



Indochina notes

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Investment

Mineral Law

Mines often require tunnels. The Mineral Law, unfortunately, shares similarities with the phenomenon of quantum tunnelling in microchips that occurs when electrons simply disappear and reappear elsewhere. Since the original Mineral Law was passed in Vietnam in 1996 (the 1996 Mineral Law), most foreign investors have found the sustenance in the law so insufficient that they have simply disappeared, to reappear no doubt in the fecund fields of Papua New Guinea or elsewhere. Instead, mining in Vietnam has been dominated by domestic companies, notably by Vinacomin, the state-owned coal and mining group. The new Mineral Law passed by the National Assembly, which became effective on 1 July 2011 (New Mineral Law), is unlikely to reverse the disappearing act. The New Mineral Law contains some improvements, but has yet to receive much praise from prospective miners. It improves the 1996 Mineral Law in certain limited ways:

- allowing an exploration period of 48 months (previously 24 months), with a further 48 months being possible (previously 24 months and discretionary), although on extension, the mining company has to return at least 30 per cent of the licensed exploration area;
- clarifying the procedures for transferring the exploration licence from one mining company to another; and
- allowing for the auction of mining rights.

The New Mineral Law does not address numerous issues in the 1996 Mineral Law. As a result, the New Mineral Law:

- still requires a mining company to obtain an investment certificate and land use rights before being able to apply for mining rights; and
- still falls short of granting an exclusive right to a mining licence to the entity that conducted the exploration. The exploration company will be given 'priority' in the issuance of a mining licence to the explored area, and only with respect to the mineral deposits that have been certified by the state. As with the 1996 Mineral Law, the exploration company has to apply for a mining licence within six months of the expiry of the exploration licence. If not, the exploration company will lose the 'priority' right to the mining licence. If the licensing authority issues the mining licence to a third party, such party merely has to reimburse the exploration costs and expenditure to the exploration company.

The New Mineral Law also raises a number of new issues:

- it requires the exploration company (i) to comply with the exploration licence and the approved exploration proposal, and (ii) to obtain the state's consent if there is a change in the method or volume of exploration work that results in costs exceeding 10 per cent of the estimated budget. These requirements may result in the exploration company having less flexibility to amend its exploration proposal to deal with changes during the exploration process; and

- it requires the exploration company's equity to be at least 50 per cent of the total exploration budget and at least 30 per cent of the total investment for the mining project. These requirements are likely to prevent entities that have exploration expertise but limited financial resources from conducting exploration activities.

Environment impact assessment

In its dash for growth, Vietnam has not paid much attention to environmental matters. This is changing, but perhaps not much faster than the speed at which Château Lafite matures in a very cold cellar. Decree 29 of the government dated 18 April 2011 on environment impact assessments (EIA) and environment protection undertakings (Decree 29) will require EIA reports for a wider array of projects, as shown in the table below.

Decree 29 also requires a new EIA report to be prepared following (i) a change of location of the project; (ii) a failure to implement the project (a notoriously slippery concept) within 36 months of the date of approval of the original EIA report; and (iii) a change in the scale or

capacity or technology of the project that results in an adverse impact to the environment. Decree 29 sets out the contents required in an EIA report and qualifications that are required for the preparation of an EIA report.

Land

Château Lafite wine is derived from land that is not particularly special except for the production of fine cabernet grapes. It could be difficult to acquire such land or even similar land. Vietnam seems to have extended the principle facing a buyer in Pauillac to all its land: the acquisition of land in Vietnam, and the cost of such acquisition, has been one of the most troublesome areas for investors ever since the country opened to investment. Foreign investors have traditionally leased land for a duration equal to the term of their investment licenses. The government's Decree 121, amending the 2005 Decree 142 on the collection of land and water surface rent, made some changes:

- foreign-invested joint ventures are now treated as foreign investors for leasing land in Vietnam (previously it was unclear if they were local entities for this purpose);

Sector		Current threshold	New threshold under Decree 29
Property	Infrastructure in urban/residential areas	50 hectares	5 hectares
	Supermarkets/commercial centres	200 stalls	500 m ²
	Hospitals	50 beds	All
	Condominium buildings	10 hectares	500 persons/100 apartments
	Resorts/sports centres/golf courses	100 hectares/18 holes	50 hectares
	Hotels	100 rooms	50 rooms
Cement	Cement production	300,000 tons per year	All
	Clinker production	N/a	500,000 tons per year
	Clinker grinding for cement production	1m tons of cement per year	100,000 tons of cement per year
Power	Hydropower	Reservoir of 300,000 m ³	100,000 m ³ or 1 MW in capacity
	Thermal power	30 MW	All
Food/ beverage	Food manufacture	5,000 tons per year	500 tons per year
	Alcohol/liquor manufacture	100,000 litres per year	50,000 litres per year
	Beer/beverage manufacture	500,000 litres per year	200,000 litres per year
Chemicals	Paints/basic chemicals	500 tons per year	100 tons per year

