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Technology Transfer Guide

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Introduction

Under the Vietnam State's policy on science and technology, the technology transfer is considered a priority matter for accessing advanced and high technologies. The importation of advanced, clean and high technologies, and prevention of the inbound transfer of outdated and hazardous technologies is a crucial policy of the state for innovation and development of key and competitive industries. The first effort to build this process was in the 1998 Ordinance on Technology Transfer where tax incentives were provided to inbound investment projects for the purpose of encouraging the importation of new technologies.

The Law on Technology Transfer No. 80/2006/QH11 dated 29 November 2006, effective on 1 January 2007 (the "**2006 Technology Transfer Law**"), was the first law on technology transfer of Vietnam, which has been implemented for about ten years and had a significant contribution to encouraging technical and industrial innovation, and application of technical and industrial advances in manufacturing and society, thus helping promote enterprises' production capacity and Vietnam's economy in general.

However, after more than ten years of implementation of the 2006 Technology Transfer Law it has exposed certain shortcomings and inadequacies for governing new practices that arose from the development of overseas and domestic technology and industries, the global and national socio-economies, and industry 4.0. In addition, a number of related new or amended laws, such as the amended Law on Intellectual Property in 2009, 2019; the 2013 Law on Science and Technology; the 2014 Law on Investment; the 2014 Law on Enterprise Income Tax; the 2015 Law on Statistics were promulgated. All of this required the 2006 Technology Transfer Law be reviewed, amended and supplemented to catch up with the then-current practices, and ensure consistency amongst the several laws. On 19 June 2017, the Law on Technology Transfer No. 07/2017/QH14, effective from 1 July 2018 (the "**Technology Transfer Law**"), was promulgated and replaced the 2006 Technology Transfer Law.

Guiding regulations for the implementation of the Technology Transfer Law have also been promulgated, namely Decree No. 76/2018/ND-CP dated 15 May 2018, providing guidelines for implementation of certain articles of the Technology Transfer Law ("**Decree 76**"); and Circular No. 02/2018/TT-BKHHCN dated 15 May 2018 providing reporting regime of the implementation of agreement on transfer of technology which is in the list of technologies restricted from transferring; document forms used in the grant of technology transfer license, registration, extension, amendment, supplementation of content of transferred technology ("**Circular 02**"). In addition, administrative violations in the sector of technology transfer are enumerated in Decree No. 51/2019/ND-CP dated 13 June 2019 providing administrative sanctions in the activities of science and technology, and technology transfer ("**Decree 51**").

Major Rules for Overseas-To-Vietnam Technology Transfer

Definition of Technology Transfer and Subject Matters of Technology to be

Transferred

Technology transfer means the transfer of the ownership or the right to use a given technology from the party with the right to transfer such technology to the technology transferee. Subject matters of technology to be transferred comprise: (i) Technical know-how and technological know-how; (ii) technology plans or processes; technical solutions, parameters, drawings or diagrams; formulae, computer software and databases; (iii) solutions for rationalizing manufacture and renovation of technologies; and (iv) equipment and machinery accompanied by one of the above-mentioned subject matters.

Form and Method of Technology Transfer

A technology transfer may be in the form of an independent technology transfer; or a section of technology transfer in an investment project, capital contribution in the form of technology, commercial franchise, IPRs transfer, or purchase or sale of machinery and equipment (in case of transfer of technology subject matter (iv) as mentioned in Section “*Definition of Technology Transfer and Subject Matters of Technology to be Transferred*” above); or in other forms as regulated by the prevailing laws. A technology transfer may be conducted in one of the following methods:

- Transfer of documents concerning technology;
- Training the technology transferee to properly understand and master the transferred technology within an agreed period;
- Appointment of expert(s) to provide technical support to the transferee in its application and operation of the transferred technology, so that agreed criteria of product quality and progress are achieved;
- Transfer of machinery, equipment (in case of transfer of technology subject matter (iv) as mentioned in Section “*Definition of Technology Transfer and Subject Matters of Technology to be Transferred*” above); and
- Other methods as agreed upon by the parties.

Technologies Encouraged for Transfer

With the State’s policies of giving priority to and promoting the transfer of high technology, advanced technology, new technology, clean technology and technology serving the development of national key products, and technology serving national defense and security tasks, the transfer of the following technologies is encouraged: high technologies; accompanying machinery / equipment of high technologies the transfer of which is encouraged under regulations of Law on High Technology No. 21/2008/QH12 dated 13 November 2008, as amended in 2013, 2014 (the “**High Technology Law**”); advanced technologies, new technologies and clean technologies that are suitable for socio-economic conditions of Vietnam (the “**Encouraged Technologies**”). A full list of Encouraged Technologies is provided in Appendix I of Decree 76.

