

# BUSINESS ISSUES BULLETIN

Translated from original Vietnamese document

VIETNAM

THE BUSINESS INFORMATION CENTER AT THE VIETNAM CHAMBER OF COMMERCE AND INDUSTRY

No.26 (29) April 2009

## REFORM OF THE MINERALS LAW Improving the Investment Climate for the Mining Sector in Vietnam

Geological and mineral surveys indicate that although Vietnam is a minerals rich country<sup>1</sup>, it does not presently appear on common lists of countries that are considered attractive for mining investment by the international community. Before 1990, most mineral resources, mainly coal and metals, were identified under the State budget with outdated techniques. In addition, environmental issues were not properly taken into account. The first Minerals Law was promulgated in 1996. In 2005, to comply with World Trade Organization accession requirements, the Law was amended and an implementing Decree was issued. Although the Minerals Law contains many provisions in common with similar laws in other countries that have thriving mineral industries, a number of inconsistencies and constraints remain that need to be addressed. Also, as a consequence of recently increased mineral royalties, export tariffs and other adverse fiscal factors, investment in Vietnam's mining industry is now in rapid decline.

In this Business Issues Bulletin, we consolidate recent comments on the present Minerals Law from experts, lawyers, business associations and government officials in order to address significant hurdles, both legislative and otherwise, to be overcome to create a regulatory environment that will encourage investment by quality investors. The analysis and discussion focus on critical issues to improve the present Minerals Law, including security of tenure, stability of fiscal/investment conditions, and clarity of administrative/permitting procedures and governmental authority.

The government's policy regarding these issues will determine whether the industry continues to stagnate and become an increasing environmental and social liability or alternatively whether conditions are established that will allow quality investors to modernize and upgrade the efficiency of the industry so that it may contribute strongly to the Vietnamese economy.

### Security of tenure should be ensured for investors

The current Minerals Law allows for the issuance of mineral exploration licenses with a duration of 24 months. The initial period may be extended at the Government's discretion for a further 24 months. It may be possible for the license to be renewed once more for an additional 24 months, thereby making it possible for the exploration license to be valid for a total of six years, with no further extensions permitted. For most significant exploration

operations, this is an unrealistic time-frame, which does not allow sufficient time for the license holder to confidently complete initial reconnaissance, detailed exploration work, resource definition and feasibility studies needed to apply for a mining license. As exploration activities often involve great upfront costs and time, uncertainty over whether a mining license will eventually be granted following explorations is a major disincentive to mining companies in Vietnam. To address this issue, the following recommendations should be taken into consideration:

- **Extend the term** of the mineral exploration license (based on international practice) to at least 10 years, so as to allow sufficient time for exploration companies to confidently complete initial reconnaissance, detailed exploration, resource definition and feasibility studies that are needed before applying for a mining license;
- **Ensure the right to mine** for

exploration license holders to apply for a mining license by extending the validity of the "special right to apply" period from six months to 1-2 years or to combine the exploration license with mining license.

### Consistent and fair fiscal regime should be established

Due to the unique characteristics of the mining industry (such as the finite life of a mining project and its requirement for large capital investment), an unpredictable fiscal regime will quickly imperil or destroy the viability of a mine and seriously undermine investor confidence in the mining sector. Unfair and unpredictable policies that affect profitability caused by changes to the fiscal regime (through taxation, royalties, and fees) threaten the long-term viability of a project.

The key aspect of a consistent and fair fiscal regime is that the government be steadfast in abiding by its commitment to stable and fair policies. In addition, the development of an optimal minerals tax regime requires policy makers to assess the unique characteristics of the mining industry and the cumulative effect of multiple taxes on mining economics and on the attractiveness of foreign investment in Vietnam. Most successful countries

*(Continued on page 4)*



The Business Issue Bulletin provides those interested in business issues with a short summary and analysis of a particular topic affecting the business environment in Vietnam, and exposure to different opinions held by various stakeholders on the topic.

The Bulletin is published in partnership with and funded by MPDF, an IFC-managed private sector development initiative in Vietnam, Cambodia, and Lao PDR, whose donors are Australia, Canada, Finland, IFC, Ireland, Japan, New Zealand, the Netherlands, Norway, Sweden, and Switzerland.

The statements and opinions presented here are only meant to provide additional reference material and do not reflect the official opinion of the Vietnam Chamber of Commerce and Industry (VCCI) or IFC.

