantage.
- Given the cost of developing a project, many developers sell interests in the project at some stage in the process, often with a view to optimising financing possibilities. This has been restricted by the new Circular in that such a transfer will henceforth only be permissible if the investor has fully paid up the equity in line with the schedule in the BOT contract. This will make it essential to have flexibility in the equity contribution schedule, but all indications in the Circular are that less flexibility is going to be allowed. Even if through that hurdle, the transfer must be approved by both the state body authorised to deal with the project and by the MPI.
- Investment in BOT projects, already minimal, is likely to decline even further given that the investors will henceforth only receive their payment (land use rights) after completing and transferring the project to the state. If the land allocated to them is worth more than the project accomplished, they will be obliged to pay to the state the difference between

the value of the land use rights they receive and the total investment capital for construction of the BOT project itself.

### **Electricity prices**

On 26 March 2011, people around the world, including in Vietnam, turned off lights to recognise Earth Hour. The government is concerned that a lack of investment in electricity infrastructure, especially foreign investment, may mean that such occurrences in Vietnam are more frequent and less voluntary. To stimulate investment in electricity infrastructure, on 23 February 2011 the prime minister released two significant decisions on domestic electricity prices. As a result of these, the average electricity price from 1 March 2011 has been increased to VND1,242/kWh from VND1,077/kWh. However, given the inflation rate and devaluation of the dong, this is scant comfort to utilities whose input costs, such as imported coal, are in US dollars.

### **State ownership of state-owned enterprises (SOEs)**

Lenin has been credited with coining the phrase the 'commanding heights' in 1922, when he temporarily relaxed government controls over Soviet agriculture even as he maintained a tight grip on big industry. His statue still stands in Hanoi and many of his theories, including this one, echo to this day. The prime minister's recent Decision 14 on 4 March 2011 outlining state capital ratios in SOEs reaffirms existing principles. The state will continue to hold 100 per cent of state enterprises operating in important sectors, such as railways, airports, grade I seaports (seaports of special importance and large scale), television stations and electricity transmission.

It also makes few changes on the limits to the progress of equitisation or the sale of state interests. The state will also continue to hold 50 per cent of state enterprises that play key roles in ensuring the stability of the national economy, such as oil and gas exploration and refining, mining, finance, banking and insurance, and large cement producers. One of the few positive changes in Decision 14 is that the state's obligation to hold at least 50 per cent of a state power company is only applicable if that company operates 500MW of capacity (100MW previously).

### **Telecoms**

Although the above Decision 14 mandates the state to retain more than 50 per cent ownership of communications network companies, on 6 April 2011, the government issued Decree 25 implementing the Telecoms Law. One of the major changes is that an entity that owns over 20 per cent of one telecoms company will not be allowed to own more than 20 per cent of another telecoms company providing the same telecoms services. This provision will impact VNPT, the largest telecoms company in Vietnam, which owns 100 per cent of two large mobile networks, MobiFone and VinaPhone. This suggests that at least 30 per cent will have to be transferred to another state-owned company (perhaps an affiliate of VNPT?) or that MobiFone and VinaPhone will have to be merged (thereby conveniently delaying an equitisation of either for years).

Under the former Telecoms Ordinance, only SOEs or enterprises controlled by the state could invest in facilities-based services. Based on Vietnam's WTO commitments, the Telecoms Law removed this obstacle to foreign investment in facilities-based telecoms services. However, under Decree 25, foreign investors are only allowed to enter into joint ventures or business co-operation contracts with telecoms enterprises that have been licensed to set up a telecommunications network in Vietnam. The process for converting an existing business co-operation contract into a joint venture remains unexplained.

### **Government guarantees**

The government has been making a concerted effort to limit the guarantees that it hands out, the exact tally of which remains somewhat obscure. A new front in this campaign opened up with a decree that could have a significant impact on foreign acquisitions of interests in infrastructure projects. On 16 February 2011, the government issued Decree 15 on the provision and control of government guarantees. The most significant change is its applicability to projects with foreign participation. Under Decree 15, government guarantees for loans to project companies with foreign investment will be limited to the portion of the loan corresponding to the level of liability of the Vietnamese party in the company.