As provided in Article 39.4 of the Technology Transfer Law, the transfer of Encouraged Technologies shall enjoy tax incentives in accordance with the tax laws and regulations. Among such tax incentives machineries, equipment, components, materials, specimens or technologies which are not yet created

domestically and are imported to directly serve science research, development of technology, reverse engineering, technology innovation, technology incubators, science and technology business incubators are all allowed to be exempted or discounted from the imposition of import tax, or VAT in accordance with the Law on Value Added Tax No. 13/2008/QH12 dated 3 June 2008, as amended in 2013, 2014 and 2016 (the “**VAT Law**”) and the Law on Export and Import Tax No. 107/2016/QH13 dated 6 April 2016 (the “**EIT Law**”).

Technologies Restricted from Transfer and Technologies Prohibited from Transfer

The State also has a policy to prevent and eliminate obsolete technologies and other technologies that may adversely influence socio-economic development, national defense and security, environment and human health. Accordingly, technologies that are no longer popular in industrialized countries; technologies that use toxic chemicals or generate hazardous waste in conformity with the national technical standards and regulations; technologies that make products by adopting genetic engineering; and technologies that use resources or minerals the extraction of which is limited domestically are restricted from overseas-to-Vietnam transfer (the “**Restricted Technologies**”). A full list of Restricted Technologies is provided in Appendix II of Decree 76.

Technologies that fail to satisfy regulations on occupational safety and sanitation, protection of human health, resources and environment protection, and biodiversity; technologies that are employed to create products adversely influencing social-economic development or adversely influencing the national defense and security or social order and security; and technologies that use toxic chemicals or generate hazardous waste that fail to satisfy the national technical standards and regulations on environment are prohibited from overseas-to-Vietnam transfer (the “**Prohibited Technologies**”). A full list of Prohibited Technologies is provided in Appendix III of Decree 76. An act of transferring Prohibited Technology will be subject to a fine of from VND80 million to VND100 million (about US\$3,433 to US\$4,292), and compulsory expulsion from Vietnam or re-export of goods, articles, equipment and means in association with the violation as an additional penalty.

Technology Transfer Agreement (“TTA”)

Form and language of the TTA

According to Article 22 of the Technology Transfer Law and the Civil Code, a TTA must be entered into in writing, and parties can agree with each other on the language thereof. The TTA must be duly signed and sealed (if any) by the parties, with initials of the parties in (and seal (if any) affixed over) all pages thereof and its appendixes, if any. Failing to make a written TTA in case of independent transfer of technology or capital contribution by technology shall be subject to a fine of from VND24 million to VND40 million (about US\$1,030 to US\$1,716).

Registration/license requirements

All overseas-to-Vietnam TTAs for technologies which do not fall into the list of Restricted Technologies must be registered with the Ministry of Science and Technology of Vietnam (the “**MOST**”), and the

transferee is responsible for such registration. Application dossiers for registration of a TTA must be made to the MOST within 90 days from the signing date of such TTA. As regulated, the time limit for examination and grant of registration for a TTA properly filed is five working days from the filing date thereof. In practice, it may take several weeks for completion of such registration procedures. Acts of transferring of technology without required registration shall be subject to a fine of from VND60 million to VND80 million (about US\$2,575 to US\$3,433) and confiscation of exhibits or means used for commission of the violation as an additional penalty. In addition, any agreed amendment or supplementation to a registered TTA shall be subject to registration with the MOST, and failure to register such amendment or supplementation as required shall be subject to a fine of from VND8 million to VND16 million (about US\$343 to US\$686).

For transfer of Restricted Technologies, technology transfer approval and technology transfer licenses issued by the MOST are required. Subject to agreement made by the contractual parties, either party of a proposed TTA may be responsible for obtaining such approval and license. If no such agreement is made between the parties, the transferee will be responsible for obtaining the technology transfer license. No particular provision on who, i.e., the transferor or transferee, is responsible for obtaining the technology transfer approval, but in practice, obtaining the technology transfer approval and technology transfer license is performed by the same party. Approval for transfer of a Restricted Technology shall be obtained before signing the relevant TTA by the parties. For a properly filed application dossier, the prescribed time limit for the MOST to examine and grant its approval is 30 days from receipt of the same. Application dossiers for obtaining technology transfer licenses shall be made to the MOST within 60 days from the signing date of the relevant TTA. As regulated, the time limit for examination and grant of registration for a TTA properly filed is five working days from the filing date thereof, and the time limit for remedying shortcomings of the application dossier, if any, is 60 days from notification of such shortcomings by the MOST.

