

APPENDICES

1. Meetings held – hydropower sector
2. Revision to Master Plan V
3. Vietnamese legal framework on foreign investment

APPENDIX 1 - Meetings – Hydropower sector

Date: 16.4.2004 and 22.4.2004

EVN - Electricity of Vietnam

Address: Tran Nguyen Han, Hoan Kiem Dist, Hanoi, Vietnam,

Tel: 84 4 8249509, Fax: 84 4 8249462, E-mail: vp@evn.com.vn, Website: www.evn.com.vn

Persons met:

- Lam Du Son, Vice President (met 22.4.04)
 - Phan Minh Tuan, Director International Cooperation Department (met 22.4.04)
 - Tran Tuan Dzung, Deputy Director Intern. Cooperation Department (16.4.04)
 - Kim Hoa, Deputy Director Power Generation Department (16.4.04)
-

Date: 21.4.2004

Ministry of Industry (MOI)

54 Hai Ba Trung, Hanoi, Vietnam

Tel: (84-4) 826-7988, Fax: (84-4) 826-5303

Persons met:

- Mr. Ta Van Huong, Director Department of Energy and Petroleum
 - Mr. Ngo Huy Toan, International Cooperation Department
-

Date: 16.4.2004

Song Da Construction Company

Address: G10, Thanh Xuan Nam Street, Thanh Xuan District, Hanoi, Vietnam ,

Tel: 84 4 8541164, Fax: 84 4 8541169

Persons met:

- Ninh Manh Hong, Deputy General Director
 - Pham Van Hung, Vice Director
 - Tranh Dinh Sinh, Senior Engineer (studied in Norway)
-

Date: 17.4.2004

Hydropower Project Management Board (PMB) No. 4 in Pleiku

Persons met:

Le Xuan Tung, Deputy Manager

Date: 21.4.2004

NHP Management Board (Son La Hydropower Project Management Board)

Persons met:

- Mr. Vo Than Thuy, Manager of Planning Division
 - Ms. Tam Dan
-

Date: 22.4.2004

Institute of Energy

Nr 6 Ton That Tung Str.,- Dong Da, Hanoi

Tel: 8529302, 5743279 and 8523353

Fax 84-4-8523311

Persons met:

- Pham Khanh Toan, Director
-

Date: 20.4.2004

Power Engineering Consulting Company 1 (PECC1)

Persons met:

- Ngyen Quyet Thang, Deputy Director
-

Date: 17.4.2004

Yali power station

Persons met:

Date: 17.4.2004

Se San 3 power station (under construction)

Persons met:

Date: 19.4.2004

Thac Ba Power Station

Persons met:

Date: 20.4.2004

Power Engineering Consulting Company 1 (PECC1)

Persons met:

- Ngyen Quyet Thang, Deputy Director
-

Date: 21.4.2004

NHP Management Board (Son La Hydropower Project Management Board)

Persons met:

- Mr. Vo Than Thuy, Manager of Planning Division
 - Ms. Tam Dan
-

APPENDIX 2 - Revision to Master Plan V

THE GOVERNMENT

SOCIALIST REPUBLIC OF VIETNAM

Independence - Freedom - Happiness

No.: 40/2003/QD-TTg

Hanoi, 21 March 2003

DECISION OF THE PRIME MINISTER on correcting certain details of the development plan for the Vietnamese power sector in the 2001-2010 period with directions up to 2020.

THE PRIME MINISTER

Pursuant to the Law on the Organisation of the Government dated 25 December 2001;
After considering the proposal of the Ministry of Industry (as set out in Official Letter 4505/CV-KHDT dated 13 November 2002), appraisal opinions of the State Evaluation Council for Investment Projects (as set out in Official Letter 19/TDNN dated 29 January 2003) and opinions from relevant ministries and sectors on correcting the development plan for the Vietnamese power sector in the 2001-2010 period with directions up to 2020,

DECIDES:

Article 1

To correct certain details of the development plan for the Vietnamese power sector in the 2001-2010 period with directions up to 2020 (called **corrected power planning V**) as follows:

1. **Requirement for additional capacity:**
By 2005, the requirement will be 48.5-53.0 billion kWh.
By 2010, the requirement will be 88.5-93 billion kWh.
2. **Developing power sources:**
 - The Ministry of Industry is to instruct the Vietnam Electricity Corporation (**EVN**) and other relevant investors to speed up progress in constructing power source and grid projects; to upgrade existing power sources; to improve methods of operation and management to meet the increasing requirement for additional capacity, quality, efficiency and savings.
 - A list of power source projects where EVN is to act as the investor is referred to in the attached Appendix 1.
 - A list of power source projects where enterprises (other than EVN) are to act as the investors is referred to in the attached Appendix 2.

Enterprises belonging to various economic sectors are encouraged to participate in investing in coal-burning power projects in the Quang Ninh area or in hydro-power projects having a capacity of 100 MW in the form of a joint stock company where a State corporation holds a controlling share.
 - The Ministry of Industry should make public power sales prices and a specific list of projects to enable enterprises (other than those belonging to EVN) to participate.

The capacity, site and timing for constructing power source projects will be decided by the authorised body before the investor approves the feasibility study report for each specific project.
3. **Developing power grids:**
 - (a) To speed up the progress of constructing high voltage power grid projects, specifically: the Phu My-Nha Be-Phu Lam; Pleiku-Phu Lam; and Pleiku-Doc Soi-Da Nang-Ha Tinh-Thuong Tin 500 kV lines in accordance with the set timetables.
 - (b) Power grid projects (see Appendix 3).
4. **Sources of investment capital:**
 - (a) EVN is allowed to raise capital from various sources to invest in power supply sources and grids on a self-borrowing and self-repayment basis (ODA loans, domestic and foreign capital credits, export credit loans from suppliers of equipment, borrowing capital by way of equipment, issuing bonds, equity); and to continue to comply with the system where the central authority, local authority, the State and the people cooperatively work to develop rural power grids.
 - (b) EVN is to encourage domestic and foreign investors to participate in building power source works and distribution power grids in accordance with the following

investment forms: independent power plants (IPP), build and transfer contracts (BT), build, operate and transfer (BOT), joint ventures and joint stock companies.

5. Certain policies:

- (a) To speed up the progress of developing projects, EVN may omit certain steps in preparing pre-feasibility study reports on power source and grid projects referred to in the Appendices to this Decision.
- (b) EVN may appoint a domestic consultancy organisation to act as the main consultant for power source and grid projects. For complex matters, EVN may sign a contract to hire a foreign consultant to help.
- (c) The Ministry of Industry is to coordinate with the Ministry of Finance in studying and submitting to the Prime Minister an appropriate policy to provide budget funds to invest in power source and grid projects for serving socio-economic development in remote and mountainous regions; providing funds to use immediate energy sources not covered by the national power grid; and separating EVN's not-for-profit activities from its business and production activities.
- (d) A commercial bank may provide to EVN loans exceeding fifteen per cent (15%) of its equity to enable EVN to invest in a power project once its efficiency has been proved and the feasibility study of the project has been approved by the authorised body.
- (dd) People's committees of provinces and cities are responsible for coordinating with the Ministry of Industry, EVN and other investors in dealing with compensation and re-settlement issues relating to power source and grid projects in accordance with timetables approved by the authorised body.

