



ICLG

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Mining Law 2018

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Vietnam

Nguyen Hai Thao



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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The mining of minerals other than oil and gas is regulated by the 2010 Minerals Law and its implementing regulations.

The exploitation of oil and gas is subject to a different set of legislation under the Amended Oil and Gas Law and its implementing regulations.

1.2 Which Government body/ies administer the mining industry?

The mining industry is regulated by the Ministry of Natural Resources and Environment (“MONRE”) at the national level. People’s committees at all local levels also oversee mining activities within their jurisdictions.

Oil and gas activities are regulated by the Ministry of Industry and Trade (“MOIT”). People’s committees at all local levels also oversee oil and gas activities within their jurisdictions.

1.3 Describe any other sources of law affecting the mining industry.

Both the mining and oil and gas industries are subject to other sets of legislation such as:

1. The 2014 Investment Law (not applicable to investment in the oil and gas industry);
2. The 2014 Enterprise Law;
3. The 2014 Environmental Protection Law;
4. The 2013 Land Law;
5. The 2008 Corporate Income Tax Law;
6. The 2009 Natural Resources Tax Law; and
7. The 2012 Labour Code.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

The State controls and organises reconnaissance surveying activities via State-controlled agencies specialising in geology (the “**geology specialised entities**”) by promulgating a master

plan for reconnaissance surveying. Private sector investors (both institutional and individual) are allowed to *participate* in reconnaissance surveying of all minerals, except uranium and thorium, by way of making cash contributions for purposes of the survey. Investors are required to submit applications through a bidding process to the General Department of Geology and Minerals (“**GDGM**”) under the MONRE. Bidders are also required to post a bond of VND 1 billion (about US\$ 44,000) provided by an onshore bank to the GDGM. In limited circumstances, the Prime Minister may appoint an investor without an open tender. Selected bidders will enter into an agreement on reconnaissance surveying with the geology-specialised entities and pay the surveying contribution to the State. A bank bond is required to guarantee the investor’s payment obligations.

2.2 What rights are required to conduct exploration?

Investors wishing to conduct exploration, or investors who have obtained mining rights for a project, are required to obtain an exploration licence. The term of this licence is up to 48 months and it may be extended multiple times; provided, however, that the total extended time does not exceed an additional 48-month period.

Investors are required to pay a licensing fee. Investors are selected on a competitive basis and priority is given to those who (in the following order of priority):

- (a) have contributed to the reconnaissance survey;
- (b) hold equity of at least 50% of the total investment on the exploration project;
- (c) use advanced technology and equipment for the maximum recovery of minerals and comply with environmental protection regulations and payment obligations; and
- (d) commit to using the exploited minerals for purposes of domestic manufacturing needs.

Investors having exploration/mining rights can hire professional surveyors to conduct the exploration if they are not capable of doing so on their own.

Subject to certain conditions (see question 5.1), exploration rights are transferable.

2.3 What rights are required to conduct mining?

Investors wishing to conduct mining operations are required to obtain an exploitation licence, whose term is up to 30 years, subject to extension for another 20 years.

In order to obtain the exploitation licence, the investor is required to pay a licensing fee.

The exploitation licence is issued to investors who meet all of the following requirements and possess the following:

- (a) a project at a location where exploration and the assessed quarry reserves are aligned with the general mining master plans;
- (b) specialised staff and advanced technology and equipment;
- (c) a project approved by the Prime Minister (applicable to projects involving toxic minerals);
- (d) the environmental impact assessment report or the undertaking on environmental protection; and
- (e) equity of at least 30% of the total investment cost of the exploitation project.

Subject to certain conditions (see question 5.1), the mining right is transferable.

2.4 Are different procedures applicable to different minerals and on different types of land?

There are various land types. Land used for mining purposes is a sub-category of non-agricultural land. Investors in mining projects acquire access to their project land basically according to the same procedures as investors acquiring land use rights in non-agricultural land. Under this procedure, land will be leased by the State to the mining investors. The land use term will correspond to the term of the mining project.

