



Atsumi & Sakai

▶ Vietnam Practice Team Newsletter

This newsletter edited by the Vietnam Practice Team at Atsumi & Sakai is delivered every other month. Our Vietnam Practice Team has achieved remarkable results through its partnership with A-PAC International Law Firm (APAC), a Vietnamese law firm with a track record of success in negotiations with government authorities. The Vietnam Practice Team strives to provide high-quality legal services in a wide variety of Vietnam-related business areas, including business expansion, M&A and corporate reorganizations, negotiations with government authorities, corporate legal affairs, litigation and arbitration, and withdrawal from Vietnam.

Foreign Investment in Rooftop Solar Power Systems in Vietnam – Notable Regulations

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Introduction

Over the past 3 years, the Government of Vietnam has focused on developing renewable energy, in line with the trend globally, in order to tackle climate change and protect the environment. Among various renewable energy sources that are specified under relevant documents, the most significant renewable energy source is rooftop solar power. As of September 2020, 56,139 rooftop solar power systems have been installed in Vietnam, with a total capacity of 1,543.2MWp, which is a five (5) fold increase on the previous year. It is believed that the promulgation of legal regulations on rooftop solar power is one of the key reasons why this sector has attracted so much investment.

Below is a general discussion of the provisions concerning rooftop solar power that are applicable to foreign investors, including provisions relating to power purchase agreements (“PPAs”), Feed-in-Tariffs (“FITs”), and other relevant regulations.

Relevant Laws and Guidelines

The electricity business is regulated under the Electricity Law No.28/2004/QH11, amended by Law No.24/2012/QH13 and Law No.28/2018/QH14 (collectively referred to as “**Electricity Law**”), the Government’s Decree No.137/2013/ND-CP guiding the implementation of Electricity Law, amended by Decree No.08/2018/ND-CP and Decree No.17/2020/ND-CP (collectively referred to as “**Decree No.137 Amended**”), and other guidelines.

Rooftop solar power, currently, is mainly regulated by the Prime Minister’s Decision No.13/2020/QĐ-TTg dated 6 April 2020 providing for the mechanism to enhance rooftop solar power in Vietnam (“**Decision No.13**”) and the Ministry of Industry and Trade’s Circular No.18/2020/TT-BCT dated 17 July 2020 providing for solar power project development and standard form of power purchase agreement applicable to solar power projects (“**Circular No.18**”).

To date, certain unclear issues regarding the implementation of Decision No.13 and Circular No.18 have been guided, on a temporary basis, by the Ministry of Industry and Trade’s Document No.7088/BCT-DL dated 22 September 2020 (“**Document No.7088**”), and Vietnam Electricity Corporation’s Document No.6948/EVN-KD dated 19 October 2020 (“**Document No.6948**”). However, Document No.6948 only applies to rooftop solar power systems, of which the commercial operation date (“**COD**”) and meter readings confirmation date are no later than 31 December 2020.

In addition, relevant authorities also issue temporary guidelines regarding rooftop solar power systems in response to queries sent by local People’s Committees or competent authorities regarding administrative procedures applicable to rooftop solar power systems from time to time.



Investment and Operation Conditions

a. Rooftop Solar Power System

A rooftop solar power system has solar panels, with a capacity of up to 1MW, installed on the roof tops of constructions works (defined below). Such system is directly or indirectly connected to a power grid (purchaser's grid) with a voltage level of 35kV or less (Article 3.5 Decision No.13). The Ministry of Industry and Trade, under Document No.7088, affirmed that the rooftop solar power system can only be installed on the roof of construction works (defined below) that have their own independent function besides the installation of a solar power system. Construction work and Roof are defined as follows:

- *Construction work* means a product constructed under a design, created by manpower, construction materials, equipment installed thereto, connected to and fixed on the ground, including underground components, on-ground components, underwater components, and above-water surface components (Article 1.1(c) Law No.62/2020/QH14 amending the Construction Law). Construction works include newly built, refurbished, or a repaired buildings.
- *Roof* means the roofs of houses or house-shaped structures in accordance with the provisions in Appendix 2 of the Ministry of Construction's Circular No. 03/2016/TT-BXD dated 10 March 2016. The roof, upon which the solar power system is installed must be suitable for the function and purpose of such houses or house-shaped structures.

