

**PPP DRAFT DECREE  
WITHER PRIVATE SECTOR INFRASTRUCTURE INVESTMENT?**

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1. The participation of the private sector in building Vietnam's infrastructure is important. Otherwise State borrowing will increase at even more alarming rates than is currently the case, or infrastructure will fail to keep pace with the country's potential.
2. The Ministry of Planning and Investment is preparing a draft Decree which will replace both Decree 71 dated 9 November 2010 on PPP pilot regulations and Decree 108 dated 27 November 2009, as amended, on BOT (the *Draft Decree*). The Draft Decree is currently being revised yet again, based on public comments.
3. There are numerous problems with the current Draft Decree which could cause substantial difficulties in attracting private foreign capital.
4. The VBF infrastructure group would like to focus on a few critical items, some of which, if not remedied, will either stop project financing of infrastructure projects in its tracks or at least lead to substantial delays while the problems are worked through.

**Scope**

5. There is a fundamental issue in the Draft Decree. It is not clear whether State support for a project is only possible through the PPP mechanism, or whether a project with State support somewhere (e.g. rent-free land) can still be implemented as a normal joint venture.
  - (a) If the former, many projects will have to be done as PPPs and the institutional machinery for PPPs will swiftly be overwhelmed.
  - (b) If the latter, then when exactly does a project have to be implemented through the PPP mechanism?

*Recommendation:* The Draft Decree should clarify the criteria by which projects will be deemed to have to be implemented as PPP projects.

**Abolition of BOT regulations**

6. The Draft Decree will replace Decree 108 on BOT. While there have not been many BOT projects in Vietnam (and even fewer that have been project financed, which is their main purpose), at least they were a known quantity and investors had a reasonable idea of the outlines of what was involved at the time of starting a development. The Draft Decree will terminate this possibility before it is clear whether and how a PPP will work. This appears slightly rash. It would be better to abolish BOTs once PPPs have a solid track record (which may be years down the road).

*Recommendation:* Amend the Draft Decree to provide a sunset clause for the BOT regulations that is the date in the future when two things have happened: (i) a committee of wise men in the Vietnamese government have opined that PPPs are

working well, and (ii) an additional period of x years has elapsed (so that investors can plan appropriately).

### **Transition of existing BOT projects into new PPP regime**

7. There are quite a number of major projects being developed as BOT projects at the moment. In the power sector alone, there are BOT projects at Van Phong, Vinh Tan, Vung Ang, Quang Ngai, Long Phu, Duyen Hai and Nam Dinh, among others. The issue of what would happen to these projects, on which developers have spent untold millions of dollars, if the BOT regulations were to be repealed, needs to be considered carefully. The current proposal, which is set out below, leaves open untold numbers of questions.
  - (i) A project that was proposed prior to the effective date of the Decree will have to go through a re-selection and re-approval process under the PPP regulations, unless otherwise approved by the Prime Minister.
  - (ii) If a Feasibility Study was approved prior to the effective date of the Decree then it does not have to be re-approved under the PPP regulations.
  - (iii) Projects established based on agreements with the Authorised State Bodies (ASB) prior to the effective date of the Decree will follow such agreements with the ASB.
  - (iv) Projects with a "decision on investor selection" prior to the effective date of the Decree do not need to carry out investor selection procedures again.
  - (v) Projects with Project Contracts that have been initialled prior to the effective date of the Decree do not need to re-negotiate the Project Contract.
  - (vi) If the Project Contract has not been initialled, but certain items have nevertheless been agreed, those items do not need to be re-negotiated.
  - (vii) Project having the Project Contract officially signed prior to the effective date of the Decree will be implemented in accordance with the Project Contract and the investment certificate.
8. All BOT projects that have not been financed (i.e. all except for Phu My 2-2, Phu My 3 and Mong Duong 2) will be adversely affected by this transaction, some seriously affected.

*Recommendation:* Amend the Draft Decree to provide a sunset clause for the BOT regulations that is the date in the future when two things have happened: (i) a committee of wise men in the Vietnamese government have opined that PPPs are working well, and (ii) an additional period of x years has elapsed (so that investors can plan appropriately).