2.5 Are different procedures applicable to natural oil and gas?

Investment in oil and gas follows a similar procedure promulgated under the Oil and Gas Law, under which an investor will enter into an agreement with the Vietnam Oil and Gas Group (“PetroVietnam”), a State-owned company having statutory control of all exploration and exploitation of oil and gas in Vietnam. PetroVietnam will conduct open or closed tendering to select a partner. In limited circumstances, the Prime Minister may select an investor through direct appointment. The selected partner will enter into a production sharing contract (“PSC”) or a joint venture agreement (“JVA”) with PetroVietnam. The standard term of a PSC is 25 years, with an exploration term of no more than five years. In limited circumstances, a PSC can have a term of no more than 30 years with a maximum seven-year exploration period. The contract term and the exploration period can be extended for five years and two years, respectively.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Foreign investors are allowed to participate in the reconnaissance, exploration and exploitation/mining activities. The law is silent as to whether onshore incorporation is required for reconnaissance purposes, and expressly requires onshore incorporation for mining purposes. The law is ambiguous as to whether onshore incorporation is required for exploration purposes and therefore this would be advisable.

With respect to professional surveyors, although Vietnam’s WTO commitments allow foreign surveyors to provide the service (CPC 8675) on a cross-border basis without the need for onshore

incorporation, the Mineral Laws seem to allow only onshore service providers (including foreign-owned onshore surveyors) to provide the service.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

The entities owning the rights can be foreign-owned. Please see question 3.1 about the onshore incorporation requirements. In practice, foreign investors generally will establish onshore companies to hold the exploration and mining rights.

Foreign investors in mining projects must first apply for an investment registration certificate from the investment licensing authority. Incorporation (if required) and exploration/mining licences will follow.

3.3 Are there any change of control restrictions applicable?

There are no restrictions as to change of control of the entities conducting reconnaissance, exploration and mining activities under the Minerals Law.

In the oil and gas industry, a six-month notice to the MOIT and PetroVietnam is required in case of a change of control of an entity having an interest in a PSC/JVA. A new guarantee will be required from the new parent to replace any existing parent guarantees. A change of control may also result in amendment of the underlying PSC/JVA.

3.4 Are there requirements for ownership by indigenous persons or entities?

There are no requirements for ownership by indigenous persons or entities in mineral activities. However, entities conducting mining activities are required to:

- (a) provide support in the form of sharing the costs for the local infrastructure;
- (b) prioritise hiring local people; and
- (c) pay support for career displacement to the local people who are displaced or resettled due to the mining project.

3.5 Does the State have free carry rights or options to acquire shareholdings?

The law allows the State the right to maintain or acquire ownership/shareholding in a number of industries for the purposes of social benefits or national security. Mining and oil and gas are included among such industries.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

Current regulations do not yet provide details on processing, refining and further beneficiation of minerals. A government decree providing on these activities is currently in draft form.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

Minerals for export purposes are subject to the following conditions:

- (a) they must be on the list of minerals eligible for export;
- (b) they must be from legitimate sources; and
- (c) they must have an export licence (applicable only to radioactive minerals).

Exported minerals are subject to export duties of 0–40%, and oil and gas products 0–10%.

Various types of minerals are VAT-free.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

The law is silent as to whether the right to conduct reconnaissance is transferable. Although it is not expressly allowed under the Minerals Law, it may be transferable on the basis of a contractual assignment of the relevant agreement and the contribution payment obligation, if approved by the GDGM.

Transfers of the rights to conduct exploration and mining are expressly permitted but certain conditions will apply as follows:

- (a) transferors of exploration right must have completed at least 50% of the projected exploration project and transferors of mining right must have completed the major construction and commenced mining;
- (b) transferees of the exploration/mining right must meet the same conditions for obtaining the exploration/mining licence respectively;
- (c) the mining licensing authorities must have approved the transfer; and
- (d) the remaining term of the licence is at least 90 days.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

The Mineral Law is silent on whether entities conducting mineral reconnaissance, exploration or mining can mortgage or otherwise use these rights as collateral to raise financing. However, as these rights have monetary value, they may be considered as property rights under the Civil Code, and therefore may be collateralised.