Article 2

This Decision becomes fully effective fifteen (15) days after the date it is signed. Other matters not contained in this Decision are to be implemented in accordance with Decision 95/2001/QĐ-TTg dated 22 June 2001 of the Prime Minister.

Article 3

The Minister of Industry, heads of relevant ministries and sectors, chairmen of people's committees of provinces and cities under central authority, the board of management and the board of directors of EVN are responsible for implementing this Decision.

PRIME MINISTER
(signed and sealed)
PHAN VAN KHAI

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APPENDIX 1

POWER SOURCE PROJECTS FOR WHICH EVN IS TO ACT AS THE INVESTOR

(issued with Decision 40/2003/QĐ-TTg dated 21 March 2003 of the Prime Minister)

I. OPERATING POWER SOURCES IN THE 2003-2005 PERIOD

No.	Name of power plants	Capacity – MW	Operating year
1	Phu My 2.1 terminal	160	2003
2	Phu My 2.1 MR terminal	160	2005
3	Phu My 4 Gas Turbine	450	2003 – 2004
4	Uong Bi Coal Thermal-power plant (MR)	300	2005
5	Se San 3 Thermal-power plant	273	2005 – 2006

II. OPERATING POWER SOURCES IN THE 2006 – 2010 PERIOD

6	Tuyen Quang hydro-power plant	342	2006-2007
7	Dai Ninh hydro- power plant	2x150	2007-2008
8	A Vuong 1 hydro-power plant	170	2007
9	Thac Mo hydro-power plant (expansion)	75	2008
10	Quang Tri hydro-power plant	70	2007
11	Dak Ninh hydro-power plant	100	2007
12	PleiKrong hydro-power plant	110	2008
13	Ban La hydro-power plant (Nghe An 1)	300	2008
14	Dong Nai hydro-power plant 3 – 4	510	2009-2010
15	Tranh River 2 hydro-power plant	120	2009
16	Con River 2 hydro-power plant	70	2010
17	Ba Ha River hydro-power plant	250	2010-2011
18	Thuong Kon Tum hydro-power plant	220	2010-2011
19	Buon Khop hydro-power plant	280	2008-2009
20	Ban Chat hydro-power plant	200	2010
21	An Khe + Ka Nak hydro-power plant	163	2009
22	Buon Tua Srah	85	2009
23	Sre Pok 3 hydro-power plant	180	2009-2010
24	Se San 4 hydro-power plant	330	After 2010
25	O Mon I oil and gas thermal-power plant	600	2006-2007
26	Ninh Binh thermal-power plant (MR)	300	2007
27	Uong Bi coal thermal-power plant (MR), engine team 2	300	2008
28	Nhon Trach thermal-power plant	600(*)	2007-2008
29	Nghi Son thermal-power plant	600	2010-2011
30	Hai Phong thermal-power plant	600(**)	2006-2007
31	Quang Ninh thermal-power plant	600	2008-2009
32	O Mon II thermal-power plant (in accordance with TBKCTHH technology)	750	2010-2-11

(*) Period 1: 600 MW

(**) Period 1: in accordance with coal burning technology

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APPENDIX 2
POWER SOURCE PROJECTS WHERE ENTERPRISES OUTSIDE EVN ARE TO ACT AS INVESTORS

(issued with Decision 40/2003/QĐ-TTg dated 21 March 2003 of the Prime Minister)

I. OPERATING POWER SOURCES IN THE 2003-2005 PERIOD

No.	Name of plants	Capacity – MW	Operating year
1	Can Don hydro-power plant	72	2003
2	Phu My 3 power plant	720	2003
3	Phu My 2.2 power plant	720	2004
4	Na Duong thermo-power plant	100	2004
5	Cao Ngan thermo-power plant	100	2005
	Total	1,712	

II. OPERATING POWER SOURCES IN THE 2006-2010 PERIOD

No.	Name of plants	Capacity – MW	Operating year
1	Cua Dat hydro-power plant	97	2008
2	Se San 3A hydro-power plant	100	2006
3	Bac Binh hydro-power plant	35	2006
4	Srok Phu Mieng hydro-power plant	54	2006
5	Ngoi Bo hydro-power plant	20	2006
6	Ngoi Phat hydro-power plant	35	2006
7	Nhan Hac & Ban Coc hydro-power plant	32	2006
8	La Ngau hydro-power plant	38	2006
9	Binh Dien hydro-power plant	20	2006
10	Tra Som hydro-power plant	24	2006
11	Eak Rong Rou hydro-power plant	34	2006
12	Bao Loc hydro-power plant	23	2006
13	Dai Nga hydro-power plant	20	2006
14	Dak Rti hydro-power plant	72	2006
15	Thac Muoi hydro-power plant	53	2007
16	Na Le hydro-power plant	90	2007
17	Coc San – Chu Linh hydro-power plant	70	2007
18	Dan Sach hydro-power plant	6	2007
19	Da Dang Dachamo hydro-power plant	16	2007
20	Nam Mu hydro-power plant	11	2008
21	Song Hieu hydro-power plant	5	2008
22	Eak Rong Hnang hydro-power plant	65	2008
23	Iagrai hydro-power plant	9	2008
24	Ca Mau thermal-power plant	720	2006
25	Cam Pha thermal-power plant	300	2006

APPENDIX 3
POWER GRID DEVELOPMENT IN THE 2002 – 2010 PERIOD

FIGURE 3.1 500 KV POWER LINES

(issued with Decision 40/2003/QĐ-TTg dated 21 March 2003 of the Prime Minister)

Name of works	Number of circuits x km	Length	Note
Construction works in the 2002-2005 period			
Pleiku – Phu Lam (circuit 2)	1 x 547	547	2003
Phu My – Nha Be	2 x 49	98	2003
Nha Be – Phu Lam	1 x 16	16	2003
Nha Be – O Mon	1 x 180	180	2005
Pleiku – Doc Soi – Da Nang	1 x 300	300	2004
Da Nang – Ha Tinh	1 x 390	390	Quarter II/2005
Ha Tinh – Thuong Tin	1 x 335	335	2005 – 2006
500kV Station – Nho Quan	2 x 30	60	2005
Total		1,926	
Construction works in the 2006 – 2010 period			
Distribution line to Dong Nai 3 & 4	2 x 20	40	2008 – 2009
Quang Ninh – Thuong Tin	1 x 110	110	2007 – 2008
Phu Lam – O Mon	1 x 170	170	2006 – 2007
Phu My – Nhon Trach	1 x 30	30	2008 – 2009
Song May – Nhon Trach	1 x 20	20	2008 – 2009
Song May – Tan Dinh	1 x 30	30	2008 – 2009
Total		400	

