

RECOMMENDATIONS ON DRAFT DECREE ON INVESTMENT FOLLOWING THE FORM OF PUBLIC-PRIVATE PARTNERSHIP (Version 21 July 2014)

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| No. | Reference to Draft Decree | Comments / Recommendations |
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| | General considerations: | |
| | Article 1.1: PPP projects grouped either through specific criteria or project type (commercial or state-subsidized project) | |
| | Article 1.2: Design of the provisions and discrimination of: (i) an overall framework for all PPP projects, and (ii) special publicly financed PPP projects | |
| | Article 2: Why is “relevant regulatory authority” removed from the coverage? | |
| | Article 3.1: The definition of “public private partnership investment” varies between 3.1 and 5.1. Clarification of concession rights is needed. | |
| | Article 3.7: “Lease” or “franchise” transactions should be enunciated for DBO projects (to tell apart from BOT). | |
| | Article 3.8: “Leased” (L) in BTL does not refer to “leased services” but “lease” as in lump sum deals or a “franchise”. | |
| | Article 3.9: O&M tends to be confused with O&M contracting. Clarification of concession grant for existing public property/assets. | |
| | Article 3.13: Grouping type A, B and C projects in accordance with public investment laws may result in confused interpretation that the Public investment law applies to all PPP projects (regardless of whether public funding is used). | |
| | Article 3.20: Timing of project company formation. | |
| | Article 3.24: Gross development capital: reference to building laws should be removed. | |
| | Article 3.25: The listing in the “gross investment fund” should be removed, because it depends on the specific projects and any listing here may not be inclusive. | |
| | Article 4.2: Decision making authority on other types of project contract. | |
| | Article 9.1: Does this follow the current “focal ministry” scheme? Clearly defined authority by governance area is needed. | |
| | Article 11.1: No indication is made that the project should be proposed by investors by their own efforts. | |
| | Article 11.3: The open-ended rule allowing additional requirements and prerequisites for PPP projects by industry should be removed. Only implementing guidelines are needed. | |
| | Article 12.1: Debt/equity ratio management where shareholders’ loan is involved. | |
| | Article 13.1.a: The VGF mechanism and how to support access to commercial loans. | |
| | Article 13.3.a: How are requirements of bilateral agreements be effective to and binding upon PPP projects? | |
| | Article 14.1: Decision making on how public investment funds are used: scope, procedures and disbursement requirements? | |
| | Article 14.3: How are project contracts going to define (public) financing criteria in conjunction with the entire project’s financing and schedule (including commercial loans)? How is the public financing process different? | |
| | Article 16.1: How is the contract going to determine the completed work volume and value? There is a need to define the relationship between the project contract and other agreements within the project. | |
| | Article 19.3: How “public investment funding intent” relates to the project proposed outline and the entire PPP project should be defined. | |
| | Article 26.1: What precedence is the proposing investor entitled to once the proposed project is approved? Is it correct that refund is only available under Article 27.2 if the bidder is not selected. | |

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| | <p>Article 28.2: Exactly how building laws should be referred to should be clarified, given the fact that many provisions and procedures of existing building laws continue to hinder or lengthen privately invested projects.</p> <p>Article 32 – 34: There is no regulations on contract negotiation.</p> <p>Article 34 and 35: Determination of project company formation timing.</p> <p>Article 35: Funding terms and conditions (including public funds) are often not included in the project contract, instead in the financing agreement, and funding mechanisms and implementing arrangements should be in place.</p> <p>Article 35.2: Different project documents and relevant agreements should be clearly defined, as well as their ties with the project contract.</p> <p>Article 42: Devolution in investment licensing should be elaborated upon.</p> <p>Article 43.2.b: What is an “investment agreement”?</p> <p>Article 58-67: Concessional investment guarantees should articulate tax, land use right, foreign exchange control and government guarantee considerations.</p> <p>Article 66: The arbitration agency should not necessarily be ad-hoc.</p> <p>Article 76: The scope and effectiveness of the sunset clause for BOT projects should be clearly defined in accordance with the current Decree.</p> | |
| 1 | <p>Article 9.1: “Authorized State Agencies in signing and implementing Project Contract are Ministries, branches and provincial People’s Committees.”</p> | <p>The following two consideration need further elaboration and amendment:</p> <ul style="list-style-type: none"> - Ministries and line agencies are government agencies in charge of projects under their corresponding jurisdiction. There have been extensive debates between ministries/line agencies and investors on whether the ministries/line agencies need written delegation by the Prime Minister to become the authorized regulator for a specific project. Ministries and line agencies are currently taken for granted as government agencies in charge of projects under their corresponding jurisdiction. This is not clear in the draft. - Projects under the jurisdiction of ministries/line agencies as the authorized regulators and those under the jurisdiction of provincial level PCs should be discriminated. |
| 2 | <p>Article 24.3: “Documents evidencing the legal status and financial and technical capacity of the Investor.”</p> | <p>Please list the specific documents required for consistency and avoidance of unnecessary barriers to investors.</p> |
| 3 | <p>Article 24.4: “Statement on experience in implementation of similar Projects (if any)”</p> | <p>Please list the specific documents required for consistency and avoidance of unnecessary barriers to investors.</p> |
| 4 | <p>Article 32: “The selection of investor shall be conducted in accordance with the laws and regulations on procurement.”</p> | <p>Addition of regulations on giving the right of first refusal for project development to the proposing investor and presentation of an approved feasibility study report is advised.</p> <p>Investors may actively study and propose projects before making preparations and applying</p> |

