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# Indochina notes

Legal updates on investment, infrastructure and finance

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## Investment

### Securities market – foreign ownership cap lifted

According to analysts, one of the reasons the stock market failed for many years to meet expectations was that foreign ownership of listed shares was limited to 30 per cent of the issued shares. Under Decision 238 of the Prime Minister dated 29 September 2005, the cap on foreign ownership of a listed company's shares was increased to 49 per cent from the 30 per cent stipulated by Decision 146 dated 17 July 2003. The stock market reacted (or pre-acted) appropriately.

In foreign-invested joint stock companies (FIJSCs) that are established after conversion under Decree 38 (see *Indochina Notes* April 2003 issue) and that list or register their shares on the local stock market, foreign investors can hold a maximum of 49 per cent of the total number of shares that the competent authority has authorised for issuance to the public.

The next step is to increase the percentage of shares that foreigners can buy in unlisted Vietnamese companies (still 30 per cent and only in certain sectors).

### Securities market – listing of FIJSCs

Another potential boost to the stock market is that foreign-invested companies may soon be listed. The listing of FIJSCs on the stock market has become possible since the State Securities Committee issued Official Correspondence 238 on 29 July 2005. Until now no FIJSC has listed, but TAYA Wires and Cable Joint Stock Company is reportedly planning to do so in the future.

### State Capital and Investment Corporation (SCIC)

Over the last 10 years, corporate Vietnam has been urged to follow all sorts of models, most of them with their own peculiar quirks. On 20 June 2005, the Prime Minister issued Decision 151 to establish the SCIC as a special state-owned corporation. The model that is being discussed is Temasek. It is hoped that the SCIC will emulate its success.

The SCIC has the power to make direct and indirect investments in Vietnam or abroad in any form or sectors. It can set up joint ventures with other investors, purchase assets of other enterprises, or trade shares, bonds and other financial instruments.

The SCIC can mobilise domestic and foreign capital by borrowing, issuing bonds and issuing certain fund investment certificates.

The SCIC is supposed to be financially independent, with charter capital of 5 trillion dong, of which 1 trillion will come from the state budget, and the rest from those state-owned enterprises where the SCIC will be the representative of state capital.

### Distribution and trading rights

Vietnam seems to have acknowledged that World Trade Organization entry will not happen this year. One of the problems to be overcome is the difficulty that US companies have had in establishing distribution businesses in Vietnam. To resolve this situation, in a recent Official Note on 28 July 2005 from the Ministry

of Trade (MOT) to the US Embassy in Hanoi, the MOT confirmed that Vietnam is ready to grant licences to American enterprises interested in establishing trading and distribution businesses in conformity with Vietnam's commitments in its bilateral trade agreement with the US.

## Foreign employees

### Employment of foreigners

Signals that the government is considering changing the 3 per cent cap on foreign employees in Vietnamese companies contained in last year's Decree 103 have proved misleading. In various meetings with the foreign-invested business community, the government had indicated that it was considering removing or increasing this cap. Decree 93 of the Government dated 13 July 2005 does not remove the cap but could help companies in the following ways.

- The maximum of 50 foreign employees has been abolished. This is good news for employers with a very large workforce, who can now employ foreign employees up to the full 3 per cent of total employees even if that results in more than 50 foreigners.
- An exemption from the 3 per cent cap is available if a higher number of foreign employees is stipulated in the employer's licence. This will not help if the Ministry of Planning and Investment or the provincial Department of Planning and Investment is unwilling to add such a clause to the relevant licence. Nor will it help companies that do not need licences but can do business after simple registration.
- Exemption from the 3 per cent cap is also available if approved in writing by the chairman of the provincial or municipal people's committee where the employer's head office is located. Such approval must be based on the 'actual needs' of the applicant enterprise. This is another example of the penchant for 'approvals' that give the country such a bad reputation for bureaucratic overkill.

### Fee for issuance of work permits

On 4 August 2005, the Ministry of Finance (MOF) issued Decision 54 setting out the fees for issuance of work permits for foreign employees:

- fee for issuance of work permit is 400,000 dong/permit;

- fee for reissuance of work permit is 300,000 dong/permit; and
- fee for extension of work permit is 200,000 dong/permit.

