MPI

MINISTRY OF PLANNING & INVESTMENT

Midterm Vietnam Business Forum 2014

From Agenda to Action
PREPARING FOR NEW TRADE AGREEMENTS

Hanoi, June 5, 2014

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Hanoi, June 5, 2014

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VBF VIETNAM BUSINESS FORUM

2014 MID-TERM VIETNAM BUSINESS FORUM

Agenda to Action - Preparing for New Trade Agreements

Time: 7:00 – 13:30, June 5, 2014
Venue: Sheraton Hotel, K5 Nghi Tam, No. 11 Xuan Dieu Street, Hanoi

PROPOSED AGENDA

7:00 – 8:00	**Registration**
8:00 – 8:05	**Opening Remarks** Ministry of Planning and Investment - *H.E. Minister Bui Quang Vinh*
Session 1:	**Review of Investment Climate**
8:05 – 9:00	**Overview** 1. International Finance Corporation – *Mr. Simon Andrews, Regional Manager* 2. Vietnam Business Forum Consortium – *Mrs. Virginia Foote, Co-Chairman* 3. Vietnam Chamber of Commerce and Industry – *Mr. Vu Tien Loc, Chairman* 4. American Chamber of Commerce in Vietnam – *Mr. Marc Townsend, Chairman* 5. European Chamber of Commerce in Vietnam – *Mr. Tomaso Andreatta, Vice Chairman* 6. Korea Chamber of Business in Vietnam – *Mr. Kim Jung In, Chairman* Japan Business Association in Vietnam – *Mr. Yoshihisa Maruta, Chairman* **Remarks by Prime Minister H.E. Nguyen Tan Dung**
Session 2:	**Topics to be discussed with Government**
9:00 – 9:45	1. **Investment & Trade** • **Investment and Trade** – *Mr. Fred Burke and Mr. Tran Anh Duc, Co-heads of Investment and Trade Working Group* • **Tax and Customs** – *Mr. Fred Burke, Head of Investment and Trade Working Group, Mrs. Huong Vu, Head of Tax Sub-group, Mr. Bill Howell, Head of Mining Working Group* • **Employment** – *Mr. Collin Blackwell, Head of HR Sub-group* *Response from the Government* - *Ministry of Planning and Investment* - *Ministry of Finance* - *General Department of Customs*

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<tr><td></td><td>- Ministry of Labour - Invalids and Social Affairs
- Vietnam General Confederation of Labour</td></tr>
<tr><td>9:45 – 10:00</td><td>Coffee Break</td></tr>
<tr><td>10:00 – 10:40</td><td>2. Banking and Capital Markets
• Banking - Mr. Sumit Dutta, Head of Banking Working Group

• Capital Markets – Mr. Kien Nguyen, Capital Markets Working Group

Response from the Government
- The State Bank of Vietnam
- State Securities Commission
- Ministry of Finance
- Ministry of Planning and Investment</td></tr>
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• PPP – Mr. Tony Foster, Head of Infrastructure Working Group

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Response from the Government
- Ministry of Planning and Investment
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5. Tourism – Mr. Ken Atkinson, Head of Tourism Working Group

Response from the Government
- Ministry of Agriculture and Rural Development
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<tr><td>11:45 – 12:00</td><td>Closing Remarks

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<tr><td>12:00 – 13:30</td><td>VIP and General Luncheons</td></tr>
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Section I

REVIEW OF INVESTMENT CLIMATE

Vietnam Business Forum
G/F, Sofitel Plaza Hanoi,
No. 1 Thanh Nien Road,
Hanoi, Vietnam

Tel: 84-4-3715 2223
Fax: 84-4-3715 2218
www.vbf.org.vn

STATEMENT BY VIRGINIA B. FOOTE, CO-CHAIRMAN

Vietnam Business Forum
June 5, 2014

Good morning to all of you Minister Vinh, and especially to your Excellency Prime Minister Dung for coming today. You do us a great honor to attend and to address us at this important Forum in this important time. We are very grateful.

I'm confident that everybody in this room today shares with great pride the remarkable progress Vietnam has made in the last 20 some years. Our hope is that through the Vietnam Business Forum with domestic and foreign business membership and 11 working groups, we have together established an ongoing constructive discussion on what additional areas need work and solutions to lead to future successes in Vietnam. We were all deeply saddened and worried by the events of mid-May and therefore the timeliness of this Forum today and your attendance is especially important and meaningful.

Today we hope to highlight some issues that are raised in the aftermath of the May events and I will let our friends from Korea, Japan and Taiwan in particular address our concerns. But I did want to speak for all of us that we support Vietnam's economic growth and its role in the increasingly complicated global supply chains - we all work with, hire, and count on people and technologies from Vietnam and many nations to make business, tourism, and supply chains work.

We salute the government's actions in the aftermath and are assured that Vietnam will handle compensation and other adjustments in a professional and transparent manner. A compensation commission with possible international participation but certainly with global standards could have an enormous reputational impact for Vietnam going forward. We stand ready to assist.

For FDI, decisions to locate or not to locate are often made from distant headquarters looking at basic issues of stability, business friendly environments, local talent, rule of law, logistical ease, soft and hard infrastructure systems and overall costs. Vietnam is better in some of these issues than in others - but these are the issues that will ultimately affect all of our futures.

It is the VBF hope that we can focus also on where Vietnam needs to be taking steps to ensure readiness for the several trade agreements currently being negotiated. While I am deeply involved with TPP, other agreements such as the EU-FTA, RCEP and full implementation of ASEAN FTAs are also potentially huge opportunities for Vietnam's economy and people.

These agreements can assist in lowering tariff barriers in areas such as market access for apparel, footwear, agriculture and other Vietnamese exports. And they call for market access in other areas such as government procurement and services while setting new standards for regulatory coherence, SOE disciplines, NCMs, workers' rights, environmental protection and intellectual property rights. These agreements will require new laws and regulations of high standard.

But some basic structures are also not yet ready. We all worry about a possible middle income trap for Vietnam - where the easy reforms have been made, while some basic building blocks of a more market based economy are not. For Vietnam some of these tough areas are clear:

For soft infrastructure, we worry that corruption is a growing problem that trade agreements cannot fix but is an overall drag on the economy and reputation of Vietnam. Too much of the economy is still dependent on cash. An economy where large transactions are done in cash, where fees and fines to the government are collected in cash, is a recipe for corruption or delays, and sometimes both. There are systems to implement legal fees structures, taxes and customs collection procedures - so that the amounts due and payments made are done in a transparent way and are uniformly assessed.

Many countries have faced these issues and under the new VBF Project 12 we very much look forward to working with VCCI and the government to help support the implementation of anti-corruption systems that have worked globally.

Another soft infrastructure difficulty VBF is working with the government on - is in general, government decisions are often painfully slow, procedures are very complicated and often burdensome with the number of offices involved, rules and laws are not uniformly enforced, and courts are weak. We are looking for ways to solve these issues to allow all companies to compete on their merits - including for access to capital, land and other opportunities.

In some areas there has been an increase of regulations that could stifle the private sector and those markets - in the areas of IT and e-commerce, with price controls, on work permits, on slowness in settling non-performing loans, and with red tape more generally. We hope that actions to enable and facilitate rather than restrict business opportunities can be the focus of government regulation to get ready for the new FTAs and to bring Vietnam's regulatory framework more in line with other successful countries.

We also know that modernizing the education system is a key priority for the Vietnamese leadership and our education working group is urging that the private sector and FDI projects in education be more quickly approved so that Vietnam has a growing skilled workforce of entrepreneurs, managers, engineers, manufacturing technicians and other very needed professionals. We urge the unions in Vietnam to work to increase training and education programs to bring more skills sets to the workers we employ.

For much needed hard infrastructure, we are concerned about the time it takes to approve infrastructure projects such as power with the focus seemingly more on long term master plans while leaving domestic fuel sources untapped today. We hope that after the lengthy discussion, an effective PPP system can be adopted soon. Additionally, more effective infrastructure in transportation will encourage both business and tourism.

VBF remains committed to working with our partners in the Government to help solve problems, and to create a more attractive, transparent, and stable business environment here. The new trade agreements offer opportunities, but it is really up to us to prepare for taking full advantages of the potential.

We again thank the Prime Minster and all the Ministers and government officials, members of the diplomatic and donor communities, and of course our business colleagues for being here today. We also want to thank the Minister Vinh for his ongoing support of VBF, Dr. Loc for our partnership with VCCI, and extend best wishes to all for a successful Forum today.

Appendix

I. The Chambers and Business Associations participating in the VBF Consortium:

Consortium members:

1. Vietnam Chamber of Commerce and Industry (VCCI)
2. American Chamber of Commerce in Vietnam (AmCham Vietnam)
3. European Chamber of Commerce in Vietnam (EuroCham Vietnam)
4. Korean Chamber of Business in Vietnam (KorCham Vietnam)

Associate members:

5. Australian Chamber of Commerce in Vietnam (AusCham Vietnam)
6. British Business Group in Vietnam (BBGV)
7. Canadian Chamber of Commerce in Vietnam (CanCham Vietnam)
8. China Business Association Ho Chi Minh City (CBAH)
9. Hongkong Business Association Vietnam (HKBAV)
10. Indian Chamber of Commerce in Vietnam (InCham Vietnam)
11. Japanese Business Association in Vietnam (JBAV)
12. Japanese Business Association in HCMC (JBAH)
13. Nordic Chamber of Commerce in Ho Chi Minh City (NordCham HCMC)
14. Singapore Business Group (SBG)
15. Swiss Business Association (SBA)
16. Taiwanese Chamber of Commerce in Vietnam (TCCV)

II. Vietnam Business Forum Working Groups:

- Agribusiness Working Group
- Automotive Working Group
- Banking Working Group
- Capital Markets Working Group
- Customs Working Group
- Education and Training Working Group
- Governance and Transparency Working Group
- Investment and Trade Working Group
- Infrastructure Working Group
- Mining Working Group
- Tourism Working Group

VIETNAM CHAMBER OF COMMERCE AND INDUSTRY

OUTLINE
PRESENTATION OF THE CHAIRMAN OF VIETNAM CHAMBER OF COMMERCE AND INDUSTRY AT THE VIETNAM BUSINESS FORUM JUNE, 2014
Hanoi, 05/06/2014

This year Midterm Vietnam Business Forum takes place in a quite special context.

Firstly, Vietnam is about to conclude several on-negotiating important Free Trade Agreements (FTAs), especially the two with biggest partners – the Trans-Pacific Partnership Agreement (TPP) Negotiations which is in its final stage and the EU-Vietnam FTA (EVFTA) Negotiations which is expected to wrap up in October, 2014. So, it is the high time for the Vietnamese Government and businesses to be well-prepared to embrace opportunities and overcome challenges from such FTAs.

Secondly, China's placement of its oil rig Haiyang Shiyou 981 within Vietnam's exclusive economic zone has violated gravely Vietnam's sovereign, and also threatened marine activities, international trade and maritime security, and undermine the stability of East Sea and the region. This activity of China has impacted significantly on Vietnam and China trade relations. In the economic perspective, Vietnam has now faced with the new challenges of maintaining normal trade relations with China and preparing measures to reduce its over-dependence to China's economy at the same time. Taking full advantage of above negotiated FTAs with prospects is one of the most useful ways to reach this aim.

China's violation of Vietnam's territorial waters led to an unfortunate incident: exploiting demonstrations and parades expressing their opposition to the illegal operation of China, on 13 and 14 May 2014 in Binh Duong, Dong Nai and Ha Tinh, some extremists had taken illegal activities that violated laws and orders, damaged assets of many foreign invested enterprises (FIEs), especially the ones from China and Taiwan. This unfortunate incident has adverse impacts on the peaceful image of Vietnam and the country's business environment in the views of foreign investors. This consequence demands Vietnam's Government to react promptly to restore the foreign investors' confidence on Vietnam's business and investment environment.

In this context, we propose the Government to put forward the following solutions to support Vietnamese businesses in the coming time:

First, as regarding to measure for ongoing FTAs, especially TPP and EVFTA, to bring in best benefits for the business and the economy, as well as limiting the heavy dependence on trading with China

Benefits from ongoing FTAs depending on the two factors: (i) Whether the negotiation results are profitable for businesses (whether businesses can access partners' market at the most preferential conditions, and whether the opening of Vietnamese market would bring businesses with the best materials, equipment, technologies and investments, and (ii)

Whether the business have the best conditions to take advantage of such FTAs (conditions to get chances and overcome challenges).

Therefore, we call for the Government to focus on the following solutions:

Relating to the negotiation process of FTAs: *First*, having flexible but concrete negotiating strategy on issues relating to export benefits of businesses, including better preferential tariff, appropriate rules of origin which are suitable with Vietnamese businesses' production structure and trade pattern in the coming time; reasonable TBT, SPS requirements; focusing especially on negotiating market access for agricultural products to diversify markets for these sensitive products that are currently heavily depending on Chinese market. *Second*, having more confident negotiation strategy in opening Vietnamese market for machines, equipment, technologies, materials and transportation means. And similar products that Vietnam has long but ineffectively protected or currently depending too much on supplies from non-negotiating partners. *Third*, having open-minded approach in negotiating issues like government procurement, competition rules... which are expected to enhance competitiveness and transparency and help changing market shares among international contractors in Vietnam market. *Fourth*, having cautious and concrete position in issues that may affect labors, farmers and agricultural production such as IP on pharmaceuticals, agrichemical productions, labor, etc. *Fifth*, paying attention to maintain necessary policy space for the Government to protect public interests or orient economic structure in negotiations on investment, dispute settlement issues.

Relating to the preparation for implementing FTAs: *First*, creating a mechanism to consult, instruct businesses on trade commitments through: (i)A focal point providing basic and update information relating to FTAs; (ii) A functional unit in charge of instruction, explanation and consultation for businesses during the FTAs implementation (to prevent the cases that businesses do not know where to consult for the exact meaning of a commitment, or how to implement, or how to deal with a commitment with different explanations from different agencies); (iii) Designating competent officials who have deep knowledge on commitments in each fields to cooperate with VCCI and business associations to propaganda and train for specific business groups on contents and impacts of the commitment, and how to implement it effectively; *Second*, increasing the participation of businesses and associations into the process of implementing FTAs of the state agencies, especially the internal codification of FTAs commitment; *Third*, speeding up the transfer of certain public services from the Government to business associations, especially services to manage the satisfactions of TBT, SPS requirements of export markets (certification, quality control); *Fourth*, realizing mechanisms allowing Government to protect legal benefits of businesses in foreign partners in accordance with FTAs.

Second, on solutions to quickly and effectively solve unfortunate event on 13 and 14 May 2014, to recover international investors' trust in Vietnamese investment environment

The recent incident on 13-14/05/2014 caused damage to some FDI companies both physically and mentally, significantly affected to the figure of a friendly, stable and safe destination which Vietnam has successfully built in international investors' view for long time.
All of damaged companies wish to quickly overcome the incident, stabilize production, and continuously cooperate with Vietnam through stable and safe investment activities in Vietnam.

We appreciate the quick and strong intervention of the government in handling consequences of the incident, especially in realizing our proposals on establishment of a Task Force in each province, industrial/economic zone where the incident happened as well as concentrated surveying and solving enterprises' problems, difficulties which caused by the incident, especially issues relating to labor (wage, labor licenses...), insurance (damage determination, prepaid compensation), tax, custom procedure (export of affected products, import of replaced machines and instruments...), security (handling vandals, finding lost properties of enterprises...).

We suggest the Government to (i) First, continue to definitely and fully handle consequences caused by the incident, especially consequences which only arise/see in the future (for example, damage to enterprises databases); (ii) Second, learn from the experience to prevent similar incidents from happening in the future as well as prepare quickly and effectively responding plan to incidents which may cause damage to companies.

Third, on strongly implementing key tasks, solutions to promote business environment, enhance national competitiveness, continuously confirm the stability, friendliness and attraction of Vietnam in domestic and international investors' perspective

Vietnamese business community appreciate the Government's efforts in issuing Resolution No. 19/NQ-CP dated 18/03/2014 on key duties and solutions to improve business environment and national competitiveness and Directive No. 11/CT-TTg by the Prime Minister dated 21/05/2014 on solving difficulties, problems, recommended proposals and promoting business. The Resolution No.19 and the Directive No. 11 stated clear targets for each periods of time, associated with international standards, provided specific tasks and solutions in direct link with responsibilities of concerned ministries, agencies and local governments, emphasized solutions to solve enterprises' difficulties, problems, comprehensively implemented business-support activities as well as transferred some public services to associations.

In order that these important Resolution and Directive work in practice, we suggest the Government: (i) regularly direct ministries, agencies and local governments to examine, supervise the work plan and implementing result of the proposed Action plans, Working programs by ministries, agencies, local governments on improving business environment, enhancing competitiveness, solving enterprises' difficulties, problems, strengthening business development promotion, transferring some public services to VCCI, etc; (ii) Publicly disclose results of these Action Plans, Working Programs of the Government, ministries, agencies, local government; (iii) Mobilize the participation and initiatives of business associations in supervising, cooperating and evaluating the implementation of these Action Plans, Working Programs by the government, ministries, and local government. /.

AMCHAM STATEMENT AT VIETNAM BUSINESS FORUM
THEME: "AGENDA TO ACTION - PREPARING FOR NEW TRADE AGREEMENTS"

Sheraton Hotel Hanoi
Thu, Jun 5, 2014

Presented by
Mr. Marc Townsend
Chairman

Prime Minister, Ministers,
Business leaders
Distinguished Delegates
Ladies and Gentlemen

Introduction

I am pleased to participate in this important VBF Meeting, with the theme: "Agenda to Action – Preparing for New Trade Agreements."

As expressed by many at the April 28 Prime Minister's Conference with the Business Community, organized by the Office of the Government, there is a dichotomy in Vietnam's economy, the domestic sector and the foreign invested sector: the but problems facing the economy affect us all. Our hope is that in preparation for Vietnam joining new free trade agreements that these problems can be faced and adequately addressed

In 2013, AmCham companies were pleased to see trade in goods between Vietnam and the U.S. increase almost 20% to reach $29.7 billion. Bilateral trade in the first three months of 2014 was up 14%. If present trends continue, bilateral trade in goods could reach $60.2 billion by 2020, and nearly $70 billion by 2020 with TPP. At the same time, revenues from AmCham companies and their partners in Vietnam's domestic market continued to grow, as well.