Readers are welcome to copy and distribute the information contained in this bulletin provided acknowledgement is given to VCCI/IFC as the source.

(1) According to Saigon Times Weekly dated September 23, 2006, Vietnam is ranked seventh among 15 countries that are the richest in mineral resources.

### Security of Tenure should be ensured for investors



- In order to encourage more quality investment in the mining sector, the following issues should be taken into account:

*Licenses issued for mineral exploitation activities should be combined.* As stated in the Minerals Law, mineral activities are defined as those related to investigation,

exploration and processing of minerals in gas and solid state, mineral and natural water; and at each stage, organizations and individuals are required to obtain a license from a State authorized body. However, these activities are closely intertwined and there is an overlap among provisions on procedures and conditions to issue a license. A proposal which may be raised is that licenses issued for mineral investigation and exploration should be combined and that a similar amalgamation should occur in relation to licenses granted for exploiting and processing minerals. This will help investors who are involved in mineral activities to relieve the burden of time limits in applying for licenses. Investors would be in a position to prepare a proposal for mineral investigation and exploration, as well as a feasibility report on the combination of mineral exploitation and processing to be incorporated into their investment project.

*The time-limit for a license to be issued should be extended.* As specified in Article 31.1 of the Law on Minerals, the holder of

the exploration license merely has a “special right to apply” for a mining license, which is only valid for six months after the expiration of the exploration license. The period of six months appears to be too short to prepare any application dossiers for issuance of the mineral exploitation license and this exposes investors to the risk of losing their exploitation rights after having spent considerable time, effort and money to get the project to that state. These provisions should be revised to extend the time limit for renewal up to two years from the expiry date of the license.

*There should be firm commitment in conducting mineral activities.* In order to protect the rights and interests of investors who are involved in mineral activities, some developed countries have applied a form of concession contract to mineral activities. Concession contracts provide security and goodwill with respect to investments and protect investors' rights and interests. In order to provide against legislative changes potentially detrimental to investors' interests, the Government and relevant parties must ensure that the investors' interests are contractually guaranteed, particularly in relation to tax concessions. A sample contract should be established and approved by the State authorized body and should be uniformly used for investments in mineral activities. Therefore, it should be considered whether the concept of a concession contract with respect to mineral activities be incorporated into the draft Law on Minerals.

Mr. Nguyen Huy Ba  
Lawyer - Frasers Law Company

### Consistent and fair fiscal regime should be established



- Mineral resources are very important for the process of modernization and industrialization. They have a long life (several decades) and therefore should be managed economically and efficiently. Moreover, according to the Investment Law of 2005, mining is considered a conditional investment activity. However, no clear and adequate

regulations are available. According to the current licensing structure (for minerals exploration), precious mineral resources are inefficiently used and sustainable development is not enshrined in law. In order to efficiently and economically use the capital invested and the limited mineral resources available, the Government should have a policy to allow investors to buy this state “property” (minerals) through auction. This would “pay back” the government for its administrative efforts.

Although such auctions are currently provided for in Article 23 of Decree 160/2005/NĐ-CP, they have yet to occur. State revenues have instead been generated mainly through royalties, fees, and taxes. Hence, state revenues from mineral activities remain low and do not reflect the value of these resources. Auctioning off mining concessions would not only increase state

revenues but would also motivate investors to improve their mining and processing technology to make full use of the mineral resources.

Dr. Le Ai Thu  
Head of Legal Division  
Department of Geology and Minerals of Vietnam



- During the second half of 2008 the Government introduced several minerals tax policy changes, including first, the removal of VAT incentives when unprocessed minerals (i.e. not yet processed into final products) were transferred into a VAT exempted category. With this policy, mining companies are unable to process

minerals into final metal products and do not benefit from VAT refunds. This increases production costs. Second is the export tax for various kinds of minerals. At present, the export of most ores are subject to tariffs of 20% (up from 5% at the start of the 2008 year). Third is the increase in corporate income tax (CIT) to 32-50% starting January 2009 depending on each specific project. Not least, the increase in royalty rates (for the majority of minerals

from 5% to 7% and for gold from 6 to 9%) and a new environmental protection fee are also included in the recent changes to the fiscal regime.