FIGURE 3.2 500 KV TRANSFORMER STATIONS				
No.	Name of works	Number of plants x MVA	Capacity (MVA)	Note
Construction works in the 2002 – 2005 period				
1	Nha Be	2 x 600	1200	2004
2	Phu My	2 x 450	900	2003
3	Da Nang	1 x 450	450	Plant 2 - 2004
4	O Mon	1 x 450	450	2005-2006
5	Tan Dinh	1 x 450	450	2005- 2006
6	Thuong Tin	1 x 450	450	2005-2006
7	Nho Quan	1 x 450	450	2005-2006
	Sub-Total		4,350	
Construction works in the 2006 – 2010 period				
1	Thuong Tin	1 x 450	450	
2	Tan Dinh	1 x 450	450	Plant 2 (2007-2008)
3	Doc Soi	2 x 450	900	Plant 2
4	Di Linh	1 x 450	450	2006-2008
5	Nhon Trach	1 x 450	450	Dai Ninh
6	Quang Ninh	1 x 450	450	Synchronisation 2008
7	Song May	1 x 600	600	2007 – 2009
8	O Mon	1 x 450	450	2008 – 2009
	Sub-Total		4,200	Plant 2
	Total		8,550	

FIGURE 3.3 220 KV LINES

No.	Area	Name of works	No. of circuits x km	Length	Note
Works to be brought into operation in the 2002-2005 period					
1		Nam Dinh-Thai Binh	1 x 30	30	Two circuit polls
2		Thai Binh- Hai Phong	2 x 45	90	2004
3		Bac Giang-Thai Nguyen	1 x 55	55	2003
4		Viet Tri-Son La	1 x 190	190	Operating 110kV
5	North	Dong Hoa-Dinh Vu	1x 17	17	2005
6		Ha Dong – Thanh Cong	2 x 10	20	2005-2006
7		Mai Dong-An Duong-Chem	2 x 18	36	2005-2006
8		Viet Tri-Yen Bai	2 x 75	150	2004-2005
9		Uong Bi-Trang Bach	2 x 19	38	2005
10		Hoa Khanh-Hue	1 x 80	80	Suspending circuit 2
11		Da Nang-Hoa Khanh	1 x 12	12	As above
12		Da Nhim-Nha Trang	1 x 140	140	2003-2004
13	Centre	Dung Quat-Doc Soi	2 x 10	20	2005-2006
14		Se San 3-Pleiku	2 x 35	70	2005-2006
15		Hue-Dong Hoi	1 x 170	170	2005-2006
16		Da Nang-Doc Soi	1 x 100	100	Strengthening circuit 2
17		Nha Be-Tao Dan	2 x 10	20	Cable + DZK
18		Nha Be-Cat Lai	2 x 10	20	2005
19		Phu My-Cat Lai	2 x 35	70	2002-2003
20		Long Binh-Thu Duc	1 x 16	16	Circuit 2
21		Cat Lai-Thu Duc	2 x 10	20	2003
22		Ba Ria-Vung Tau	2 x 15	30	2005
23	South	Dai Ninh-Di Linh	2 x 39	78	Dai Ninh synchronisation
24		Bao Loc-Tan Rai	2 x 20	40	2005
25		Tan Dinh-Binh Hoa	2 x 18	36	2004-2005
26		Thu Duc-Hoc Mon	1 x 16	16	Circuit 2
27		Tan Dinh-Phuoc Long	2 x 70	140	2004-2005
28		Tan Dinh-Trang Bang	1 x 50	50	Two circuit poles
29		Kien Luong-Chau Doc	1 x 75	75	2005
30		O Mon-Tra Noc	2 x 15	30	2005
31		Ca Mau-O Mon (or Rach Gia)	2 x 150	300	2005-2006
32		Ca Mau-Bac Lieu	1 x 70	70	2005
33		O Mon-Thot Not	2 x 28	56	2003-2004
34		Thot Not-Chau Doc	2 x 70	140	2003
Total				2,425	
Construction works in the 2006-2010 period					
1		Na Hang-Yen Bai	2 x 160	320	
2		routing to Nho Quan	4 x 4	16	
3		Hai Phong-Dinh Vu	2 x 17	34	
4		Hai Phong-Vat Cach	2 x 19	38	
5		routing to Hai Duong-Hai Duong	2 x 15	30	
6		Ha Tinh-Thach Khe	2 x 9	18	
7	North	Van Tri-Soc Son	2 x 25	50	
8		Van Tri-Chem	2 x 10	20	
9		Huoi Quang-Son La	2 x 20	40	
10		Thanh Hoa-Ha Tinh	1 x 215	215	
11		Ban La-Vinh	2 x 150	300	
12		Quang Ninh-Hoanh Bo	2 x 15	30	
13		Quang Ninh-Cam Pha	2 x 30	60	
14		Uong Bi-Trang Bach	2 x 20	40	
15		Doc Soi-Quang Ngai	1 x 40	40	
16		Ha Song Ba-Tuy Hoa	2 x 40	80	

17		Quy Nhon-Tuy Hoa	1 x 95	95	
18		Tuy Hoa-Nha Trang	1 x 110	110	
19		Srepok 3-Buon Kuop	1 x 20	20	
20	Centre	Buon Kuop-KrongBuk	2 x 45	90	
21		T.Kon Tum-Pleiku	2 x 70	140	
22		A Vuong-Song Con-Da Nang	2 x 70	140	
23		Dung Quat-Dong Tranh2	2 x 75	150	
24		Se San 4-Pleiku	2 x 43	86	
25		Se San 3-Se San 3A	1 x 10	10	
26		Nha Be-Cat Lai	2 x 10	20	
27		Ham Thuan-Phan Thiet	1 x 60	60	
28		Song May-Long Binh	2 x 30	60	
29		Tra Noc-Soc Trang	1 x 75	75	
30	South	Bac Lieu-Soc Trang	1 x 53	53	
31		routing to Thap Muoi	2 x 10	20	
32		Tan Dinh-Trang Bang	1 x 50	50	Strengthening circuit 2
33		Nhon Trach-Cat Lai	2 x 10	20	
34		Tan Dinh-Song Be IZ	2 x 12	24	
35		My Tho-Ben Tre	1 x 35	35	
36		Da Nhim-Da Lat	1 x 50	50	
Total				2,639	

FIGURE 3.4: 220 KV STATIONS

No.	Area	Name of works	No. of Plants x MVA	Capacity (MVA)	Note
Construction works in the 2002-2005 period					
1		Dinh Vu	1 x 125	125	2005
2		An Duong	1 x 250	250	2005
3		Mai Dong	2 x 250	500	2005
4		Bac Ninh	1 x 125	125	2005
5		Hoanh Bo	1 x 125	125	Plant 2
6	North	Nghi Son	1 x 125	125	2003
7		Pho Noi	1 x 125	125	Plant 2
8		Soc Son	1 x 125	125	Plant 2
9		Thai Binh	1 x 125	125	2002-2003
10		Thai Nguyen	1 x 125	125	Plant 2
11		Thanh Cong	1 x 250	250	2005
12		Uong Bi	1 x 125	125	2005
13		Viet Tri	1 x 125	125	Plant 2
14		Xuan Mai	2 x 125	250	2002-2005
15		Yen Bai	1 x 125	125	2004-2005
16		Doc Soi	1 x 125	125	Plant 2
17		Dong Hoi	1 x 125	125	Replacing MBA
18	Centre	Dung Quat	1 x 125	125	
19		Hoa Khanh	2 x 125	250	2003-2005
20		KrongBuk	1 x 63	63	Plant 2
21		Nha Trang	1 x 125	125	
22		Dai Ninh	1 x 63	63	Dai Ninh synchronisation
23		Binh Hoa	1 x 250	250	Plant 2
24		Ba Ria	1 x 125	125	
25		Bac Lieu	1 x 125	125	
26		Cat Lai	2 x 250	500	2003
27		Ca Mau	1 x 125	125	2005-2006
28		Chau Doc	1 x 125	125	2004
29		Kien Luong	1 x 125	125	
30		Long Thanh	1 x 250	250	Plant 2
31		My Tho	1 x 125	125	
32	South	Nam Sai Gon	1 x 250	250	2005
33		Phuoc Long	2 x 125	250	2004-2005
34		Tan Dinh	1 x 250	250	
35		Tan Rai	2 x 125	250	Aluminium plating synchronisation
36		Tao Dan	2 x 250	500	2003-2004
37		Thot Not	2 x 125	250	
38		Thu Duc	2 x 250	500	Replacing MBA-2003
39		Trang Bang	1 x 125	125	
40		Tri An	1 x 63	63	Plant 2
41		Vung Tau	1 x 125	125	
42		Vinh Long	1 x 125	125	Plant 2
		Total		7939	