To be consistent with such new limitation, Decree 15 also restricts the ability of a Vietnamese shareholder of a borrower to transfer its shares to a foreign investor. This can only occur if a percentage of the loan has been repaid that corresponds to the percentage shareholding being transferred. In addition, investors holding 5 per cent or more of a borrower must undertake to hold 65 per cent of the paid-up charter capital of the guaranteed entity for the entire period of the government guarantee. Any proposed transfer requires Ministry of Finance (MOF) approval.

## Banking and capital markets

### Government and government-guaranteed bonds

It may not be a coincidence that the government issued Decree 1 on government bonds, government-guaranteed bonds and municipal bonds on 5 January 2011 (Decree 1). This was shortly after the restructuring of Vinashin, which was the direct beneficiary of Vietnam's first international bond in 2005, became necessary. Effective 20 February 2011, Decree 1 sets out detailed provisions – implementing the Law on Management of Public Debts – on issuance of government bonds in both domestic and international markets. It replaces Decree 141 of the government dated 20 November 2003 on government bonds and relevant provisions in Decree 53 of the government dated 4 June 2009 on issuance of government bonds (Decree 53) in the international market.

Decree 1 removes the requirement that an international issue of government bonds must have a face value of more than \$500m. Instead, it requires that the face value of the bonds be within the government's annual authorisation for foreign commercial loans.

More prescriptively, the government may guarantee bonds issued to finance the following types of projects:

- projects in which investment has been approved by the National Assembly or the prime minister (including debt-restructuring plans);
- projects in energy, the high-tech sector, the mining and minerals processing sector, and projects for manufacturing and exporting goods and services that the ever-busy prime minister decides are in line with national goals;

- projects within areas in which investment is encouraged under the prime minister's policy decisions; and
- credit programmes carried out by Vietnam Development Bank, Vietnam Bank for Social Policies, or other credit and financial institutions approved by the government and the prime minister.

Unsurprisingly, given Vinashin's travails, stricter requirements have been imposed on the financial condition of entities seeking government guarantees for their international bonds. The issuer must provide unqualified audited financial statements recording no losses during the previous three years, no accumulated losses and no overdue debts. Immaterial qualifications can be accepted if there is a proper explanation.

### Legal capital of credit institutions

Reflecting the difficulty in which some small banks are reported to find themselves, the required minimum legal charter capital applicable to credit institutions in 2011 has not been increased. Furthermore, Decree 10 of the government, issued on 26 January 2011, extended the date by which credit institutions had to increase their legal capital to three trillion (roughly \$150m) for a year until 31 December 2011.

### Securities companies

Cicero's line that rashness belongs to youth; prudence to old age is accurate; the new prudential requirements applicable to securities business organisations (SBOs) would indicate either that the Vietnamese securities industry is advancing into its dotage (and there would certainly be some in favour of a good dose of euthanasia) or that it is too youthful. Under Circular 226 of the MOF dated 31 December 2010, SBOs must henceforth comply with specified liquidity ratios. If an SBO has less liquidity than required it can be sanctioned, subjected to SSC control, and ultimately its operations can be suspended (though given how much money some of them are reportedly losing, this penalty may not look too worrisome at the current time).

SBOs are required to report their liquidity ratios to the SSC on a monthly basis. More frequent reporting is required if the liquidity ratio falls below 180 per cent, and the frequency of reporting increases if the liquidity ratio falls further.

## Lending fees

The first major codification of Roman law, the Twelve Tables, contains caps on interest rates. Lenders have therefore had plenty of practice in developing fees as a means of supplementing interest. Savvy borrowers the world over know that it is not just the headline interest rate that they need to worry about, but also the fees charged by banks on their loans. In the latest salvo in this seemingly endless game, the State Bank of Vietnam (SBV), in Circular 5 dated 10 March 2011, prohibited credit institutions from collecting fees from borrowers, except for early repayment fees, fees payable for a reserve credit facility under regulations of the SBV on lending, arrangement fees for syndicated loans, and other 'legitimate' fees. The word 'legitimate' opens the door wide enough not only for the coach but for several horses as well. The game goes on.

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