



Thom Thi Mai Nguyen
Attorney-at-Law
maithom.n@tilleke.com

Foreign Traders Without Presence in Vietnam: Import and Export Rights

The Vietnamese press has written frequently in recent months on the issue of foreign traders illegally carrying out import and export activities in Vietnam by entering as “tourists”—a very simple immigration procedure—and then collecting goods such as agricultural or fisheries products in Vietnam to export back to their home countries.

Since such transactions take place directly between Vietnamese suppliers and foreign traders, they typically lack the necessary tightness of an international commercial trading transaction as well as the oversight of state agencies. This makes it easy for the foreign traders to break the (mostly verbal) purchase contracts, which can result in a sudden glut of products on the local markets, forcing sellers to accept lower prices. The situation can also lead to a lack of necessary materials for domestic processing, as suppliers plan their production based on anticipated demand from foreign traders.

In light of these activities, on September 27, 2012, the Ministry of Industry and Trade (MOIT) issued Circular 28/2012/TT-BTC (Circular 28) detailing the registration of import and export rights of foreign traders with no subsidiary, branch, or representative office in Vietnam (“traders without presence”), as first provided by Decree 90/2007/ND-CP of May 31, 2007 (Decree 90). Circular 28 will take effect on November 15, 2012.

Prior to the issuance of Decree 90, a foreign trader wishing to conduct import or export activities in Vietnam was required to either set up a foreign-invested enterprise in the country or implement an import-export contract via a Vietnamese intermediary. Decree 90 allowed foreign traders to make import and export contracts directly with Vietnamese providers, in line with Vietnam’s commitments for its World Trade Organization (WTO) accession. Under its WTO commitments and then Decree 90, Vietnam committed that from the day of accession, any individual or enterprise without presence in Vietnam could participate in the export and import of all types of goods except those belonging to restricted lists, provided that it registered these export and import activities with authorized bodies in Vietnam. Foreign individuals and enterprises without presence in Vietnam would then have the right to do business in Vietnam after registration.

It has been more than five years since the issuance of Decree 90, which raises the question as to why it has taken so long for the authority to issue the guidance for this decree. Perhaps it is because the regulations under Decree 90 do not reflect actual practice. In fact, we are not aware of any traders without presence obtaining certificates for import and export from the MOIT.

Circular 28 applies to all foreign traders from countries

or territorial regions that are members of the WTO and/or have entered into bilateral agreements with Vietnam on import and export rights, and other organizations and individuals related to import and export activities of traders without presence.

Under this Circular, traders without presence who have been granted Certificates of Registration of Import and Export Rights shall:

1. Have the right to import or export goods which are not on the lists of goods that are banned, suspended, or not permitted to be imported or exported under international commitments. For goods for which the import or export is conditional, they must satisfy certain conditions as prescribed by law.
2. Comply with the committed schedule for imported and exported goods, pursuant to international commitments.
3. Have the right to directly conduct import and export procedures for goods at customs agencies in accordance with the law, based on sale and purchase contracts signed with Vietnamese traders.
4. Ensure that the imported or exported goods comply with the contents of the Certificate of Registration of Import and Export Rights.

In particular, the Circular expressly provides that traders without presence are only permitted to directly purchase goods from Vietnamese traders who possess business registration certificates or the right to export or distribute such goods for export. They are not permitted to organize networks to purchase goods in Vietnam for export, including setting up business locations to purchase goods for export, unless provided otherwise by Vietnamese law or international treaties. Traders without presence are also restricted from organizing or participating in goods distribution networks in Vietnam. This is clearly consistent with WTO commitments and other regulations of Vietnamese law on distribution activities conducted by foreign investment enterprises in Vietnam.

The Circular also requires all traders without presence who have been granted Certificates of Registration of Import and Export Rights to provide the MOIT with annual reports and ad hoc reports (submitted to the MOIT within five days of a request by the MOIT). The annual report must be an audited financial report in a standard form issued by the MOIT in conjunction with the Circular. Furthermore, it must also be translated into Vietnamese and authenticated or notarized by a Vietnamese public notary. The annual report must then be submitted to the MOIT no later than March 31 of the subsequent year.

Traders without presence shall register their import and export rights at the Import and Export Department of the MOIT. The term of the Certificate of Registration of Import and Export Rights is five years.

A legal framework has also been established for punishment of violations. A monetary fine of up to VND 30 million (approximately USD 1,500) may be imposed if a trader without presence provides false information in its application dossier for obtaining its Certificate of Registration of Import and Export Rights. A fine of up to VND 40 million (approximately USD 2,000) may be imposed on the act of buying goods from Vietnamese traders who have no business registration certificate.

While the enforcement of these regulations by the regulatory authority is still in question, Circular 28 nevertheless provides clearer requirements and strict conditions on the import and export activities of foreign traders without presence in Vietnam. 🐼