On the other hand, the law expressly provides that land use rights for which land rent is paid upfront for the entire lease term are property rights and can be mortgaged. In practice, many mining project investors do mortgage their land use rights. It should also be noted that offshore lenders are not allowed to take mortgage over land use rights and immovable assets except in very limited circumstances.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

Although one entity/investor can have the rights to conduct all three activities, these are separate and distinct rights (reconnaissance, exploration, and mining) under Vietnamese laws.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

Each and all of these rights are held in undivided shares.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

Holders of exploration/mining rights are obliged to mine secondary minerals. They are required to report on secondary minerals (for exploration right holders) and notify the licensing authorities prior to mining secondary minerals.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

Mining of residue deposits is a separate right. In order to conduct mining of residue deposits on the same land, a separate residue mining licence is required.

6.5 Are there any special rules relating to offshore exploration and mining?

There are no special rules under the Mineral Laws as to offshore exploration and mining. However, as the project is implemented in the sea and/or the seabed, the investor/developer does not lease land from the State – they will lease water surface or an ocean area instead. However, current regulations only provide that water surface/ocean area may be leased for aqua-culture purposes only.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

The right to use the land surface does not come automatically with the exploration/mining licences. After these licences are granted, the investor will lease land for the relevant area from the State to implement the project. A land use right certificate will be granted after the investor enters into a land lease agreement with the State. If land rent for the entire lease term is paid upfront, the land use right holder can mortgage the land use rights with onshore banks to raise financing.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have *vis-à-vis* the landowner or lawful occupier?

When a mining project is approved, residents/occupiers on the land will be resettled. Resettlement is the responsibility of the State. However, investors are encouraged to participate to expedite the relocation. The costs of relocation advanced by the investors will be applied against the land rent to be paid by the investors under the land lease agreement.

7.3 What rights of expropriation exist?

The Law on Expropriation allows the government to buy or take possession of an asset owned by Vietnamese or foreign owners on the grounds of national security or national interests. In that case, the government will pay the market price to the owner. The law does not provide a definition or method of determining the market price.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

Entities conducting exploration and mining must have an approved plan on environmental protection and an environmental impact assessment (“EIA”) report, respectively. These plans or reports are to be approved by the environmental protection regulators.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

Treatment of solid waste must be carried out by properly licensed entities.

Management of waste must be carried out during the entire process from being generated until it has been properly disposed. Regular industrial solid waste must be separated from hazardous waste. The collection, storage, and transportation of waste must ensure that no leaks will occur.

Liquid waste is to be properly treated on-site with a liquid waste treatment system before disposal into the common sewers or the ocean.

Owners of hazardous waste are required to register with the regulator for monitoring purposes.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

When a quarry is closed, holders of the rights are required to:

- (a) submit a closure plan for approval by the licensing authorities;
- (b) remove all assets from the site within six months of the expiry of the licence; and
- (c) level the project site, and rehabilitate the environment and/or the land.

For oil and gas projects, besides the obligations above, prior to the decommissioning, the decommissioning party must execute an

environmental monitoring plan and produce a report to the MONRE, and submit to the MOIT certain documents in accordance with the safety rules for oil and gas activities. Within nine months of the completion of the decommissioning, the decommissioning party must produce a report on the decommissioning to the MOIT, and also execute a post-decommissioning environmental monitoring plan and produce the post-decommissioning environmental report to the MONRE.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

The government promulgates zoning/master plans for mineral projects for various locations throughout Vietnam. The granting of reconnaissance, exploration and mining rights must follow such zoning/master plans. The current master plan for mineral projects is envisioned for the period until 2030.

A similar master plan is also promulgated for oil and gas projects.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

Residents/occupiers of the land will be resettled for mining projects and are entitled to compensation for their prior land use rights, and relocation support. These costs are to be borne by the State, but if advanced by the investors, will be applied against the land rent to be paid by the investors to the State.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

Health and safety in all industries are regulated by:

- (a) The 2012 Labour Code; and
- (b) The 2015 Law on Occupational Safety and Hygiene.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

Most mining jobs are considered hazardous and dangerous. Employers are required to provide safety training prior to and during the assignment, and a semi-annual health check for employees.

Employees working on hazardous/dangerous assignments cannot work more than six hours per day and are entitled to 14–16 leave days per year.

11 Administrative Aspects

11.1 Is there a central titles registration office?

There is not a central title registration office.

The investment registration certificates, and land use right certificates are granted by provincial people’s committees of the jurisdictions where the projects operate. Most exploration/mining

licences are granted by the MONRE, and some are granted by provincial people's committees.