Construction works in the 2006-2010 period

1		Dinh Vu	1 x 125	125	Plant 2
2		Dong Hoa	2 x 250	500	Replacing MBA
3		An Duong	1 x 250	250	Plant 2
4		Bac Giang	1 x 125	125	Plant 2
5		Hai Duong	1 x 125	125	
6		Nam Dinh - Hai Phong	1 x 125	125	
7		Nam Dinh - Quang Ninh	2 x 250	500	
8		Na Hang	2 x 63	126	2007-2008
9		Nam Dinh	1 x 125	125	Plant 2
10	North	Nghi Son	1 x 125	125	Plant 2
11		Phu Ly	1 x 125	125	
12		Son Tay	1 x 125	125	
13		Son La	1 x 125	125	
14		Thai Binh	1 x 125	125	Plant 2
15		Thanh Cong	1 x 250	250	Plant 2
16		Trang Bach	1 x 125	125	Plant 2
17		Van Tri	2 x 250	500	2006
18		Vat Cach	1 x 125	125	Plant 2
19		Xuan Mai	1 x 125	125	Plant 2
20		Dung Quat	1 x 125	125	Plant 2
21		Hue	1 x 125	125	Plant 2
22		Ba Don	1 x 63	63	
23		Dong Hoi	1 x 125	125	Replacing MBA
24	Centre	Krong Buk	1 x 125	125	Replacing MBA
25		Quang Ngai	1 x 125	125	
26		Quy Nhon	1 x 125	125	Plant 2
27		Tam Ky	1 x 125	125	
28		Tuy Hoa (Phu Yen)	1 x 125	125	
29		Ben Tre	1 x 125	125	
30		Ca Mau	1 x 125	125	Plant 2
31		Cao Lanh (Thap Muoi)	1 x 125	125	
32		Chau Doc	1 x 125	125	Plant 2
33		Song Be IZ	1 x 125	125	
34	South	Kien Luong	1 x 125	125	Plant 2
35		Long An	2 x 125	250	
36		My Tho	1 x 125	125	Plant 2
37		Nam Sai Gon	1 x 250	250	Plant 2
38		Phan Thiet	1 x 125	125	
39		Binh Phuoc (HCMC)	2 x 250	500	
40		Soc Trang	1 x 125	125	
41		Song May	1 x 125	125	
42		Tan Binh	2 x 250	500	
43		Vung Tau	1 x 125	125	Plant 2
Total				7,689	

Appendix 3 -Vietnamese legal framework on foreign investment¹

The following sets out a general view of Vietnamese foreign investment laws and regulations. This memorandum is intended as a summary only and not as definitive legal advice on specific factual situations.

1.1 Foreign investment regulations for infrastructure projects

Foreign investment in Vietnam is governed by the Law on Foreign Investment in Vietnam² (the **FIL**) and its implementing regulations.³

1.2 Establishment of Joint Venture Company

The constitution of a Joint Venture Company (**JV company**) includes the Investment Licence, the Joint Venture Agreement and the Joint Venture Charter (**JV Charter**). The Investment Licence will be issued by the Ministry of Planning and Investment (**MPI**).

(a) Licensing

The Investment Licence:

- constitutes the legal permission to invest in Vietnam;
- serves as the business registration certificate for a JV company;
- is a formal approval of the Joint Venture Agreement and the Joint Venture Charter, the documents which govern the relationship between the parties and the operation of the JV company;
- usually sets out a number of incentives (e.g. tax incentives) to which the investors are entitled.

Group A projects must be approved by the Prime Minister and are granted an Investment Licence by the MPI.⁴

Prior to issuance of an Investment Licence, the MPI will co-ordinate with various central and local governmental agencies interested in the project.

(b) Charter

The Investment Licence sets the outer boundary of what the JV company can and cannot do under the laws. The charter, on the other hand, sets the inner boundary of how the relationships between the parties will be governed, and how the parties will manage the business of the JV company.

¹ This is a summary on the legal framework by the law firm Freshfields

² The Law on Foreign Investment in Vietnam passed by the National Assembly on 12 November 1996 as amended by the Law on Amendment of and Addition to the FIL passed by the National Assembly on 16 May 2000. It is also possible for a foreign investor to invest in up to 30% of a domestic enterprise, such as a joint stock company, established under the Law on Enterprises. Such investment is however outside of the scope of the FIL.

³ Decree 24 dated 31 July 2000 of the Government providing detailed regulations on the implementation of the FIL as amended by Decree 27 dated 19 March 2003 of the Government (**Decree 24**) and Circular 12 of the Ministry of Planning and Investment dated 15 September 2000 (**Circular 12**).

⁴ Article 114.1 of Decree 24.

Under Article 13 of Decree 24, the charter of a JV company may cover any matters agreed by the JV parties which are not inconsistent with the law. This, combined with the ability to specify that decisions at the Board of Management can only be taken by supermajority vote, makes the charter the most important document in the management and control of the JV company.

1.3 Management structure

(a) Organisational structure

A joint venture company's management structure consists of a Board of Management, a general director and deputy general directors. Under the FIL, there is no concept of a shareholders' meeting, with members on the Board of Management, which acts as the equivalent of a board of directors, being appointed directly by shareholders and representing particular shareholders.

- (i) Board of Management: The Board of Management is the highest authority in a JV company. The parties to the JV company will reach an agreement on and set out in the JV charter the number of people on the Board, their terms and how many Board members each party can nominate. Representatives on the Board of Management are appointed in accordance with each party's respective ownership interest in the venture. At least two members of the Board of Management of a two party joint venture must be representatives of the Vietnamese party. If more than two parties to the joint venture, each party must be represented by at least one member on the Board.
- (ii) Power of the general director and deputies: The executive management of a JV company consists of a general director and one or more deputy general directors. Either the general director or the first deputy general director must be Vietnamese.⁵

The general director and the deputy general directors of the JV company are "responsible for the management and conduct of the day to day business of the JV company".⁶

The Board of Management determines the powers and duties of the general director and the first deputy general director. Subject to such overriding control, the general director is the chief executive officer of the JV company.⁷ He has the power to bind the JV company. The general director may also be obliged to consult with the deputy general director and if they are in disagreement over an issue, that issue may have to be referred to the Board of Management.⁸

Key personnel, i.e. Board members, the general director, deputy general director(s) and chief accountant, must be registered with the local provincial Department of Planning and Investment.