### Minimum salary level

There has been mild inflation in Vietnam this year of 6 per cent or so. Public sector employees, hardly paid a decent wage at the best of times, have been protected against its effects. The minimum salary of public employees rose 20.7 per cent on 1 October from 290,000 dong to 350,000 dong per month, as stipulated in Decree 118 of the Government dated 15 September 2005. The adjustment covers employees working in administrative and non-productive agencies and the armed forces, and workers in state-owned enterprises. It also includes labourers working for enterprises operating under the Enterprise Law.

The Ministry of Labour, War Invalids and Social Affairs (MOLISA) is also drafting a Decision to increase the minimum salary level of Vietnamese workers in foreign-invested enterprises (FIEs). The new Decision is scheduled to be issued in early 2006.

### Competition

Nearly three months after the Competition Law came into effect, the government has augmented it by issuing Decree 116 and Decree 120 on 15 September 2005 and 30 September 2005 respectively.

Decree 116 provides further on: (i) how to determine the relevant market and market share (with special provisions for certain sectors); (ii) what constitutes the various types of agreement in restraint of competition; (iii) what constitutes the various practices that are in abuse of a dominant market position or monopoly position, and how to determine when an entity has the capability to substantially restrain competition; (iv) how to determine whether an acquisition amounts to an economic concentration (again, with special provisions for certain sectors); (v) procedures for exemption from competition prohibitions; and (vi) various procedural matters.

Decree 120 sets out the penalties for violations of the Competition Law. Fines can reach 10 per cent of the violator's turnover in the preceding year.

### **Multilevel sales business**

Multilevel sales became popular in Vietnam in the late 1990s but were regulated for the first time in the Competition Law issued in 2004. Detail has now been provided in Decree 110 of the Government dated 24 August 2005.

An enterprise wishing to use multilevel selling methods must obtain a multilevel sales registration certificate from the provincial Department of Trade and pay a deposit of 5 per cent of the enterprise's charter capital (but not less than 1bn dong) to a commercial bank operating in Vietnam.

Decree 110 specifies the responsibilities of multilevel sales companies and bans them from requiring participants to pay security deposits, from charging fees for training courses or seminars, from requiring participants to buy a large quantity of goods when joining the multilevel sales network and from providing false information on the products or benefits for participants.

Medicines, vaccines, biological products, medical equipment, veterinary medicines, pesticides, chemicals and pharmaceutical materials cannot be sold under multilevel sales programmes.

### **House ownership certificates**

Much ownership of land and buildings is not properly certificated: a relic of turbulent times in the recent past, not to mention a political distrust of private ownership. However, times change and now the drive is on to provide better assurances of title. So from 'too little', the country seems to be moving efficiently towards 'too much'.

Before Decree 95 of the Government dated 15 July 2005, land use rights (LURs) were evidenced by a LURs certificate, commonly known as a red book. This is consistent with the concept of buildings being owned, rather than the subject of a use right. A pink book was issued to the owner of a house and evidenced the ownership of both the LURs and the house attached to that land. After Decree 95, two certificates will be required: certification of ownership of housing and certification of ownership of the land on which the housing stands. The Ministry of Construction (MOC) will issue the certificate of ownership of housing and construction works (pink book). The Ministry of Natural Resources and Environment (MNRE) will issue the LURs

certificate (red book) for the land. The happy result (at least for some) is that a person must obtain two different certificates from two different authorities to have full evidence of ownership of a house.

The current draft of the Law on Real Estate Registration complicates matters further: it proposes that ownership of land and construction works and other immovable assets attached to land will be evidenced in a single certificate, which would be called the blue book.

### **Construction quality**

Circular 11 dated 14 July 2005 issued by the MOC provides guidelines on the examination and certification of the quality of certain construction. This Circular applies to projects that must have certificates of quality before being put into operation, which includes public places such as theatres, cinemas, circuses, halls, stadiums, gymnasias, supermarkets, apartments, hospitals, offices and hotels.

### **Pharmacy law**

Pharmaceutical activities used to be subject to numerous laws and ordinances, such as the Law on Protection of People's Health, Ordinance on Private Medical and Pharmaceutical Practice and Ordinance on Price. A new Law on Pharmacy came into effect on 1 October 2005. It tackles issues regarding the pharmaceutical business, pricing and the distribution of pharmaceuticals.