Oil and gas projects are approved by the Prime Minister.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Administrative decisions can be appealed under either of the following procedures:

- (a) appealing to the agency of higher authority of the agency issuing the decision under appeal; or
- (b) taking legal action against the agency issuing the decision under appeal before the administrative court.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

The 2013 Constitution provides that the land, and all natural resources are the under the ownership of the people and administered by the State. Therefore, there is no private ownership concept with respect to land and natural resources under Vietnamese laws.

12.2 Are there any State investment treaties which are applicable?

Vietnam currently has 51 bilateral investment treaties and 16 multi-lateral investment treaties, the most notable are:

1. WTO Commitments on Services;
2. ASEAN-EU Cooperation Agreement dated 7 March 1980;
3. ASEAN Investment Agreement dated 15 December 1987;
4. EC-Vietnam Cooperation Agreement dated 17 July 1995;
5. ASEAN Framework Agreement on Services dated 15 December 1995;
6. US-Vietnam Trade Relations Agreement dated 13 July 2000;
7. ASEAN-China Framework Agreement dated 4 November 2002;
8. ASEAN-Japan Framework Agreement dated 8 October 2003;
9. ASEAN-India Framework Agreement dated 7 March 2004;
10. ASEAN-Korea Framework Agreement dated 13 December 2005;
11. ASEAN-US Trade and Investment Framework Arrangement dated 25 August 2006;
12. US-Vietnam Trade and Investment Framework Arrangement dated 21 June 2007;
13. ASEAN-Japan Free Trade Agreement dated 28 March 2008;
14. Japan-Vietnam Economic Partnership Agreement dated 25 December 2008;
15. ASEAN Comprehensive Investment Agreement dated 26 February 2009 (ACIA);
16. ASEAN-Australia-New Zealand Free Trade Area Agreement dated 27 February 2009;
17. ASEAN-Korea Investment Agreement dated 2 June 2009;
18. ASEAN-China Investment Agreement dated 15 August 2009;

19. Korea-Vietnam Free Trade Agreement dated 5 May 2015; and
20. Eurasian Economic Union-Vietnam Free Trade Agreement dated 29 May 2015.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

Entities doing business in the mining industry are subject to the following taxes:

- (a) Natural Resources Tax of 1%–35%; crude oil, natural gas and coal gas are taxed at progressive tax rates depending on the daily average production output.
- (b) Non-Agricultural Land Use Tax: on par with other industries.
- (c) Corporate Income Tax: 32%–50% (as opposed to the standard rate of 20% for other industries).

13.2 Are there royalties payable to the State over and above any taxes?

Royalties of 1%–5% of the estimated value of the reserves apply to entities conducting mineral mining activities. Royalties do not apply to holders of residue mining right.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Local provincial authorities are not allowed to make regulations that are inconsistent with national laws.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

While a global (rather than regional rule), it is critical to be aware of the scope and limitations to Vietnam's WTO accession commitments; see question 3.1.

The regional Korea-Vietnam Free Trade Agreement dated 5 May 2015 also provides the same commitment as the WTO commitments with respect to professional surveying services.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

Under the Minerals Law, holders of exploration and mining rights are entitled to relinquish all or part of the area for which the licence is granted. There are no conditions/requirements for relinquishment. Oil and gas project owners can do so too, but are subject to the approval of the Prime Minister.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Besides the obligations mentioned in questions 8.2 and 8.3 above, rights holders are required to return the granted licences to the licensing authorities, settle their outstanding tax obligations, and other financial obligations with third parties. In addition, if the entire project is abandoned, the investor may also need to wind up the project company.

An oil and gas contractor under a PSC/JVA abandoning the project may be required to pay PetroVietnam compensation for the committed but unfinished work.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Under the Minerals Law, the State can cancel exploration and mining rights by withdrawing the issued exploration/mining licence, if the licensed entity: (i) fails to implement the exploration project or the mining project within six months or 12 months of the licence date respectively; (ii) breaches its obligations under the laws and fails to remedy such breach/non-compliance within 90 days; or (iii) the area covered by the exploration licence is announced to be a prohibited or temporarily prohibited area.

Alternatively, the State can also revoke the investment registration certificate issued to the investor if the investor does not implement the project within 12 months (or 24 months, if extended) of the investment registration certificate being issued.



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