In addition, investment projects apply Restricted Technology shall be subject to the appraisal of the State Appraisal Board, the MOST in coordination with relevant authorities and organizations, or the specialized science and technology agencies affiliated to the People's Committees at provincial-level in coordination with relevant authorities and organizations, subject to the investment project in question, and phase of the investment project, i.e., phase of decision on investment policy and phase of decision on investment as provided in the Law on Investment. The MOST's approval in case of an investment project that applies Restricted Technology which has had a relevant appraisal will be exempted, and accordingly, only the MOST's technology transfer license is required. An act of transferring Restricted Technology without obtaining the technology transfer license shall be subject to a fine of VND60 million to VND80 million (about US\$2,575 to US\$3,433) and confiscation of exhibits or means used for commission of the violation as an additional penalty.

Certain remarkable provisions on contents of the TTA

Under Article 23 of the Technology Transfer Law, a TTA includes the following contents: (i) name of technology to be transferred; (ii) subject of technology to be transferred, products created by the transferred technology, standards and technical specifications of the products; (iii) scope and method of technology transfer; (iv) rights and obligations of the parties; (v) price and mode of payment; (vi) effective time and term of the TTA; (vii) responsibilities and penalties in case of breach of the TTA;

and (viii) dispute resolution. The agreement on foreign law as the governing law of a TTA, as well as on foreign court or arbitration as jurisdiction for dispute resolution is not contrary with the prevailing laws of Vietnam.

Per Article 25.2 of the Technology Transfer Law, the transferor must ensure that it has the legal right to transfer technology and such technology transfer is not limited by the transferor's obligation to any third parties, unless otherwise agreed by the parties, and notify the transferee and implement appropriate measures upon discovery of any technical difficulties which may result in the transferred technology failing to satisfy commitments specified in the TTA.

Parties shall have the right to agree with each other on the price of technology transfer under a TTA; however, such price shall be audited and applied in accordance with regulations of the laws on taxation and prices in the following cases: (i) technology is transferred between the parties among which one or both parties have State funding; (ii) technology is transferred between the parties having a parent company-subsidiary company relationship; and (iii) technology is transferred between the parties having an associated relationship as provided in Article 5 of Decree No. 132/2020/ND-CP dated 5 November 2020 prescribing tax administration for enterprises having related-party transactions ("**Decree 132**"), i.e., parties with one of the following relationships: a/ one party participates directly or indirectly in the management of, control of, capital contribution to or investment in the other party; or b/ the parties are directly or indirectly subject to the management, control, capital contribution or investment of another party.

Payments from transferee to the transferor under a TTA can be in one of the following forms:

- One-off or multiple payments in cash or by goods;
- Transfer of technology value as capital contribution to the investment project or enterprise under regulations of law;
- Payment by percentage (%) of the net selling price;
- Payment by percentage (%) of the net revenue;
- Payment by percentage (%) of the earnings before income taxes of the transferee; or
- Other payment method as agreed upon by the parties.

Subject to the agreement of the parties under a TTA, payments from the local transferee to the overseas transferor may include, but are not limited to, royalties, training fees and technical assistance fees. Such fees are subject to foreign contractor tax (the "**FCT**") as regulated under Circular No. 103/2014/TT-BTC dated 6 August 2014 guiding the implementation of tax obligations applied to foreign organizations and individuals doing business in Vietnam or having income from Vietnam ("**Circular 103**") which normally comprises a combination of value added tax (VAT), and corporate income tax (CIT) or personal income tax (PIT) for income of foreign individuals. The local transferee is responsible for withholding the applicable FCT from the amounts payable to the transferee under the TTA and pay the same, on behalf of the overseas transferor, to the competent tax authority of Vietnam. Because of different tax rates imposed on royalties and service fees, parties to a TTA are recommended to separate royalties and service fees in the TTA, to facilitate the local transferee's declaration, payment and finalization of the tax with the competent tax authority.