	2004	2008	2012	2013	2014	2016	2020
VN Imports from U.S.	$1.2	$2.8	$4.6	$5.0	$5.4	$6.1	$7.7
VN Exports to U.S.	$5.3	$12.9	$20.3	$24.6	$28.4	$36.4	$52.5
Total	$6.4	$15.7	$24.9	$29.7	$33.8	$42.6	$60.2
VN Apparel Exports to U.S.	$2.7	$5.4	$7.7	$8.8	$9.4	$11.0	$14.0

Source: U.S. Department of Commerce

Importance of TPP:

The Trans-Pacific Partnership offers a new opportunity for Vietnam to renew the country's

growth model and to meet economic and social development goals.

The TPP could provide a good boost to Vietnam's economy: one projection is that TPP could increase Vietnam's GDP by 28.4% in 2025 over the "baseline estimate" without TPP, and increase Vietnam's exports by 35.7%.[1]

AmCham strongly believes that the TPPand the other trade agreements offer new opportunities to help Vietnam's strategic drive to industrialize, modernize and globalize. These agreements can assist in tearing down trade barriers in areas such as market access and government procurement while setting new standards for regulatory coherence, workers' rights, environmental protection and intellectual property rights.

However, to prepare for TPP and other agreements, a few other missing elements need to be addressed. The elements are:

Growing corruption
Corruption has become corrosive and widespread in Vietnam and is dangerous to the economy and society as a whole. While there have been some actions from the Government it is time to address corruption in an wider fashion by implementing systems well known to reduce the opportunities for illegal payments as well as incorporating a code similar to the FCPA in the US or the UK's Bribery Act. A significant step forward would be actions that greatly limit the use of cash payments and increasing the use of eCommerce.

A lack of robust implementation of the WTO commitments, especially in the areas of investment and services, has made it difficult to benefit from some of the efficiencies that could have been created in key sectors. It is time to ensure that WTO commitments are being implemented on-time, and with the spirit of creating a more efficient and competitive economic climate – especially in the areas of investment and services.

A lack of adequate infrastructure in terms of power and transporthas discouraged FDI. This is, or should be a national issue and must be addressed at a national level with Public-Private Partnerships (PPP) and other business models adopted urgently.

A lack of an adequate skilled workforce has made it hard to move up the value chain even as labor costs have continued to rise. AmCham member companies have worked to help in developing a skilled work force of engineers and manufacturing technicians.Foreign and domestic companies have worked to provide training and education programs but it is urgent that Vietnam modernize and upgrade its national curriculum, particularly at the vocational and university levels. A successful example is the establishment of HEEAP. Cooperating with Vietnam's leading universities and vocational training colleges, together with the Ministry of Education and Training, and the Ministry of Labour, Invalids, and Social Affairs, Public-Private Partnership (PPP) was established, the Higher Engineering Education Alliance Program (HEEAP) over the past three years, 2010 – 2012. Now, HEEAP 2.0, a five-year program from 2013 – 2017, a $40 million PPP funded jointly by government, industry and academia, will guarantee that by 2017, "Vietnam will be well on the way to producing engineering and vocational-technical graduates that can compete with any in the

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[1] http://www.amchamvietnam.com/wp-content/uploads/2013/05/130328-2.2.e.-Petri-TPP-Vietnam-24mar13-v2-web.pdf,pg 13

region and the World."[2]

A lack of government – business coordination on improvements for the economy as a whole. We have recommended that SOEs be restructured and managed with transparency, responsibility, and accountability, and that they operate on a "level playing field" with private sector enterprises, both Vietnamese and FDI, which should have treatment no less favorable that the SOEs, in terms of access to capital, land, etc.

There has been some progress to address the reforms required in the **banking and finance sector**; however more and accelerated actions are required to help make for an efficient economic system.

These issues are not easy, fast, or inexpensive to solve. However, implementing solutions on these issues will boost investor confidence, will help ensure that Vietnam remains an attractive and competitive destination for foreign investment, and will renew the country's growth model.

Conclusion

At the 2013 mid-term Vietnam Business Forum, AmCham recommended "a new round of reforms, a DoiMoi 2, that provides further encouragement of private enterprise; fosters trade and investment through initiatives like the TPP; establishes renewed emphasis on and commitment to regulatory and SOE reform," and enables and facilitates rather than restricts business.

We have been pleased that the Prime Minister's 2014 New Year Message[3] and the Government's Resolution 19 announced on March 18, 2014[4] seemed to recognize the need for change.

We aspire to a transparent and consultative environment where the interaction between State agencies, between the State apparatus and socio-political organizations must be strengthened. Dialogues with the people and businesses must be expanded under various forms to promote closer relationship between the State, cadres, civil servants and the people and better match policy and legislation with reality;"[5] and where government agencies have Key Performance Indicators (KPIs), such as number of days to issue a license, number of hours to complete tax finalization, number of days to clear export and import cargoes, that will measure and increase the efficiency of their interactions with the people, and with businesses.

Several imminent issues are being addressed by the other working groups and we hope to see positive and successful actions on those.

AmCham will continue to play a helpful and constructive role, to work to identify and implement solutions, and to be a strong advocate for a better business environment in Vietnam. Much work remains to be done. We want Vietnam to succeed and AmCham

[2] What will HEEAP 2.0 achieve in 5 years?" Presentation by Intel Products Vietnam at the "Higher Engineering Education Conference," in Can Tho, Mar 19-20, 2013, pg 15

[3] http://www.amchamvietnam.com/30443555/thinking-about-the-prime-ministers-new-year-message/

[4] http://www.amchamvietnam.com/30443758/government-sets-metrics-to-improve-business-conditions-and-national-competitiveness/No. 19/NQ-CP, Ha Noi, Mar 18, 2014

[5] http://www.amchamvietnam.com/30443555/thinking-about-the-prime-ministers-new-year-message/

remains committed to working with our partners in the Government to help solve problems, to take action in preparation for Vietnam's membership in new free trade agreements, and to create a more attractive, transparent and stable business environment here

Once again, we express our appreciation for the guidance in Resolution 19 and the Prime Minister's New Year Message, and this opportunity organized by VCCI, VBF, and the MPI for " … interaction between State agencies, between the State apparatus and socio-political organizations … . Dialogues with the people and businesses … to promote closer relationships between the State, cadres, civil servants and the people and better match policy and legislation with reality."[6]

"Phải tăng cường tương tác giữa các cơ quan trong bộ máy nhà nước và giữa bộ máy nhà nước với các tổ chức Chính trị – xã hội. *Mở rộng đối thoại với người dân và doanh nghiệp bằng nhiều hình thức để Nhà nước, cán bộ, công chức gần dân hơn và chủ trương, chính sách, pháp luật sát với thực tiễn hơn."*[7]

I wish good health, happiness, and success to all, and that this meeting be successful.

Attachment:

Change in Perceptions of Vietnam's Business Climate, 2008 – 2013 (five years) Compared with other countries in the ASEAN Region
(Source: U.S. Chamber of Commerce and AmChams in Southeast Asia)

Factors	Regional	Indonesia	Malaysia	Philippines	Singapore	Thailand	Vietnam
Availability of low cost labor	▼ 9%	▲ 11%	▼ 27%	▲ 12%	▼ 5%	▼ 13%	▲ 3%
Availability of raw materials	▼ 1%	▲ 4%	▲ 4%	▲ 21%	▼ 10%	▼ 2%	▼ 11%
Availability of trained personnel	0%	▼ 4%	▲ 1%	▲ 25%	▲ 7%	▼ 7%	▲ 3%
Corruption (or lack of)	▲ 8%	▼ 13%	▼ 14%	▲ 20%	▼ 2%	▼ 5%	▼ 3%
Ease of moving your products through customs	▲ 4%	▼ 3%	▲ 17%	▲ 6%	▲ 9%	▼ 3%	▲ 1%
Free movement of goods within the region	▲ 1%	▲ 13%	▲ 5%	▲ 12%	▲ 9%	0%	▼ 15%
Housing costs	▲ 1%	▼ 7%	▼ 16%	▲ 10%	▲ 6%	▲ 10%	▲ 2%
Infrastructure	▲ 5%	▼ 3%	▲ 27%	▲ 15%	▼ 7%	▲ 3%	▼ 4%
Laws & Regulations	▲ 1%	▼ 23%	▲ 5%	▲ 2%	▼ 5%	▼ 3%	▼ 9%
Local protectionism (or lack of)	▲ 3%	▲ 1%	▲ 7%	0%	▲ 4%	▲ 6%	▼ 16%
New business incentives offered by government	▼ 7%	▼ 13%	▲ 8%	▲ 15%	▼ 6%	▼ 7%	▼ 32%

[6] http://www.amchamvietnam.com/30443555/thinking-about-the-prime-ministers-new-year-message/
[7] http://www.amchamvietnam.com/30443556/thong-diep-nam-moi-cua-thu-tuong-nguyen-tan-dung

Office lease costs	▼ 1%	▲ 2%	▼ 6%	▼ 9%	▲ 10%	▼ 1%	▲ 16%
Personal security	▲ 1%	▼ 5%	▼ 17%	▲ 18%	▼ 1%	▲ 2%	▼ 18%
Sentiment towards the U.S.	▼ 2%	▲ 7%	▼ 7%	▲ 18%	▼ 10%	▲ 9%	▼ 16%
Stable government & political system	▲ 2%	▼ 25%	▼ 1%	▲ 50%	▼ 1%	▲ 5%	▼ 31%
Tax structure	▲ 6%	▼ 19%	▼ 22%	▲ 6%	▲ 4%	▲ 13%	▼ 9%

Increase: 10% or greater increase in satisfaction

Weak Increase: Between 5% and 10% increase in satisfaction

Decrease: 10% or greater decrease in satisfaction

Weak Decrease: Between 5% and 10% decrease in satisfaction

Minimal Change: the satisfaction percentage changed less than 5%

EUROCHAM POSITION PAPER
Vietnam Business Forum
June 5, 2014

Presented by
Mr. Tomaso Andreatta
Vice Chairman

Honourable Ministers, Ambassadors, Your Excellencies, Ladies and Gentlemen: On behalf of EuroCham and its partner European Business Groups, I would like to thank the Ministry of Planning and Investment and all the authorities represented here today for facilitating this on-going constructive dialogue with the private sector through the Vietnam Business Forum.

Vietnam is in the process of negotiating Free Trade Agreements that have the potential of providing a serious boost to the economy. In particular, the EU–Vietnam FTA seems to be making progress and there are hopes that a political agreement will be signed this year. The European Union (EU) is one of the largest investors in Vietnam with 1,810 FDI projects in the country and a total registered capital of circa VND 723 trillion (USD 34.28 billion) as of January 2013. The relationship between Europe and Vietnam grows year on year, which is demonstrated not only by the political strengthening of ties, but especially in terms of their economic development and increased integration. Both of these aspects lead to growing confidence in the Vietnamese market from European investors, which are clearly demonstrated by last quarter's jump in the Business Climate Index from 50 to 59 points - going above the midpoint for the first time since 2012. This is an important increase, which seems to further demonstrate the strong belief of European companies in the Vietnamese market. Under the FTA, it is estimated that Vietnam's GDP could rise by over 15%, skilled real wages could increase by around 12%, unskilled wages by 13% and the value of exports could increase by almost 35%.[1] However, the resulting potential benefits could be undermined unless Vietnam is fully committed to international trading rules and ensures effective implementation of these.

It is very important that Vietnam ensures to get strong, implementable Free Trade Agreements signed, in particular as it looking towards the creation of an ASEAN Economic Community in 2015. In line with this prospect, Vietnam needs to ensure that its companies are competitive both internally as well as externally. Therefore, protectionist measures need to be removed incrementally - but rapidly - in order to allow Vietnamese companies to adapt to global market standards in terms of quality, price, branding, etc. Vietnam is at an important crossroad, where the achievements of the coming years will have a significant impact on the long-term success of Vietnam. Hoping for successful conclusion of these agreements, we - the European business community expect greater access to the Vietnamese market and more favourable conditions to invest in Vietnam. This will bring

[1] Commission Services' Annex on Vietnam to the Position Paper on the Trade Sustainability Impact Assessment of the Free Trade Agreement between the EU and ASEAN, http://trade.ec.europa.eu/doclib/docs/2013/may/tradoc_151230.pdf, 22 May 2013

increased transfer of knowledge, something which Vietnam has been calling for in order to get out of the low-cost labour trap. Furthermore, if you lower the tariffs for imported inputs, you increase the value added for the process in Vietnam. Hence, by rapidly removing Vietnam's trade barriers, you encourage local firms to adapt to the changing environment and become increasingly competitive in the global market.

As EuroCham, we have 5 main points that we would like Vietnam to focus on in this regard: Respect and implementation of WTO commitments prior to signing an FTA; Distribution licensing for foreign companies; Visa issues to facilitate tourism and business visits; Removal of cap for foreign ownership in particular as it relates to banking; and Business to Government Dispute Settlement Procedure in the EU-Vietnam FTA.

I. Respect and implementation of WTO commitments

It is important for Vietnam to send a strong signal that it will implement what is to be set out in the FTA – and the best way of doing so is by fully implementing and respecting existing agreements, such as Vietnam's WTO commitments, as a first basis to the more advanced opening that Vietnam can afford at this point in time. This will induce confidence in the European business community and will increase the likelihood of attracting FDI.

II. Tourism

Even if more detailed explanations are provided in the specific section on Tourism, EuroCham still wishes to reinforce the message of two main points, namely visa facilitation and destination advertising.

Visas

We propose that visa-exemptions are expanded to include countries that can potentially account for significant tourism revenue, such as the EU member states, the United States and Canada, Australia, Hong Kong and Taiwan. Visa-exemptions to these countries should generally be granted for stays of up to ninety (90) days.

We also suggest that an efficient and real "Visa-on-Arrival" procedure is established, with no documentation to be completed prior to the physical landing. Vietnam could possibly refer to the examples of Laos or Cambodia, where visas are issued and fees are collected upon arrival. "Visa-on-Arrival" procedures and policies should be transparent and consistent, and should include an explanation of the process, a set fee schedule and a consistent enforcement at various airports.

Destination marketing

It still remains unclear where the income from visas is being spent. However, we do know that one of the most efficient ways to address the negative perception of tourism service standards in Vietnam is to continue a concerted promotional campaign on both national and international levels. Such campaigns should continue to highlight Vietnam's attractiveness due to its rich cultural heritage, outstanding natural beauty including beaches and friendly people. In order to accomplish these recommendations, a significant budget is required especially as Tourism accounts for 7% of GDP. We would therefore recommend reinvesting at least VND 20,000 per visa into a fund for destination marketing.

III. Distribution licensing

Ensuring that companies can follow and take care of their products all way to the end-consumer is a necessity to be able to ensure quality of the product. For instance, in the case of alcohol, on 12 November 2012, Vietnam adopted Decree 94/2012/ND-CP, regulating liquor production and trading. Decree 94 allows traders to possess only one type of

licenses: distribution, wholesale or retail. This limits the range of services that foreign operators can provide; no such restrictions apply to local producers.

Import rights will only be given to holders of distribution licenses. In conjunction with an obligation to have only one license, importers will effectively be prohibited from engaging in any other activities other than distribution. In theory, a multi-national entity may need to create a second company (belonging to the same owner) to be a wholesaler for wholesale activities, such as selling to supermarkets, stores, bars, restaurants, etc.

The above create significant disruptions to the current supply chain especially in modern off-trade channels that do not operate in a centralised way. Currently, these outlets are able to operate as wholesalers and retailers of products and have direct relationship with manufacturers and importers. Under the new rules, these outlets will need a retail license to sell to consumers directly, but will be restricted from entering direct trade relationships with the manufacturers and importers based on commercial considerations. These difficulties might serve to deter investment and trade.

Decree 94 also establishes a quantitative limit on the number of distribution, wholesale and retail licenses, based on population. Restricting the number of licenses, in particular in the above-mentioned licensing regime, will create a secondary market for the licenses themselves and limit distribution options, particularly in under-populated, rural areas.

This issue is also relevant in other sectors such as pharmaceuticals.

The Economic Need Test is another serious hindrance to modern distribution in Vietnam. While we would recommend to abolish it altogether, it is a well-known fact that the definition in the current regulations is still a bit vague, so we would be grateful for a new, more objective and easily implementable definition in the near future.

IV. Foreign ownership– in particular the banking sector

Under the WTO commitments, as of 2012, foreign investors have the right to establish new 100% foreign-owned companies in Vietnam. Also, Decree 58/2012/ND-CP, dated 20 July 2012, allows foreign investors to own 100% of the charter capital of operating securities companies or to set up a new 100% foreign-invested brokerage. However, foreign ownership in all Vietnamese listed enterprises (except securities firms) remains capped at 49% under current regulations. We therefore welcome the move from the Ministry of Finance to put forward proposals to raise or completely remove this limit.

In particular banks are unclear, in terms of the limit of foreign ownership (Decree 01/2014/ND-CP).There are two main obstacles to getting the banking sector more involved; difficulty in getting involved in the local bank's activities and lack of voice at Board level. In that sense, foreign investors are not only concerned about ownership caps, but are equally concerned about actual control in Vietnamese credit institutions. Banks consolidated by serious international financial institutions usually are supported in terms of all needs, including capital, even in situations of stress, as their worldwide image is affected, but such support cannot be given to banks whilst actions are not controlled by the international shareholder.

We would therefore call for the removal of all cap for the foreign invest in banks and further increase the level of activity/presence/control of foreign companies in the direction of financial institutions.

V. Business to Government Dispute Settlement Procedure

It is of utmost importance for companies that they have a legal recourse in case of dispute on trade disagreements. This argument of course goes in both directions, as it will allow Vietnamese companies to protect their investments in Europe and vice-versa. Experience from existing FTAs is that there is an indispensable need to have a clear mechanism for Dispute Settlement – but not one which is limited to Government to Government, as it is the case for instance at the WTO. A similar point was made in the Quantitative and Qualitative Impact Analysis of the EU-Vietnam FTA by MUTRAP of 2011. If a company experiences unfair treatment it must have access to a body of recourse, and not one which requires enormous time and resource investment, as most companies simply are not able to invest this level of resources, which will therefore limit the value of the dispute settlement procedure, and hence of the free trade agreement.

A connected point is the recognition of international arbitration and its enforcement in Vietnam in case of disputes between companies. This crucial improvement will substantially raise Vietnam's attraction as an investment destination and as a business partner.

VI. Conclusion

The economic decisions taken over the next couple of years will strongly influence Vietnam's future and it is therefore extremely important to ensure that, if Vietnam wants to follow an internationally competitive and sustainable economic growth model, it needs to attract more and better-quality foreign investment. In order to do so, the Vietnamese Government should focus its efforts in 2014 on addressing the issues outlined above and ensure a strong, implementable FTA with Business to Government Dispute Settlement Procedure. If this is not done, it creates uncertainty for investors and FDI will remain limited as compared to its potential.