(b) Voting

⁵ Article 20 of Decree 24.

⁶ Id.

⁷ Under Article 20.1 of Decree 24, the General Director is the legal representative of a JV Company who is in charge of the day-to-day operations of the JV Company.

⁸ Article 20.2 of Decree 24 provides that:

“The Board of Management shall determine the authorities and duties between the General Director and the First Deputy General Director. The General Director shall be responsible before the Board of Management for the operations of the joint venture company. The General Director shall consult the First Deputy General Director on the implementation of the resolutions of the Board of Management on such important issues such as: the organisation structure; appointment and dismissal of personnel holding key positions; annual financial finalisation, cost finalisation of the project; and execution of economic contracts.

Where there is inconsistency between the opinions of the General Director and the First Deputy General Director in management and control of the operations of the joint venture company, the opinions of the General Director shall prevail, however, the First Deputy General Director shall have the right to reserve his opinions in order to refer to the Board of Management for consideration and decision in the next meeting.”

By law, in a JV company, certain issues require unanimous approval at a vote of the Board of Management. Article 14.1 of the FIL states that:

“The Board of Management shall, on the basis of unanimous consent of the board members participating in the relevant meeting, decide all major issues relating to the organisation and operation of the joint venture businesses including: the appointment and dismissal of the General Director and the First Deputy General Director; and amendments and additions to the charter of the company.”

Other issues can be made unanimous in the charter of a JV company:

“Joint venture parties may also agree to set out in the charter of the company other issues which need to be decided on the principle of unanimous consent.”

Matters other than those listed above require approval of a simple majority of the Board members present at the relevant Board meeting. The JV parties may agree in the charter upon other matters which should be decided upon the unanimous approval of the Board of Management.

(c) Quorum

For a board meeting to be quorate, it must be attended by at least two third of its members. Board membership should be proportional to ownership interests.

(d) Failure to reach a decision on a unanimous issue

Under Article 26 of Circular 12, if unanimous approval cannot be reached on any of the issues that have to be decided unanimously, and this results in the operation of the JV company being "adversely affected" then the Board may refer the matter to the MPI as conciliator. If the conciliation fails, the dispute settlement mechanism in Article 122 of Decree 24 will apply. In that case, the JV parties can choose the Vietnamese courts or any local or international arbitration centre to resolve their dispute.

1.4 Capital contribution

In the absence of special permission to the contrary, at least 30% of the total invested capital of a project must be in the form of equity, referred to as "legal capital".⁹ With MPI approval, the legal capital for projects such as that in view may fall to 20% of the total invested capital.¹⁰ In certain infrastructure projects such as power plants, we have seen the sponsors obtaining approval for a lower equity/debt ratio (e.g. 20% of the total invested capital for the Phu My 3 case and 25% for the Phu My 2-2 case).

The capital contribution by a foreign party to a JV company must be at least 30% of the equity. There is usually no maximum.

Legal capital must be contributed in accordance with a schedule set out in the Charter of the company.¹¹ The Investment Licence can be withdrawn if this schedule is not respected.

“Loan capital” can bear interest, which is a deductible expense as long as it is reasonable.

The law contains specific provisions allowing investment capital or legal capital to be restructured when there are changes to the objectives and scale of the project, joint venture partners or capital contribution methods.¹²

1.5 Term

⁹ Article 23.1 of Decree 24.

¹⁰ Articles 14.1 and 23.1 of Decree 24. The law does not set out the procedures for obtaining this special approval.

¹¹ Article 23.2 of Decree 24.

¹² Article 34 of Decree 24.

The term of the project is provided in the Investment Licence and is decided on a case-by-case basis by the MPI. Although the FIL provides a maximum duration of 50 years,¹³ in practice projects are often licensed for less than this theoretical maximum.¹⁴

1.6 Land and Construction issues

(a) Land and water surface

Land and water surface¹⁵ used by a JV company can be leased directly from the Government or contributed by the Vietnamese partner.¹⁶ In the latter case, the Vietnamese party still has to enter into a lease with the State, although the relevant land use right certificate will be issued in the name of the JV company. If land has been contributed as capital by a Vietnamese party, and the JV company is liquidated or bankrupt, the residual value of the land use rights nevertheless remains one of the assets of the JV company.

The certificate of land use right will be issued by the provincial People's Committee.¹⁷

Land compensation and clearance is the responsibility of the Vietnamese partner, if it makes its capital contribution in the form of land use rights, or of the provincial People's Committee if the land is leased to the JV company by the State of Vietnam.¹⁸ The costs for land compensation and clearance should be included in the value of the contribution by the Vietnamese partner.

(b) Construction regulations

In the case of a Group A project, the JV company will have to obtain approval of the Ministry of Construction for the technical design of the project. In addition, approval of the Fire Prevention and Extinguishment Police must be obtained for the design of equipment for fire prevention and extinguishment, and for the equipment itself.

If the investors so desire, the construction of the project can be performed by a foreign construction company, which would operate as a foreign contractor in Vietnam.

Under Decree 66 of the Government dated 12 June 2003, a JV company would have to put construction contracts out to tender if the Vietnamese partner is a state-owned enterprise and that entity owns 30% or more of the project.

1.7 Ownership Interests

Profits are to be distributed to the parties in proportion to their equity capital contributions although the parties may in theory vary this rule in their joint venture contract.

Ownership interests are not freely transferable. In the event that a party desires to sell out, the other joint venture party has a pre-emptive right to purchase the interest that is to be sold. In addition, the Board of Management of the venture and the MPI both have to approve the transfer.

In order to avoid restrictions on the transfer of interests arising under Vietnamese regulations, many investors choose to establish single purpose offshore companies through which the ownership interests in the Vietnamese company is held. Sales of shares in the offshore company can be made without recourse to the licensing authority in Vietnam and without triggering the right of first

¹³ 70 years in certain very exceptional cases.

¹⁴ Article 17 of the FIL.

¹⁵ Specialised land in the Land Law dated 14 July 1993 (as amended) is defined to include land with water surfaces used for purposes other than agriculture. It is not clear if the 2003 Land Law changed the pre-existing treatment of water surfaces. Further research would be required after the issuance of the implementing regulations for the 2003 Land Law.

¹⁶ Article 85 of Decree 24.

¹⁷ Article 52 of the Land Law passed by the National Assembly on 26 November 2003.

¹⁸ Article 46 of FIL.

refusal of the joint venture partner. However, in one case, where the local partner wished to exercise its right of first refusal, the authorities threatened to assess a deemed capital transfer tax in order to increase the Vietnamese partner's leverage.

1.8 Non-application of adverse laws

Under Decree 24, if a change in law adversely affects the interests of a foreign-invested enterprise, it will be entitled to continue the incentives and privileges stipulated in its investment licence and the FIL, or it would be entitled to:¹⁹

- (i) change the objectives of the project;
- (ii) exemption and reduction of taxes according to the law;
- (iii) deduction of damages from taxable income; or
- (iv) in case of necessity, compensation.

Furthermore, more favourable provisions in any law passed after the date of an investment licence will also be applicable to a licensed foreign-invested enterprise.