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| | | for approval of the feasibility study to obtain the project development right. Investors having incurred considerable costs (including opportunity costs) to have an approved feasibility study, only to have to go through the bidding process all over will not feel encouraged to make efforts in proposing meaningful projects to Vietnam. |
| 5 | Article 35.2: “Enclosures to the Project Contract (if any), including annexes, materials and other documents shall be an integral part of the Project Contract.” | What exactly are “relevant agreements”? Do they include land leases, fuel supply contracts, dealership contract or other contracts? |
| 6 | Article 36.2: “The agreement on lender’s step-in rights shall be made in writing between the lender(s) and the Authorized State Agencies or between the lender and parties signing the Project Contract. The lenders and the Authorized State Agencies shall determine when to sign such agreement.” | The text in red is recommended to be added to the second sentence: “The lenders and authorized state agencies shall determine when to sign agreements on the project acceptance right.” |
| 7 | Article 37.2: “Assignment of rights and obligations of investor prescribed in Clause 1 hereof shall be conducted after the Project Facility has been construction and put the into operation except for the case the lender(s) exercises the Step-in-right as prescribed in Article 36 of this Decree.” | The following changes are proposed: “Assignment of the investor’s rights and obligations specified in paragraph 1 of this Article may only be executed once accepted by the relevant regulatory authority.” Ruling out assignment prior to the project being completed is too demanding and unrealistic. Due to various uncontrollable factors, investors may have no other options than transferring a project for capital raising purposes (e.g. a potential creditor would only agree to the loan if an investor from their home country becomes a party in the project), or simply for the project to continue. Requiring the relevant regulator’s acceptance therefore should be enough. |
| 8 | Article 40: “Parties shall sign agreements on selection of the law governing Project Contract; Contracts which are provided performance guarantee by the Government as prescribed in Article 60 of this Decree; financing contracts or guarantee contracts between the Lender, Investor and Project Enterprise and other contracts as prescribed in the Project Contract.” | The following changes are proposed: “Parties may agree on the selection of foreign laws as the applicable law for the Project Contract; contracts which are provided performance guarantee by the Government as prescribed in Article 60 of this Decree; financing contracts or guarantee contracts between the Lender, Investor and Project Enterprise and other contracts as prescribed in the Project Contract.” |

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| 9 | <p>Article 47.1: “The Investor, the Project Enterprise are allowed to select contractors for consultancy, purchase of goods, construction and installation and other contractors on the basis of ensuring impartiality, transparency and economic efficiency to implement the project implementation.”</p> | <p>The following changes are proposed:</p> <p>“The investor and project company may select contractors for consultancy, procurement, plant and construction, and other contractors in conformity with the provisions of the Project contract.”</p> <p>Expectations of “inclusive, transparency and cost-effectiveness” are too generic and difficult to apply consistently in real life.</p> |
| 10 | <p>Article 49: “Based on the Feasibility Study Report and provisions of the Project Contract, the Investor, Project Enterprise shall formulate the designs and send them to the Authorized State Agency for supervision and inspection. In the case the change of designs affects objectives, and requirements of the Project, approval by the Authorized State Agency shall be sought.”</p> | <p>The following changes are proposed:</p> <p>“Based on the Feasibility Study Report and provisions of the Project Contract, the Investor, Project Enterprise shall formulate the technical designs and send them to the Authorized State Agency for supervision and inspection. Any change to the technical design that may affect the project’s objectives and requirements as specified in the feasibility study shall be require prior acceptance by the relevant regulatory authority.”</p> |
| 11 | <p>Article 57.2.a: “One (01) year before the date of handover or within such other period agreed upon in the Project Contract, the Investor or the Project Enterprise must publicize the handover of the Project facility and issues related to procedures, contract liquidation time-limit and/or repayment of debts.”</p> | <ul style="list-style-type: none"> - How long should the news be on the papers? We understand that under the provisions of the draft, the transfer should be on the media one year before actual hand-over (or another time agreed in the Project contract). It is unclear however, how long and on how many released it should remain on the papers. - “Issues related to ...” can be removed since it is too generic to be consistently implemented in practice. |
| 12 | <p>Article 57.2.d: “The Project Enterprise shall be responsible for carrying out technology transfer, training and periodical maintenance and full repair to ensure the normal technical operation conditions of the Facility in accordance with the requirements specified in the Project Contract.”</p> | <p>The following changes are proposed:</p> <p>“The project company is responsible for technology transfer, training, periodical maintenance and overhaul prior to the transfer of the project works to ensure the normal technical and operating conditions of the works in accordance with the requirements of the Project contract.”</p> |
| 13 | <p>Article 58.3: “The Investor and the Project Enterprise shall be exempted from or deducted land use fees for the area of land allocated by the State or shall be exempted from land rent for the whole term of implementation of the Project in compliance with the laws and regulations on land.”</p> | <p>The following changes are proposed:</p> <p>“The investor and project company are entitled to land use fees waiver or reduction for land allotments granted by the government or land rent waiver or reduction for the project implementing period in accordance with existing land laws and regulations.”</p> |