Additionally, a number of more specific issues remain in the individual sectors, which are also outlined in our Whitebook 2014. These should be dealt with between the relevant ministries and companies and EuroCham is happy to help facilitate this process.

We make our various suggestions within this position paper on behalf of and in the interests of our members, the European business community in Vietnam. However, it is also clear that in the vast majority of cases these suggestions are clearly in the long term interest of the Vietnamese Government and population: the economy can only grow sustainably if the business climate is favourable, etc. if there is a level playing field; if IPR are effectively protected; if corruption and the resulting inefficiencies are banished; if Government bureaucracy and oversight are reasonable. We sincerely hope our suggestions will assist the Government in reaching this goal and EuroCham will continue to assist, where possible, in striving towards achieving this.

Let me close by saying that at EuroCham we will continue to work hard to help ensure the successful conclusion of a strong, implementable EU-Vietnam FTA, and if possible within this year. We look forward to working with the Government of Vietnam and all our members and partners, both Vietnamese and European, to maximize their success in an ever more vibrant Vietnam!

VBF MID-TERM FORUM PROPOSAL
Hanoi, June 5, 2014

Presented by
Mr. Kim Jung In
Chairman

I. INTRODUCTION

First of all, we would like to express our deepest condolences to the Vietnamese government and foreign invested companies who are facing difficulties due to the situation in Mid-Southern region of Vietnam. We would also like to express our sincere gratitude to Prime Minister Nguyen Tan Dung and the Vietnamese government for its tremendous efforts to resolve the situation. We believe that we can overcome this time of hardship by handling the crisis together through further mutual understanding and insightful analysis of the situation.

In regard to that, we would like to make several recommendations.

First, we believe that the Vietnamese government needs to make a public announcement to the foreign investors all over the world that it is giving its best effort and taking certain measures to re-stabilize the business environment for the foreign invested companies in Vietnam.

Second, we recommend that the Vietnamese government need to propose and come up with immediate indemnification or compensation plan.

Third, we also recommend the Vietnamese government to provide loan with low interest rate by legislating the special law as part of the crisis management so that the foreign invested companies can resurge as soon as possible and get back to the right track on running their businesses in Vietnam. Also, we sincerely request the Vietnamese government to exempt the damaged companies from tariffs to speed up the customs clearance process in importing raw materials required to restore the damaged supply chain.

Fourth, we recommend the Vietnamese government to take appropriate measure for the labors who lost their jobs due to the accident.

KorCham is more than welcome and strongly support the will and effort that the Vietnamese government has shown for rehabilitation. As a true companion of the Vietnamese economy, KorCham will also give its best effort to turn this moment of crisis into opportunity for sustainable foreign investment in Vietnam.

Vietnam is under its negotiation process with TPP, EU and Korea for FTA. We believe Vietnam will make such a great contribution to the world economy. Korean is also doing its best to conclude and sign the FTA with Vietnam within this year. Furthermore, for the fabric and shoe industry of which Korean companies are focusing its investment, rules of origin under FTA negotiation is a crucially sensitive matter. We hope the Vietnamese government provide the information on negotiation status of FTA not only to the parties of the agreement but also to the foreign invested companies so that they can set up the future master plan

and make investment at the right time.

As many will agree, an open and constructive dialogue with the Vietnamese Government is greatly appreciated by the private sector. I believe development assistance by itself does not promote economic growth. Rather it is foreign direct investment and trade that promotes growth. Countries, economic zones, cities, and provinces need good economic policies and a good legal and regulatory structure to attract international investment, promote trade and spur economic and social development. It should be said in advance that KorCham's outlook is generally positive, but that there are some areas for improvement. Through such improvement to the law, we are reminded that Vietnam is full of hope and potential.

II. KOREAN BUSINESS COMMUNITY'S RECOMMENDATIONS

Today, four (4) suggestions will be recommended by members of the Korean business community in Vietnam.

1. Sustainability of Foreign Investment

Article 32 of the Law on Investment provides that:

> *"1. Investors with investment projects in the investment incentive sectors and geographical areas stipulated in articles 27 and 28 of this Law shall be entitled to the incentives as stipulated in this Law and other provisions of the relevant laws.*
> *2. The investment incentives stipulated in clause 1 of this article shall be applicable to new investment projects and investment projects for expansion of scale, for raising output capacity or business capacity; for renovation of technology or raising product quality, or for reducing environmental pollution."*

However, the implementation of certain circulars such as 130/2008/TT-BTC Part I of 6 and Article 23.5 of the Circular 123/2012/TT-BTC in 2008 has caused some problems for Korean companies to enjoy the tax incentives provided in Article 32 of the Law on Investment as shown in the table below.

Applying CIT incentives	*From 2004 - 2008* *(under the Law on CIT 2003)*
	Yes, the business expansion will be entitled to CIT incentives (Article 18 of the Law on CIT 2003)
	From 2009 – 2013 *(under the Law on CIT 2008)*
	No, the business expansion will not be entitled to CIT incentives, except for the business expansion led to the establishment of a new legal entity (Article 23.5 of the Circular 123/2012/TT-BTC guiding the implementation of the Law on CIT 2008)
	From 2014 – now *(under the Law on CIT 2013)*
	Yes, the business expansion will be entitled to CIT incentives (Article 14.4 of the Law on CIT 2003)

As you can see from the table, implementation of such circulars has adverse effects on the Korean companies who have expanded their investments and businesses since 2009. It is unfair for those companies to suffer the relative tax disadvantages compared to the companies who invested between 2004 and 2008 and after 2014, just because they invested

between 2009 and 2013, without any reasonable justification. As such, we request that the lawful benefits of investors be guaranteed as provided by the Investment Law.

2. Foreign investment Ombudsman system

Furthermore, for the sake of sustainability of foreign investment in Vietnam, we propose the Foreign Investment Ombudsman System. The Foreign Investment Ombudsman system was first introduced on October 26, 1999, under the Foreign Investment Promotion Act, for the purpose of supporting the affairs of grievance settlement in foreign-invested companies operating in Korea. The Foreign Investment Ombudsman is commissioned by the President on a recommendation of the Minister of Trade, Industry & Energy via deliberation of the Foreign Investment Committee. He / She also heads the grievance settlement body, which supports the duties of the Ombudsman.

The Foreign Investment Ombudsman and its grievance resolution body collect and analyze information concerning the problems foreign firms experience, request the cooperation of and recommend the implementation thereof to relevant administrative agencies, propose new policies to improve the foreign investment promotion system, and carry out other necessary tasks to assist foreign-invested companies in solving their grievances. In particular, the Foreign Investment Promotion Act, partly revised on December 11, 2012, includes new provisions that strengthened the Ombudsman's authority to more effectively improve regulations regarding grievances faced by foreign investors. According to the new provisions, the Foreign Investment Ombudsman may request that the heads of relevant agencies report the results of their grievance handling and corrective measures. In addition, the Ombudsman can also report these agencies' failures to follow his recommendations to the Foreign Investment Committee, should such a case arise.

The Foreign Investment Ombudsman system is highly recognized as an important institutional device for international investment facilitation. The system has been introduced and discussed at various international venues, including UNCTAD and APEC. In April of 2012, at the 3rd World Investment Forum held by UNCTAD in Doha, Qatar, Russia announced its adoption of the Ombudsman system, while the Brazilian government had visited Korea to learn about it. More recently, Kaznex Invest of Kazakhstan announced plans to send its delegations to Korea to benchmark the system.

Korea's Foreign Investment Ombudsman system has garnered global attention for its pro-active grievance resolution efforts for foreign investors in Korea: around 350 cases, including around 90 cases of administrative intervention, were resolved in 2013 by revising laws or requesting the administrative cooperation of relevant ministries. Researchers from the World Bank, under which the International Centre for Settlement of Investment Disputes (ICSID) is run, conducted an in-depth analysis of Korea's Ombudsman system. In August of 2012, the Ombudsman's Office received a commendation from the Japanese Ministry of Foreign Affairs for its contribution to addressing difficulties faced by Japanese investors in Korea.

Korea, Japan, Taiwan, the U.S., the EU and other foreign investors are voicing a variety of complaints. When people with rich experience and knowledge in foreign investment are appointed as a foreign investor’s Ombudsman to facilitate the problems, Korcham is more than certain that many foreign and new investors will be able to have reliable and efficient services from the Vietnamese Government.

Therefore, it is highly recommended that the Vietnamese Government actively review establishment of the Ombudsman institution.

3. Overtime for Laborers

The Labor Law in Vietnam was amended on June 18, 2012 and has been effective since 1st May 2013. The amended Labor Law (10/2012/QH13 dated June 18, 2012) strictly prohibits the maximum overtime of laborers to no more than 4 hours a day, 30 hours a month, or 200 hours a year. Therefore, the maximum overtime for laborers allowed in accordance with the Vietnamese law is 200 hours per year unless otherwise agreed by the Vietnamese Government. In cases of violation of these laws, the company has to suspend its business for 1 to 3 months and face a fine of between 25,000,000 VND to 30,000,000 VND. However, KorCham believes that such penalties are too harsh. We urge that the Vietnamese Government ease the penalties from the current regulations and instead give a warning and allow time for the foreign investment enterprise (FDI companies) to make the required adjustments.

Furthermore, most FDIs are facing difficulties in satisfying overseas buyers' needs because it is hard to fulfill their production orders under the current restrictions on overtime for laborers. In addition, factories need to operate 3 shifts, which means that companies have to recruit more laborers. This will cause a financial burden for the company. Eventually, operating 3 shifts will result in management problems for the companies, especially during non-peak operation times.

As for the laborers, there is no opportunity for overtime compensation because of such regulations. Such restrictions on overtime prohibit laborers from voluntarily working overtime to earn overtime compensation. In addition, these restrictions deny FDIs the ability to offer laborers overtime work even though they want to. In other words, the Labor Law prohibits what both FDIs and laborers want. We are afraid that this kind of conflict will have adverse effects on the investment friendly legal environment for FDIs in Vietnam.[1]

Therefore: i) as the maximum overtime of most other countries is more than 300 hours, and ii) as the United States of America does not have any restrictions on overtime for laborers, we believe that the current law on the maximum overtime for laborers should be either amended from 200 hours per year to at least 300 hours per year, or removed entirely, as long as both the company and the laborer agree to the overtime work. We feel this will allow the FDIs in Vietnam smooth management and protect the laborers' income.

4. Transfer Pricing- Advance Pricing Agreements

The Vietnamese government issued Circular No.201/2013/TT-BCT ("Circular 201") regarding the Advance Pricing Agreements ("APA"). Korcham would like to point out several special features of the APA in Vietnam compared to APAs in other countries and make some suggestions so that the APA can act positively for both the Vietnamese Government and companies in Vietnam.

The most significant issue concerning the APA in Vietnam is that there is no roll-back provided in circular 201. One of the most attractive incentives for taxpayers seeking an APA is a rollback in an APA to resolve past open tax years (rollback period). A rollback may provide a cost-effective way to resolve an ongoing transfer pricing issue. Therefore, even before circular 201 was issued, there were requests from numerous parties to adopt the roll-back system in APA. However, the roll back which exists in most APAs in other

countries was not adopted, and this is regarded as a big obstacle for companies.

Furthermore, while the pre-filing consultation is a mandatory APA procedure according to circular 201, the number of required documents for pre-filing consultation is extremely complicated and takes a long time to prepare. Some documents even overlap with the required documents for the formal application procedure.

Companies in Vietnam are facing a lot of difficulties because pre-filing consultation requires thorough preparation from the beginning. In order for APA to be a more efficient system, KorCham recommends that the government revise circular 201 and the roll back system, and decrease the duration and number of documents required for pre-filing consultation.

III. CONCLUSION

In conclusion, we sincerely hope that our proposals and recommendations can be carefully considered by the Government of Vietnam and appropriate solutions can be promptly reached. As long as Vietnam continues along its current path of economic and legal reform, Korean enterprises will feel confident investing and expanding operations in Vietnam in many different areas of industries. In closing, KorCham is more than ever committed to working with the Vietnamese Government to develop a more favorable business environment that can continue to attract foreign investments to Vietnam and promote economic growth.

The Japan Business Association in Vietnam

STATEMENT BY JBAV
Mid-term Vietnam Business Forum 2014
Hanoi, June 5, 2014

Presented by
Mr. Yoshihisa Maruta
Chairman

Honorable Ministers, Your Excellencies, Ladies and Gentlemen:

First of all, I would like to express my sincere gratitude to Ministry of Planning and Investment (MPI) and representatives of Business Associations for giving me the opportunity to make a presentation at Vietnam Business Forum today.

1. The diplomatic and economic relation between Japan and Vietnam

Through the 40th anniversary of Japan-Vietnam diplomatic relation last year, as well as President Mr. Truong Tan Sang's visit to Japan this March, the diplomatic relation between both countries has been further strengthened. FDI from Japan toward Vietnam has continuously expanded in the past 3 years. The total amount of new investment and expansion investment in 2013 reached USD 5.88 billion, which was ranked top among countries and regions, and has greatly contributed to industrial development of Vietnam. Even though Japanese corporations are still keenly interested in Vietnam, failure in taking appropriate governmental measures (as stated below), investment from Japan may face a risk of reaching a plateau.

2. The Investment Environment in Vietnam for Japanese Corporations

As of May 2014, the number of JBAV member corporations reaches 1,319, making it the 2nd biggest Japanese Business Association among ASEAN countries, only after Thailand. This number is more than doubled from 604 corporations in 2007.

According to the annual "Status Survey on Activities of Japanese Corporations Operating in Asia and Oceania" by JETRO, 70% of Japanese corporations investing in Vietnam in 2013 continue to consider Vietnam as an important market and maintain its corporate strategy as "business expansion" in 2014 (This is a higher rate than most of other countries).

On the other hand, the dissatisfaction with business environment is getting prevailed. In particular, more than 60% of inquired corporations considered below issues as obstacles against their business operations: rapid increase of labor cost; complicate administrative procedure; lack of transparency of governmental policy; complicate tax procedure; incomplete legal system and lack of law enforcement transparency. These appraisals are more negative than other neighboring ASEAN countries.
Although Japanese corporations still hold very high expectation toward business

opportunities in Vietnam, the fact that above these issues keep raised affects investors' sentiments and eventually may hinder FDI itself. Improvement of business environment for existing corporations is definitely imperative for future socio-economic development of Vietnam.

Both governments have been cooperating to improve the business and investment environment through an effort called "Japan-Vietnam Joint Initiative" for more than 10 years (now in 5th phase of the Initiative).

Today we would like to discuss problems JBAV corporations are facing with from both short term and mid-to-long term point of view and would request Honorable Ministers present serious consideration to take improvement measures.

3. Short term problems in investment environment

3.1. Work permit

Since circular No. 03/2014/TT-BLDTBXH (January 20, 2014) of MOLISA took effect from March 2014, some Japanese corporations are instructed from authorities that new transferees who previously visited Vietnam even 1 day must have Certificate of Non-Criminal Record to get which Stay Certificate of the hotel previously stated is required. Moreover, issuing Certificate of Non-Criminal record for just 1 day-stay in the past is sometimes rejected by authorities. We would like to request application of this rule has to be more realistic and limited to only transferees who have previously stayed in Vietnams for a certain length of time.

3.2. Mandatory specification of steel products

From June 1st 2014, joint circular No. 44/2013/TTLT-BCT-BKHCN (December 31, 2013) by MOIT and MOST will take effect, and most of imported HS 72 steel products have to be gone through administrative inspection for domestic distribution. According to The Iron and Steel Institute of Japan's estimation, approximately 80% of steel products imported from Japan are assumed to be subject to the inspection. Implementation date and detailed administrative procedures are not yet clear enough, and thus this scheme may lead to confusion to Japanese corporations using imported steel, and eventually Vietnamese whole market as well. Thus, we would request that procedures be explained clearly.

3.3. Clarification of conditions for investment incentives

Decree No.218/2013/ND-CP (December 26, 2013) that took effect from January 1st 2014 is a big step to encourage foreign investment in Vietnam, however, conditions for investment incentives are still not clear and detailed. We would request MOF to clarify the conditions and take necessary measures to guarantee incentives to each investment project (i.e. issuing official letter to each individual investment project) to enhance stability and predictability of legal framework.

3.4. Guarantee the conversion of foreign currency for large projects

Big infrastructure projects are usually financed in hard currencies such as USD. On the other hand, corporations are required to settle in Vietnam Dong, thus it is necessary to convert to Vietnam Dong revenue to repay the debt. Currently, Vietnam Government intends to guarantee conversion of up to 30% revenues of VND into USD (Official letter 1604/2011/TTG- TN), however it is not enough to be bankable for international lenders. If Vietnam wants to attract large investment including power sector, guaranteeing the conversion of 100% revenues is essential.

4. Industrialization Strategy

4.1. The promotion and action plan of the Industrialization Strategy

After two year discussion of Industrialization Strategy between both countries, Decision No. 1043/QD-Ttg (1 July, 2013) by the Prime Minister has specified six priority industries: Electronics, Food Processing; Agricultural Machinery; Environment and Energy Saving; Automobiles & Auto Parts; and Shipbuilding. Developing such new industries will take very long period of time and requires consistent and practical government policies. First in all, feasible implementation plan which reflected past discussion between both countries has to be formulated and disclosed with the least delay. Japanese corporations are ready to support the plan and contribute to the development of Vietnam.

4.2. Development of the Supporting Industries

Fostering supporting industries is crucial to implement the above Industrialization Strategy. Let me cite JETRO's survey data about local procurement rate of Japanese corporations. The rate in Vietnam is 32.2%. Even though the number increased by 4.3 point since last year, still it is far lower than China (64%), Thailand (53%), Malaysia (42%), and Indonesia (41%). This indicates how costly for Japanese manufacturers to choose Vietnam. There are many competitive Japanese medium and small-sized corporations (SMEs) which Vietnam can potentially attract its investment to enhance these supporting industries. However, let me remind that cozy business environment with meticulous governmental support has to be created in order to attract such SMEs which only have with limited management resources (HR, Finance, etc..).

4.3. Human Resource Development

On August 14, 2013, JBAV signed MOU on human resources development with MOLISA, MOET and MOIT, which includes

- To provide more opportunities to learn Japanese craftsmanship or manufacturing.
- To provide more job opportunities in Japanese corporations in Vietnam
- To support to enhance skills of industrial workers
- To provide opportunities to learn Japanese business management style

Currently, above four issues are under discussion in Vietnam-Japan Joint Initiative Phase V, and JBAV would like to keep close communication with related Vietnamese Ministries on this.

