

Informed Counsel

Analysis of Recent Legal Developments in Thailand and Vietnam



c o n t e n t s

1 Renewable Energy Investment Incentives

As part of its national energy strategy, Vietnam's government has made a commitment to solar and wind projects, including some attractive incentives for investors.

3 Considerations for Foreign Investors

Foreign investors in Thailand should familiarize themselves with the restrictions on their business activities provided under the Foreign Business Act.

4 Anti-Dumping Measures

In an anti-dumping investigation, domestic producers need to demonstrate that export prices were set below normal value, that injury to domestic industry occurred, and that the injury was caused by the dumping.

5 Arrest of Ships

Ship arrest can provide an effective channel to obtain security for a maritime claim, if the creditor meets the requirements under the Arrest of Ships Act.

6 Bankruptcy Liability for Business Partners

Business partners in ordinary and limited partnerships need to be cognizant of their liabilities when faced with business reorganization or liquidation.

7 Pharmaceutical Product Recall

The Thai FDA has issued a notification requiring importers and distributors of pharmaceutical products to put in place effective product recall systems.

8 "New Use" Patents

The question of whether "new use" patents fulfill the patentability criteria in Thailand has been settled by a Supreme Court decision.

9 Trademark License Registration Requirements

A recent Supreme Court decision has clarified which types of transactional agreements constitute a trademark license agreement requiring registration in Thailand.

10 Domain Name Disputes

Circular 37 provides new clarity on the settlement of domain name disputes in Vietnam through administrative measures.

11 IP Enforcement Actions

Thai authorities and brand owners have been engaged in an aggressive campaign of intellectual property enforcement measures in the first few months of 2012.

12 Tilleke & Gibbins Updates

The intellectual property teams in both Thailand and Vietnam have been recognized by Managing IP and World Trademark Review.

Investment Incentives for Solar and Wind Energy Projects in Vietnam



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Solar and wind energy are clean, renewable sources that are becoming increasingly popular in many countries, especially in developing economies such as Vietnam. Realizing the importance, advantages, and benefits of such sustainable sources of energy, and facing an increasing demand for electricity supply for further economic development (with consistent annual electricity consumption increases of 10–15 percent), Vietnam decided recently to give greater scrutiny to studying, surveying, encouraging, and supporting investors, both foreign and domestic, investing in renewable energy projects.

Development of new and renewable energy was included in Vietnam's national energy development strategy through 2020, with a vision towards 2050, as promulgated in Decision 1855. This strategy sets specific targets to increase the proportion of new and renewable energy sources to 3 percent of total commercial primary power by 2010, 5 percent by 2020, and 11 percent by 2050. To reach these targets, Decision 1855 also guides the direction and orientation for development together with policies, incentives, and governmental support to attract investors. These goals are reflected in various pieces of legislation.

Advantages for Investors

Under current legislation, investors are entitled to maximum incentives for every aspect related to solar or wind energy projects, such as land or water surface lease terms and fees, corporate income tax, value-added tax, import and export duties, land site clearance, and depreciation of fixed assets, among others. In addition, solar and wind power projects are considered clean investments under the country's clean development mechanism (see Decision 130). Accordingly, investors are subsidized by the state through the Environmental Protection Fund of Vietnam for the difference between the real input costs and the sales price of power as agreed to in the contract to provide power generated by solar or wind energy (see Decree 58).

Challenges for Investors

Although enjoying a variety of incentives, investors also face several challenges when investing in these kinds of projects. First, at present, Vietnam has not yet conducted any official or comprehensive surveys, studies, or assessments on the potential of solar or wind energy in Vietnam. Thus, prospective investors may lack necessary information when seeking investment opportunities.

Second, Vietnam does not have a cohesive legal framework governing policies related to solar or wind energy projects. Such policies are now stipulated separately in various statutes. In some instances, there are conflicting rules and regulations between different laws governing the same issues. To overcome these difficulties, the deputy prime minister recently requested and assigned the Ministry of Industry and Trade to fast-track a draft decision of the prime minister's office on the strategy and general planning for development of renewable energy in Vietnam up to 2030, with a vision towards 2050. The draft plan is awaiting the prime minister's approval.

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Investment Incentives (from page 1)

Third, and most importantly, Vietnam lacks an effective and feasible mechanism for investor financing as it relates to the sales price of wind power. Currently, the Vietnam Electricity Group (EVN) is the exclusive transmitter, purchaser, and distributor of power. The sales price for power in Vietnam is always the highest hurdle for investors to overcome, and in practice, the set prices for power purchase by the EVN monopoly are always much lower than the actual input costs. As encouragement, the state assists investors by providing a subsidy for the difference in contract price (see Decision 130). But these subsidies are often insufficient and limited to the amount set aside in the state fund. As a result, investors remain cautious of their risks when investing in this field.