1.9 Governing law and dispute resolution

(a) Governing law

Article 66.2 of the FIL states that:

“Foreign investment activities in Vietnam must comply with the provisions hereof and other relevant provisions of the laws of Vietnam. Where there is no provision of Vietnamese law on any particular issue, the parties may agree in the agreement on the application of foreign laws, provided that such application of foreign laws is not contrary to the basic principles of Vietnamese laws.”

Article 4.2 of Decree 24 states that:

“In a specific circumstance on foreign investment in Vietnam, if such issue has not yet been governed by the laws of Vietnam, the parties may agree in the contract on the application of foreign laws provided that such application of foreign laws is not inconsistent with the major principles of the laws of Vietnam.”

It is not clear whether the above provision only applies to the JV Agreement and the JV Charter or whether it also covers other project documents. Another problem is that “the basic principles of Vietnamese laws” have not been identified either by the FIL or its implementing regulations.

If the Civil Code is used for interpretation, then the parties to a contract creating civil relations may agree to choose a foreign law to apply to a contract involving a foreign legal person, provided that such agreement does not conflict with the Civil Code or any other applicable law of Vietnam. However, civil contracts signed and performed entirely in Vietnam must comply with the laws of Vietnam. These provisions have not been interpreted, and no unqualified views can therefore be expressed. But the result of these difficulties would be that the Vietnamese partner may insist on applying Vietnamese law to the JV Agreement. As Vietnamese law is still uncertain in numerous respects, this places substantial strains on projects and on foreign financing.

(b) Dispute resolution

Article 24 of the FIL permits parties to a JV Agreement to agree to refer disputes to foreign arbitration.

1.10 Financial issues

¹⁹ Article 121 of Decree 24.

(a) Accounting

The Vietnamese accounting system must be adopted by most foreign-invested companies. A foreign accounting system can be used with the approval of the MOF.²⁰

(b) Foreign accounts

Foreign-invested companies are required to maintain a bank account in foreign currency at a bank in Vietnam (either a local Vietnamese bank, a joint venture bank or a branch of a foreign bank in Vietnam) for the purpose of capital transactions.²¹ Foreign-invested companies can open additional bank accounts in both Vietnamese Dong and foreign currency for other transactions.²²

Despite this, Article 35 of the FIL permits the opening of offshore accounts “in special cases where approval from the State Bank of Vietnam has been obtained”. Under Circular 4, foreign-invested enterprises operating in the maritime sector, which have “international commercial activities” and “need to open an account overseas for the purpose of payment and off-setting in accordance with international practice” can seek such an approval from the State Bank. The Governor of the State Bank will have the right to decide the purposes for which the account is used, the duration of operation of the account and the balance. In addition, special exceptions can be considered and authorised by the Governor.²³

(c) Foreign currency conversion

(i) *Legal basis*

1. The FIL does not contain unlimited foreign exchange conversion rights. Article 33 of the FIL states that:

“Foreign-invested businesses and parties to business cooperation contracts are permitted to purchase foreign currency from commercial banks for their current transactions and other permitted transactions in accordance with the provisions of the foreign exchange control regulations.

The Government of Vietnam shall ensure the foreign exchange balance of especially important projects the investment of which is carried out under the Government’s programme from time to time.

The Government of Vietnam shall ensure the support for foreign exchange balance of projects involved in infrastructure projects and a number of other important projects.”

2. As a general proposition, (i) the first paragraph provides foreign-invested businesses with conversion rights for certain transactions; (ii) the second paragraph provides certain foreign-invested projects with guaranteed conversion rights for those same transactions; (iii) the third paragraph provides foreign-invested infrastructure projects with guaranteed “support” for conversion rights for those same transactions. Circular 4 confirms that the third paragraph means that the Government will support the conversion for those transactions if the commercial banks cannot perform the conversion.

3. The conversion right is limited to “current transactions” and “other permitted transactions” and conversion must be in accordance with the provisions of the foreign exchange control regulations. The Government’s “support” would be limited to the same transactions.

4. “Current transactions” are defined as “foreign exchange transactions between residents and non-residents relating to goods, services, income from direct investment, income from

²⁰ Article 62.2 of Decree 24.

²¹ Article 3.1 of Circular 04 of the State Bank dated 18 May 2001 on foreign exchange control applicable to foreign invested enterprises and foreign partners to a business cooperation contract (*Circular 04*).

²² Article 4 and 5 of Circular 04.

²³ Article 8 of Circular 04.

investment in valuable paper, interests from foreign loans, deposit interests and unilateral remittance of money and similar transactions in accordance with the provisions of the law”.

5. “Other permitted transactions” include:

- repayment of principal, interest and fees relating to short-term foreign loans (if the loans satisfy the relevant conditions specified by the State Bank Governor’s regulations on obtaining and repayment of foreign loans by businesses);
- repayment of principal, interest and fees relating to medium or long term foreign loans that have been registered with the State Bank of Vietnam;
- repayment of principal, interest and fees relating to foreign currency loans obtained from Banks permitted to operate in Vietnam;
- remittance abroad of legal capital, re-investment capital or capital for implementing BCCs upon termination of operations.

(ii) *Conversion guarantees*

Under the FIL and Circular 4, if a foreign-invested company cannot convert Vietnamese Dong into foreign currency, because, for example, foreign currency is not readily available, the commercial bank concerned will notify the State Bank, which should seek the approval of the Government for foreign currency support. If the approval of the Government is obtained, the State Bank will sell a certain amount of foreign currency to the company. In and of itself, this does not constitute a guarantee that the Government and the State Bank will provide sufficient foreign currency to satisfy the company’s requirements.

Circular 4 also contemplates a category of foreign-invested projects which are designated by the Government as being of special importance. This categorisation enables companies covered by it to seek a decision of the Prime Minister guaranteeing their access to foreign exchange. Companies obtaining such guarantees will first have to approach a commercial bank to satisfy their foreign currency requirements. If the commercial bank does not have sufficient foreign currency, the State Bank will sell the shortfall amount to the relevant company through the relevant commercial bank.²⁴

Outside the oil and gas and electricity context, few companies have obtained such guarantees. The Government has made it clear that it intends to reduce the scope of the guarantees that it makes available to private projects, so it is not clear what guarantees can be negotiated in the future.

1.11 Taxation

(a) Corporate Income Tax

Foreign-invested companies have to pay Corporate Income Tax (**CIT**) in accordance with the FIL, the Law on Corporate Income Tax and the implementing legislation. From 1 January 2004, under the new Law on Corporate Income Tax passed by the National Assembly on 17 June 2003, the standard CIT rate for entities operating under the FIL will be raised to 28% but the remittance tax (see below) will be eliminated. Preferential treatment will be given to projects in the sectors, industries and areas in which investment is encouraged, including tax rates of 20%, 15% or 10% and tax exemption of up to 4 years from the date taxable income starts, with 50% tax reductions for up to 9 years thereafter.

The FIL and its implementing legislation permit foreign invested companies to carry forward losses for CIT purposes to the following five years.

(b) Value Added Tax

²⁴ There is some doubt in the language of Circular 4 as to whether a further decision of the Prime Minister is required in to order for the State Bank to effect the sale. Investors obviously try to resolve areas of vagueness, as well as the mechanics of the foreign currency support to which they are entitled, through their Government guarantees

Value added tax (**VAT**) is calculated either (i) on the basis of the "deduction method", pursuant to which the VAT on inputs is fully refundable upon payment of VAT on outputs; or (ii) on the basis of the value added method.