5. Conclusion

Vietnam is the third-most populated country in ASEAN and has diligent and young labor workforce. Furthermore, it can receive the benefit from the geographical and resource-rich perspective and thus have significant opportunities to develop economy and industries.

On the other hand, unless well managed, economy cannot bolster fast growing young generation and provide employment opportunities to them. Vietnamese government is now tested for its discretion to make and sustain long term industrial development policy.

Turning our eyes to even immediate challenges, Vietnam is now under the very important stage where AEC (ASEAN Economic Community) will be enforced in 2015 and the TPP is currently under final discussion. Especially, Vietnam will be exposed to intensified global competition in 2015, most of the import tariff will be removed in 2015 under ATIGA

(tariff on some products remains till 2018).

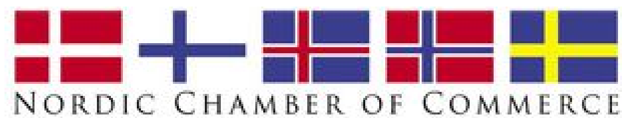
Thailand is shifting its policy to higher stage of industrialization and gradually cuts incentives to labor-intensive industries and promotes high-value added industries instead. The surrounding CLM (Cambodia, Laos and Myanmar) countries are focusing on capturing the needs of so-called "Thailand plus One" corporate strategy and try to attract labor-intensive industries as Vietnam did in the past.

Under such circumstances, unless government has clear vision of industrial development and seriously copes with rapid wage increase and stricter overtime regulation than other developed countries, current Vietnamese competitive advantage in labor intensive industries may disappear, and Vietnam cannot attract industrial capital and may be fallen into just a destination of final products made in other neighboring countries.

Our last but not least suggestion to Honorable Ministers present is that Vietnam should listen to the corporations operating in Vietnam already, treat them favorably but fairly in order to strengthen their competitiveness. Following corporations now considering coming to Vietnam is watching carefully how preceding corporations has been treated.

We Japanese corporations are proud of our corporate principles of contributing to the society, and are thirsty to put our principles into practice in Vietnam with support of Honorable Ministers present.

Thank you very much.



INVESTORS FEEDBACK
05.06.2014

Prepared by
Mr. Sigmund Strømme
Chairman Nordcham Ho Chi Minh City

Government leaders, business representatives, ladies and gentlemen, The Nordic Chamber of Commerce – Nordcham, appreciates this opportunity to share its views on the business climate in Viet Nam.

As a small Nordic business community with a long history in Viet Nam we would like to share our view on s few specific areas which Nordic investors focus on.

RENEWABLE ENERGY WIND & SOLAR

The potential for wind and solar energy in Vietnam is high, and Nordic countries are no stranger to these industry. Given that traditional power development takes years to develop and no new systems are due to come on line, wind and solar development can be implemented in a couple of years and could bring 1000's of mega-watts in a few years with private investments. However, before this can be done, the country needs to further enhance its business and regulatory climate, such as improve policy and regulatory mechanisms to enable wind and solar power project development, engender greater transparency in governmental decisions on energy issues, provide greater incentives for wind and solar industry investment and project development, enhance grid and transmission infrastructure, enable access to cheaper financing options as well as provide governmental guarantees on the purchase of wind power and solar between private own utilities and private commercial users.

Without these issues addressed, investment from Nordic companies into the renewable energy sector will continue to be limited and risky. Nevertheless Nordic companies will continue to prioritize business in Vietnam by continuing their work with users, local business and Governmental agencies through discussions and engagement on these issues, to assist Vietnam's rural population (bottom of the pyramid) and those most affected by climate change to have a safe sustainable power by renewable energy.

ENVIRONMENT

Viet Nam like the Nordic Countries share thousands of years of habitation in areas close to sea level which has produced a share relationship of our love for clean environment. Protecting the natural resource from climate change and pollution is a high priority in Vietnam and Nordic countries. Viet Nam today is seen taking proactive action on industrial polluters and in the reduction of CO2; however penalties for polluters are low compared to income of these industries. Our earlier industrialization of Nordic countries has allowed us to developed proven technological know-how in pollution reduction. When Nordic companies invest overseas, they are obliged to follow the same strict environmental rules as applied in their respective Nordic countries.

We recommended that you continue your vigilance on Environment issues and be selective, and choose only investors that want to accept to work within Viet Nam using the highest environmental standards, especially in waste water treatment and CO2 reduction.

A clean and healthy environment is also very important in order to stimulate a growing tourist industry.

LABOR AND HUMAN RESOURCES
The Vietnamese workforce is young and dynamic, even compared to other Asian countries, and is one of the main and important assets of Vietnam, which can stimulate further foreign investment.

Many of our companies have difficulties in recruiting skilled workers and also engineers. We believe it is necessary for the authorities to focus and invest more in education, particularly vocational schools and engineering, in order to upgrade the knowledge and standard of the workforce.

As to foreign experts that are needed in the initial phase of the establishment of new investments, it should not be made to complicated, as they are needed for a proper technology transfer. For the Nordic companies we believe that the cost of bringing in foreign nationals will anyway limit their use, to only the period the investors judge it feasible.

LOGISTIC/TRANSPORT/PORT SITUATION
Many of our member companies are still experiencing great problems due to increased transport and logistics cost. In is important to improve the cargo handling time and cost in order for Vietnam to remain competitive compared with its neighboring countries.

Present ports need to be improved and new ports need to be built, this applies both for container terminals and bulk-steel cargoes, however the current cap on foreign shareholding is often limited to 49% only. As the main users of the ports are mostly foreign shipping companies, as users they can participate in such large investments in order to make them successful. We recommend that in order to accelerate investment in this important sector the policy is eased to allow at least 70% or 100% foreign shareholding in transport and port investment projects.

Recently new strict weight control for trucks has been applied, and do understand the need to control the weight and keep the road standard. However the application is not always clear and is further complicated by the weight permitted to be transported on trucks according to international standard is different. Resulting in containers arriving to Vietnam are now overweight according to new Vietnam standard. As the weight difference is only about 10 % we would recommend that the rules are adjusted to International standard to make the cargo flow for import /export easier and not penalize Vietnamese exporters having to short load the containers.

Finally as from January 2014 in accordance with the WTO commitments the foreign ownerships of certain logistic, forwarding and shipping related activities should be increased, however we have not yet seen any concrete regulations about how this should be applied and what is now permitted. We trust that these regulations will soon be issued so that we can get clarity on foreign ownerships in such companies.

IMPORT TARIFF FOR NPK FERTLIZERS.

Several of our members are producing NPK fertilizers in Vietnam of high quality supporting the development of the agriculture development. We understand and appreciate the recently applied import tariffs for raw materials Urea and DAP as well as the import tax on NPK which is protecting local producers including our members companies. However one of our members, who is the world leader in NPK production, is also importing and distributing a special type of very high quality NPK fertilizer from Norway and Finland to Vietnam, this product is mainly for the coffee production. This special type of NPK fertilizer is today not produced in Vietnam. We would therefore recommend that these import tax regulations are adjusted to apply for only those type of NPK fertilizers that are today produced in Vietnam.

From Nordcham's perspective, our members are confident about their investment in Vietnam which is based on a long term view. Several new Nordic companies have increased their present investments and new companies have been established during the past year.

We appreciate this opportunity to participate in the Vietnam Business Forum and thank for this opportunity to exchange views and enhance understanding between the Government of Vietnam and the business community.

We wish good health to the Minister, representatives of business associations, and the diplomatic corps, and all the representatives here today.

Section II

INVESTMENT & TRADE

FROM AGENDA TO ACTION: PREPARING FOR NEW TRADE AGREEMENTS

Presented by
Mr. Fred Burke
Co-head of Investment & Trade Working Group

Your Excellency, Mr. Prime Minister, Minister Vinh, Vice Ministers and honored guests,

I am very pleased to have the chance to present today on behalf of the Investment and Trade Working Group. A more detailed version of our contribution with some supporting documents is included in the book, but please let me briefly summarize the key points of our suggestions on the question of how to prepare most effectively for accession to new free-trade agreements. Such agreements include the EU Vietnam FTA ("**EU FTA**"), the Trans-Pacific Partnership ("**TPP**"), the Regional Comprehensive Economic Partnership ("**RCEP**") and ASEAN Economic Community 2015 ("**AEC 2015**"), among others.

Vietnam stands to gain uniquely and even disproportionately in some respects if it can make some adjustments to its investment and trade environment. To this end, we have been asked to respond specifically to three questions:

1. First, what are the recommendations from working group has to fix the current problems in the investment and trade environment?
2. Second, what are the challenges Vietnam's faces when entering into new trade agreements?
3. Third, what does Vietnam need to do to prepare for the new opportunities presented by these trade agreements?

We respectfully set out our group's various comments and suggestions below.

I. INNOVATIONS REQUIRED IN THE INVESTMENT ENVIRONMENT TO "FIX PROBLEMS"

We would like to raise five basic points in this area.

1. Response to the Disturbances of the Week of May 12th

a. Immediate Follow up and Support Measures

First, we must address the aftermath of the disturbances in certain industrial zones during the week of May 12.The full impact of the disturbances of the week of May 12 on the Vietnam supply chain have yet to become apparent. We are hearing reports of serious disruptions in certain important industries, especially certain export related industries which had up until now been the backbone of Vietnam's economic growth story.

The immediate needs of enterprises to restore stable production and minimize the impact on the labor force were raised in a constructive meeting on May 20th in Hanoi. The Prime Minister released new set of measures that are intended to mitigate the impact for affected enterprises. While these measures are welcome, they do not go far enough to account for the damage, much less restore the sector to its previous competitiveness. Moreover, longer-term questions about the supply-chain and international sources of raw materials need to be addressed.

For the short-term, the most immediate issue was alleviating the impact on the workers themselves. In respect to social insurance, unemployment insurance, etc. help is badly needed. Records have been destroyed by vandalism and the affected employers need government departments to help replace them or manage without them. Government supplements in terms of pay outs of social insurance and unemployment insurance for the affected workers should be expedited to ensure that all workers receive what they are entitled to a timely manner. Work permits should be issued on an extraordinary basis to enable manufacturers whose staff have fled the country to return immediately. The measures suggested in the May 20th Notice from the Government Office go some way to addressing these issues, but relevant authorities still have to implement them.

More on measures to mitigate the impact of the disturbances in the near term will follow in the sections below, but these immediate financial measures for the workers' well being are the most critical, if they have not already been addressed at the end of May in the normal payroll cycle.

b. Scope of Support Program

In terms of compensation for the disturbances, there is also the issue of how broadly this compensation will be extended. Many enterprises are pointing out the fact that even though their factories were not burned down, they are being severely impacted for one reason or another. Sometimes it is their key Taiwanese or mainland Chinese staff who have left, sometimes it is the investment project that has been suspended or cancelled by the worried investor, or the tourist groups that will not be arriving to stay in Vietnam's beautiful new resorts. There should be some measures to facilitate the recovery of these enterprises too, until the market gets back to normal, so may we respectfully suggest that some of the measures set out in the May 20th Notice be applied broadly to all enterprises however affected, directly or indirectly?

c. Improving Workers' Lives

Third, in order to reduce the chances that such disturbances happen again in the future, some members have made constructive suggestions for consideration. While we appreciate that the initial trigger for the demonstrations that lead to the disturbances was an external factor, it must be recognized that there were some internal grievances that fuelled the violence and destruction that occurred overnight between Tuesday and Wednesday of May 13 May 14. According to many of the manufacturers in the affected areas, it seems to have been a small minority of workers, instigated by still unidentified outside influences, behind the disturbances. We would like to know what the Government has learned about the events that lead up to the disturbances. In the meantime, we note here that while peaceful demonstrations held in accordance with law are a normal part of the democratic process in all modern countries, illegal vandalism, rioting and theft should be dealt with swiftly in accordance with law. It was the delays on the night of May 13th that lead to the biggest property damage in certain key industrial zones, so measures for more rapid deployment of control measures to stop illegal violence should be developed for the future.

For the longer term, some of our members have suggested certain measures that industrial zones could use to help improve the lives of their workers with recreational and community facilities. These facilities might include not just job placement offices, but health and recreation facilities such as a swimming pool, parks and athletic facilities so that workers can relax and have a better standard of living. Such facilities need not be expensive, if the proper incentives are given to the industrial zones, and they would not seem to violate any rules on subsidies for export manufacturers. To supplement the industrial zone and government support for this idea, perhaps some of the 2% of payroll

that is allocated for union dues could be mobilized for this purpose? This may seem like a small move to many people, but done properly, it could reinforce the strong worker support already enjoyed by the majority of employers in these zones.

2. Too timid market opening and global competition requirements

Turning to the problem areas that need "fixing" for Vietnam to take fuller advantage of international trade agreements, we believe that in many cases, Vietnam has opened its market to foreign goods and services that support the export economy, but in many ways its remaining market access and national treatment limitations handicap exporters from competing in international markets by limiting the international standard services and inputs they require to compete.

There are many examples of this problem, and each one may seem but a small detail to high-level policy makers. But to businesses any single measure may mean life or death in a competitive global marketplace.

Example 1: H.S. Code Requirement for Foreign-Invested Trading Companies

To take just one example: foreign invested enterprises license to engage in trading must list the specific H.S. Codes for each product they trade in their Investment Certificate. Unless the product's H.S. Code is in the Investment Certificate, the company cannot trade in that product. This applies to foreign invested trading companies only.

It often takes 6 months or more to amend an Investment Certificate to add a new good, even if that good is not on any legal restricted list. This obviously handicaps traders in terms of the response time for local projects and exporters when they need specific new inputs for their exported products, or to meet local market requirements. This is also a form of*de facto* discrimination against foreign invested enterprises as compared with local enterprises, who do not need to list these H.S. Codes in their Business Registration Certificates (local companies do not need Investment Certificates to engage in trading, but more on that later).

Moreover, even for the local enterprises, as noted below, there is still the issue of what happens when these local enterprises mobilize some foreign capital to meet their funding needs? Do they become "foreign invested enterprises", subject to the same H.S. Code requirement, as some local investment officials insist?

There are reports that the Investment Law may be amended to do away with this requirement and that would be very welcome.

Example 2: Education and Vocational Training

While educational and vocational training services were committed areas under Vietnam's 2007 WTO commitments, these areas have still not seen the flourishing of activity that they could have with bolder support from the Ministry of Education and Training, and other relevant authorities. There is clearly a huge thirst for knowledge and job-ready graduates in Vietnam, and many foreign educational institutions are ready to step in. A few universities and vocational schools have, very slowly and after much wasted time, got limited programs off the ground, and there have been a few company-driven programs like the one Intel has invested in to produce the skilled workers it needs. But so much more could be done to mobilize international capital and know how to help train up Vietnam's workforce. This goes not just to the curriculum, the investment appraisal process but even to issues such as work permits teachers and visas for international students. This is indeed an area where

more robust follow through on the WTO commitments is needed to develop the workforce Vietnam needs to climb the value chain.

3. Recognition and Enforcement of Foreign Arbitral Awards

Some members have complained that the record of recognition and enforcement of foreign arbitral awards in Vietnam remains very poor, notwithstanding that it has been a member of the 1959 Convention on the Recognition and Enforcement of Foreign Arbitral Awards for nearly two decades. The Vietnam International Arbitration Center ("**VIAC**") is developing well as a viable alternative to arbitration in the more established regional and international centers, but it only undermines Vietnam's reputation as an investment destination when foreign investors learned that applications for recognition and enforcement are routinely turn down based on the most spurious of technicalities. This is another thing that needs to be "fixed" to reassure foreign investors.

II. CHALLENGES FOR VIETNAM

Clearly, Vietnam has more to gain than it has to lose from participation in the pending set of new trade agreements. If the last 20 years have showed anything, it is that the net benefit to the country has been greater as a result of its joining the several important trade agreements Vietnam has already exceeded to, including most importantly the WTO Agreements. Although the benefit of WTO accession was muted by the Global Financial Crisis that followed Vietnam's accession in 2007, nevertheless, its benefits in terms of GDP growth, boosting exports and producing jobs and taxes has been obvious. Some of the shortcomings that became apparent during the WTO implementation process remain. So what are the shortcomings and how can they be addressed?

Here, much discussion takes place regarding the need for better infrastructure, and that is clearly important. But there is a counterpart that is never discussed that is the what for want of a better word I would describe as "superstructure". By this I mean the way of thinking of many officials and business people as they implement their tasks and try to survive in the new economy. If this way of thinking does not shift in the direction of how to provide international standard services in areas such as customs, business registration, product registration etc., then Vietnam will be frustrated in achieving its intentions under these agreements. The superstructure will be too weak, even if the infrastructure is available.

1. The "Superstructure" Issues : More Administrative Reform Needed, Better Mentality

The important Administrative Reform program that we know as Project 30 resulted in certain tangible benefits, but much work remains to be done this is an ongoing struggle. Sometimes, limits on the supply of international standard services in the domestic market hinder domestic enterprises' ability to compete in the global marketplace. As noted above, this is a topic that requires an overall change to the way of thinking away from "control" to "support" of legitimate business activity.

Example 1: Freight Tax Exemption under Double Taxation Agreements

For example, Project 30 resulted in an attempt to simplify the process for freight transport companies to claim their legal exemption from the 2% freight tax on international goods where a Double Taxation Agreement applies. However, this potential reduction of 2% in the cost of export products has been stymied by the fact that the exemption is still too difficult to claim in practice. We have submitted a lengthy paper regarding the best practices in the international marketplace and our suggestion for Vietnam to further streamline the domestic procedure. We hope that this will help Vietnam achieve its own objectives as stated under Project 30 and its Double Taxation Agreements.

Example 2: Trading Companies - Trans-shipment Limitations
Second, there is the example of trading companies that are foreign invested who would like to engage in trans-shipment of goods from other countries into regional target markets such as Cambodia, Laos and Thailand. Allowing foreign invested trading companies to sell their products not just in Vietnam but into these other markets under the rules governing trans-shipment would be advantageous for Vietnam in terms of creating jobs, taxes and know-how. This should be allowed under Decree No. 187 of 2003, but we do not understand why the Ministry of Industry and Trade still does not favour this kind of business activity. We hope that its concerns can be articulated and addressed so that Vietnam can capture this potential business and not let it go to another competing jurisdiction in the region.

