



ClientAlert

Issue No. 8.8 | January 2018

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Introduction

Dear Reader,

This month saw a handful of new regulations that affect business in Vietnam. We've briefed them and outlined the most important changes from each new regulation. They cover numerous topics concerning the development of petroleum investments by foreign companies, the participation of foreign investors in logistics services, trade defense measures, and the signing of the Trans-Pacific Partnership.

As always we hope you find this month's Client Alert helpful and wish you prosperity in the coming month. We look forward to working with you.

Kind regards,
Indochine Counsel

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Offshore Investment in Petroleum Operations

On 15 November 2017 the Government issued Decree No. 124/2017/ND-CP ("**Decree 124**") regulating offshore investment in petroleum operations. Decree 124 repealed Decree No. 121/2007/ND-CP dated 25 July 2007 regulating the same content and its amendments.

Under Decree 124, offshore investment capital takes the following forms:

- Foreign currency in an account at an authorized credit institution or purchased at an authorized credit institution or foreign currency from other lawful sources in accordance with law;
- VND in compliance with the laws of Vietnam on foreign exchange control;
- Machinery, equipment, materials, raw materials, fuel, finished goods and semi-finished goods;
- The value of industrial property rights, technical know-how, industrial processes, technical services, intellectual property rights and commercial trade or brand names; and
- Other lawful assets.

The investors are permitted to remit investment capital overseas to implement their investment activities after satisfying the following conditions:

- The investor has been issued with an offshore Investment Registration Certificate ("**IRC**"), except in the cases the investor is permitted to remit overseas foreign currency from the investor's (main) foreign currency account, and goods, machinery and equipment for purposes of market research, opportunity search and investment preparation prior to issuance of the IRC; or the investor is permitted to conduct transactions prior to issuance of their IRC in order to participate in international tendering or other security forms prior to conducting official negotiations with other parties;
- The petroleum project has been approved by the competent State agency of the investment recipient country in accordance with the law of such country. If the law of such foreign country does not regulate investment licensing or approval of projects, then the investor must have data proving its right to conduct investment activities in such investment recipient country;
- The investor must have opened an investment capital account at an authorized credit institution in Vietnam;
- The investor accepts responsibility for the remittance ensuring that it is made for the correct purpose, on time, and complies with the provisions in the petroleum contract or contract for purchase and sale of shares, etc.; and
- The investor must make the overseas remittance via a direct offshore investment capital account after the State Bank confirms registration of the forex transaction relevant to the offshore investment.

Decree 124 entered effectiveness on 1 January 2018.

Changes on Provision of Logistics Services

On 30 December 2017, the Government enacted Decree No. 163/2017/ND-CP stipulating logistics services business (“**Decree 163**”). Decree 163 changes and provides details regarding the conditions for foreign investors engaging in these services.

In particular, any foreign investor belonging to a country or territory which is a member of the World Trade Organization is permitted to provide logistics services in accordance with the following conditions:

- (i) For freight transport services as part of maritime transport services (excluding inland transport):
 - The ratio of capital to be contributed by the foreign investor to a company operating ships flying the Vietnamese flag shall not exceed **49%**. The total of foreign sailors working on such ship (or on a Vietnamese-registered ship) shall not exceed 1/3 of the statutory number of personnel working on the ship. The captain and the first mate must be a Vietnamese citizen.
 - The ratio of capital to be contributed by the foreign shipping company to a company providing the cargo transportation service classified as shipping service (except for domestic transportation service) is not restricted under Decree 163.
- (ii) For the container handling business as part of maritime transport support services:
 - The ratio of capital to be contributed by the foreign investor to a company providing this container handling service shall not exceed **50%**.
 - The foreign investor is allowed to establish a commercial presence in Vietnam under a business cooperation contract.
- (iii) For the container handling business as part of support services for all modes of transport, except for provision of such services at airports:

The ratio of capital to be contributed by the foreign investor to a company providing this container handling service shall not exceed **50%**.
- (iv) For the customs clearance services as part of maritime transport support services:
 - The ratio of capital to be contributed by the foreign investor to a company providing the customs clearance service shall not be **100%**. In other words, the capital contribution by

the Vietnamese investor to such company is one of compulsory conditions for the foreign investor to provide such service.