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| 14 | <p>Article 60: “Based on the nature of the Project and requirements for Project implementation, the Prime Minister shall appoint an agency to provide guarantee on foreign currency conversion, provision of raw materials, sale of products and other contractual obligations to the Investor, Project Enterprise or other enterprises participating in the implementation of the Project and a guarantee for performance of obligations of state-owned enterprises in selling raw materials, purchasing products and services from the Project Enterprise.”</p> | <p>The following changes are proposed:</p> <p>“Depending on the nature and requirements of the project, the Prime Minister shall appoint an agency to, on behalf of the government, provide guarantee on foreign exchange supply and conversion, provision of raw materials, sale of products and services, and other contractual obligations to the Investor, Project company or other businesses involved in the project implementation, and performance guarantee for state-owned enterprises selling fuel, raw materials, and purchasing products and services from the Project company.”</p> |
| 15 | <p>Article 62.1: “Investor, Project Enterprise are allowed to mortgage assets or busines rights of the Project facility with the Lender. The mortgage term shall not go beyond the time period for operation as specified in the Project Contract.”</p> | <p>The following changes are recommened to remain consistent with Article 57.2(c) of the draft:</p> <p>“The investor and project company may mortgage assets and business rights or the project works with the creditor. The mortgage term shall not exceed the dated of project works hand-over, except otherwise specified in the Project contract.”</p> |
| 16 | <p>Article 62.2: “The agreement to mortgage the assets or the business rights of the Project Facility shall be made in writing and signed between the Lender and parties to the Project Contract.”</p> | <p>We understand that this provision requires the relevant regulatory authority to be involved and endorse the deeds of pledge with the creditor and the investor/project company. But we believe it would suffice if the relevant regulatory authority simply gives written acceptance of the pledge transaction, rather than actually becoming a party to the deed of pledge.</p> |
| 17 | <p>Article 64.2: “For important projects in investment plans and programs and other project, guarantee on balance of foreign currency shall be decided by the Prime Minister.”</p> | <p>The following changes are proposed:</p> <p>“Vital projects as part of the government’s investment plans and programs and other projects that are subject to the Prime Minister’s decision making are entitled to the government’s guarantee for foreign exchange supply.”</p> |

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| 18 | Article 66: Dispute settlement | <p>According to the draft, only disputes between the relevant regulatory authority and foreign investors may be resolved with international arbitration. Other disputes (including those between the relevant regulatory authority and project company, and between the project company and other business entities involved in the project implementaiton) shall be resolved through a Vietnamese arbitrary or judicial agency.</p> <p>This provision seems inconsistent with Article 12 of the Investment Law. The provision will also reduce significantly access to investment funding and foreign loans. Changes are recommended to remain consistent with Article 12 (especially Article 12.3) of the Investment Law.</p> |
| 19 | Article 70.1: “To preside over the negotiations in order to provide legal opinions on the Project Contract, Government guarantee document and other documents related to Project Contract which are signed by the Government in accordance with laws and regulations.” | <p>The following changes are proposed:</p> <p>“To preside over the negotiations for the release of legal views on the Project contract, the government’s guarantee documents and other project-related documents entered into by the government, regulatory authorities and state-owned enterprises in accordance with applicable laws.”</p> |