

REGULATORY FRAMEWORK IN RELATION TO MINING IN VIETNAM

Introduction

On 17 November 2010, the National Assembly of Vietnam introduced the Law on Minerals (*the Mineral Law*) that came into force on 1 July 2011 and replaced the old mineral law issued in 2006. Following the Mineral Law, the Government of Vietnam issued Decree No.15/2012/ND-CP, dated 9 March 2012 (**Decree 15**) and Decree No.22/2012/ND-CP dated 26 March 2012 (**Decree 22**), providing for the implementation of the Mineral Law and mineral auction procedures. Under the new regime, only two separate licences must be obtained for each activity undertaken during a commercial scale mining project - exploration and mining.

A mining company should also consider requirements for approvals for:

- (a) an environmental impact assessment report under the Law on Environmental Protection, or for exploration activities, the registration of a Commitment of Environmental Protection certified by the relevant authority;
- (b) the change of use of land under the Law on Forestation and Forestry Development and its implementing provisions contained in Decree 23/2006/ND-CP of the Government of Vietnam, dated 3 March 2006, providing detailed provisions for implementing the Law on Forestation and Forestry Development (**Decree 23**), where land designated for 'forest' use is involved; and
- (c) the lease of land from the State or the transfer of land rights from other economic organisations, family households or individuals in accordance with the provisions of the Law on Land and its implementing provisions contained in numerous land decrees and circulars. Where the designated use of the land is something other than 'non-agricultural production and business', a mining company will also need to apply for a change in the designated use of the land.

The time involved in obtaining these approvals varies, however, in general, an environmental impact assessment report will be appraised within 30 to 45 days of submission and a change of use of 'forest' land will take 30 days from the date of submission.

Overview of the key changes

Under the Mineral Law, the mining activities consist of exploration and mining which now encompass the mineral processing. While the mineral licensing authority has been mostly centralised to the Ministry of Natural Resources and Environment (**MONRE**), provincial people's committees only have the authority to

approve the mineral survey and obtaining samples, mining licences for common construction materials and peat, scattered/low reserve minerals as specified by MONRE. The exploration and mining licences will be auctioned except for exemption areas delineated by the State on energy security and national security grounds. With respect to licensing procedures, the Mineral Law and Decree 15 extend the term of the exploration licences from 24 to 48 months, and additionally require the licensees' debt/equity ratio of 50/50 for exploration and 70/30 for mining projects. The mining right transfer procedures are also set out in a clearer manner. Furthermore, the mineral regime requires the mining licensee to pay a mining fee upon the issuance of a mining licence in either a one-off payment or annual instalment method at the licensee's discretion. The mining fee would be calculated on the basis of value, reserves and quality or types of minerals, as well as mining conditions. Vietnam has a new policy restricting mineral exports.

Recently, the Prime Minister of Vietnam issued a new directive including (i) no more exportation for raw minerals, iron ore; lead- zinc ore; chromite ore; manganese ore; copper ore; apatite ore; and cubes ore; (ii) no more exploration and mining licence for placer titanium ore; placer gold; (iii) temporary suspension of licensing for new mining of white marble, granite; (iv) the Prime Minister decides on the export of rare earth minerals.

Investment Certificate

Before issuing an investment licence for mining activities to a foreign organisation or to a joint venture involving a foreign party, the provincial people's committee, as the investment licensing authority, is required to obtain the written opinion of the relevant mineral licensing authority, i.e. MONRE and/or Ministry of Industry and Trade (**MOIT**). The mineral licensing authority must reply to the investment licensing authority within 30 days. In the event of differing opinions, the investment licensing authority will make a submission to the Prime Minister for his final consideration and decision.

Decision No.37/2007/QD-BCN of the Ministry of Industry and Trade, dated 7 August 2007 (**Decision 37**), requires an investment project for the exploration and mining of minerals to comply with the Master Plan and to guarantee compliance with relevant environmental laws.

If the investment project is yet to be included in the Master Plan, an approval in-principle approval issued by the Prime Minister to that investment project will be required.