When considered together, these changes have transformed Vietnam into one of the most heavily taxed mineral jurisdictions in the world. Most of these changes were introduced last year, when the world economy was robust. The subsequent global recession however has sent the world economy into dramatic decline and the price of most minerals has plummeted dramatically. As in Vietnam, Governments all over the world are aggressively seeking solutions to limit this damage. Most are achieving this by providing incentives and economic stimulus to assist enterprises to cope with difficult conditions and continue operating. In Vietnam the government has acted swiftly to introduce several mechanisms that will assist small and medium sized domestic enterprises in other industry sectors, including the reduction of 50% VAT, the exemption of CIT for the 4th Qtr of 2008 and the year 2009 and the deferral of changes to the Private Income Tax rates.

The value of these concessions to the minerals industry however is small and do little to compensate for the heavy tax

increases imposed during 2008. Some relief in the form of reductions in tariffs has been granted to specific sectors (steel, and more recently coal) but the retention of high tariffs and the imposition of blanket bans on the export of other commodities (despite the absence of domestic markets) is threatening closure of a number of existing operations and the abandonment of plans for the development of new mines. Since late last year, more than US\$500 million in foreign investment has already been lost. Should the Government fail to decisively correct investors' negative sentiment towards Vietnam following the 2008 fiscal changes, the consequential loss of foreign investment will likely be measured in many tens of billions of USD in years to come.

Alternatively, rapid and decisive corrective action by the Government could allow the mining industry to contribute greatly to the national economy and the alleviation of poverty and to the creation of new infrastructure and job opportunities, particularly in remote and poorer regions.

*Mr. Tran Hai Binh*

*Head of Consulting Division  
ACC Consulting Company*

## Clarity of administrative/permitting procedures and governmental authority

- Implementation of the Minerals Law has shown that regulations relating to licensing coordination among ministries and agencies do not meet the requirements of administrative reform and are not relevant to the characteristics of the mining industry. This has created hurdles in implementation of the law. It is more prevalent in areas under the authority of provincial People's Committees not covered in the mineral master plan for the country. Criteria for granting a mining license, except for minerals for building materials and peat, are not based on legal regulations, for instance. Nor are there guidelines for provincial People's Committees to grant mining licenses for minerals to produce ordinary building materials, which does not require an exploration process.

Moreover, it is not clear which ministry or agency is responsible for licensing, causing severe overlap. As stipulated in Article 55 (amendment) of the Minerals Law however, the Ministry of Natural Resources and Environment (MONRE) at the central level and the provincial People's Committee at the local level are responsible for administration of minerals. According to Article 4 of Decree 160/2004/NĐ-CP, the Ministry of Construction (MOC) and Ministry of Industry and Commerce are responsible for submitting the minerals master plan, which is under the state administration of each ministry, to the Prime Minister for approval.

Thus, in order to ensure consistency, feasibility, and compatibility with the law while also taking into account unique characteristics of mineral resources, the National Assembly should designate MONRE as the lead agency in the administration of minerals. MONRE's responsibilities would include developing a strategy and master plan as well as deciding areas for bidding.

They would also hold auctions for mineral concessions. MOC and the Ministry of Industry and Commerce would only coordinate with MONRE as needed.

*Dr. Le Ai Thu*

*Head of Legal Division  
Department of Geology and Minerals of Vietnam*



- Optimum development of mineral resources in Vietnam will require a careful decentralization of authority and responsibility between central, provincial and local governmental entities to avoid the pitfalls that other countries have faced with rapid decentralization. Such pitfalls, which quickly become disincentives to investment in the mineral sector, can include project approvals inconsistent with overall government policy, gaps in the administrative and technical capacity to oversee projects, and inconsistencies in enforcement of the regulatory regime. By establishing its own decentralization strategy for the sector, Vietnam can: (a) allocate authority and responsibility to provinces and local governmental units to improve administration of the sector guided by national goals and expectations; (b) utilize central government's lead agency regulatory expertise through coordinated guidelines to provinces and local governmental units; and (c) improve the investment regime to attract foreign investment.

*Dr. Jennifer Cook Clark*

*International Consultant on Mining*



● The Ministry of Planning and Investment recently released figures showing that foreign direct investment (FDI) in the Vietnam mining sector is currently decreasing markedly.