Example 3: Lack of Facilitating Environment for e-Government
Third, while the rest of the world is rapidly and developing e-Government solutions to facilitate the emerging "e-economy", Vietnam remains locked in a paper bound system that is an antiquated holdover from the colonial era. Take a couple of random examples. One, a Danish citizen who applies for a work permit cannot meet the requirement for a "No Criminal Record Certificate" from Denmark because such certificates are only available online and their print outs are not signed by a human being, therefore they cannot be legalized and therefore are not accepted in Vietnam. Similarly, companies from some US states cannot meet the requirement to produce a legalized copy of their audited financials because they are submitted online and the Secretary of State of certain states does not sign them or certified copies of them. Vietnam has taken steps to proceed to the Apostille Convention and this is a move in the right direction, but noting that the concept of appostille itself is becoming an anachronism in the modern world and better, more "e-friendly" solutions need to be researched and adopted.

Example 4. Lack of Duly Licensed International Ship/Rig Classification Service Providers
A fourth example is the lack of fully licensed classification societies for international ship repair and ship manufacturing, including offshore oil rigs. Although a few of the several international companies that provide this vital service are operating in Vietnam on an *ad hoc*, informal basis under the umbrella of the Vietnam Registry, their operations have not been normalized in the form of duly licensed commercial presences with the relevant business lines in their Investment Certificates. They would like to set up normal business operations here to support Vietnam's ship building and repair industry. The case of VINASHIN illustrates the importance of these invisible services in supporting Vietnamese enterprises as they try to compete in the international marketplace. In VINASHIN's case, due to the lack of these international classification service providers, the shipbuilder could never have sold its ship building or repair services to foreign buyers because Vietnam lacks mutual recognition agreements between Vietnam Registry and the target markets.

Example 5: Dissolving Enterprises
Fifth, and last for the time being, the procedures on dissolving an enterprise remain overly cumbersome, prompting the comment remark that there are thousands of enterprises that want to "die" but cannot obtain a death certificate. Delays in completing tax audits are the main reason cited as the tax offices say that they often do not have enough officers to do tax audits. To find a solution to this problem, the tax office and the Department of Planning and Investment of Ho Chi Minh City have recently proposed to the People's Committee there that the enterprises should be allowed to be dissolved based on the audit result from an auditing company, but the auditing company will have to be responsible for its audit reports. To further streamline the process, the enterprise would be allowed to return the Business Registration Certificate and chop to the tax office instead of going back to the Department of Planning and Investment. It remains to be seen if the People's Committee will agree to this

proposal, and whether the auditing companies will be willing to assume this legal liability, but it would certainly provide a better procedure than the current one.

Example 6: Licensed Production of Medical Equipment for Export and Clinical Trials
Government should apply common sense in applying domestic regulation to exported products. For example, there should be no need for Vietnamese clinical trials of drugs and medical equipment that are being produced under license exclusively for a foreign export market. Clinical trials, required for medical products sold into the domestic market, are expensive and time consuming and they should only be required for goods sold into the domestic market, and only where reliable international clinical trials are not available. Yet the draft of the Decree on the Management of Medical Devices that was released on 11 March 2014 would have required clinical trials even for pure export sales.

This requirement was thankfully dropped from the most recent draft of the Decree thanks to the good effort of the drafters to seek comments and the timely feedback from the business community. However, there remain some issues regarding the requirements for the registration dossiers and the procedure for registering for the acknowledgement of satisfaction of conditions for the manufacturing conditions for medical devices that may inhibit the development of the manufacturing industry in Vietnam. These remaining issues were presented in the paper sent to the Ministry of Health on March 28th.

2. Infrastructure and the PPP Program

The next major challenge for Vietnam is infrastructure. This is an area where in the last couple of years Vietnam has made remarkable gains, especially in terms of ports and roads, so that supply is meeting demand more often. However, there are concerns regarding the proposed new PPP program and specifically that notion that it might replace the BOT program and even private infrastructure investments. No doubt, you will hear more from the Infrastructure Working Group on this point but in terms of investors and manufactures this is a key issue because of the concern that the PPP regulations would only slow down infrastructure development, which is already challenged in light of the important role that Chinese construction companies and key suppliers have been playing in the recent period.

III. CAPTURING NEW OPPORTUNITIES

There are many measures and indeed industrial policies that Vietnam can adopt to take better advantage of the opportunities presented under the trade agreements it is negotiating. In addition to the points noted above, the following are worth mentioning.

1. Attracting Investors into a new Textile Industry to Supply the Garment Sector

The most important of these, perhaps, is the industrial policy to attract textile manufacturing investment, preferably in concentrated industrial zones with relevant environmental services and energy supplies. In order for Vietnam to enjoy the TPP duty rates for the garments it exports, the raw materials must originate in a TPP country, or at least they must have been spun, woven or dyed in one. This means that it is not necessarily required to grow the cotton or raise the sheep in a TPP country in order to get TPP duty rates for cotton and wool clothes. It is however necessary for the cotton or wool to have been spun, woven or dyed in Vietnam. As we went out in our detailed paper, this industry requires serious capital investment and this will be an even bigger challenge in the current post-disruption environment. Policies supporting infrastructure for wastewater from dying operations will be critical, as is reliable access to electricity. More details and specific issues are raised in our paper.

2. Customs

There are a number of issues that come up in the customs area that Vietnam should address in order to improve its competitiveness.

a. Advance Ruling System too Narrowly Applied

First, the implementing procedures for the advanced rulings system that the new customs law introduced last year, have not gone far enough to make that procedure available to most traders. Obviously, the burdensome paperwork requirements, including the signed contract for the good in question even before you have a custom's ruling, we intended to focus the mechanism on existing large-scale manufacturers and general traders. However, if there is going to be an advanced ruling system, it should be open to all commercial traders. We hope that this mechanism can be streamlined and perfected going forward to eliminate the unnecessary documentation and make it more reliable.

b. Advance Pricing Agreement ("APA")

Similarly, the Advanced Pricing Agreements used to manage transfer pricing need to be more legally authoritative. There is no point in negotiating an APA with the customs authority if it is not legally binding.

c. The New Customs Software System

As noted already in the presentation by Am Cham, and as discussed at the Ho Chi Minh City forum in March, the introduction of the new software for managing customs clearances is facing serious problems. We are glad that the General Department of Customs agreed to slow down the introduction of the new system to a few pilot provinces and we hope that the lessons learned in those provinces will enable the eventual roll out of an improved system nationally. We look forward to continued cooperation and communication with the General Department of Customs to make this transition as smooth as possible.

d. Tracking and Transparency

Certain government departments have recently introduced excellent new procedures to enhance transparency and improve service levels. For example, the Ho Chi Minh City Department of Planning and Investment now sends e-mail updates to applicants for Investment Certificates updating them regularly on the status of their applications.

This is an encouraging innovation and it should be applauded. Customs could adopt similar measures to track and report on the time required to clear customs, providing an objective measure of its service record as compared to other customs administrations in the region (who already report this data).

3. Investment Licensing

Much work has been done to come up with new proposals to streamline the Investment Certificate issuing process. It is even proposed to eliminate the investment certificate altogether, except for "conditional" areas. This is a very constructive orientation, but it may not go far enough.

a. Doing away with "Investment Certificates"

If all businesses, both foreign and domestic, can rely on a single uniform document, being the Business Registration Certificate, to evidence their legal establishment and identity as a legal entity, then the Investment Certificate is probably altogether unnecessary. The proposal to retain the Investment Certificate for "conditional" areas may not be relevant because all of those areas are already governed by branch-specific regulatory requirements in each of the regulated sectors they fall into. Whether it is property

development, infrastructure, multilevel marketing, insurance, legal services, securities, banking and finance, construction, health services, telecommunications, etc. - all of these areas for investment are already subject to specific licensing procedures that obviate the need for an Investment Certificate. Moreover, it we are concerned that it will create confusion in the marketplace especially in terms of capital raisings and other regulators, if the system is changed so that it is not exactly clear when Investment Certificate is needed. Further study in this regard is required to mitigate such confusion.

b. Mobilizing Capital from Abroad

Private Vietnamese companies, not to mention state owned enterprises, need foreign investment to take advantage of the opportunities that will arise in the international marketplace. Getting that capital, and expertise that goes with it, remains a serious impediment to their taking full advantage of international trade agreements. This issue is still a serious disincentive for Vietnamese companies to mobilize capital. For example, if a Vietnamese company wants to raise new capital by issuing new shares to a foreign investor, some local authorities would require both the local and foreign investors to apply for an Investment Certificate. This could be done away with if the proposal to eliminate the Investment Certificates adopted in the pending round of amendments to the Law on Investment.

4. Work permits

Turning to the subject of work permits, this remains one of the most common concerns of foreign investors, not to mention more and more Vietnamese enterprises.

First, it should be clarified when work permits are necessary. For example, workers present in Vietnam for a limited period of time under cross-border service contracts should not be required to get a permit if they are not being paid by a local enterprises and they are not on the local payroll. The measures announced by the Prime Minister on May 19, which involve returning to the old system of five years of experience or four years university level education, rather than ***both*** of those, would be welcome if applied across the board to all enterprises because, as noted above, all enterprises are in fact being impacted by the current supply chain disruptions.

A radical revisit of the current rules should be initiated, especially in light of the special circumstances we are facing.

5. Avoid Impractical New Rules - Regulatory Impact Assessments

The point is to avoid passing impractical new rules and to follow more strictly the requirements for regulatory impact assessments of new legal measures.

a. 90 Day Deadline for Chartered Capital Contribution

For example, in the draft amendments for the Enterprise Law, it is proposed that investors must contribute all of their charter capital contributions within 90 days of the issuance of the investment certificate friends or perhaps business registration certificate. This an impossible requirement if it applies across the board to all kinds of enterprises, such as real estate companies as well as smaller service businesses. It would only increase the cost of capital for Vietnam to require that cash funds come in and sit in a bank account awaiting a construction contract progress payment that may not be due until years into the future. Moreover, the requirement is somewhat discriminatory, if applied in the current legal framework that distinguishes foreign and domestic enterprises, because it is easy for a domestic enterprise to raise its charter capital anytime in most sectors, while foreign invested companies must seek discretionary (i.e., unpredictable) approvals.

We only request that this proposal be reconsidered. It is reasonable to set the liability of the foreign investor at the amount stipulated as charter capital so that it is liable for the debts of the enterprise up into the full amount of charter capital stipulated. But the liability of the foreign investor to pay in the charter capital in the event that the company requires the funds, is different from requiring it to pay and those funds within a 90 day period.

6. Approaching New Trade Agreements

The new round of trade agreements that Vietnam is currently negotiating are broader in scope and deeper in reach and not like anything it has negotiated previously. It will require a globally competitive domestic platform for services, infrastructure, intermediate goods, etc.

To fulfill Vietnam's potential, the domestic market should be inclusive, sustainable, equitable and "green" in order to meet the demands of the 21st century marketplace. FTA's are no longer just an issue of duty rates; they reach into "behind the border" issues that impact trade. It is also necessary to develop the superstructure or mindset to take fullest advantage of these opportunities.

The recently agreed "Bali Package" of WTO-related trade facilitation measures is a good step for all the WTO members in terms of trade facilitation issues, food security and LDCs, but it is not enough to leverage a country like Vietnam up into the next level in the value chain.

Vietnam must be careful not to miss the train as it leaves the station, for once it is gone it may is hard to catch up. Vietnam experienced challenges when it wanted to join the WTO, a "club" that had been established by members years prior and became harder to join as a new member.

To maintain competitiveness in the global economy, it is important not to unnecessarily interfere with the marketplace and distort market pricing. Vietnam's hard work to marketize fuel and energy prices in recent years is one example. On the other hand, the issue of powdered milk and infant formula has been a controversial one in Vietnam. I personally know of two milk formula production projects that were put aside simply because of the unpredictability introduced by the price control system. This means that far from keeping the price of milk low, the promoters of the price control system are unintentionally restricting demand and thereby increasing milk prices. If it is really price that you're concerned about, it is better to address that with supply-side measures, in our view. This helps keep the entire economy on a sounder footing, functioning more efficiently. Avoiding price controls also helps defend against "Non-Market Economy" charges from trading partners that Vietnamese exports are subsidized or sold below fair market value.

The Investment and Trade Working Group has done a lot of direct work on the proposed amendments to the Enterprise Law and the Investment Law. Some of these materials should be in the book. Some protectionist tendencies that would limit competition and handicap the Vietnamese enterprises in international markets have arisen, but generally speaking, much good thought, expertise and experience has gone into these discussions.

But it is clear that the law itself cannot create the kind of environment where the Vietnamese enterprises are supported to compete. They need access to world class services such as Dun & Bradstreet reports on their counterparties, standards and classification services for their goods and services, including technical training on how to

meet those standards, risk mitigation mechanisms such as insurance, derivative tools and futures markets.

Finally, the elephant in the room is today is China. There has been much talk recently by some of the smartest people in Vietnam about weaning the country away from Chinese raw materials and services reasons of national security. While self-sufficiency is a nice dream, it is an impossible fantasy in the real global economy we live in today and Vietnam's pragmatic "integration" strategy has been successful by recognizing that reality to date.

Vietnam is already integrated to some extent with the Chinese economy, just as we are with the rest of the global economy, and Vietnam has enjoyed some of the success of the successful China supply chain. Looking at this issue objectively and rationally, we have to ask ourselves how realistic it is to avoid sourcing from our northern neighbour. Whether it is steel for infrastructure projects, construction services or many other inputs and raw materials, Vietnam competes more efficiently in the international market to the extent that it can rely on cheap inputs from China. The question then is how to co-exist peacefully, and here we can only hope that the leaders of both countries can find a way to co-exist and cooperate in the future.

CENTRAL LEVEL COORDINATION FOR TEXTILE INDUSTRIAL ZONE ESTABLISHMENT

Prepared by
Investment and Trade Working Group

Context: For Vietnam to take full advantage of the opportunities provided by the pending Trans Pacific Partnership Agreement, it needs to have a reliable source of textiles (raw materials, spinning, weaving and dying) in a TPP member, or domestically. Industry sources indicate the best source would be the creation of a domestic textile industry. This is feasible, though central coordination and support are a must.

Background: The transpacific partnership or "TPP" contains rules of origin that may be disadvantageous to Vietnam garment exports because they require the raw material or textiles in those garments to be produced in Vietnam or another TPP country in order for them to enjoy preferential TPP duty rates. Though Vietnam has a strong apparel industry (cut and sew), it is far from being able to attract and nurture this high capital industry to produce such textiles. That is lacking is three things: (1) a large area where a critical mass of textile industry players could situate their production facilities. (2) Reliable sources of electricity. (3) Water treatment facilities especially for the dying industry which is a critical part of the feasible textile manufacturing process that could be moved to Vietnam.

The garment sector is perhaps Vietnam's most important employment generator, and it enables capital accumulation that has been channeled into other parts of the economy, so it is an important driver for Vietnam's sustainable economic development.

Solution/Proposal: AmCham and its sister chamber from Hong Kong have already had productive conversations with provinces in potential leaders in Binh Duong and elsewhere regarding this concept. Basically, they are receptive to it, but without central government support and coordination it is impossible to implement at the provincial level alone.

One of the issues that must be considered is the environmental impact of the dying industry. Dying can be a generator of harmful effluents. It would not be suitable to let these effluents be dumped into the rivers in Vietnam where they maybe upstream from food sources such as shrimp and rice. However, in some countries the effluent standards for die waste are somewhat lower for waste that goes directly into the ocean as compared to waste that goes into rivers and lakes. In other words, situating Vietnam's industrial textiles manufacturing area in a zone near the ocean may help alleviate the capital cost of requiring a very high water treatment standard. This could be done without material damage to the environment because of the absorptive capacity of the ocean as compared to rivers and lakes.

In any event, it is critically time sensitive that this issue be addressed quickly in order to resolve the problem before the end of whatever phase in period is ultimately agreed to in the TPP. According to our information, the 3 to 5 year window may be available for a very limited number of raw materials that are in short supply within the TPP countries. Moreover, it would be up to the buyers in the United States to decide which products to apply for exceptional treatment, not the Vietnam sellers. Vietnam can import textiles from other TPP countries and still get the TPP duty rates in the US market, however, it would be more price competitive to have a domestic source of raw material and this would generate more jobs and taxes domestically too.

Suggestion: Clearly, given the high capital investment required, this is not an industry that will spring up out of the ground by itself. It needs government coordinated policy support. We'd like to suggest that the Prime Minister to convene and in a ministerial working group to put together the basics of such an industrial policy, and we would muster a pledge to liaise with our colleagues in neighbouring countries to seek their commitments and support for this initiative.

Working Group Members' Additional Concerns & Suggestions

In addition to the suggestion above, members of the Working Group have the following additional specific comments and suggestions regarding the strategy for taking full advantage of the TPP and respect of textile and garment industry.

Move Quickly

First, they stress the importance of using the phase in periods to prepare for the full application of the Yarn Forward period that is ultimately negotiated. Whether that period is three or five years, it is extremely important that action be taken at the outset of this period to install the textile production capacity necessary to supply the garment industry's needs by the time the period expires.

Vertical Integration - Petrochemicals?

Second, members encouraged the government to consider the prospects for vertical integration with the petroleum industry along the model of the development of the petrochemical industry in Taiwan and South Korea in years past. This is important for the production of polyesters and man-made fibers.

Formosa Chemicals in Taiwan is probably the best example. They built a man made island 10km long in Mai Liao that encompasses a completely vertically integrated petrochemicals and plastics complex, taking crude from ships and converting into upstream petrochemicals for industry use and downstream plastics that are sold into a wide variety of end uses, not only textiles. With the oil resources available to Vietnam, and the population, this would be an investment that could open a brand new industry, and create downstream opportunities for the creation of new companies and jobs (injection molding for example), along with textiles.

The long term success and global competitiveness of Korea, Taiwan, and even Singapore was underpinned by the creation of massive petrochemical complexes that allowed them to use the by-products domestically to create or strengthen industries, or trade them on the international market.

Mobilize Existing Equipment

Third, it has been reported that Vinatex has some very under-utilized assets in the form textile production equipment in several locations around the country. Currently under-utlized spinning equipment in is in the process of exploring how it can be used more effectively, for example to make yarns for fabrics, but the actions on how to use it the most effectively should be a part of a wider and more comprehensive strategic roadmap and plan. Seems that better inventory and mobilization could address the local production challenge to some extent.

Concerns about Focus on Cotton Industry

Fourth, there is discussion of a proposal to develop the cotton growing industry in Vietnam so that cotton for exported garments could be sourced domestically. However, there are

certain disadvantages to this approach that members of the industry would like to note for consideration.

- Cotton is a very competitive global commodity and some of the other countries who produce it have important real or and man-made competitive advantages. Facing the greater economies of scale and indirect subsidies that support this industry elsewhere, there is concern about the likelihood of success of this effort.