Document No.7088, among other issues, specifies that rooftop solar power systems cannot be deemed as such, within the meaning and purposes set out in Decision No. 13, in cases where: (i) a solar power system has a capacity of up to 1MW, but is not installed on the roofs of construction works having their own functions that are independent of the installation of a solar power system; (ii) a farm or a ranch's solar power system has a capacity of more than 1MW or more than 1.25MWp; and (iii) a solar power system is connected to a grid with a voltage level higher than 35kV. If a system cannot be deemed as rooftop solar power systems as above, preferred treatments and mechanism under Decision No. 13 such as FiTs, cannot be applied.

b. Restriction to Foreign Investors

In accordance with Government Decree No.31/2021/ND-CP on the implementation of the Law on Investment (“**Decree No.31**”), excluding business lines restricted from foreign investors^[1], foreign investors are entitled to access the market under the same terms and treatment of domestic investors (Article 17.1 of Decree No.31). As the business line of generation, transmission, and distribution of solar energy is not listed as a business restricted to foreign investors, foreign investors are permitted to conduct the business of generation, transmission, and distribution of solar energy on the same terms as domestic investors.

Notwithstanding the above, in the case of electricity transmission, according to the Electricity Law, the State has a monopoly on the electricity transmission business (Article 4.2 of the same law). Therefore, both foreign investors and domestic investors are not permitted to engage in the business of electricity transmission. Vietnam Electricity (EVN), a State-owned corporation, is currently the sole provider of electricity transmission services.

In light of the above, we can conclude that foreign investors are entitled to conduct the business of generation and distribution of rooftop solar power.

c. Electricity Business License

In accordance with Appendix IV of the Law on Investment, electricity generation, transmission, distribution, wholesale, retail, and consultancy services are conditional investment business activities. This means that, in principle, any investors conducting electricity business must obtain an Electricity Business License issued by a competent authority, which specifies the scope of suitable business (Article 32.1 and Article 35 Electricity Law). In order to obtain the Electricity Business License, the applicant is required to fulfill all specific conditions such as conditions relating to technical managers, environmental impact assessment reports, or environmental protection plans, pursuant to relevant regulations.

However, it is important to note that a rooftop solar power system is exempted from the obligation to obtain the Electricity Business License (Article 5.4 Circular No.18), which means that investments in rooftop solar power systems are not subject to the abovementioned conditions.

[1] Government Decree No.31/2021/ND-CP, Appendix 1, List of Business Lines Restricted from Market Entry Applicable to Foreign Investors

d. Compliance with Relevant Regulations

Although a rooftop solar power system is not subject to the conditions to obtain the Electricity Business License mentioned above, in order to ensure the safety of the system, investors still have to comply with relevant regulations on electricity safety, construction safety, environmental protection, and fire prevention and fighting, before and during the operation of the system (Article 9.4 Decision No.13). In particular:

1. To assure *electricity safety*, investors must follow general requirements in electricity generation and distribution as provided in Government Decree No.14/2014/ND-CP amended by Decree No.51/2020/ND-CP, and the Ministry of Industry and Trade's Circular No.31/2014/TT-BCT. For example, individuals responsible for operating, installing, or repairing electrical equipment must go through safety training and an examination in order to obtain an electricity safety certificate. The purpose of the training and examination system is that such individuals are provided with technical training in conformity with operational requirements.
2. Based on the relevant provisions of the laws on construction and the Ministry of Construction's response to the queries of local departments of construction (e.g., the Ministry of Construction's Document No. 1634/BXD-HDXD dated 8 April 2020), in principle, investment and additional installation of a rooftop solar power system, especially those set up on the roofs of existing factories in industrial zones, must fully comply with *procedures on construction*. Investors must prepare, appraise and approve the construction design of the system, and obtain a construction permit if required by relevant regulations. Additionally, investors are obliged to assure construction safety during installation by cooperating with contractors, as stipulated in relevant documents such as the Ministry of Construction's Circular No.04/2017/TT-BXD. In particular, system installation should be in compliance with the Technical Guidance on Construction Work Safety in Installing Rooftop Solar Power Systems issued by the Ministry of Construction in 2020.^[2]

3. In relation to *fire prevention and fighting*, investors must comply with the provisions of the Law on Fire Prevention and Fighting. In particular, as instructed by the Ministry of Police's Document No.3288/CP07-P4 dated 8 September 2020, if a rooftop solar power system is categorized as works stipulated in Appendix V of the Government's Decree No.136/2020/ND-CP, its design on fire prevention and fighting must be inspected and approved by the competent police authority. For cases falling outside of the Appendix V, investors should implement precautions and protocols to ensure fire safety, as instructed by the competent local police authority.
4. Investors must also comply with provisions on *environmental protection* set forth in relevant documents. In particular, pursuant to the Government's Decree No.40/2019/ND-CP, the investors may have to prepare environmental impact assessment reports or environmental protection plans, and cause to have the same approved by a competent authority. In addition, the investors also have to comply with regulations on the disposal of industrial solid waste and scrap, as set forth in Government's Decree No.38/2015/ND-CP and other relevant guidelines.

