

## Comments on Draft Mineral Law Version 5

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From an international perspective, the Draft Mineral Law Version 5 (“DML5” or “draft law”) presents positive steps from the 2005/1996 Mineral Law and demonstrates that the drafters have given considerable thought to many issues raised during the drafting period and also takes into account Vietnam’s environmental and social impacts experience with mining. However, from an international perspective, significant issues are also presented by the draft law that will either virtually prohibit or seriously inhibit investors from investing in major exploration and mining projects, unless they obtain relief from those provisions through agreement or otherwise.

First, the positive amendments to the draft law include the following:

- Licensing for mineral activities has been nominally centralized with MONRE who has become the lead agency for mineral activity licensing;
- Prospecting and exploration activities have been combined into a single exploration license; and
- A “right of refusal” (the right to mine) has been included as part of the rights of an exploration license holder; and
- “Priority” is given to explorers who participate in geological baseline studies in mineral auctions.

The major problem areas that appear from an international practice perspective from DML5 include:

- There is still some conflict in authority over the sector as it appears that the Ministry of Industry and Trade will draft policies, strategies and the Master Plans and submit them for approval while MONRE will handle all licensing. As all mineral activities seemingly must be approved consistent with the Master Plan it raises flags about possible conflicts;
- Regarding responsibilities of central versus provincial and people’s committees: these are areas of frequent conflict. It may be helpful to add into the provisions regarding these levels that their actions will need to be consistent with guidance, policies and procedures from the central ministries. In addition, there should be clearer provisions on how to resolve inter-ministerial and central/provincial disputes or inconsistencies. It may be helpful to include that part of the authority of MONRE that includes training for provincial and other levels of government with authority over the sector.

- Export limitations/restrictions for raw materials and ores may likely contravene WTO obligations and will certainly discourage foreign investment;
- Reasons/procedures for placing geologically prospective areas in reserve areas are unclear – see additional comments below;
- Compensation to companies for exploration expenditures if a mining concession is not granted is very problematic, especially if it is according to a system of unit costs that is determined by a third party; it also does not appear to reimburse the company for a sufficient return on investment as companies do not explore for the sake of exploration --governments in open-market economies do, but private companies that must show a profit to survive cannot;
- Requirements that ores be processed to the “maximum” is not realistic in international terms and may not be consistent with an investor’s need to undertake a level of processing that is economically feasible;
- Transfer of licenses may be unduly restricted and/or taxed by the Ministry of Finance—best international practice sets a transfer tax of up to a maximum of 10% on a sale;
- Sizes of exploration areas and maximum durations is not realistic for the state of maturity of Vietnam’s mining sector; for example, in neighboring Laos, the Sepon project (13 years of exploration; 1000 sq km+ size of concession) would not have been found under the time frames and size restrictions in DML5; in Papua New Guinea when Ok Tedi was found, approximately 70% of the country was open for exploration. This provision is worthy of reconsideration—otherwise it is a tremendous disincentive for major investment.
- Fiscal issues still figure prominently as disincentives absent an understanding that they must be comprehensively assessed for the mining industry pursuant to a method similar to Effective Tax Rate (ETR) assessments;
- Financial capacity requirements of equity are not internationally realistic for international investors; it may be more appropriate to require this of small domestic or regional companies who are undertaking mining;
- The draft law takes the stance that laws of general administration are applicable to the mining sector; in best international practice, the most successful countries have specific regimes of comprehensive terms for the mining sector because of the uniqueness of the business; Also, just the fact that a company is obligated to comply with many other agency and authority laws and regulations that can and do change is another reason why comprehensive terms are often found in the minerals law. Absent a single, overriding agency that understands the risks and economics of the industry, major investors will find that these laws of general application are too disparate and unconnected to mining. The laws and regulations and the fact that they change without regard to the economics of the project present too much risk and uncertainty over the life-cycle of the mine for a major investor to risk investment.