- There are six forms of business in pharmaceuticals: (i) manufacture; (ii) import and export; (iii) wholesale selling; (iv) retail selling; (v) preservation services; and (vi) services of testing pharmaceuticals. To do business in any of these, companies must obtain a certificate demonstrating that they meet the conditions to do so. To obtain this certificate, companies must have the requisite material and technical facilities and personnel with the relevant professional qualifications. Managers must have been issued with a pharmacy practising certificate.
- To be distributed in Vietnam, pharmaceuticals, whether locally manufactured or imported, must: (i) achieve the registered quality standards; (ii) satisfy pharmaceuticals labelling requirements; (iii) be wrapped and packed with materials satisfying requirements for ensuring quality; and (iv) have a registered number. If the product is imported, its

price must not be higher than the current price of imported pharmaceuticals in regional countries similar to Vietnam.

- Non-prescribed pharmaceuticals may be advertised on advertising media. Prescribed pharmaceuticals may not be advertised in whatever form.

## Infrastructure

### Maritime Code

Maritime activities in Vietnam have been constrained by limitations in the Maritime Code of 1990. In an attempt to bring maritime activities back into oceanic mainstreams, the National Assembly passed a new Maritime Code on 14 June 2005 (the New Code).

### Scope of application

The old code applied to Vietnamese seagoing ships and only in specific cases to foreign ones. The New Code covers foreign seagoing ships. This amendment lays the ground for foreign ship owners to be involved in a broader scope of maritime activities, including inland transportation.

The New Code provides slightly greater flexibility to undertake certain inland transportation activities. In cases where Vietnamese seagoing ships are not capable of providing services, foreign ships are entitled to:

- transport super-long, super-heavy cargos or other cargos using specialised ships;
- transport goods for the purpose of preventing or alleviating natural disasters, epidemics or other emergencies (which will be useful if Vietnam needs to start barging in boat loads of Tamiflu); and
- transport passengers and luggage from cruise ships to the mainland and vice versa.

### Ship registration

Previously, only seagoing ships owned by the Vietnamese state, by a Vietnamese organisation having its principal place of business in Vietnam, by a Vietnamese citizen residing in Vietnam or by a foreign person were permitted to register in Vietnam. The New Code expands this to allow registration of ships owned by non-resident Vietnamese and foreign ships leased by a Vietnamese person under a bareboat charter or a finance lease contract.

### Ship mortgages

The New Code should boost financing prospects for shipbuilding by permitting ships in construction to be mortgaged in the same manner as registered ships. Under the old code, ships could be either pledged ('cam co' in Vietnamese) or mortgaged ('the chap' in Vietnamese). By contrast, the Civil Code provides that immovable assets may be mortgaged and movable assets may be pledged. The New Code recognises only one kind of security over ships (a non-possessory mortgage) and sets out the principles for ship mortgages.

### Seaport construction and development

The New Code contains a statement that as a matter of policy, foreign organisations are entitled to invest in constructing seaports and seaport lanes in accordance with the laws. Further, the investor can decide how to manage and exploit its seaport and seaport lane. In fact, as the Thi Vai and Cai Mep developments demonstrate, practice may not be as flexible as policy.

### Southern ports master plan

One of the big concerns for foreign investors in manufacturing industries is the capacity of ports in the south to handle their goods. Now these concerns can be measured against the government's plans to allay them. The Prime Minister issued Decision 791 on 12 August 2005 to approve the master plan on the development of seaports in Ho Chi Minh City, Dong Nai and Ba Ria-Vung Tau provinces to 2010 (with a vision to 2020). The master plan covers two main areas: (i) the development of new ports; and (ii) the move of ports on the Saigon river and the Ba Son Shipbuilding Factory out of Ho Chi Minh City. From now to 2010:

- priority will be given to developing new ports and port complexes for containers, including (i) the Cai Mep container seaport and the Thi Vai general seaport in Ba Ria-Vung Tau province; (ii) general ports and container ports in the Cat Lai and Hiep Phuoc area in Ho Chi Minh City; and (iii) Phu Huu I general port in Dong Nai (for the transportation of goods for industrial zones);
- various ports and shipbuilding factories must be moved out of Ho Chi Minh City by 2010, including Tan Cang (New Port), Nha Rong port complex, Khanh Hoi port, Tan Thuan Dong port, Rau Qua port and Ba Son Shipbuilding Factory;

- state capital will be granted for the construction of the Cai Mep seaport and the Thi Vai general port – foreign investors are encouraged to invest in building other ports in the form of BOT, BTO, BT and joint venture projects;
- the government is studying the establishment of an investment fund for port infrastructure to be financed by port charges – the purpose is to raise money for reinvestment; and
- the government expects to permit foreign investors to invest in loading equipment and to rent domestically invested port infrastructure in the future.