In addition, under Decree 132, the local transferees with related transactions must declare information about their relationships with associated / affiliated parties and about their related transactions, as well as declare and determine the price of any such transactions without reducing the amount of CIT payable in Vietnam. Tax authorities shall manage, check and inspect related transactions of the local transferee on the principle of the nature of the activity or transaction is decisive in determining the tax liability corresponding to the value created from the nature / substance of such transaction, production or business activity of the taxpayer, will not recognize related transactions which fail to follow the principle of independent transactions and which reduce the tax obligation of the enterprise, and shall adjust the price of the related transaction in order to correctly determine the prescribed tax obligations.

Regarding the effective date of TTAs, as provided in Article 24 of the Technology Transfer Law, TTAs for Restricted Technologies shall come into effect from the granting date of the technology transfer license, and TTAs which are subject to registration with the MOST shall come into effect from the granting date of the certificate of registration. Any amendment or supplementation to a registered TTA is effective from the registration date of such amendment or supplementation.

In connection with intellectual property rights (“**IPRs**”), in case a subject of a technology to be transferred is protected by IPRs under the Law on Intellectual Property No. 50/2005/QH11 dated 29 November 2005, as amended in 2009 and 2019 (the “**IP Law**”), the transfer thereof shall be in accordance with such IP Law, i.e., the agreement on such transfer of IPRs shall be subject to registration with the National Office of Intellectual Property of Vietnam (the “**NOIP**”) in order to be considered a legally effective IPRs assignment agreement or legally effective against third parties, except for trademark license agreements. In practice, the IPRs transfer agreement may be established in a separate agreement or as a part of the TTA for convenience in registration with the NOIP.

Obligation of submission of annual reports on implementation of the TTA

The local transferees of overseas-to-Vietnam TTAs shall be responsible for submission of annual reports on their implementation of the TTA to the MOST. Circular 02 provides provisions on the reporting regime for local transferees of TTAs relating to the transfer of Restricted Technologies. Accordingly, the annual report of a given year must be made to the MOST before 31 December of that year, and the annual report must be in accordance with the standard form provided in Annex 5 of Circular 02, and contain the figure recorded from 15 December of the preceding year to 14 December of the year of the report. The first annual report for the period which is less than one calendar year shall be included in the annual report of the next year.

Decree 51 provides that failure to submit of an annual report for a technology for which the technology transfer license has been granted shall be subject to a fine of VND1 million to VND2 million (about US\$42.9 to US\$85.8).

Notes for the capital contribution by technology

Article 34 of the Law on Enterprises No. 59/2020/QH14 dated 17 June 2020 (the “**Enterprise Law**”)

allows the owner(s) of a technology eligible for transfer to contribute such technology as capital in an enterprise. In such case, in addition to the registration of the agreement on transfer of ownership of technology to be transferred, if the subject matter of the technology to be transferred is protected as IPRs under the IP Law of Vietnam, the IPRs protection titles in the name of the technology owner(s) must be assigned to the enterprise in accordance with Article 35 of the Enterprise Law and the IP Law.

For the purpose of capital contribution, as provided in Article 36.1 of the Enterprise Law, technology contributed as capital must be denominated in Vietnamese Dong. The denomination in Vietnamese Dong of a technology to be contributed as capital shall comply with the following provisions:

- Technology contributed to an enterprise upon its establishment shall be valued by members or founding shareholders on the principle of consensus or shall be valued by a price evaluation organization. In the case of valuation by a price evaluation organization, the value of the assets contributed as capital must be approved by more than 50% of members or founding shareholders. If the technology contributed as capital are valued at more than their actual value at the time of capital contribution, the members or founding shareholders must jointly make additional contribution in an amount equal to the difference between the valuation and the actual value of the technology contributed as capital at the time of completion of the valuation, and concurrently, are jointly liable for any loss and damage caused by the contributed technology being valued intentionally at more than their actual value; and
- Technology contributed as capital during the course of an enterprise's operation shall be valued on the basis of agreement between the enterprise's owner or the members' council or the partners' council in the case of an LLC or partnership or the board of management in the case of a shareholding company on the one hand and the owner of the technology on the other hand, or by a price evaluation organization. Where a price evaluation organization conducts the valuation, the value of the technology contributed as capital must be accepted by the owner of the technology and the said enterprise's owner, the members' council or the partners' council or the board of management. Where the technology contributed as capital is valued at more than its actual value at the time of capital contribution, the owner of the technology, the said enterprise's owner or members of the members' council or the partners' council or members of the board of management shall jointly make additional contribution in an amount equal to the difference between the valuation and the actual value of the technology contributed as capital at the time of completion of the valuation, and concurrently, are jointly liable for any loss and damage caused by the contributed technology being valued intentionally at more than their actual value.

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