- The foreign investor is allowed to establish a commercial presence in Vietnam under a business cooperation contract.
- (v) For other services including bill of lading inspection, cargo brokerage, cargo inspection, sampling and weighing services; goods receipt and acceptance services; and preparation of transport documents:

The ratio of capital to be contributed by the foreign investor to a company providing other services as specified above shall not be **100%**.

- (vi) For the cargo transportation service classified as inland waterway transportation service and railway transportation service:

The ratio of capital to be contributed by the foreign investor to a company providing the cargo transportation service classified as inland waterway transportation service and railway transportation service shall not exceed **49%**.

- (vii) For the cargo transportation service classified as road transportation service:

- The ratio of capital to be contributed by the foreign investor to a company providing the cargo transportation service classified as road transportation service shall not exceed **51%**.
- The foreign investor may also provide such service under a business cooperation contract provided that the contribution ratio of the foreign investor shall not exceed **51%**.

- (viii) For air transportation service: to be in accordance with the laws on air transportation.

- (ix) For the technical assessment and inspection service:

- Services provided in order to exercise authority of the Government are permitted to be provided in the form of an enterprise in which there is capital contribution from domestic investors after three (3) years or in the form of an enterprise in which there is no limitation on the capital contribution from foreign investors after five (5) years from the date on which the private service provider is permitted to conduct business in such services.
- It is not permitted to conduct the business of providing testing services and/or issuing certificates to means of transport.
- Provision of technical testing and analysis services may be restricted in certain

geographical areas as determined by the competent agency for reasons of national defense and security

Decree 163 took effect on 20 February 2018 and repeals Decree No. 140/2007/ND-CP of the Government dated 5 September 2007 detailing the Commercial Law on conditions for provision of logistics services and limitation of responsibility for the traders providing the logistics services.

Foreign Trade Management of trade defense measures

On 15 January 2018 the Government promulgated Decree No. 10/2018/ND-CP detailing some articles of the Law on Foreign Trade Management on trade defense measures (“**Decree 10**”).

The important contents under Decree 10 are the conditions for applying provisional defense measures. Accordingly, the Minister of the Ministry of Industry and Trade shall decide to apply the provisional defense measures when:

- There is an excessive increase in import of imported goods under investigation;
- There is serious injury or threat of serious injury to the domestic manufacturing industry;
- The excessively increased import causes serious injury or threat of serious injury to the domestic manufacturing industry;
- The delay in applying defense measures causes serious injury or threat of serious injury to the domestic manufacturing industry, and such injury is difficult to remedy.

Provisional defense measures are only applicable under the form of additional import taxes. The Minister of the Ministry of Industry and Trade may decide to suspend the provisional defense measure before its time-limit in cases where it is necessary.

In addition, the term “**major proportion**” of the total output of products of the domestic manufacturing industry (for the purpose of determining the domestic manufacturing industry according to Article 69.1 of the Law on Foreign Trade Management) is also detailed by Decree 10. Accordingly, quantity, volume of manufactured products accounting for at least 50% of the total quantity, and the volume of similar products or directly competing products which are domestically produced will be considered to be major proportions in the total output of products of the domestic manufacturing industry. However, the investigation authority may consider a lower ratio if there are bases evincing that such ratio is sufficient to be considered as the major proportion of the total output of products of the domestic manufacturing industry.

Decree 10 also provides details on the following contents: bases for conduct, procedures, time limit, contents, bases for termination of trade remedies investigations; determination of injury to domestic manufacturing industry; action against evasion of trade remedies; imposition and review of trade remedies; responsibilities for cooperation of relevant authorities during investigation; exemption from trade remedies; and dealing with the trade remedies imposed on exported products of Vietnam.

Decree 10 took effect on 15 January 2018 and replaces the following regulations: Decree No. 150/2003/ND-CP dated 8 December 2003, Decree No. 89/2005/ND-CP dated 11 July 2005, Decree No. 90/2005/ND-CP dated 11 July 2005, and Decree No. 04/2006/ND-CP dated 9 January 2006.