Pursuant to Article 60.2 of Decree 24 and the laws and regulations on VAT, a foreign-invested company will be exempt from VAT with respect to:

- equipment, machinery and specialised means of transport which are imported to form the fixed assets of the company and which are not produced in the domestic market; and
- construction materials which are not produced in the domestic market and which form the fixed assets of the company.

(c) Import Duty

Under the amended Law on Import and Export Duties, import duties are classified into three categories: (i) ordinary rates, (ii) preferential rates, and (iii) special preferential rates. Preferential rates are applied to countries which have most favoured nation (**MFN**) status with Vietnam, and special preferential rates are applied to goods from countries which have a special preferential agreement with Vietnam. Goods from non-MFN countries are assessed for import duty at rates up to 70% above those specified for MFN countries.

Payment of import duty for machinery, equipment, materials, fuels, supplies and means of transport which are imported for production purposes must be made within 30 days.

According to Article 57 of Decree 24, a JV company will be exempt from import duties in respect of goods imported to form its fixed assets including:

- equipment and machinery for capital construction;
- specialised means of transport;
- components, details, parts, spare parts, fittings, moulds and accessories accompanying the machinery, equipment and specialised means of transport referred to above, including those used for replacement and maintenance;
- equipment and machinery leased from foreign lessors under finance leasing contracts which form fixed assets of the company.

(d) Remittance Tax

Remittance tax used to be levied on profits remitted abroad. The remittance tax rate for a foreign investor investing US\$10 million or more was 3%. However, as from 1 January 2004, under the new Law on Corporate Income Tax, the remittance tax will no longer exist.

(e) Capital Transfer Tax

There is a 25% capital transfer tax on any profit received on the sale of an interest in a foreign-invested company.²⁵ The new Law on Corporate Income Tax provides that taxable income includes "income from the sale and purchase of ownership rights and rights to use assets; [...]; profit from assignment of assets; [...] and other income". Its guiding Decree 164 is no clearer when it lists "profit from the assignment of assets" and "other income which have not been provided in this Decree" as taxable income. As no implementing regulations by MOF have been issued, it is not clear whether these provisions replace the capital transfer tax. If they do, from 1 January 2004, the tax rate on capital gains will be 28% instead of 25%.

A sale of an interest in an offshore holding company in theory should not result in any complications in Vietnam, but the MPI has in the past occasionally taken the view that a transfer of an offshore interest can be treated for Vietnamese regulatory purposes in the same manner as an onshore sale.

²⁵ Section IV of Circular 13.

(f) Natural Resources Royalty

The Ordinance on Royalty²⁶ contains a list of eight kinds of natural resources subject to royalties: (i) metallic minerals, (ii) non-metallic minerals, including minerals used as ordinary construction materials and exploited soil, (iii) oil, (iv) gas, (v) forestry products, (vi) agricultural products, (vii) natural water, and (viii) other (non-defined) natural resources.

If the natural resource is contributed to the legal capital of the JV company by the Vietnamese party, the JV company would not have to pay the royalty for that natural resource.²⁷

(g) Personal Income Tax

Personal income tax payable by foreign expatriates residing in Vietnam for more than 183 days per year is calculated on a worldwide income basis in accordance with the Ordinance on Personal Income Tax.²⁸ Tax rates range up to 50%.

Foreigners in Vietnam for more than 30 but less than 183 days in a year are taxed on their Vietnamese income at a rate of 25%.

Vietnamese employees pay tax at significantly higher rates than expatriate employees, as the monetary threshold for each tax rate band is much lower for Vietnamese citizens. There are proposals for a new Law on Personal Income Tax to be issued in 2004 or 2005 which will provide the same tax rates for both Vietnamese employees and expatriates.

The current tax rates and bands are as follows:

Personal Income Tax Table for Vietnamese Earners

Taxable income (VND million/month)	Tax rate (%)
Up to 3	0
Over 3 to 6	10
Over 6 to 9	20
Over 9 to 12	30
Over 12 to 15	40
Over 15	50

(Exchange rate is about 15,500 Dong to 1US\$)

They also pay a 30% surtax on net monthly incomes which are higher than 15,000,000 VND (approximately \$1,000).

The rates for expatriates are as follows:

Taxable income (VND million/month)	Tax rate

²⁶ The Ordinance on Royalty was passed by the Standing Committee of the National Assembly on 16 April 1998 and came into effect on 1 June 1998.

²⁷ Article 3 of the Ordinance on Royalty.

²⁸ Ordinance on Personal Income was passed by the Standing Committee of the National Assembly on 19 May 2001 and was entered into force on 1 July 2001.

Up to 8	0
From 8 to 20	10%
From 20 to 50	20%
From 50 to 80	30%
From 80 to 120	40%
Over 120	50%

(h) Withholding tax

Under Circular 169,²⁹ a withholding tax of 10% would be imposed on payments to foreign contractors, including a withholding tax of 10% on “lending interest” earned by offshore lenders in Vietnam. The borrower is obliged to deduct the amount of tax payable by an offshore lender prior to making interest payments. If the parties agree under the loan agreement that the payment of interest will be net of tax, the interest payment will be grossed up for the purpose of calculating withholding tax.

Under Circular 169, the “lending interest” on a foreign loan is, for the purpose of tax payment, defined to include fees payable by the Vietnamese borrower as agreed in the relevant loan agreement.

The repayment of principal of a foreign loan is not subject to withholding tax or any other taxes.

The contracts signed with foreign contractors from 1 January 2004 will be treated in accordance with the new Law on Corporate Income Tax which governs, yet not sufficiently specific, the tax on foreign contractors. The MOF is currently drafting an amendment to the Circular 169 which will be in line with the new Law on Corporate Income Tax.³⁰

Vietnam has entered into tax treaties with several countries, according to which different tax treatments will be applied.

1.12 Financing

Loan

Foreign-invested companies can borrow from any source, including foreign banks. No approval is required for borrowing from a local bank as long as a debt to equity ratio of 70/30 is maintained. Long and medium term loans provided by foreign banks must be registered with the State Bank. There are no longer any restrictions on the interest rates that banks can charge for their loans.

Securities - general overview

- (a) The mortgage of immovable property and the pledge of movable property are the two main types of recognised security over assets which

²⁹ Circular 169 of the MOF dated 22 December 1998 guiding the tax regime applicable to foreign organisations and individuals carrying out business activities in Vietnam not in accordance with the investment forms stated in the FIL in Vietnam (*Circular 169*), as amended by Circular 95 dated 6 August 1999 of the MOF.

³⁰ This has been confirmed by the Official Letter 148 of the General Department of Taxation dated 19 January 2004 regarding Phu My 3 project.

may be offered under Vietnamese law. The Civil Code³¹ also provides for security by way of escrow account and for guarantees.