- The import of cotton from any producer in the world is a 'non-issue' according to TPP yarn forward requirements. Besides, two TPP partners, the USA and Australia, are the #3 and #7 cotton producers in the world, so would already be able to supply cotton into Vietnam at competitive prices than would comply with TPP rules. Cotton imports from China, the #1 global producer of cotton, is right next door and the import of it would again have no negative effect on TPP yarn forward requirements.

- Rice cultivation is a completely different commodity compared to cotton cultivation. While rice can be harvested 3X per year in parts of Vietnam, careful consideration should be given to how quickly a cotton crop could be grown, as it would likely be much slower than rice. In addition, while a rainy season of 4-6 months might be beneficial for rice cultivation, for cotton cultivation and the resulting quality, a rainy season may be a big negative. Finally, cotton is damaging to the soil and attention would have to be paid to rotating crops lest Vietnam end up severely damaging its most precious natural resource – its land.

- And last, there are easier ways to meet the TPP rules of origin requirements for Yarn Forward, among them the mobilization of midstream production steps such as dying, knitting and weaving rather than commodity source material. It would be wonderful to have full upstream cotton production to leverage on Vietnam's agriculture resources, but for the time being this appears to be more of an artisanal opportunity for specialized products, rather than a large-scale industrial plan, given the global economics of the cotton industry. Production of ma-nd made fibres and filaments is clearly more urgently needed, thus the request again to consider large scale petrochemical and plastics production, at the minimum to meet Vietnam's domestic appetite.

Work Permits - Obstacles to Technology Transfer

Another issue that is raised by all manufacturers is the challenges of obtaining work permits under the recently amended work permit rules. In order to "back integrate" upstream and create new sources of raw materials within Vietnam, it will be essential to allow freer access to foreign expertise, which would mean making it easier for foreign experts to come in for temporary work assignments. Additional foreign engineers installing and training Vietnamese workers, for example how to use more complex machinery, would help the country to develop at a faster rate of speed. Almost every business represented at the two most recent Vietnam Business Forums had complaints about the new work permit rules, and this is something that is reportedly affecting the entire textile and garment industry. If there are real issues concerning the migration of Asian migrant workers into Vietnam, those should certainly be addressed, but the recent restrictive nature of the new work permit rules does not address that specific issue, but in fact puts limits on the experts that can provide technology transfer and expertise to the country.

Vocational Training in Rural Areas

Along similar lines, vocational training should be strengthened in the rural areas to enable local workers to service factories outside of the suburban areas around the big cities.

Vocational training is a green light subsidy under the WTO rules so it enables Vietnam to provide support to its industry. Similarly, allowing for incentives to investors in rural and backward areas can also provide greater flexibility in terms of government support to mobilize investment and technology transfer. This can create more equal distribution of jobs and incomes around the country.

We envision certain provinces could be designated "new textile production zones", where local private companies, state companies, and foreign direct investment could receive temporary or permanent tax incentives for location manufacturing facilities there, where workers could be employed making a higher wage without having to migrate to an urban area, where worker retention and subsequently product quality and production efficiency would then remain high (which would keep prices competitive). The central government in partnership with provincial governments could apply for and receive subsidies for vocational training in textiles, of which there are several companies already operating in Vietnam that are more than capable of and willing to deliver. This would incrementally increase GDP per capita over time and provide a better way of life in those rural areas. A "win-win-win" for the people, the industry, and the country.

* * *

AMENDMENTS TO INVESTMENT LAW AND ENTERPRISE LAW

Presented by
Mr. Tran Anh Duc
Co – head of Investment & Trade Working Group

His Excellency, Mr. Nguyen Tan Dung, Prime Minister of the Government of Vietnam; Ladies and Gentlemen,

In previous meetings, we expressed our concerns regarding difficulties confronted by foreign investors upon their acquiring shares in Vietnamese enterprises, namely:

(i) Vietnamese enterprise must apply for Investment Certificate upon its sale of shares to foreign investors; and
(ii) Vietnamese enterprise is considered as a foreign invested enterprise and it is subject to various restrictions that restrict its accessibility to the market.

The above legislations have hindered Vietnamese enterprises from mobilizing capital from foreign investors. In addition, although the Enterprise Law states that enterprises in all sectors of the economy may engage in those businesses and industries not prohibited by the law, the requirements for registering specific business operations in the Business Registration Certificate have in practice have restricted their rights of freedom of business as stipulated under the Enterprise Law.

We know that the Ministry of Planning and Investment is presiding over amending several provisions of the Investment Law and the Enterprise Law for the purposes of providing enterprises with breakthrough-oriented amendments, particularly as below:

(i) the right of freedom of business is given to enterprises, except for prohibited investment areas;
(ii) specific business operations are not required to be recorded in Business Registration Certificate or Investment Certificate; and
(iii) Vietnamese enterprise shall only be considered as a foreign investor when foreign investors own 51% or more of its charter capital.

According to statistics, there are currently more than 330 restricted businesses as regulated in more than 200 different legislations issued by both central and local state authorities. Now is the time for the Government to review and narrow down the scale of restricted businesses. The proposed removal of Investment Certificate requirement would be meaningless if we continue maintaining the said 330 restricted businesses. To this end, restricted businesses should only be specified in the law and accordingly, ministries and local people's committees should not be allowed to add in any restricted business at their will.

We have heard different voices from different state bodies. And we are not certain that whether such amendments are adopted by the Government and the National Assembly. With the presence of His Excellency, Mr. Nguyen Tan Dung, Prime Minister of the Government, at today's meeting, we hope that the Prime Minister of the Government would promptly provide appropriate instructions for convincing and securing an approval from the

National Assembly to adopt the above proposed amendments to the Investment Law and the Enterprise Law.

Tax

ISSUES SURROUNDING ADMINISTRATIVE PROCEDURE SIMPLIFICATION FOR TAX EXEMPTION UNDER DOUBLE TAXATION AGREEMENT

Prepared by
Investment and Trade Working Group

On behalf of Maersk Vietnam Limited, APL-NOL (Vietnam) Limited, MSC Vietnam Company Limited, and CMA CGM Vietnam JSC, shipping lines operating in Vietnam, Investment and Trade Working Group would like to convey our concern regarding the current administrative procedure applied to tax exemption provided for under Vietnam's network of Double Taxation Agreements (DTAs) for your due consideration. We believe the current procedures frustrate the intent of the treaties and should be finally reformed, especially after our long and extremely intensive discussion involved in different ways with the Ministry of Finance and the General Department of Taxation during the last 10 years including the submission of Project 30 under the Vietnamese Government support in 2010 and the series of DTAs-simplifying proposals officially submitted.

Administrative Reform Direction Applauded
At the outset, we wish to highlight our appreciation for Vietnam's efforts to reform and simplify administrative procedures, creating a more favorable operating environment for local and foreign invested enterprises alike. We have received benefits from the promulgation of Resolution 25/NQ-CP of the Government in 2010 and the implementation of Project 30, whereby administrative reforms have been implemented in an effective manner. In respect to the scope of administrative procedure for claiming tax exemption under DTAs, we have acknowledged certain improvements, namely elimination of document notarization and certification requirement, limiting the requirement of consularization, the deregulation of port certificates submission, etc. **Remaining Obstacles Threaten Success**

These efforts would strengthen Vietnam's efforts to become a regional hub for export manufacturing if only they were supported completely and in the bold manner necessary to implement them in spirit as well as in letter. However, we are concerned that some of the specific actions that are being undertaken in this particular reform, specifically the dossier requirements for tax exemption under DTAs applied to international shipping lines stipulated in Circular No.156/2013/TT-BTC ("Circular 156"), the "**Measure**", have failed to line up to the Government's own standard for the simplification of administrative procedures.

Though Circular 156 may be viewed as an administrative reform in certain aspects of tax exemption under DTAs, the current requirement that regulates shipping lines to present too many documents to prove their direct operation of a vessel is a step backward, frustrating the realization of our legitimate tax benefits, which we are entitled to under the DTAs between Vietnam and other Contracting States.

Specifically, Article 20.3.d.2 of Circular No.156 requires the shipping lines to obtain and maintain following documents for the purpose of proving direct vessel operation:

- Vessel registration certificate, or vessel leasing contract, or vessel swapping contract ("**Ownership Documents**") corresponding to the forms of vessel operation including vessel ownership, vessel leasing, or vessel swapping respectively;
- Goods transportation contract;
- One of the transportation documents as stipulated at Article 73 of Law on Vietnam Maritimeincluding Bill of Lading, Ocean through bills of lading, Sea waybills, or other

carriage documents (documents with their contents and validity agreed upon by the carrier and the charterer).

We refer to these documents as the "**Required Documents**".

Cumbersome document requirements

- *Ownership Documents*

Given the number of Bill of Lading generated from the increasingly international trade activities in Vietnam, which may amount to the number of 100,000per annum, and the fact that there are often more than one vessel participating in the process of goods delivery from Vietnam to the final destination country, the more vessels involve in, the more documents required for submission. Shipping lines have to communicate with overseas offices, tracing the vessels, and collecting the right documents for Vietnamese tax purpose. For your reference, it normally takes us from 60 to 90 full days per year to gather the **Ownership Documents** for each dossier seeking DTA tax exemption.

Taking into account thousands of copies of **Ownership Documents** that we are requested to maintain, Vietnam tax authority is casting an overwhelming and exhausting burden on the business operation of international shipping lines in Vietnam for a purpose which is not legally justifiable in terms of regulatory framework under DTAs.

Particularly, we refer to the case of international airlines whose profits are governed by the same article under DTAs as those of international shipping lines.[1] While sea transport and air transport share the same nature of operation, air transport is exempt from the obligation of providing documents similar to the **Ownership Documents** that shipping lines are requested to submit. Such difference creates a regulatory inconsistency, which has resulted in an unreasonable discrimination between international shipping lines and international airlines.

Furthermore, for each vessel arriving (and then departing from) Vietnam, we are also requested by Vietnam Maritime Administration to present several vessel documents including the Vessel Registration Certificate.[2]

It may get worse in many instances that regardless of all best efforts invested in, the shipping lines due to the complexity of maritime services may still not be able to successfully trace and obtain such **Required Documents** from related chartering parties to fulfil the **Measure**.

- *Goods Transportation Contract*

We find that this aspect of the **Measure** is redundant as there is overlap among the **Required Documents**. The Bill of Lading, in international transportation, is a document issued by the shipping lines / carrier to serve three purposes: (i) evidences receipt for the goods shipped; (ii) evidences the contract of carriage; and (iii) serves as a document of title (i.e. ownership). Therefore, a goods transportation contract is not necessary as the Bill of Lading practically serves this role.

[1] Article on Shipping and Air Transport under DTAs

[2] Section 2d. Article 54. Decree 21/2012/ND-CP dated 21 Mar 2012 on management of seaports and navigable channels

The Law on Vietnam Maritime also recognizes these three roles of the Bill of Lading.[3]

- ***One of the transportation documents as stipulated at Article 73 of Law on Vietnam Maritime including Bill of Lading, Ocean through bills of lading, Sea waybills, or other carriage documents (documents with their contents and validity agreed upon by the carrier and the charterer).***

With the per annum number of Bill of Lading amounting to as many as 100,000 and an average time amount of 1 minute for system data extraction and printing spent on each Bill of Lading, it takes us 100,000 minutes or 1,667 hours or 208 working days each and every year to fully provide the copies of Bill of Lading.

Furthermore, we have already submitted E – manifest by vessel to Customs Authority for all export shipments which include all information shown on Bill of Ladings.

Finally, as Vietnam has drastically implemented the tax policy of concluding DTAs with all major trading partners of which most international shipping lines are residents, the implication of proving direct vessel operation would not constitute a legal enforcement as all goods must be eventually transported by a carrier regardless of the complex involvement of different entities including shipping agents in the delivery process. Therefore, the proof of direct vessel operation is deemed unreasonable and incompatible to the practical business development as well as the administrative simplification policy of Vietnamese Government.

Impact of these new requirements

Such overlap has turned the new **Measure** from a solution into a new obstacle for the business operation of international shipping lines with several drawbacks for the Vietnamese trade and investment environment as follows:

(i)The Measure affects Vietnam's competitiveness by raising the price of exported products and their imported components.

In practice, it is a time and cost-consuming process for shipping lines to accommodate this **Measure** by allocating human and financial resources to obtain and maintain the **Required Documents.**

Given the increasing goods volume of international trade, such requirement has created significant workload, setting up a cost barrier which affects directly to the price competitiveness of Vietnamese exports by increasing the freights of goods departed from Vietnam.

This fact definitely undermines the recent sincere efforts of Vietnamese Government in pursuing the negotiations and conclusion of various free trade agreements to reinforce the competiveness of Vietnamese exports in international markets.

(ii)The Measure affects Vietnam's international commitments.

As explained above, the overlap of the **Required Documents** makes the **Measure** an unreasonable requirement since it requires more documents than necessary to meet legitimate regulatory purpose.

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[3]Article 73.2 Law on Vietnam Maritime.

Pursuant to *ArticleVI.1Domestic Regulations* of the WTO's General Agreement on Trade in Services, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. Given our analysis, we believe that the requirement of **Required Documents** is not reasonable, thus violating Vietnam's commitments under the WTO.

Furthermore, Vietnam, together with other WTO country members, has concluded the WTO Agreement on Trade Facilitation in 2013. Though the Agreement does not directly govern the tax aspects under DTAs, it may be construed as a strong commitment of Vietnam in facilitating the movement of trade flows. Shipping lines provide an indispensable linkage in international trade, so they should benefit from such commitment to contribute in a more effective manner to the development of international trade in Vietnam.

Additionally, as pursuant to either Item 1, Article 25: Non-Discrimination, or Article 26 of the two separate Avoidance of Double Taxation Agreement (DTA) that Vietnam signed with either Singapore or Denmark Government, respectively, the current DTA review practice of Vietnam could be seen as not meeting its stipulation which is as below:

> "Article 25: Non-Discrimination
>
> 1.The nationals of a Contracting State shall not be subject in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected."

Obviously, the Measure is not complying with the stipulation of DTAs that Vietnam has signed with other counter-partner countries once these countries have not applied with the same practice as Vietnam does, which all were clearly discussed earlier in our Project 30 submission provided.

(iii)The Measure affects the image of the investment environment in Vietnam.

As international shipping lines, we have business operations worldwide. Our experience reveals that the **Measure** is unusual. For tax exemption under DTAs, most countries around the world require just a certificate of tax residency. In certain countries within ASEAN, namely Thailand, Malaysia, and Singapore, shipping lines do not need to submit any **Required Documents**, or any other transportation documents including the Bill of Lading / the Manifest. Instead, shipping lines are only required to submit a self-declaration of goods transportation eligible for tax exemption under DTAs, and the business license.

In our previous Project 30's proposal and DTA-simplifying proposals in 2013, we provided clear procedures required in other countries in terms of DTAs application. Such foreign practice is much simpler and significantly helps shipping lines easily prove their eligibility if they are entitled to relevant DTA tax benefits.

Evaluating the issue in terms of administrative procedure, it reveals the disadvantage of business environment competitiveness as long as all the above discussed concerns would not be appropriately addressed. Should Vietnam remove the **Measure**, it would enhance the country's tax administration and strengthen competitiveness.

Our Reform Proposal

To that end, we kindly request your Agency as an advocate for business facilitation in Vietnam, to take further actions to address the issue to related Vietnamese governmental

agencies to reform the administrative procedure for implementing its treaty commitments to exempt freight tax. Particularly, for the purpose of vessel operation verification, we respectfully propose the amendment of **Required Documents** to balance the function of state management against the facilitation of business operations of shipping lines by submitting the following documents:

- Documents proving the enterprise is an international shipping line(the business registration certificate / business license of shipping lines); and
- Documents proving the enterprise is the tax resident of the Contracting State to a DTA with Vietnam (certificate of tax residency);

Next Steps

We appreciate the hard work that has gone into the administrative reforms and respectfully request that our detailed recommendations and comments be given due consideration. We believe these reforms can help reassure the business community regarding Vietnam's commitment to effective implementation of its treaty commitments under DTAs, in a manner compatible with healthy and competitive business environment for international shipping lines, and Vietnam-based manufacturers and traders.

VBF –SOME TAX ISSUES

Presented by
Mrs. Huong Vu
Head of Tax Sub-group

1. The Warranty Term in good provision contracts of foreign Contractors

Issue:
Circular 60/2012/TT-BTC specifies cases where foreign contractors supply goods, machines and equipment with accompanied service conducted in Vietnam such as installation, commissioning, warranty, .. (including the case whereby the **accompanied service is free of charge**), including cases where the provision of such services is or is not included in the value of the contract to provide goods, the taxable income of the foreign contractor is the total value of goods and services. Accordingly, at the moment, tax authorities are working on the calculation of foreign contractor tax on the contracts to provide goods, machines and equipment with accompanied warranty term.

Shortcomings:
This regulation needs to be reviewed because of the following shortcomings:

- The imposition of foreign contractor tax on goods, machines and equipment supply with accompanied warranty terms is over-collection because in reality, the warranty is nearly a mandatory provision in any contract to supply goods under international practices to protect the right and benefit of the buyer as well as confirm the quality of the product sold; it is additional services and cannot separate the value of the warranty.

- If the foreign contractor tax is imposed on all commercial contracts with warranty terms, it will go against international practices , does not protect the right and benefit of the buyers which are domestic enterprises, and in a way, Vietnam is imposing foreign contractor tax on all cases of goods, machines and equipment provision in Vietnam, in which there are manymachines and equipment that cannot yet be produced domestically; this does not support enterprises in modernizing Vietnam's industrial base,not enhancingeffectiveness resulting in poor competition within the region.

Proposal:
The Ministry of Finance should further discuss with local tax authorities/the general department of taxation to recognize properly the meaning of "services", distinguish between regulations on provision of free of charge warranty in the contract and chargeable warranty service accompanied with the contract, accordingly stipulate the case of supplying machinery and equipment accompanied with the warranty provision without any other services conducted in Vietnam shall then not be subject to foreign contractor tax.

2. Expenses relating to contracts signed with parent company

Issues:
Current regulations do not have specific guidance for the treatment of costs relating to service contracts signed with the parent company of the company in multinational corporations; this results in the practice whereby when conducting inspection, tax authorities haveinconsistent treatment and unreasonable demands towards businesses. For example for each service provided, the tax authorities require companies to keep minute of completed work which shows what services were provided on the day, which

hour, how this service contributes to the company's revenue although the contracts have clearly stipulated that providers will provide what services and those services themselves are essential for business operations of the Vietnamese company, services that can be provided by phone, email; tax authorities even reject where the enterprise submitted photo evidence of some services such as training program with detailed agenda.