There are two types of licences for commercial scale mining available under the Mineral Law as outlined below.

Exploration licence

An exploration licence is required for exploration activities in areas not already subject to any other licence issued by the MONRE. The area of land over which an exploration licence may be granted varies depending on the minerals involved and the location of the site.

An exploration licence may be granted for no more than 48 months, but may be extended on numerous occasions for up to a further 48 months in total to entities having equity of not less than 50% of their proposed exploration budget. On each request for an extension, the exploration licence holder must surrender at least 30% of the licensed area. This includes the time required for preparing a report on the exploration results and a feasibility study on mining activities. If the exploration right is transferred to another entity, then the duration for exploration will be the residual duration of the previously issued exploration licence.

An exploration licence is exclusive in respect of the area over which it applies and is transferable under certain conditions set out in Article 43 of the Mineral Law including the issuance conditions, receipt of issuer approval and payment of assignment tax. However, the Mineral Law cancelled the inheritance right of an individual over the exploration licence.

An investment licence does not automatically entitle the holder to an exploration licence.

Within six months of the expiry of an exploration licence, the licence holder enjoys a 'special right' under Article 46.3 of the Mineral Law to apply for a mineral mining licence providing it has satisfied all conditions of the exploration licence and complies with all applicable Vietnamese laws and regulations. If the holder does not meet these conditions then a new exploration licence or a mining licence may be granted to a different organisation over the same area.

Mining licence

Where a foreign company applies for a mining licence, that licence is to be issued at the same time as, or subsequent to, the issue of an investment licence under the Investment Law.

The duration of a mining licence is determined on the basis of the feasibility study submitted as part of the application for the investment licence, but cannot exceed 30 years. It may be extended several times under certain conditions, but Article 54.2 of the Mineral Law provides that the total duration of any extensions granted must not exceed 20 years.

The mining licence is transferable subject to three main conditions:

- (a) the mine has been constructed and put into operation;
- (b) the assignee is eligible to be the mining licence holder as required in Article 53 of the Mineral Law; and
- (c) the licensing authority for the transferred mining licence has approved the terms and conditions of transfer.

One of the new provisions is the mining licence auction as set out in Article 78 of the Mineral Law. The Prime Minister has the authority to provide an exemption from the auction of the mining licence in some specific areas in relation to the national mineral strategy, national defence, and sensitive environment areas in accordance with the opinion of the MONRE. Royalties are payable based on production and selling price. The issue of prospecting permits and exploration, mining and processing licences falls mainly within the jurisdiction of MONRE. Other ministries have specified responsibilities and the Mineral Reserve Evaluation Council (under MONRE) has the responsibility for assisting in evaluating and approving reserves for feasibility study purposes.

A mining right fee will be payable by entities to which mining licences are granted and also by existing mining licence holders based on remaining reserves.

The Mineral Law does not contain any restriction on exports. However, the Vietnamese Government has adopted a Master Plan whereby restrictions may be placed on the export of certain minerals pursuant to that plan.

Environmental approval process

The National Environmental Agency is located within the MONRE and is responsible for environmental administration of the mining sector.

Entities licensed to carry out mining activities must comply with the Law on Environmental Protection to minimise any adverse environmental impacts. They must also rehabilitate the environment after they have ceased their mining activities. All expenses required for these purposes must be identified in the company's environmental impact assessment report and the feasibility study.

Under the Law on Environmental Protection, a mining company is required to provide a deposit for environmental rehabilitation, pay an environmental protection fee, prepare a plan of environmental rehabilitation for approval by the relevant authority and implement environmental rehabilitation in accordance with the approved plan.

In accordance with Article 5 of Decree 21/2008/ND-CP of the Government of Vietnam, dated 28 February 2008 (**Decree 21**), prior to applying for a mining licence, a company intending to undertake

mining activities must submit an environmental impact assessment report to either MONRE or Department of Natural Resources and Environment of the municipal/provincial people's committee (depending on the scale of the investment project) for approval.