### **Electricity**

On 17 August 2005, the government issued Decree 105 to implement the Law on Electricity. Decree 105 replaces regulations contained in Decree 45 of the Government dated 2 August 2001 on electricity activities and use and Decree 169 of the Government dated 24 December 2003 on electricity safety.

#### **Power plants to be entirely owned by the state**

Under the Law on Electricity, the state will maintain its monopoly over electricity transmission, regulation of the national electricity system and the construction and operation of large power plants considered significant for socioeconomic development or national defence and security. Decree 105 makes it clear that these large power plants consist of nuclear power plants and several hydro-power plants. The list of such power plants will be submitted by the Ministry of Industry (MOI) for the Prime Minister's approval. The implication for investors, including foreign investors, is that power plants not listed under Decree 105 may be open for investment.

#### **Sale of electricity**

Most of the provisions of Decree 45 regarding contracts for sale of electricity, quality of electricity, measurement of electricity and payment of electricity charges have been repealed by Decree 105, but there have been some improvements. Notably the division of contracts into economic and civil contracts has been repealed. This repeal is consistent with the new Civil Code, which will take effect as of 1 January 2006. Decree 105 continues to focus on contracts governing the sale of electricity to end users. Regulations on the purchase and sale of electricity

on the electricity market will presumably be issued by the MOI at some stage.

#### **Electricity prices**

Except for retail sales to end users subject to fixed price levels prescribed by the Prime Minister, Decree 105 expressly allows parties to agree upon the price of electricity, provided the agreed price is within the price brackets laid down by the competent authority depending on the type of electricity sale. If a producer and wholesale buyers are interdependent, and there is no competition, and if the parties cannot come to agreement on the price of electricity to be sold under a long-term contract, upon request by one of parties, the MOI, in coordination with the MOF, will arrange for conciliation between parties. If the conciliation fails, the MOI will set an interim price.

#### **Electricity licences**

Decree 105 specifically addresses the requirements and procedures for the issuance of a licence for each electricity activity. In addition, it sets out the maximum term of a licence for each electricity activity: 50 years for a generating licence, 30 years for a transmission licence, 20 years for a distribution licence and 10 years for a licence for wholesale, retail or consultancy services. These licences are required even for foreign investors who have received an investment licence (always after intensive investigation into their qualifications), another example of the excessive bureaucracy that hinders development of the sector.

#### **Mineral export**

The MOI issued Circular 4 on 2 August 2005 on the export of minerals in the period 2005-2010. Circular 4 restricts the export of raw minerals.

- To be exported, (i) minerals must be exploited from a mine that is not part of the master plan for minerals; and (ii) their quality, after being processed, must meet the quality standards accepted by Vietnam Laboratory Accreditation Scheme.
- Mineral exporters have to satisfy the conditions stipulated in the Commercial Law regarding imports and exports and must obtain all required documents, including relevant mining licences.

## **Vietnam National Coal Group**

Vietnam National Coal Corporation has always been one of the best-run SOEs in Vietnam. It is now set to get even better. In Decision 198 dated 8 August 2005, the Prime Minister approved the establishment of Vietnam National Coal Group (Vinacoal) upon restructuring the current Vietnam National Coal Corporation and its member companies. This will be the second business group established in the country, after Vietnam National Post and Telecoms Group, which was established in March 2005.

On the same day, the Prime Minister issued Decision 199 to set up the parent company of Vinacoal. The parent, which rather confusingly bears the same name as the whole business group, Vietnam National Coal Group, will consist of 11 businesses, including three coal companies, a financial company, a mining company, a rescue centre for miners, a human resources development centre, two coal project management boards and a clinic. The parent company will hold 100 per cent of the charter capital of 18 affiliates but can equitise up to 50 per cent of the charter capital of 24 subsidiary businesses and more than 50 per cent of the capital of four other enterprises.