Shortcomings:
We reckon that Vietnam's subsidiaries company is only a part of the Corporation's business chain, so like it or not, the subsidiary cannot be independent in all management, trading process and they must comply with the regulations that have been established and implemented from dozens, even hundred of years of the Corporation. As an independent business operating in Vietnam, the company itself using systems management, the services that are invested by the Corporation to use for the whole system must bear a part of cost corresponding to the level/value that is used for subsidiaries in Vietnam. It is very consistent with the international practices and ensures fairness as well as on the principles of revenue recognition to record in full detail corresponding costs. In fact, it can be said that the cost of the subsidiary to pay for the services provided by the Corporation actually bring economic benefits and serving the production and trading activities of the company.

However, it appears that the tax authorities are strictly looking at these costs and always suspect this is only transfer pricing.

Proposal:
To reflect and recognize the right of the cost of the subsidiary company to pay for services provided by the Corporation, we propose that the Government, the Ministry of Finance should promulgate more specific guidelines for the management costs, especially the standards of materials and documents necessary that businesses have to show these costs are actually deductible expenses of the business.

3. Pre-determination of customs value for imported goods

Issues:
According to Clause 2, Article 1 of the Law on Tax Administration No. 21/2012/QH13 dated 20/11/2012 and supplemented Clause 12, Article 5 of the Law on Tax Administration No. 78/2006/QH11 predetermined the product's number, the customs valuation and origin of goods exported and imported, Circular No. 128/2013/TT-BTC dated 10/09/2013 was detailing the contents of Article 7 (pre-determined product's number), Article 8 (pre-determined customs valuation) and Article 9 (predefined origin of import and export product). Although the regulation is understood that this is one of the measures to promote trade, besides the clear regulation and can be done related to the pre-defined product's number and its origin, the predetermined guidelines on the customs valuation of imported goods, by contrast, makes it difficult to implement during the process.

Pre-determination of the customs valuation includes two cases: (i) to pre-determine the valuation method and (ii) pre-determine the price level.

Shortcomings:

- Regarding applicable conditions:

- The case (i) is only requested for pre-determination of valuation towards goods which enterprise has not yet imported any identical goods before. This regulation is not reasonable whereby for a kind of goods, even the transaction is between the same buyer

and seller but in different buying/selling conditions (e.g. adjusted elements on distance of transportation, on plus adjustments, elements to be the condition of the transaction) which might result in different customs valuation methods.

- The case (ii), in addition to the condition of good compliance to legal regulations, the enterprises are only recommended to pre-determine price for each shipment (delivery once for all goods under pending sales contracts) which have been paid under the LC method. Limitation of delivery and payment conditions for all shipmentsbeing proposed to pre-determine rates are not only inconsistent with commercial practices which is inherent diversity but also in conflict with the Comercial Law allowing enterprises to be free in negotiating on delivery and payment method. In addition, this provision also creates discrimination against goods imported under the different methods of payment and delivery.

- On the record: The case (i) only indicates the general requirements on documents (eg, vouchers, documents proving the special relationship does not affect the transaction value; vouchers and documents related to any plus adjustment / minus adjustments, etc.) but does not specify types of evidences, documents required to be submitted to the customs authorities. The case (ii) requires enterprises to present the payment vouchers in accordance with LC method.

  Unclear regulations or restrictions of dossier may cause different interpretations between customs and enterprises, leading to delay of completion of the dossier and official answer from the customs authorities.

- Handling at customs clearance stage: The purpose and benefits of pre-determining customs value are not clarified, so the use of Announcement of result of pre-determined value (although the provision of Clause 5 of Article 8 Circular 128 is *"basis to declare the dutiable value declarations and submitted together with customs dossier when implementing the customs procedures")* does not bring the desired effectiveness. With this written notice, enterprise is still at risk of being challenged by customs inspection on the price declared at the customs clearance stage and may be required to perform consultations in order to protect the value of business interests. Thus, the clearance process is not shortened or simplified than the absence of notification on the result of pre-determined value.

Proposal:

- Specifying the pre-determination of value can be applied to a framework contract which covers goods delivered in many times and makes payment through bank / no cash.
- Stipulating documents required to submit at the most detailed level as possible to avoid the inconsistent interpretation and implementation.
- Specifying the Announcement of result of pre-determining value shall be used to declare and define the dutiable value of imported goods at customs clearance stage, to avoid wasting time on both sides. Enterprise shall be responsible before the law if there are any changes to the transaction of proposing to pre-determine value without notice to the customs authorities promptly.

4. Taxable unit price of resource products with exported natural resource

Issues:
Pursuant to the provisions of Circular No. 105/2010/TT-BTC guiding a number of articles of Law on Royalties, dutiable price for royalty is selling price per unit of the resource product presented on selling documents.

Shortcomings:
- In principle, dutiable price for royalty must be the price of crude resources.
- In fact, not all enterprises sell crude resources right after exploitation. Many enterprises which exploit crude resources have to invest significantly in various kinds of machinery and equipment to manufacture new products, to increase content.
- Accordingly, the determination of dutiable value according to selling price to the market is not reasonable and insufficient and is not in accordance with technical concept of royalty for resources.

Proposal:
We recommend the Ministry of Finance to consider the proposal for promulgatingguidances on dutiable value for royalty according to the principle of selling price per unit of exploited product, means not inclusive of expenses that enterprise pays extra during the production process, specialize processing, selling. Or to consider the specific regulation about dutiable price for royalty of each unit of product which is similar to that applicable to environmental resources protection tax.

COMMENTS AND PROPOSALS ON THE DRAFT AMENDMENTS TO THE LAW ON SPECIAL CONSUMPTION TAX (SCT)

Prepared by
Tax Sub-Group
Vietnam Business Forum

(1) Proposed additions of products and services to the List of SCT products and services

We understand that SCT is primarily intended to apply to products and services the consumption of which is not encouraged by the State, such as products that are harmful to public health (such as tobacco and alcohol); products the consumption of which should be limited (such as petrol); and luxury products and services the consumption of which is mainly by the higher income elements of the population (such as motor vehicles, airplanes, yachts and golf).

It is our view that the addition of (i) non-alcoholic sweetened carbonated beverages (NSCB) and (ii) the transmission of voting games and betting via text messaging to the List of SCT products and services is not likely to be largely beneficial to consumers, businesses or the economy at this stage.

We articulate our views on this as follows:

(i) Proposed SCT on non-alcoholic carbonated beverages

We understand that within the non-alcoholic beverage industry, NSCB is the only category proposed to be included in the List of SCT products and services and the key rationale is that they contribute to consumer health issues (such as obesity, digestive issues, stomach ulcers and diabetes) and therefore their consumption should be taxed like other SCT products (such as tobacco and alcohol).

We understand however that there is currently no conclusive report from medical research literature about the effects of consumption of NSCB on public health. Therefore, if the proposed SCT on NSCB aims to safeguard public health, then this requires further consideration. While there remains no evidence that the consumption of NSCB is attributable to public health issues, it would be unfair to NSCB producers if they are singled out for SCT, while other non-alcoholic beverages remain exempt from SCT.

Furthermore, if SCT is imposed on NSCB, producers will be forced to pass this cost on to consumers, likely reducing demand. As a result, imposing SCT on NSCB may not raise significant tax revenue, and could even result in a reduction of overall tax revenues (i.e. including CIT, VAT etc.) collected from this sector, if it reduces the consumption of such products.

From our experience, other nations that levy an excise tax on non-alcoholic beverages do so broadly, i.e. on all beverages, and we are not aware of any nation that levies an excise tax exclusively just on NSCB. The countries that do tax non-alcoholic beverages have broad-based excise taxes on many types of non-alcoholic beverages, rather than taxes on NSCB also. Cambodia, for example, levies a tax of "10 percent on all types of beverages."[1] We understand that other nations do not single out NSCB for excise tax.

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[1] KINGDOM OF CAMBODIA MINISTRY OF ECONOMY AND FINANCE TAX DEPARTMENT, LAW ON TAXATION CHAPTER 4, § 1, ARTICLE 85 (emphasis added).

Generally, consumers do not appreciate novel taxes, and proposals for excise tax on beverages in other countries have generally been quickly rescinded after sparking public debates. As a result, the movement to tax beverages has lost momentum in recent years in many countries. For examples, we understand that many countries that had previously experimented with excise tax on beverages later repealed or reduced such taxes, including Argentina, Denmark, the Dominican Republic, Egypt, Ghana, Indonesia, Pakistan, the Philippines, South Africa and Zambia (among others), along with several U.S. states.

While, on the one hand, the introduction of SCT on NSCB aims to protect public health and to generate additional tax revenue, it may, on the other hand, result in significant adverse impacts, including the following:

- Due to the price elasticity of demand, as prices increase, demand could decrease, leading to declines in sales volumes and production.

- Contributing to inflation, due to the increase in price of NSCB, as a result of producers passing the SCT to consumers – this is not in line with the Government's continuing efforts in combating inflation. NSCB is a popular beverage choice and is consumed by a large consumer population, so increasing NSCB price may also lead to price increases in other food and beverage categories where these are consumed along with NSCB's, adding additional inflationary pressure to the economy.

- Misaligning Vietnam with common international tax practice and trends and potentially creating a negative impression of Vietnam's tax system in the eyes of foreign investors – this might undermine the Government's continuing effort in attracting foreign direct investment.

- Unfairly disadvantaging producers of NSCB versus other non-alcoholic beverages.

- Adverse economic impacts on small and medium sized businesses in Vietnam, which are suppliers of NSCB producers in the supply chain (such as suppliers of sugar, packaging and other materials etc.)

In summary, we are concerned that the introduction of SCT on NSCB at this stage may not be beneficial to either consumers, businesses or the economy. We would recommend that the MoF's proposal should be carefully reviewed by the Government and the National Assembly, taking into consideration the reality and reliability of the alleged public health effects and of the forecast increase in SCT collection versus the potential adverse economic impacts on consumers and businesses and Vietnam's economy, as described above.

(ii) Proposed SCT on transmission of votes and bets via text messaging

As Vietnam's technology and telecommunication infrastructure is developing, text messaging communication is becoming an essential part of daily life of the Vietnamese population. Since text messaging of votes or bets (as opposed to the votes or bets themselves) can be distinguished from gambling or betting, the introduction of SCT on such activities could undermine Vietnam's growth and returns in the telecommunication industry, therefore making investment in this industry less attractive.

Imposing SCT on text messaging of votes and bets could also impact other business sectors such as the advertising industry. It will likely discourage viewers/spectators from participating in public voting or betting activities and/or from viewing such events. This

would reduce the effectiveness of sponsored advertisements and hence reduce revenue and profitability of the advertising industry.

In addition, public participation in text messaging of votes and bets does not clearly create or increase risks to public health (like tobacco), nor is it a luxury entertainment consumed by high-income population (such as karaoke, golf), nor is it akin to any form of betting or lottery. By contrast, it is an affordable form of entertainment for the ordinary population, the consumption of which helps boost economic growth not only in the telecommunication sector but also others sectors in the supply chain such as TV industry, and advertising industry etc. This should therefore be encouraged and supported rather than being discriminated against by the SCT policies.

(2) SCT rates for tobacco, alcohol and beer products

While we acknowledge the importance of using SCT policy to adjust consumer habits and safeguard public health, we are concerned that further increasing the SCT rates for tobacco, alcohol and beer products in the current position of Vietnam's economy may result in more negative impacts than positive impacts on the economy.

The health, tax and customs authorities are already experiencing increasing problems associated with high SCT rates, such as public health issues relating to the consumption of counterfeit alcoholic products and smuggling. The increase of SCT rates could worsen these problems and increase incidental costs borne by the Government (such as increased spending on law and enforcement to control counterfeits and smuggling, losses of other tax revenue such as corporate income tax and value added tax caused by the reduction of the sales and profitability of bona-fide producers).

We would therefore recommend that the SCT rates for these products be kept at the current rates.

(3) SCT on air-conditioners

The draft SCT law retains air-conditioners with capacity up to BTU90, 000 as an item subject to SCT at 10%. It is our view that this SCT rate on air-conditioners may no longer be appropriate.

As Vietnam's economy and society are developing, air-conditioners nowadays tend to be no longer "luxury items". Furthermore, under extreme weather conditions, air-conditioners are increasingly becoming an essential part of ordinary Vietnamese households, especially in urban areas where construction of housing apartments (including affordable low-cost apartments) is booming. The use of air-conditioners essentially provides comfort for living, working and business environments. It helps improve health and increase productivity. Moreover, using air-conditioner is the notion of civilization and application of technology to facilitate life, which should not be discouraged by the SCT policies.

The removal of SCT would encourage consumption and boost demand. It would help manufacturers improve sales and profitability, and hence increase their tax contributions to the State through the increases in corporate income tax, value added tax and personal income tax. We recommend an immediate removal of all air-conditioners from the List of SCT products and services or at least a gradual reduction of the SCT rate over a number of years until ultimate abolition.

STATEMENTS ON PROPOSED EXCISE TAX ON CARBONATED SOFT DRINKS

Prepared by
AmCham Vietnam

1. The new draft Law on Excise Tax proposes a new excise tax on "non-alcoholic sweetened drinks with gas" [carbonated soft drinks: "CSD"]. It excludes "non-alcoholic sweetened drinks without gas". In other words, the tax is imposed not, for example, on the basis of sugar content, but only on the basis of gas (CO_2) content. Stated differently, this is not a tax on soft drinks. This is a tax only on soft drinks with carbonation.

2. Generally, drinks with gas (CO_2) are manufactured by foreign-owned Vietnamese companies (mostly American brands). 88% of the carbonated drinks sold in Vietnam are American brands.

   On the other hand, soft drinks without gas (CO_2), like bottled teas, sports drinks, and juice-flavored drinks, are mostly manufactured by domestically-owned Vietnamese companies.

   Look at the total soft drinks market (carbonated and non-carbonated) including non-carbonated (teas, sports drinks, juice-flavored drinks, etc). The carbonated drinks portion is 28%, a very small part of the entire soft drinks market.

3. Proponents of the tax claim that CO_2 is unhealthful: ulcers, indigestion, constipation, some cancers, etc. The Health Policy and Strategy Institute of the Ministry of Health and the Hanoi School of Public Health have accessed hundreds of world-wide studies. They have concluded that existing medical literature does not reveal harmful effects on human health caused by CO_2. In fact, research indicates that CO_2 has several health benefits. We are happy to share these reports with anyone interested in reviewing the research.

   It is said by those who support the tax that sugar causes obesity, diabetes, heart disease, and other serious diseases. If so, why is the tax imposed on carbonation, not on sugar?

4. Proponents of the tax claim that other countries have similar taxes. We have reviewed the law in every country cited by advocates of the tax. While it is true that some countries tax soft drinks--carbonated AND non-carbonated, we have not found any evidence that any country imposes a tax on soft drinks based on CO_2 content only. Vietnam would be unique.

5. Will the tax lead to increased revenues?

   Soft drinks are easily substituted one for another. A survey of Vietnamese consumers indicates that nearly 70% of consumers will switch from carbonated drinks to non-carbonated drinks if a 10% tax is imposed on drinks with CO_2.

   The proponents of the tax have admitted in the media that higher prices on carbonated drinks will cause many people to change from foreign owned (taxed) carbonated to domestic owned (non-taxed) non-carbonated drinks. As substitution is likely to occur

(which is the precise fear of the industry) the excise tax revenues will be negatively affected.

This is just a fact. It is the way the industry is structured.

6. This tax will disrupt the market. It will harm both foreign-owned companies that produce CSDs and their local suppliers (like sugar cane growers, packaging companies, and other companies throughout the supply chain), as well as retailers who sell these products. The tax, by disrupting markets, will hurt Vietnam's economy.

7. An economic impact study by CIEM indicates that the tax will only generate around $8M in new revenue, while causing loss of sales in the industry of $45M and overall economic losses of $12M.

8. The tax is not consistent with Vietnam's WTO requirements. To quote the Report of the Working Party on the Accession of Vietnam to the WTO dated October 27, 2006 which Vietnam executed when it joined the WTO, Vietnam explicitly assured the WTO that its Law on Excise Tax "conforms fully to the national treatment principle with respect to excise taxes". We question whether Vietnam can make that statement if it adopts this tax on "sweetened carbonated drinks with gas" as such a tax clearly discriminates against foreign producers.

   But WTO goes further than excise taxes. It guarantees equal treatment to foreign and Vietnamese investors to invest in and to operate their businesses in Vietnam.

9. To repeat:
   Generally, drinks with gas (CO_2) are manufactured by foreign-owned Vietnamese companies (88%).

   Generally, drinks without gas (CO_2) are manufactured by domestically-owned Vietnamese companies.

   This appears clearly to be a discriminatory tax against foreign-owned soft drinks manufacturers, is inconsistent with WTO undertakings Vietnam made in 2006, and is likely to be challenged as it so obviously denies "national treatment".

POSITION PAPER: ALCOHOL SCT INCREASE IN VIETNAM

Prepared by EuroCham

Background

Vietnam is an important market for the EU wines and spirits industry. The launch of EU-Vietnam free trade agreement (FTA) negotiations in June 2012 further illustrates the country's growth prospects and ambition to be an economic powerhouse in ASEAN.

Although there are opportunities for future trade and investment, the industry continues to face a number of trade, tax and regulatory challenges that are hindering growth and potential. Indeed, the Ministry of Finance's recently announced proposal to substantially increase the Special Consumption Tax (SCT) on alcohol beverages will only have a detrimental impact on legitimate industry growth, hurt government revenue in the long-term, and impact non-tax paid and illicit market activity.

The Ministry of Finance has proposed the following changes to the SCT, **effective from 1 July 2015:**

Category	Current Rate	Proposed Rate (from 1 July 2015)	Percentage change from the current rate
Beer	50%	65%	+ 30%
Alcohol ← 20% alcohol by volume (ABV)	25%	35%	+ 40%
Alcohol → 20% ABV	50%	65%	+ 30%

Industry's position on SCT proposal

The industry is **seriously concerned about** the abovementioned double-digit changes to the SCT for the following reasons:

Need industry consultation in development of SCT rates

The Industry appreciates the economic challenges facing Vietnam and commends the Ministry of Finance's ongoing efforts to protect and grow tax revenue and boost economic growth. Taxation reform is an important policy tool of government and it is more important than ever given the ongoing volatility in the global economic landscape. But reform that substantially increases tax rates in a way that would dramatically impact industry and consumers, only undermines the efficacy and long-term sustainability of the changes. This double-digit increase in the excise levels will significantly impact supply chain costs to industry that will translate into higher alcoholprices for retailers and consumers.