- Art. 3 Definitions: “Mineral Resources” is a term that has gained general international acceptance as having an economically recoverable dimension. There are several specific classifications including JORC; the UN Classification and the US McKelvey classifications. While the use of this term is subject to national practice, consideration should be given at this stage of significant change in the government sector to harmonizing language and classifications with international practice for the benefit of the country’s own scientific, geological and mining undertakings to take advantage of international information as well as for investors;
- Many of the exploration and mining provisions have time limits that are very inflexible; adding “without good cause” to expiration provisions would provide more attractive flexibility to international investors who can face severe weather conditions, supply, commodity price cycles and other issues that might not be considered force majeure but may extend operations outside the time frames indicated in the provisions. This would still allow the government the ability to act on malfeasant companies that are simply not performing or speculating;
- As a general matter, there are too many “approvals” required. A good company should be allowed to operate within the bounds of sound international practice and inform the government of its activities, but the insertion of approvals breaks the “right to mine”, especially if these approvals come, as mentioned previously, from other Ministries and agencies who are not familiar with the specific attributes of the mining sector and whose laws change for reasons not related to mining. Where, as here, the approvals are presumably intended to control smaller companies that can not provide adequate, technically qualified documentation to support their actions, control of these companies comes from grant or denial of the exploration application and subsequent compliance with work programs along the life-cycle of exploration and mining.
- “Assessment and approval” of mineral exploration outcomes: while the intention of the provision to make sure that companies are exploring and then working appropriately on finds – the language of the provisions will be a disincentive for investment because foreign companies will take actions that are based on project and company economics. The insertion of judgments either technical or business by the government will be seen as very problematic. See comments about controlling smaller companies, above.
- For areas open to exploration or mining; do these areas need to be classified specifically within the master plans or can they be open areas not claimed by anyone else—which is general international practice? One of the most important concepts in international exploration is access to land for exploration—if it is perceived to be unduly closed or the best prospective areas are locked away in reserve areas for domestic or future operations—investors will look elsewhere;
- Some terms “pop up” unexpectedly in the provisions, an example of this is Article 50(2) where “foreign-invested enterprise” is introduced for the first time; and Article 54(1) (e) “investment certificate” is not mentioned previously or defined.
- Some terms are too broad, for example “mineral governing agency” in Art. 56(1) (b).

- With regards to “landfill” or secondary recovery: Art. 60 should be clarified to also list where there are no current licenses;
- Part 3 of Mining “Mine Closure”: Sound international practice dictates that mine closure should be part of the planning from the start of the development of the mine. There will not likely be enough resources to undertake proper mine closure if planning is only mandated and started at the end of the mining cycle.
- Environmental reclamation and rehabilitation funds should be defined precisely and how they are to be administered and by whom. Otherwise, it is another financial obligation that a foreign investor cannot quantify prior to determining whether to engage in minerals activities.
- Article 69 regarding minerals processing is problematic because it again appears to allow the government to inject its judgment into a project where foreign companies will want project economics to dictate appropriate levels of processing.
- In Article 70 companies that undertake mining are permitted to import equipment, supplies, etc. Are exploration companies not allowed to import similarly?
- Compensation for mineral resources in Art. 71 is unclear. Royalties are internationally defined and accepted as compensation to the government for exploitation of a state’s mineral resources. Presumably “compensation” and “royalties” are different in this provision or else “compensation” would not be listed separately from royalties. This will raise questions as to the legitimacy of what is being included in taxes, royalties, “compensation”, fees, etc. and the level of understanding by the government of the mining sector. See comments regarding Article 72, below.
- For general comments on auctions please see previous comments to earlier drafts;
- Article 72 “Pricing of unexploited mineral resources”—governments with resource sectors have been trying to value mineral resources for at least one hundred+ years. Best international practice has evolved over this time to the point where governments with successful mining sectors have determined that the most practical, realistic and best “take” of government share of fiscal benefits is by taxes and royalties. Valuation of resources/reserves is a sophisticated scientific and economic exercise that changes constantly with international commodity supplies which in turn is reflected in part in changing commodity prices. Resources are particularly difficult and virtually all governments with long mining histories do not attempt it. Moreover, companies view attempts by the government to value reserves and resources as a sign that government decision makers do not understand the mining industry. International practice has shown that where government decision makers do not understand the sector, it is much more likely to make arbitrary decisions that will unfavorably impact a project and this significantly discourages investment.
- Article 73: It is unclear what regulatory regime will apply to exploration and mining in auctioned areas as financially the systems will be different. How will financial benefits be split if a company bids and wins? Is this intended to apply to oil and gas as well? Legislation concerning auctions for oil and gas concessions is quite sophisticated internationally but the commodities are explored, recovered and

transported so differently with such different technology that they are not usually treated in the same legislation.