In recent years, the fiscal and regulatory regimes applicable to the mining sector have deteriorated. As a result, FDI within Vietnam's mining sector decreased from around 10% of total FDI in the years preceding 2006, to less than 1% today. The reasons for this are not hard to understand, since unlike other countries that have robust mineral industries, the mineral industry in Vietnam continues to face three substantial hurdles. *Firstly, the present Minerals Law* comprises a labyrinth of archaic and supplementary regulations, which have led to Vietnam being widely perceived as one of the most difficult mining jurisdictions in the world. *Secondly, opaque administration*, as a consequence from separate administrative and licensing functions at ministries, has introduced uncertainties and inconsistencies in the application and interpretation of the Minerals Law. These in turn produce unacceptable delays and dilute the "security of tenure" and "right to mine" that are critical to attract quality investment and are also necessary for government to maintain effective control over exploitation of the national mineral assets. *Thirdly, the adverse fiscal regime*, as exemplified by recent Ministry of Finance increases in mineral royalties and export tariffs, removal of VAT incentives and a punitive increase in Corporate Income Tax, have made Vietnam's mining sector perhaps the most heavily taxed in the world. Regulations banning the export of some mineral

products (despite there being no Vietnamese market for those products) impose yet further disincentives to FDI.

When considered together, these three hurdles are almost insurmountable and will continue to deter significant FDI in minerals assets until such time as they are effectively remedied. With increasing pressure to meet National Socio-Economic Development Plan (NSED 2006-2010) growth targets (especially in remote regions) there is no other industry that could equal the variety of benefits that a successful mineral industry could potentially provide. Vietnam is a mineral-rich country with enormous potential for a strong, modern mining industry to build infrastructure and create skilled employment opportunities in low socio-economic remote regions and contribute many times more to the national economy than it does at present.

It is therefore greatly hoped that current Government initiatives are successful in reforming the Minerals Law, improving administration transparency and granting fiscal stimulus to the minerals sector. Experts within the industry have predicted that contingent upon such success, Vietnam mineral FDI could well surpass US\$1 billion per annum within the next few years, with future potential well beyond that. Sustained capital investment at this level would promote much needed improvements in the fields of mineral exploration, health and safety and environmentally sustainable mining methods. This would be reflected by greatly enhanced sector contribution to the national economy and growth targets in remote regions.

Mr. Rod Murfitt  
Director General

Olympus Pacific Minerals Inc  
Chairman and Chief Executive Officer

(Continued from page 1)

recognize that mineral taxation arrangements cannot be decided one instrument at a time, on an ad hoc basis, but need to be established as a comprehensive package that balances taxes, royalties and fees against another, and recognizes acceptable cumulative impact upon the industry.

### Clarity of administrative/permitting procedures and governmental authority

Vietnam's existing administrative and permitting procedures raise many issues regarding unnecessary requirements of approvals by various ministries and agencies during the applications for investment, exploration and mining license. The relationships between the minerals master plans (prepared by the Ministry of Industry & Trade and the Ministry of Construction) and the Minerals Law (administered by the Ministry of Natural Resources and Environment) and the Investment Law (Administered by the Ministry of Planning & Investment) are unclear and create disincentives to mining investors. To address these issues, the following recommendations should be taken into consideration:

- **There should be a "lead agency"** with necessary oversight of the entire mineral development process. Even more importantly, that lead agency must be the main agency in charge of licensing, administration, inspection and enforcement. In addition, it should be responsible for coordinating with other ministries/agencies as needed. The existence of disparate ministries with separate management functions now threatens the "right to mine" that is critical to attract quality investment and for government to

competently maintain control over the mining life-cycle;

- **There should be clarity** in the decentralization of responsibilities for implementation and administration from central government to the provincial authorities. Presently, ambiguity in regulations leads to inconsistencies in interpretation and application from province to province.

### Conclusion

Amending the Minerals Law to improve the investment climate for the mining sector will entail dedicated and focused work. Aspects that will need to be folded into the process include early briefings and guidance from policy makers to direct and authorize drafting in directions that will be positive for the outlook of the mining sector. Significant issues have been raised, including recentralization of licensing authority, instituting a "lead agency" to oversee and manage the entire life-cycle of a successful mining project, stabilization measures for the fiscal regime and investment condition and clarity of administrative/permitting procedures and authority.

In addition, WTO accession has opened the country to the markets of the world and has opened the mining sector of Vietnam to international companies. It is critical that current trade and tariff issues relevant to the mining sector be considered during the 2009 Minerals Law reform.

Finally, as a country rich in minerals, Vietnam has the potential to develop a vibrant mining industry that will provide the country with a major source of public and private revenue. It is important for the Government to help ensure the success of the industry, by introducing legislative and fiscal enhancements that recognize the unique characteristics of the mining industry.