The MONRE or the municipal/provincial people's committee (as applicable) will then organise for the appraisal of the environmental impact assessment report to be completed within 30 to 45 days of the date of receipt of the report.

In the case of mineral exploration and other mining projects, the company concerned must register a commitment of environmental protection to be certified by the relevant authorities (that is, the people's committee at district level) before submitting the application for issuance of an exploration licence or a mining licence.

Forestry

The Ministry of Agriculture and Rural Development (**MARD**) is responsible for exercising State administration of forestation and forestry development throughout the whole country with the coordination of the MONRE, the Ministry of Police, and other ministerial departments.

The main sources of regulation on forestation and forestry development are:

- (a) the Law on Forestation and Forestry Development, passed by the National Assembly of Vietnam, on 3 December 2004; and
- (b) Decree 23/2006/ND-CP of the Government of Vietnam, dated 3 March 2006, providing detailed provisions for implementing the Law on Forestation and Forestry Development (**Decree 23**).

Under these laws, and as directed by the Prime Minister, mineral mining and processing activities must not cause any impact on the protection of watershed and specialised-use forests.

Under Article 29 of Decree 23, the prescribed purpose for the use of a forest may be changed to a non-forestry purpose only in compliance with the laws and regulations relating to land, forest development and protection and the master plan of forest development and protection approved by relevant authorities. An applicant seeking an amendment in the use of certain land must submit:

- (a) details of the investment project and its approval by the relevant authorities;
- (b) an environmental impact assessment report prepared for the change of use of the forest;
- (c) a plan of compensation for forest surface clearance approved by the relevant authorities; and
- (d) an afforestation plan prepared by the relevant authorities.

Approval for the change of land use takes 30 days from the date of submission of properly completed application documents.

Landholder approvals

Under Article 94.3 of the Law on Land, land can only be used for mineral activities where the project owner has obtained a licence for mineral activities and a decision on the lease of land for mineral exploration or exploitation or a decision on land allocation or the lease of land on which mineral processing has been issued by the competent state body.

Under certain decrees and circulars providing details for the implementation of the Law on Land, the State may lease land to organisations and individuals permitted to explore and exploit minerals. It is not necessary to lease land if the mineral exploration does not affect the land use or if the mineral exploitation does not affect the ground layers of the land or the land surface.

In accordance with Article 94.3 of the Law on Land, land may only be used for mineral activities:

- (a) in accordance with the terms of a mining licence issued by the relevant authorities and the schedule for mineral exploration and mining and on the basis of a lease provided for that purpose;
- (b) where appropriate measures are taken to protect the environment, to treat waste and to avoid causing loss to surrounding land users and the local community; and
- (c) on the condition that the land user will return the land to the condition stipulated in the land lease contract on the completion of the project.

Organisations and individuals wishing to use land surfaces for processing minerals may lease the land from the State or receive an assignment of the land use right or the land lease from other economic organisations, family households or individuals.

Mineral processing may be conducted only on land designated for non-agricultural production and business. Such land is subject to the land use regime applicable to land on which production or business facilities are built. If the land is not designated for non-agricultural production and business, the mining company will need to apply to the relevant authority for a change in the designated use of the land.

Other approvals

Assignment of rights to conduct mineral exploration and mining

Under Article 43 and 66 of the Mineral Law, organisations and individuals permitted to conduct exploration and mining activities may assign their mineral rights to other organisations or individuals only after obtaining the approval of the body that issued the relevant licence and paying an assignment tax.

Surrender of licences to conduct mineral activities or surrender of a part of a licensed area

Under Article 48 and 59 of the Mineral Law, any organisation or individual permitted to conduct exploration and mining activities may surrender a part of the licensed area or the licence for mineral activities provided that they have:

- (a) fulfilled all their obligations up until the time of their application to surrender the licence, and
- (b) taken adequate measures to rehabilitate the environment and to ensure that the surrendered area is safe.

The licensing body must provide written approval for the surrender of a licence.

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