- (b) Forms of security generally available in other jurisdictions, such as assignments by way of security, charges, trusts and liens, are not recognised under Vietnamese law.
- (c) Decree 90³² permitted foreign lenders to take guarantee and other forms of security in accordance with the law of Vietnam.³³ However the law of Vietnam applicable to security interests is not determinable with certainty and various laws impact considerations relating to security. We do not set out these laws or the concerns to which they give rise in this memorandum.
- (d) Although the concept of agency is recognised in Vietnamese law, there is uncertainty as to whether that law recognises the concept of an agent holding security on behalf of principals.
- (e) Generally, Vietnamese law does not recognise the concept of third party security.

Mortgage

- (a) Mortgages can be granted over immovable property. Immovable property, for the purposes of Vietnamese law, consists of:
 - (i) land use rights; and
 - (ii) buildings and other assets attached to land.
- (b) There are, however, some issues which need to be considered in relation to mortgages:
 - (i) Vietnamese law expressly prohibits the grant of mortgages to foreign banks (other than the Vietnamese branch of a foreign bank) over land use rights. Whether it is possible for the branch of a foreign bank to hold such a mortgage as security on behalf of foreign banks who do not have branches in Vietnam is currently unclear at law.
 - (ii) Decree 24³⁴ would allow a mortgage of land use rights and the property attached to the relevant land to a Vietnamese credit institution (which includes the Vietnamese branch of a foreign bank) if land rentals have been prepaid for at least five years in advance.³⁵
 - (iii) There are no clear statements in Vietnamese law as to whether immovable assets on land may be mortgaged separately to a mortgage over relevant land use rights.

Pledge

³¹ The Civil Code passed by the National Assembly on 28 October 1995 (the *Civil Code*).

³² Decree 90 of the Government dated 7 November 1998 issuing the regulations on management of borrowing and repaying foreign loans (*Decree 90*).

³³ Article 23 of Decree 90.

³⁴ Article 92.1 of Decree 24 of the Government dated 31 July 2000 (*Decree 24*).

³⁵ Under the new Land Law, passed at the end of 2003 and effective 1 July 2004, it appears as if foreign organisations investing in Vietnam can mortgage the land rented from the Government if all rent has been paid at the outset (Article 119.3 of the New Land Law). The exact impact of this provision will need to be studied further, especially in the context of land that has been contributed to the capital of a JV by a Vietnamese partner which itself has leased it from the Government.

A pledge is recognised as a security interest within the Vietnam legal framework and can be given over movable property and rights. A pledgor may only retain possession of pledged assets where ownership in the assets has been registered. Decree 165 and Decree 8 legitimise a non-possessory pledge as long as it is registered at the National Department for Registration of Secured Transactions (**NDRST**).

Pledges of legal capital

- (a) Given that assignments by way of security are not recognised under Vietnamese law, a pledge of an investor's interest in legal capital remains the most appropriate security. As Vietnamese law does not recognise third party security, lenders require investors to enter into a limited guarantee or a "guarantee by property" of a borrower's obligations, with the pledge securing the obligations under the guarantee. The liability of the investors under the guarantee will be limited to enforcement of the "guarantee by property" or pledge.
- (b) Without the prior approval of the MPI to a transfer of such legal capital upon enforcement, the value of a pledge of legal capital is limited, because the FIL requires the MPI's approval for any transfer of legal capital. Lenders therefore tend to insist that the security interest itself be approved and that a direct agreement be entered into with MPI to "pre-approve" the right of lenders to transfer legal capital ownership on enforcement. The MPI has proved reluctant to enter into such direct agreements, and outside the BOT context the inadequacy has been an impediment to financing.

If the foreign investor's interest in the JV company is to be owned by an intermediate special-purpose offshore holding company, it would be possible for the lenders to take a security interest over the shares in such holding company. A transfer of such shares upon enforcement would, in theory, not require the approval of the MPI.

1.13 Sovereign guarantee

Article 66 of the FIL confers a broad authorisation on the Government to enter into guarantee agreements or to issue guarantees for any project within the principles of the FIL.

Legally, there are two main issues relating to Article 66 of the FIL:

- Article 66 refers to guarantees being within the principles of the FIL. It is not clear if these principles qualify the agreements or guarantees which may be issued or the projects that they must support. The latter is the more logical as there are no principles which deal specifically with the issue of direct agreements or guarantees. There are, on the other hand, principles in the FIL relating to investment in projects generally. Even here, though, there could be questions as to whether such "principles" have been met.
- The legislative history to Article 66 gives rise to concerns if the agreements or guarantees provided by the Government go beyond current Vietnamese law. The draft of Article 66 that was presented to the National Assembly would have specifically given the Government the right to issue guarantees that went beyond the law (special tax exemptions for example) if it obtained approval from the Standing Committee of the National Assembly. This concept was deleted by the National Assembly. Presumably, if a guarantee purports to go beyond the law, specific approvals from the National Assembly would be required.

Decree 24, which implemented the FIL, specified that such guarantees will only be given to specially important projects in infrastructure that are within the Government's programme or BOT projects.³⁶

In order to be eligible for such a guarantee outside the BOT context, a foreign investor would have to obtain a decision from the Government or the National Assembly that its project was of special national importance. This would be very difficult and could entail substantial difficulties and delays.

1.14 Maintenance and operation

³⁶ Article 120 of Decree 24.

The project company may wish to have the port operated and maintained by a third party. If that company is foreign certain issues exist as to the capacity in which it can act in Vietnam. A foreign contractor can do business in Vietnam by obtaining its own investment licence under the FIL,³⁷ or it might be able to act as a foreign contractor. Unfortunately, there is no clear legal basis pursuant to which entities can act as foreign contractors outside the construction context. The main possibility is to register the contract as a management contract under Inter-ministerial Circular 13 of the MPI and MOF dated 8 October 1997.³⁸ This requires an approval from the MPI which should be granted, at least in theory, within 30 days after receipt of the duly prepared application file. Although it may take longer in practice, it should be quicker and simpler to proceed in this fashion than to obtain an investment licence for the operator to act as a wholly foreign-owned company.

Once a management contract is approved, the contractor would have to act in accordance with Inter-ministerial Circular 13. This has some drawbacks:

- It would have to “operate under the name of the company and use the bank account and seal” of the company.
- The contract may have to specify in greater detail than normal the activities that will be taken by the contractor because the scope of its activity will be circumscribed by the contract itself: it would have no known legal rights at all except those that can be derived from approval of the contents of that contract.
- Section 2.2 of Inter-ministerial Circular 13 provides that the duration of a management contract cannot exceed 10 years. However, “If it is necessary, the parties can apply to the licensing body for approval of extension of the contract”. It is therefore possible (though not certain) that the MPI would approve an automatic renewal clause that operates upon expiry of the original 10-year term.
- Fees have to be approved by the MPI.

If operations are to be performed by the project company rather than by outsourcing, investors should be aware of the impact of Decree 105 dated 17 September 2003. Under this Decree, foreign employees of a company in Vietnam will only be able to number 3 per cent of the existing workforce (50 foreigners at most; one foreigner being permissible in all companies).³⁹

³⁷ Obtaining such an investment licence may not be straightforward.

³⁸ Inter-ministerial Circular 13 of the MPI and the MOF dated 8 October 1997 guiding the hiring of management organisations for managing business of foreign invested businesses.

³⁹ There are some exceptions from the caps on foreign employee numbers. Certain employers (e.g. foreign contractors, branches and representative offices) can recruit any number of foreign employees, but must seek prior consent from the Chairman of the relevant People’s Committee.