To calm investors' anxieties, the Ministry of Industry and Trade very recently completed and submitted to the government, for its consideration and approval, a draft decision on promulgating regulations on investment and construction of wind power projects in Vietnam. The draft indicates EVN will assist in the connection of wind-generated power to the power grid and be liable for purchasing and distributing all products from wind power projects. In particular, EVN will pay VND 1,317 (approximately USD 0.07) for each kilowatt of wind-generated power, and the state will subsidize an amount of VND 185 (approximately USD 0.01).

Furthermore, under the draft plan, wind power investors will enjoy import tax exemption on machinery and equipment, corporate income tax at 10 percent for the life of the project, land-use tax exemption for the duration of the project, and access loans up to 80 percent of the total investment capital along with preferential interest rates.

Project Restrictions

At present, there are no statutory prohibitions relating to the development of coastal areas as it pertains to energy investors, either foreign or Vietnamese. Legislation on investments only prohibits projects that:

- ▶ Are detrimental to national defense and security and/or the public interest.
- ▶ Are detrimental to historical and cultural traditions and ethics, and Vietnamese fine customs.
- ▶ Harm the people's health, or destroy natural resources and the environment.
- ▶ Treat toxic wastes brought into Vietnam, or are projects for the manufacture of any type of toxic chemicals or for the use of chemical agents prohibited by international treaties.

Subject to the above exceptions, investors enjoy the right to invest in other projects without restrictions as to location within Vietnam, provided that the investor satisfies all conditions and procedures in accordance with the law.

Wind Projects in Vietnam

Among alternative energy sources, wind power may represent the strongest growth opportunity in Vietnam. Surveys have shown that approximately 85 percent of

Vietnam's land has an elevation and average wind speed that is suitable for generating wind power. Experts from the World Bank have concluded that Vietnam has the ability to generate 513,360 megawatts annually through wind power—10 times the projected national electricity capacity for 2020.

The coastal provinces of Binh Thuan and Ninh Thuan, in particular, are considered to have the greatest potential for wind power in large plots of land that are arid and not agriculturally fertile. At present, there are more than 20 wind power projects in Vietnam, mainly located in Binh Thuan (12 projects on the mainland and Phu Quy Island District), Ninh Thuan, Binh Dinh, Phu Yen, and Con Dao Island District of Ba Ria-Vung Tau province, where the volume and average wind speed are highest compared to the rest of the country.

Of these, the wind power projects in Binh Thuan and Ninh Thuan of the Vietnam Renewable Energy Joint Stock Company (REVN) stand out because of their size. REVN is the owner of Tuy Phong Wind Power Factory located in Binh Thanh commune, Tuy Phong district, Binh Thuan province. Phase 1, consisting of 20 turbines, was just completed with a capacity of 30 megawatts. The project was put into operation (i.e., began generating power) as of March 2011 with a total investment capital of VND 1.5 billion. REVN is now carrying out phase 2 of this project at both Binh Thanh and Chi Cong communes, with an anticipated capacity of 90 megawatts, and total investment capital of VND 4.5 billion. The project, which is now being implemented, will be concluded by 2015.

Planned Structure of Vietnam's Power Supply for 2020 and 2030

| TOTAL | 2020 | | 2030 | |
|---------------------------------------|-----------------------|-------------------------------|------------------------|-------------------------------|
| | Capacity 75,000 MW | Production 330 billion kWh | Capacity 146,800 MW | Production 695 billion kWh |
| Renewable (wind, biomass, solar) | 5.6% | 4.5% | 9.4% | 6.0% |
| Hydropower (including pumped storage) | 25.5% | 19.6% | 15.7% | 9.3% |
| Coal | 48.0% | 46.8% | 51.6% | 56.4% |
| Gas | 13.9% | 20.0% | 7.7% | 10.5% |
| LNG | 2.6% | 4.0% | 4.1% | 3.9% |
| Nuclear | 1.3% | 2.1% | 6.6% | 10.1% |
| Imported | 3.1% | 3.0% | 4.9% | 3.8% |

Source: National Power Development Plan for 2011–2020 (Master Plan VII)

In Ninh Thuan province, REVN is building Wind Power Factory 1 located at Phuoc Minh commune, Thuan Nam district, with an anticipated capacity of 30 megawatts, including 15 turbines, and a total investment capital of VND 1.35 billion. Operations are expected to begin in 2012. All remaining projects are either in the surveying stage or under construction.

Outlook

Based on projected energy consumption levels, Vietnam will need to secure new sources of energy to maintain its economic growth. The state has given positive signals that it is committed to solar and wind energy over the long term, and these signals have been backed up by the implementation of a wide range of incentives and commitments to a more cohesive plan for renewable energy development in the years to come. As this legal framework develops, solar and wind projects may emerge as one of the most attractive fields for foreign investment in Vietnam. 🏡