[2] To access the Technical Guidance on Construction Work Safety in Installing Rooftop Solar Power Systems, please click on the following link: <https://moc.gov.vn/vn/tin-tuc/1268/65630/tai-lieu-huong-dan-ky-thuat-lien-quan-den-an-toan-cong-trinh-xay-dung-khi-lap-dat-he-thong-dien-mat-troi-mai-nha.aspx>



PPA and FiT

In contrast to power generated by other means, electricity generated by rooftop solar power systems may be sold to organizations and individuals other than EVN or its authorized subsidiaries, in the case where the rooftop solar power system is not directly connected to EVN's grids (Article 8.1 Decision No.13). The terms of the PPA and FiT will depend on who the buyer is, as discussed in (a) and (b) below.

a. PPA

In cases where the buyer is EVN or its authorized subsidiaries, the current standard form of PPA for rooftop solar power systems attached to Appendix 2 of Circular No.18 must be used (Article 8.5 Decision No.13). However, the parties can make amendments to clarify the rights and obligations of the parties, provided such amendments are consistent with the other provisions of the standard PPA (Article 6.3 Circular No.18). In practice, it seems that EVN does not negotiate on issues that may have an impact on the mandatory terms.

If the buyer is an organization or individual other than EVN or any of its authorized subsidiaries, the parties are entitled to negotiate the agreement in accordance with Vietnamese law (Article 8.3 Decision No.13). Practical, reasonable and comprehensive modifications of basic terms under the standard PPA, as well as agreement on additional terms, are desirable and can save considerable time for the parties.

b. FiT

According to Article 8.2 of Decision No.13, if the buyer is EVN or an authorized subsidiary, the FiT that is proposed must be as set forth in the solar power purchase price list appendix of Decision No.13 (i.e.: US cent 8.38/kWh). Nevertheless, such preferred price can only be applied to the systems that have a COD or meter reading confirmation date that falls on or before 31 December 2020 (Article 8.4 Decision No.13). To date, the FiT applicable to systems with a COD or meter reading confirmation date on or after 1 January 2021 has not been decided. However, under the latest draft decision announced by the Government, the estimated FiT is roughly US cent 5.2 ~ 5.8/kWh. Similar to the negotiation of the PPA by organizations or individuals other than EVN or its subsidiaries, such other organizations or individuals are free to negotiate the power purchase price in accordance with Vietnamese law.

Conclusion

It is understood that the draft Power Development Master Plan VIII (“**PDP VIII**”) has been revised by the Ministry of Trade and Industry and will be submitted to the Government this June. Despite the voicing of several opinions that too much focus has been given to renewable energy in the draft PDP VIII, renewable energy is expected to be prioritized, along with the development of a transmission system that is capable of harnessing the full benefit of the power generated. Vietnam's national technical standard on rooftop solar power systems and specific regulations on the disposal of discarded solar panels have also been proposed.

Against the backdrop of a regulatory landscape that is currently in a state of flux, a degree of uncertainty remains regarding the regulation of some aspects of rooftop solar power systems in Vietnam. Therefore, in order to mitigate and minimize risks in investing in rooftop solar power systems, the investors should keep abreast with the regulatory environment, and consult with its legal advisors when entering the market.



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Ms. Tomatsu was seconded to APAC (Ho Chi Minh) from August 2013 to July 2016, where she advised on various legal matters in a range of fields including cross-border transactions, M&A, general corporate law, corporate restructuring, and labor law cases. Ms. Tomatsu is now based in Tokyo where she leverages this experience advising Japanese companies seeking to expand into Vietnam.



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After teaching at Hanoi Law University, Mr. Kamihigashi was seconded to APAC's Hanoi office from March 2015 to March 2017, where he handled matters including M&A, real estate, labor, and dispute resolution. Using this experience, he is currently based in our Tokyo office supporting Japanese companies expanding into Vietnam.



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Atsumi & Sakai has established an office in London operating as Atsumi & Sakai Europe Limited (a company incorporated in England and Wales (No: 09389892); sole director Naoki Kanehisa, a lawyer admitted in Japan), and has established an office in New York operating as Atsumi & Sakai New York LLP (a limited liability partnership established in New York; managing partner Bonnie L. Dixon, a lawyer admitted in New York and a Registered Foreign Lawyer in Japan). We also have an office in Frankfurt operating as Atsumi Sakai Janssen Rechtsanwalts- und Steuerberatungsgesellschaft mbH, a German legal and tax advisory professional corporation (local managing director: Frank Becker, a lawyer admitted in the Federal Republic of Germany).

2. LEGAL ADVICE

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