- Decree 121 extends to land leased from the state for the construction of underground structures such as parking lots (previously no clear principles applied);
- if rent is paid annually, Decree 121 fixes the annual land rent at 1.5 per cent (previously between 0.5 per cent and 2 per cent) of the value of the land as determined annually by local provincial people's committees; and
- if the lessee pays in advance for site clearance, compensation, support and resettlement of people, the advance payments will be deducted from the rent. If such advance exceeds the rent, the remainder would be considered part of the capital of the project.

Infrastructure

BOT

It might be a slight understatement to say that infrastructure in Vietnam needs a boost. The government regularly adjusts the legal framework applicable to BOT (build-operate-transfer) projects in order to try to stimulate the infrastructure sector. This began with Decree 108 in November 2009 and Circular 3 in January 2011, and now Decree 24 in April 2011 has been added. Decree 24 amends four articles of Decree 108. This broadens the scope of Decree 108 by encouraging investment projects for building, operating and managing new infrastructure facilities in sectors such as health, education, training, occupational training, culture and sports. Whether these amendments constitute a booster rocket is somewhat debatable.

Gas industry

Even the ancient Greeks understood the importance of gas – the Pythian priestesses at the oracle of Delphi rendered their prophetic (and usually incoherent) utterances at a shrine filled with underground gas. Vietnam has not always given the development of its gas supplies such priority. Substantial recoverable gas reserves lie untouched off south-west Vietnam and elsewhere. But this policy has come under strain as the cost of importing coal has permeated into the relevant bureaucratic strata. A new gas industry development policy was issued by the prime minister in Decision 459 dated 30 March 2011 (Decision 459). The development

of the gas industry in Vietnam between 2011 and 2025 will now focus on the following major goals:

- speeding up natural gas exploration and exploitation to achieve gas output of more than 14bn cubic metres per year in 2015 and about 15 – 19bn cubic metres per year for the period 2016 – 2025;
- developing gas markets to take 17 – 21bn cubic metres per year in 2015 and 22 – 29bn cubic metres per year during 2016 – 2025;
- promoting the import of liquefied natural gas (LNG) for balancing supply and demand in Vietnam;
- concentrating on infrastructure construction to improve the economical use of gas; and
- investing in domestic liquefied petroleum gas (LPG) production to meet domestic demand of about 1.6 – 2.2m tons per year in 2015 and about 2.5 – 4.6m tons per year in 2025.

Decision 459 also sets out a specific list of investment projects in the gas industry aimed at ensuring long-term energy security and the development of the country.

Electricity

Without wishing to quote Virgil in every edition of these Indochina notes, one of his lines ('At first small from timidity, but soon rising to giant size') may in due course apply to electricity prices. In 2006, the prime minister unveiled a road map for a competitive electricity market for generation, wholesale then retail of electricity. The road map suggested that a competitive retail market is only expected to be well after 2020. That has not stopped the government from using the market to pass one of the hottest of its potatoes.

On 15 April 2011, Decision 24 of the prime minister on adjustment of electricity prices following market mechanism was issued (Decision 24). Under Decision 24, retail power prices can be adjusted by Electricity of Vietnam (EVN) as often as every three months from 1 June 2011 depending on market conditions, instead of being fixed for a calendar year by the government as before. Raising electricity prices was always a political problem for the government given public pressure. Now it seems the government has passed the problem to EVN. It is highly unlikely that EVN will raise prices every time the input prices rise by more than 5 per cent.

Banking and capital markets

Insurance

Minos' palace at Krossos is a maze of rooms (often serving no purpose), corridors and halls that all lead to a central area if you do not lose your way. The Law on Amendment and Supplement of a Number of Articles of the Law on Insurance Business (the Amendment), which became effective on 1 July 2011, is a bundle of provisions in which it is equally possible to lose one's way without a firm grasp of the 2000 Law on Insurance Business, WTO requirements and new developments in the insurance market:

- *cross-border services.* Complying with Vietnam's WTO commitments on cross-border insurance, the Amendment allows foreign-invested enterprises (FIEs) and foreigners working in Vietnam to procure insurance from foreign insurance companies and allows foreign insurance companies to provide cross border services;
- *branches.* the Amendment allows foreign non-life insurance companies to set up branches in Vietnam under branch licences to be issued by the Ministry of Finance (the MOF);
- *reinsurance.* Local reinsurers can now reinsure with foreign insurance or reinsurance companies without needing compulsory reinsurance with a local reinsurer. Despite the sad state of the ratings industry, the Amendment requires such foreign reinsurers to have an international rating that remains to be specified by the MOF;
- *forms of insurance business organisations.* The Amendment reclassifies insurance business organisations in line with the 2005 Law on Enterprises of the National Assembly dated 29 November 2005 as follows (i) joint stock insurance companies; (ii) limited liability insurance companies; (iii) insurance co-operatives; and (iv) mutual insurance organisations;
- *competition.* The Amendment specifically prohibits acts of co-operation between insurers and between an insurer and an insured to divide the insurance markets or limit insurance services; and
- *regulatory control.* Offshore investments and changes of actuary must be approved by the MOF. So must other changes to the name, charter capital, opening or closing of branches and representative offices, the location of the head office, branches and representative offices, transfer of shares representing at least 10 per cent of the charter capital, board chairman and chief executive officer, and reorganisation.

Selection of foreign strategic investors in equitised commercial banks

Warren Buffet may rescue Bank of America and Goldman Sachs, but he may not be able to buy 10 per cent of a Vietnamese state-owned bank. The State Bank of Vietnam issued Circular 10 in April 2011, providing additional criteria for the selection of strategic foreign investors in equitised state-owned commercial banks. These criteria supplement those contained in Decree 69 of the government dated 20 April 2007 on purchases of shares in Vietnamese joint stock commercial banks by foreign investors. Equitised state-owned commercial banks (SOCBs) covered by this Circular include SOCBs that are undergoing equitisation, equitised SOCBs that are not yet listed on the securities market, and equitised SOCBs that are listed on the securities market.

The Circular stipulates additional criteria for the selection of strategic shareholders. Strategic shareholders need to fulfil multiple criteria to prove they have the financial capacity and professional capability to assist SOCBs in their development. Apart from the general criteria, including that strategic shareholders must have strategic interests in line with the development strategy of SOCBs and must not have any conflict of interests with the SOCB, the Circular contains specific criteria that a foreign strategic shareholder must meet:

- the foreign strategic shareholder must be a foreign credit institution or foreign financial institution with total assets of at least \$20bn in the year before the year of registration as strategic shareholder;
- the foreign strategic shareholder must have more than five years of international operating experience;

- the foreign strategic shareholder must be rated by independent international credit rating agencies as 'being capable of undertaking financial commitments and operating normally, even when the economic situation and conditions become unfavourable';
- the foreign strategic shareholder must not be a strategic shareholder, major shareholder or founding shareholder of any credit institution in Vietnam; and
- the foreign strategic shareholder must provide a written commitment and undertaking stipulating its commitment to assisting with the goals of the state-owned commercial bank on a long-term basis.

In addition, equitised SOCBs can only use selection criteria to select strategic shareholders after these selection criteria have been approved by the prime minister.

Administrative sanctions – securities

The government issued Decree 85 on 2 August 2010 to toughen the penalties for breaches of the securities laws (Decree 85). Fines in respect of certain categories of offences have been increased significantly to a maximum of VND500m. Decree 85 also defines new types of administrative breaches of securities laws and additional sanctions. The MOF has also issued Circular 37 dated 16 March 2011 to bring more detailed guidance on a number of breaches defined under Decree 85.

Securities trading

With stock markets reeling not just in Vietnam but also the world, analysts in Vietnam fastened on some rather paltry regulatory changes to support the usual good-cheer waffle that they peddle. Circular 74 became effective on 1 August 2011 (Circular 74). In it, the MOF gave an official green light for investors to overcome certain regulatory barriers that have in practice not hindered them much anyway.

The key points of the new Circular are:

- under prior regulations, investors were not allowed to open more than one securities trading account. Under Circular 74, an investor will be allowed to have accounts at more than one securities company;

- investors will be allowed to buy and sell the same kind of security within a trading day. This point does not mean that 'day trading' (or T+0) will be possible, just that sale/purchase of securities is permitted after the completion of a prior sale/purchase of the same kind of securities on the same day;
- Circular 74 permits margin transactions (*giao dịch mua ký quỹ chứng khoán*, in Vietnamese); however, those hoping to magnify their gains (or losses) will in theory need to wait for detailed implementing regulations; and
- for those investors who prefer the judgement of others to their own, Circular 74 permits an investor to authorise a securities company to trade on his behalf.

For further information please contact

HANOI
 Tony Foster
 T +84 4 3824 7422
 F +84 4 3826 8300
 E tony.foster@freshfields.com

HO CHI MINH CITY
 Milton Lawson
 T +84 8 3822 6680
 F +84 8 3822 6690
 E milton.lawson@freshfields.com

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