## **Chemicals industry**

The Prime Minister issued a master plan on the development of Vietnam's chemicals industry to 2010, with a vision to 2020, in his Decision 207 dated 18 August 2005. According to the master plan, the industry should develop into one of the country's key manufacturing sectors. It should focus on the following products: (i) products for agricultural development, including fertilisers; (ii) petrochemical products; (iii) products for industrial development; and (to avoid missing anything) (iv) products for daily consumption. The Decision encourages foreign investors to participate in capital-intensive projects and the petrochemicals sector to effectively exploit oil and gas reserves.

The Prime Minister encouraged the chemical industry to take full use of all financial resources, especially those from foreign direct investment and the issuance of corporate bonds.

## **Banking and finance**

### **International sovereign bond**

Vietnam has just issued its first international sovereign bond. The issue was a great success and has been widely covered in the press. Freshfields Bruckhaus Deringer represented the government of Vietnam on the issuance. For further information on the project please contact Tony Foster or Mara Folz at [tony.foster@freshfields.com](mailto:tony.foster@freshfields.com) or [mara.folz@freshfields.com](mailto:mara.folz@freshfields.com)

### **Deposit insurance**

Deposit insurance was introduced in Vietnam in late 1999 to protect individual depositors. The new Decree 109 of the Government dated 24 August 2005 introduces several reforms:

- the maximum deposit insurance compensation level is raised from 30m dong (US\$1,900) to 50m dong (\$3,200) for each depositor at local credit institutions;
- deposits must be in Vietnam dong to be protected by insurance – insured depositors include individuals, households, co-operatives, private companies and partnerships, whereas previously only individuals were covered; and
- depositors who are shareholders owning more than 10 per cent of the relevant credit institution, members of the board of directors, inspectors, general directors and deputy general directors may not be reimbursed in the event of failure.

### **Land mortgages and guarantees**

The MNRE issued Circular 5 on 16 June 2005 to replace the previous Circular 3 dated 4 July 2003 guiding the registration of mortgages and guarantees using LURs and assets attached to land. The new Circular 5 introduces the following reforms.

### **Registered agreements**

Circular 5 stipulates that all mortgages and guarantees using LURs and assets attached to land must be registered. The agreements to be registered include mortgages or guarantees involving (i) LURs; (ii) residential houses, other structures, forest trees and perennial trees; (iii) LURs and assets attached to land; and (iv) future assets attached to land. The previous Circular 3 did not mention the registration of mortgages and guarantees of future assets.

### Registrar

Under Circular 3, mortgages and guarantees using LURs and assets attached to land were registered at the provincial Department of Natural Resources and Environment (DNRE) if the mortgagor or the guarantor was an organisation, or at the local people's committee if the mortgagor or the guarantor was an individual. Circular 5 now provides for two registries, the LURs Registration Offices at district and provincial levels, under the district and provincial DNRE respectively. The provincial LURs Registration Office will be responsible for registration by mortgagors or guarantors that are economic organisations, overseas Vietnamese carrying out foreign investment projects in Vietnam, foreign organisations and foreign individuals. The district LURs Registration Office will be in charge of registrations by mortgagors or guarantors that are family households or domestic individuals, or overseas Vietnamese individuals permitted to purchase residential houses.

### Time limit for registration

Under Circular 5, the registration file must be submitted no later than five working days after the date of execution of the credit agreement. Failure to meet the time limit could result in a fine of between 200,000 dong and 500,000 dong in accordance with Decree 182 dated 29 October 2004. The previous Circular 3 was silent on this time limit.

### Equitisation of Vietcombank

The Prime Minister has approved the plan for the equitisation of the Bank for Foreign Trade of Vietnam (Vietcombank), one of the country's leading banks. One of the requirements for equitisation is to ensure the continuing state control in Vietcombank. The bank's charter capital will be decided by the Governor of the State Bank, subject to approval by the Prime Minister.

The schedule for equitisation of Vietcombank comprises two stages.

- Stage I: in 2006, Vietcombank will start selling its shares in phases. Each sale will consist of 10 per cent or less of Vietcombank's charter capital. The state will retain control of at least 70 per cent of the bank's charter capital.
- Stage II: from 2007 to 2010, the state will reduce its shareholding in Vietcombank but will retain control of at least 51 per cent of its charter capital.

All domestic and foreign investors will be allowed to purchase Vietcombank's shares. The maximum number of shares that each legal entity and individual will be allowed to purchase will be capped at 10 per cent and 5 per cent respectively. The shares held by foreign investors cannot exceed 30 per cent of the bank's charter capital and a single foreign investor cannot own more than 10 per cent.

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