Trans-Pacific Partnership Signed

Recently, eleven countries came together to sign the amended Trans-Pacific Partnership without the participation of the United States.

This is a major development in the trade position of Vietnam, one of the signatories, and could prove to bring a 2% bump in GDP by 2030. Reports state that the deal may be less attractive without the participation of the United States under the Trump Administration, but the deal has gone through nonetheless.

This is great news for Vietnam. The deal is designed to minimize trade tariffs among signatory nations, provide environmental and labour standards, and create an investor-state dispute resolution mechanism.

As of yet, Vietnam has yet to sign on to any investor-state dispute resolution mechanism so this is a huge step for large scale investors in the country. It will allow investors to sue the government for laws or actions of the government that could be deemed dilatory to the investment of a foreign company.

I have personal experience of this mechanism from my time in Laos. The government of the country claimed that my employer was delinquent in millions of dollars of taxes, a claim which my employer vehemently denied. The dispute went to international investor arbitration and is still currently in flux, so I won't go into much more detail. Only to state that the ability to go after a government for actions that devalue or take an investment is important to the development of a stable state of law.

The other elements of the trade deal are important as well. While the deal does not access the largest economy in the United States, the other countries will provide a great incentive for export and trade. From Chile and Argentina to Malaysia, Singapore, and Brunei-as well as Australia and Canada-the countries involved are hopeful that their actions will show up the United States removal from the deal.

About Indochine Counsel

Established in October 2006, Indochine Counsel is one of the leading business law firms in Vietnam. The firm provides professional legal services for corporate clients making investments and doing business in Vietnam. The legal practitioners at Indochine Counsel are well qualified and possess substantial experience from both international law firms and domestic law firms. The firm boasts more than 45 legal professionals working at the main office in Ho Chi Minh City and a branch office in Hanoi.

Indochine Counsel's objective is to provide quality legal services and add value to clients through effective customized legal solutions that work specifically for the client. The firm represents local, regional and international clients in a broad range of matters including transactional work and cross-border transactions. The firm's clients are diverse, ranging from multinational corporations, foreign investors, banks and financial institutions, securities firms, funds and asset management companies, international organizations, law firms to private companies, SMEs and start-up firms in Vietnam.

Indochine Counsel advises clients in the following areas:

- Inward Investment
- Corporate & Commercial
- Mergers & Acquisitions
- Securities & Capital Markets
- Banking & Finance
- Property & Construction
- Taxation
- Intellectual Property
- Technology & Media
- Mining & Energy
- International Trade
- Dispute Resolution

A full list of partners, associates and other professionals is available on our website. |

Contact Us

For further information or assistance, please contact the following Indochine professionals:

Dang The Duc

Managing Partner
duc.dang@indochinecounsel.com

Dang The Duc

Managing Partner
duc.dang@indochinecounsel.com

Le Nguyen Huy Thuy

Partner
thuy.le@indochinecounsel.com

Le Van Duong

Senior Associate, Head of Hanoi Office
duong.le@indochinecounsel.com

To Xuan Tinh

Partner
tinh.to@indochinecounsel.com

Steven Jacob

Foreign Associate
steven.jacob@indochinecounsel.com

Phan Anh Vu

Partner
vu.phan@indochinecounsel.com

Nguyen Thi Hong Anh

Partner, Head of IP&T Practice Group
anh.nguyen@indochinecounsel.com

Ho Chi Minh City

Unit 305, 3rd Floor, Centec Tower
72 -74 Nguyen Thi Minh Khai, District 3
Ho Chi Minh City, Vietnam
T +84 28 3823 9640
F +84 28 3823 9641
E info@indochinecounsel.com

Hanoi

Unit 705, 7th Floor, CMC Tower
Duy Tan Street, Cau Giay District
Hanoi, Vietnam
T +84 24 3795 5261
F +84 24 3795 5262
E hanoi@indochinecounsel.com

www.indochinecounsel.com

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