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## Invention Secrecy in Vietnam

Patent law hinges on the disclosure of secrets. To be granted a patent, an inventor is required to publicly disclose his or her invention—often in great detail—in exchange for the exclusive rights to the patented invention for a limited period of time. In theory, this disclosure of secrets benefits society by fostering a wider sharing of knowledge and know-how, accelerating the overall pace of scientific and industrial development. The awarding of patents, meanwhile, provides a continued incentive to innovate.

However, some inventions contain sensitive information whose publication or disclosure could be detrimental to national security and defense. Governments therefore have a vested interest in keeping those inventions secret, regardless of the inventors' intentions.

### Invention Secrecy

In Vietnam, Ordinance No. 30/2000/PL-UBTVQH10, effective from April 1, 2001 (the Ordinance) requires that inventions related to the contents of state secrets must be registered with a competent state authority. Subsequent guidelines on implementation issued in Decree No. 33/2002/ND-CP of March 28, 2002 (Decree 33) designated the state science and technology management agency as that competent state authority, and assigned it the responsibility of “keeping and preserving” such inventions placed under secrecy orders. However, the Ordinance and Decree 33 provided no further details on the examination and classification of these inventions, or the rights conferred from them.

Consequently, further guidelines were issued in Decree No. 122/2010/ND-CP of December 31, 2010 (Decree 122), which amended and supplemented Decree No. 103/2006/ND-CP of September 22, 2006, guiding the implementation of the 2005 Law on Intellectual Property. Decree 122 defines a “secret invention” as an invention classified by the competent state authority as a state secret in the field of national defense and security under the laws on protection of state secrets (mainly the rules in the Ordinance and Decree 33).

Decree 122 also notably introduced the concept of patent secrecy for classified inventions. Inventions that are subject to secrecy restrictions, and any patents granted on such inventions, are not published and must be kept confidential under the law. The rights to use, license, and assign these secretive patents must be approved by the competent state authority. Compensation for an owner whose patents are withheld is not specified.

If the information about an invention subject to a secrecy order is disclosed or is determined to no longer be sensitive to national security and defense, details of the invention can then be published in the same manner as a

normal invention application, and patented as usual. The identification and disclosure of secrecy orders is conducted by the Ministry of Public Security in coordination with the Ministry of Defense and the Ministry of Science and Technology.

Applicants may wonder specifically what kinds of inventions will be subject to secrecy restrictions in Vietnam. Unfortunately, the criteria for assessment have not been revealed.

According to an official at the National Office of Intellectual Property, the Ministry of Public Security, in coordination with the Ministry of Defense and the Ministry of Science and Technology, is planning to issue a Circular with operational guidelines for the implementation of Decree 122. It is expected that the practice of invention secrecy will be outlined in detail in this Circular.

### Foreign Filing License

Article 23(b) of Decree 122 raised for the first time the issue of foreign filing licenses. Under this provision, inventions of Vietnamese organizations and individuals and inventions created in Vietnam must first be filed in Vietnam if the owners wish to seek patent protection in Vietnam. This is to ensure that all Vietnamese inventions will be examined to determine whether they should be subject to secrecy restrictions.

If an invention is not deemed a threat to national security or defense, it can be filed outside Vietnam after six months from the Vietnam filing date. Otherwise, if the invention must be kept secret, the applicant must obtain a license to file abroad, in addition to first filing in Vietnam. Registration is only permitted in countries which also recognize the protection of invention secrecy.

If an owner does not plan to seek patent protection in Vietnam, it is not necessary to initially file the patent application in Vietnam. But because it is difficult to determine whether an invention must be kept secret and the Ordinance requires all secret inventions to be registered, it is a best practice for owners of Vietnam-origin inventions to register in Vietnam first in all cases.

### Unanswered Questions

Foreign investors are understandably concerned about Decree 122, as it leaves a number of unanswered questions. For example, if a Vietnamese inventor assigns an invention to a foreign investor, will it be deemed an “invention of Vietnamese organizations and individuals” under the Decree? And more fundamentally, what are the specific criteria for assessing whether an invention may be subject to secrecy? With greater clarity on these criteria, foreign investors can avoid planning projects that will be deemed “secret inventions.”

Decree 122, on its own, is not adequate to put these contents into practice. Recently, some experts have proposed that the rules governing invention secrecy should be introduced to the Law on Intellectual Property. This would increase the perceived importance of invention secrecy and foreign filing licenses and would likely result in expanded regulations following the amended law, so as to clarify the requirements. If not, it is hoped that detailed clarifications will be provided through upcoming regulations in additional decrees and circulars, so that some of these uncertainties can be put to rest. ⚖️