### **Foreign currency guarantee**

9. One of the key bankability hurdles for most infrastructure projects is that they have to sell their output in Vietnamese dong, but the only long-term financing available is in dollars. If there is no government guarantee of convertibility (at the same exchange rate) of dong into dollars, and of the availability and remittability of dollars, financing of a dong-revenue project on a project basis is effectively not possible at the current point in time.
10. The current position of the government in the Draft Decree seems to be to address the issue head on by limiting the availability of government FX guarantees.

*Recommendation:* The FX guarantee provision should affirm the possibility of obtaining a convertibility, availability and remittability guarantee. For example "Any convertibility, availability and remittability guarantee must be approved by the Prime Minister." We

realise there are economic and political issues, but caution against a flat denial of such guarantee, as this would send a negative anti-investment message. If a positive outcome is not possible, the Decree on PPP should simply remain silent on the issue.

### **Governing law**

11. Another consistent bankability issue has been the difficulty of using a well-known system of laws for the project documents. While Vietnamese law is of course widely used in Vietnam, it is not as developed as English law and does not give lenders the certainty they need when lending on the basis of the assets and cash-flow of a project. The alternatives on this issue in the Draft Decree allow for the application of foreign law if it does not contradict the laws of Vietnam (option 1) or the Law on Investment (option 2).
12. If these alternatives are carried through into the final Decree, there will be a major financing issue because the conditions are not likely to be provable without a legal opinion from the Ministry of Justice. Unfortunately, there is a clause on what legal opinions the Ministry of Justice can give – and it does not cover some of the documents that will need such a legal opinion.

#### *Recommendation:*

- (a) The parties should be allowed to decide what law governs their contracts.
- (b) If that is not possible, the range of opinions that the Ministry of Justice can give should not be limited.

### **Dispute settlement**

13. The Decree allows any dispute arising between the ASB and a foreign investor during the implementation of the Project Contract and guarantee agreements to be settled by arbitration or by the courts of Vietnam or by a foreign arbitral tribunal as agreed upon by the Parties. The Project Company is not a foreign investor.

#### *Recommendation:*

- (a) Contracts involving the Project Company, such as the Power Purchase Agreement, should be entitled to select foreign arbitration.
- (b) The provision should also include further clarifications to deal with persistent problems in enforcing arbitration awards in Vietnam.

### **Feasibility Study**

14. The feasibility study report requirements appear to be input based (technical specifications, components etc.).
15. The Draft Decree includes a catch-all stating that other contents may be required in accordance with the laws.

*Recommendation:* The Draft Decree should contain more flexible provisions for the detailed contents of a feasibility study. It should be output-based to the extent possible.

**Project Contract clauses**

16. The Draft Decree is too prescriptive in respect of the numerous specific detailed contents expected to be contained in the Project Contract. All sectors are different, and there are major differences between new build and rebuild projects.

*Recommendation:* The Draft Decree should raise the general principles and give the parties the right to negotiate the detailed contents of the Project Contract.

**Land**

17. The Draft Decree states that investors will be in charge of conducting land clearance, compensation and resettlement procedures.

18. The investors will be exempt from land use fees/rental in accordance with the Law on Land. The Land Law does not permit the mortgage of land if the rent has not been fully paid. This has been interpreted to mean that land that is exempt from land rent cannot be mortgaged. This is an important issue for banks.

19. The Draft Decree is silent on the right to mortgage the land use rights to lenders. So it fails to address the issue completely.

*Recommendation:*

(a) The bankability of the Project should be enhanced by greater clarity on the mortgage rights to which lenders would be entitled in respect of land.

(b) The Draft Decree should provide the comfort that the ASA will be in charge of land clearance, compensation and resettlement procedures.

**Investment Certificate**

20. Pursuant to the Draft Decree, an additional evaluation procedure will be required for the issuance of the investment certificate for the Project Company. There is a concern that the licensing authority will reopen the commercial details of the Project and this could cause further delays to an already cumbersome development process.

*Recommendation:*

The Draft Decree should slim down the procedures for the issuance of the investment certificate in the context of PPP.

**Conclusion**

21. The Draft Decree contains many areas which need further clarifications. The areas that are not bankable need to be further amended before the draft is finalised and the Decree is issued. Otherwise foreign private sector infrastructure development could come to a halt, though as there is so little of it anyway, it would not be a grinding halt and may be barely perceptible.