More illicit trade led to non-tax paid trade and counterfeit which impact consumer health

The WHO estimates that 72% of consumption in Vietnam is unrecorded consumption (WHO Global Status Report on Alcohol, 2011). Vietnam's combination of high, *ad valorem* customs duties and SCT, and various non-tariff barriers on imported alcohol (e.g. Decree 94 licensing rules) has helped create a sector that has widespread non-tax paid activity in the form of non-commercial/traditional alcohol, counterfeit, and smuggled alcohol.

Illicit alcohol production is increasingly widespread across Vietnam.Much of this is produced in unsafe stills that leave high levels of methanol in the end products. In addition, some producers are believed to be adding industrial methanol to products to increase their potency. Methanol and the ethanol that is found in regular alcoholic drinks are chemically similar but are metabolised very differently by the body. As little as 10 millilitres of methanol can break down in the body to make formic acid which can attack the optic nerve and cause blindness. As little as 30 millilitres can be fatal.

Dr. Nguyen Kim Son, deputy director of Bach Mai Hospital's Poison Control Center, reports that, in 2012, 63 people suffered liquor poisoning nationwide and seven of them died. According to statistics from his department, the number of poisoning cases from industrial alcohol sharply increased in 2008-2011 compared to 2000-2008. While the problem appears to not yet as widespread as in India and Indonesia, where hundreds of people have died from methanol poisoning over the past three years, a number of Vietnamese people have died or suffered blindness and other injuries as a consequence of drinking methanol-laced alcohol in recent months.

A 30-40% immediate excise increase across the board on 1 July 2015 will only make the situation worse:

1. The 'cost' of trading and purchasing legitimate tax-paid alcohol willincrease, which will divert volumes and consumption to non-tax paid variants.
2. The high SCT rates will encourage under-invoicing, especially on higher priced products where the tax burdens will be higher, irrespective of the alcohol content. Rogue businesses dealing in illicit liquor are likely tounder-value goods to minimise excise payments.
3. Consumers will 'trade down' from higher-priced to lower-priced brands and/or illicit and non-tax paid alternatives.

The public's perception is that counterfeit and illicit alcohol are already widespread. The threat to consumer health and safety and the impact on Vietnam's reputation as a preferred tourism destination caused by encouraging the non-tax paid trade could be considerable.

Countervailing increase of excise will impact international alcohol market

The Industry is encouraged by the progress of the EU-Vietnam free trade agreement negotiations and looks forward to the elimination of tariff and non-tariff barriers to trade, including the high customs duties on imported spirits and wines. The proposed excise increase could however erode any benefits gained by international wines and spirits, especially if the trade agreement does not enter into force before 1 July 2015 and/or the committed timeframe for tariff elimination on imported alcohol is extended over several years. This will adversely impact and severely restrict the opportunities for quality tax-paid international products to grow organically in the market and limit consumers' choice and option to trade up. As noted above, this double-digit increase will however encourage non-tax paid trade and undermine long-term revenue generating efforts by government.

Loss for the state tax revenue

Alcohol taxation receipts make up a relatively small component of total government revenue. Indeed, between 2011 and 2013, spirits excise revenue made up only 2.1% – 2.5% of total excise tax revenue to government (Ministry of Finance). Furthermore, progressive increase of revenue from alcohol taxation has been registered despite the reduction of the effective tax rate since the implementation of last SCT review in 2010 (SCT on spirits

changed from 65% to 45% in 2010). This signifies a positive and sustainable development of the legitimate alcohol market.

Although the Ministry has identified the incremental revenue it expects to receive from the SCT changes, the Committee contends that the sizeable 'shock' to the industry, the negative impact on the growth of legitimate international spirits and wines, and the risk of more non-tax paid activity could undermine the government's revenue targets.

COMMENTS AND PROPOSALS TO THE DRAFT AMENDMENT TO THE LAW ON SPECIAL CONSUMPTION TAX

Prepared by
Tax sub-group
Automotive Working Group

(1) Special Consumption Tax ("SCT") applied to four wheels

Overall concept:
Together with the increase of income per capita in Vietnam, the trend of motorization which means the increase for demands of cars (less than 9 seats) is both desirable and unavoidable. This is similar to the situation in other countries such as Thailand, Indonesia. Therefore, in a long run, Vietnam Government needs to satisfy local car manufacturing (CKD) to avoid deficit of foreign currency and trade balance. Accordingly, the implementation will include 2 steps:

Step 1: Address cost gap of CKD versus CBU in automotive industry
Address the "cost gap" between CKD and CBU (import) so that the automotive companies can continue to maintain the production facility in Vietnam and provide employment and local tax revenues. It is recommended to consider supporting measures and legal exceptions under different bi-lateral and other international trade agreements (WTO etc.) whilst drafting measures to address the cost gap. This is with a purpose to have stability in the policies. Frequent changes results in instability and affects consumer and investor confidence. If the cost gap is not addressed urgently there is a potential risk to the local industry after 2018 when AFTA sets in completely. Some of the ideas include reduction/subsidies import duties on kits for CKD assembly.

Step 2: Grow the overall automotive industry
Currently the automotive industry of Vietnam is operating at much below potential. It is estimated that despite a capacity of ~500,000 units per annum, the current industry is operating at 100,000 units only. This is approximately 20% utilization of capacity. Measures such as marginal reduction in SCT can help to increase affordability. This will lead to overall growth in the industry. It has been observed internationally that the reduction in per unit SCT is more than compensated at an overall/aggregate tax collection due to the increase in overall industry size. It is suggested to reduce the no of slabs to drive simplicity and also to reduce SCT across the slabs.

Suggested Slabs and SCT rate:

Buses and Trucks:
a) Buses of 10-15 seats: SCT reduce to 25% (current 30%)
b) Buses of 16-23 seats: SCT reduce to 5% (current 15%)

Passenger cars of up to 7 seats (excluding driver):
a) Cars of ←1.0 liters: SCT reduction from current rate of 45% to 30%.
b) Cars of →1.0 L to 1.5L: SCT reduction from current rate of 45% to 35%.
c) Cars of →1.5 L to 2.0L: SCT reduction from current rate of 45% to 40%.
d) Cars of →2.0 L to 3.0L: SCT reduction from current rate of 50% to 45%.
e) Cars of →3.0L to 4.0L: No additional SCT reduction. (current: 60%)
f) Cars of →4.0L: Consider increase in SCT to 70% (current: 60%)

Detailed analysis of overall impact to the tax collection based on projected increase of automotive industry is available.

Encourage Eco-"GREEN TECHNOLOGY" Cars.

According to Article 7 about Tax rates: Tax rates of cars running on gasoline in combination with electricity or bio-fuel, with gasoline accounting for not more than 70% of the used fuel: 70% of the tax rate for cars of the same kind as specified at Points 4a, 4b, 4c and 4d of this Article	Enhance the development of eco cars by reducing 70% SCT for cars using simultaneously petrol and electrical or biological energy. *(the provisions of used gasoline proportion not exceeding 70% of the energy used* <u>*is not reasonable*</u> because: 1. Nowadays, the popular vehicles which use gasoline power combine electric energy is hybrid cars; in which "brake energy car" is converted into electrical energy in batteries to reuse for running, so they *are gasoline saving, however 100% of used energy is derived from gasoline*; 2. Saving rate depends on traffic conditions, driving style of each person; 3. Therefore, many countries support for all hybrid vehicles without based on fuel saving level)

(2) SCT applied to motorcycles with capacities over 125cc

In accordance with the Draft Law, SCT rate applied to motorcycles with capacities over 125cc is 20%. In fact, this provision is no longer practical due to the following reasons:

- The motorcycles with capacities over 150cc are in fact a suitable mean of transportation for Asian and Vietnam's terrain.
- Specification, composition and design of a 150cc motorcycle are not different to a 125 cc motorcycle, except for its capacity.
- In reality, driving/using a 150cc motorcycle is similar to the one 125cc capacity; therefore, it should not be considered as luxury goods. The definition/classification as luxury was considered a few years ago; but now the overall market has graduated.
- A SCT of 20% puts pressure on locally produced vehicles and domestic manufacturers. Vietnamese manufacturers will not be encouraged accordingly to invest in and develop this business segment.
- Government provisions on issuance of driving license for two-wheeler with capacity below 175cc is the same and not limited.
- Regulations and provisions of competent authorities on import duties to two-wheelers with capacity from 50cc to 200cc are the same, and there is no discrimination between a 125cc and a 150cc motorcycle.

Given the above, it is recommended that the drafting team of the amended Law on SCT to review carefully the SCT structure and not apply SCT to motorcycles; or consider imposing SCT only to two-wheelers with capacity over 175 cc.

CONCLUSION

The working group proposes a seminar/ working session with international experts on this subject to enable a shared learning for the members of the ministry. We look forward to having this session at the soonest.

Mining

BUILDING A STRONG, MODERN MINING INDUSTRY IN VIETNAM - THE NEED TO ENCOURAGE INVESTMENT BY REDUCING UNCOMPETITIVE HIGH TAXES ON MINING

Presented by
Mr. Bill Howell
Head of Mining Working Group

On behalf of the Mining Working Group, and speaking personally from my observations of being involved in mineral exploration and mining in many developing countries, including Vietnam, for over 45 years, the good news for Vietnam is that it is a mineral rich nation and that the country's known, but obviously diminishing, mineral inventory is only a fraction of what may yet be found.

This is because the discovery and exploitation of Vietnam's mineral resources have so far, except for some coal and coal-gas projects, only literally scratched the surface to a depth of 100 to 200 metres, using in too many cases outdated and wasteful mining and processing methods. Below the depth of 100-200 metres there are almost certainly many large and valuable deposits awaiting discovery, which can only be found and developed by modern, state-of-the-art technology and equipment not currently used in Vietnam.

Unfortunately, the much-needed investment in modern technology and know-how is not coming to Vietnam for a number of reasons, but primarily because of the crippling mineral royalty rates which are 2 to 5 times higher than the world average.

Royalty tax rates are calculated on the gross sales value of the minerals produced, as they are in many countries, so have a major impact on the economic viability of a mining operation if they are too high, because cost of production is not considered in the tax calculation.

Vietnam's high level of royalty taxes, on top of other multiple taxes on the mining industry, contributed to Vietnam being ranked as low as 95th out of 96 mining jurisdictions surveyed around the world by the well-respected Fraser Institute of Canada in 2012. This has made Vietnam one of the least attractive countries in the world in which to invest high-risk exploration and mining funds.

As a consequence, and unlike in other ASEAN countries, there are currently no recognized major foreign companies investing in the mining sector in Vietnam and only a small number of technically competent Vietnamese companies.

Instead, what we see is that many existing mining operations in Vietnam are now being forced to down-size, close, or in some cases adopt unsafe and environmentally damaging practices to cut corners and reduce costs, and even report lower than actual output for tax purposes in order to stay in production.

Moreover, the high royalty rates have also encouraged increased illegal mining and illegal export of minerals on which no tax is paid. At the same time, small-scale illegal mining only exploits the higher grade, richer portions of a deposit, meaning that a significant percentage of Vietnam's valuable total mineral wealth will never be recovered:

a) either lost because of primitive processing methods; or

b) permanently left in the ground, as it is usually not economically feasible to go back later to mine only the lower grade material left behind.

Imposing high mineral royalty rates and other multiple taxes are having the opposite effect to that intended by the Ministry of Finance in trying to raise revenue for the Government. Rather than increasing revenue, such economically unrealistic policies discourage legitimate investment in mining and thereby reduce revenue flowing to the Government and to the local communities involved in mining.

The mineral wealth of Vietnam is owned by Vietnam as it should be, but as Vietnam prepares to enter into new trade agreements, we respectfully urge the Government to improve investment confidence in Vietnam's minerals industry by introducing a more investor-friendly fiscal regime which is competitive with other countries.

This will enable Vietnam to better manage and build up its valuable mineral reserves by attracting world best-practice methods in exploration, mining and processing in order to:

a) maximize efficient extraction;
b) maximize returns to the government, the investor and the communities involved; and
c) minimize the damaging environmental, health and safety issues that are so apparent at present in many low technology mining operations.

Also modern mining is one of the key drivers in infrastructure development in the more remote and mountainous areas where most mineral deposits are discovered, as has been shown in many countries.

Therefore Vietnam has everything to gain by providing incentives to encourage investment and thereby ensuring that mining by high technology and internationally accepted standards becomes an essential, modern, safe and vital part of its growing economy.

SUMMARY OF ROUNDTABLE DISCUSSION ON TAX ISSUES IN MINING

- *Time:* *14:00, Monday, December 30, 2013*
- *Venue:* *Ministry of Planning & Investment, 6B Hoang Dieu, Hanoi*
- *Participants:* *Appendix 1*

I. COMMENTS, RECOMMENDATIONS ON TAX ISSUES IN MINING BY BUSINESSES

Ms. Tran Ngoc Anh - Vice President, Ban Phuc Nickel Company

- *Potential effects of mining rights feeson theBan Phuc Nickel mining project:* Ban Phuc Nickel has invested about USD136 million, employs 400 Vietnamese workers and uses production lines and technology imported from Australia. With an expected output of 360,000 tons per year, all pay gravel will go through a processing plant built next to the mine, to be in operation for six years, as part of a new industry – production of nickel.It is the only nickel mine in Vietnam, butgiven the economic recession and slumping global metal prices, the company is struggling.In the past two years, nickel prices have sharply dropped. During 2007-2008, nickel prices plummeted by 300% andin December 2013 the price of nickel was USD13,000 a ton compared to USD23,000 a ton in January 2012.Against the backdrop of such heavy price drops, mining companies face twelve basic taxes and fees, including geological information user, prospecting and exploration cost reimbursement, reserve assessment, licensing, environment impact assessment review and environmental protection fees as well as mineral tax, export tariff, corporate income tax, value added tax (VAT), environment tax, land rehabilitationbond and most recently the requirements of Decree 203, providing details on a mineral rights granting fee.An account of royalties and export tariffs shows that since 2008, these two taxes have increased five-fold.In 2007-2008 theroyalties for nickel was only 3%, now it has soared to 10%.The tax base has also changed, instead of being computed based on onsite pay gravel costs, reflecting the nature of the mineral tax -a levy on crude ores, it is based on the FOB price, including production, transportation and a wide variety of operating and development costs.This higher tax rate and altered tax base have caused a big increase intotal tax.With respect to export tariff policies, from the 0% rate of 2007 this tax rate has quickly increased to 5%, 7%, 10% and the current 20%, not to mention theexport tariff is levied directly on revenue.Taking into account four types of taxes and fees alone, theexport tariff, royalties, mineral right granting fee and environmental protection fee of VND50,000 per ton, the payable tax is already as high as 36% of revenue, before deduction of operating costs and any capital recovery costs.The mining conditions are also challenging as pits in a remote site in Son La. The current global price for direct shipping ore isUSD1,256 per ton.Now, with our cost price at USD929 per ton, plus related royalties and export tariffs at approximately USD380 per ton, the ex-work price will be USD1,309 per ton.This means the company incurs 53USD loss for every ton of ore produced.This project can really make a difference to the local economic development, particularly in Son La province where it is the most important investment project worthmore than VND3,000 billion. In the six months of 2013 alone, the project contributed VND84 billion in tax revenue and the estimated tax revenue for 2014 will be VMD270 billion, with jobs created for 400 Vietnamese workers, together with additional skills training such as study tours toAustralia and procurement activities prioritizing local contractors worth VND150 billion in 2013 and VND200 billionplanned for 2014.The company also has plans toincrease processing development by building another onsite nickel metallurgy plant in accordance with a Ministry of Industry and Trade masterplan.However, a productive operation is necessary first before further investment is made.

- *Given these challenges a number of solutions are suggested:* First, the mining rights fee should be postponed until after December 2014, simply because in our financial shape there isnomoney to pay itin 2014.Second, the base price fornickel ore mining rights fee computation should be VND1.4 million a ton.Setting the mining rights fee at the same level as the mineral tax base will not work, because to determine the mine reserve, the mining rights fee used should be thegravel price underground (excluding mining cost), not the price of direct shipping ore or other products. Also, the FOB tax base has been used to calculate the export tariff.The taxable reserve should be extractable reserve, asthe geological reserve is a deductive concept. When it comes to actual mining, ledges make it too narrow to allow for the extraction of ores and levying on inextricable ore bodies is unreasonable. The license clearly points to a geological reserve, whereas the mining reserve is a different subject. Taxes should be levied upon retrievable materials, or extractable reserves, which is more logical and practical considering current mining conditions. Furthermore, we suggest for companies involved in investment for increased processing, there should be a specific ratio to allow deductions or claw backs of parts of capital costs invested in plants.

- *Regulations on marginal concentration:* This is an economic factor in the mining industry. As the marginal concentration depends on the metal price and dictates conversion between geological and extractable reserves. For example, a geological reserve of 3 million tons will become 3.2 million tons with a marginal concentration rate of 0.2. In times of falling sales prices and climbing taxes and fees, the respective marginal concentration may increase to 0.4. At this rate, the initial 3 million tons will drop to 2 million tons. With production, the miner must refer to the marginal concentration for calculation. For a marginal concentration of 0.4, the miner will focus on the inner part of the concession. Further from the center, the higher the risk of losses. For this reason, the actual extractable reserve will diminish as taxes and fees increase. The higher the taxes and fees, the higher the respective marginal concentration and the lower the extractable reserve. Once a parcel has been mined, the pits filled and land rehabilitation completed, no other miners will mine there.

- *Taxes and fees:* Any steps to raise taxes and fees should be done with a broader view in mind, such as how much has been collected, how much remains and can the liable payers survive if further obligations are claimed.

Mr. Dominic Heaton – Director, Masan Resources

- In relation to principles behind the calculations on tax and charges, as a mining company we understand theneeds to harmonize theinterests of the State, enterprises and community in terms of calculation and payment of taxes. As pointed out by Ban Phuc, the mining industry within Vietnam faces 13 taxes, fees and charges at the moment and the mining rights fee will be the 14th to be applied. In terms of context, the Nui Phao project was recommenced in 2010,10 years from its initial discovery.Since then, the project has gone through a feasibility study, but capital increases in cost have been very significant. During this time, taxes, fees and theincrease inroyaltiesright fees have also increased significantly as have the export tariffs associated with mining products. These fees and charges are substantial for any businesson an annual basis. These fees and charges are also applied to other projects, not just Nui Phao – it has industry wide implications.

- Article 6 onthe determination of reserves for mine right fee calculation, it isfeltin Decree 203 that linking "g" to the selling price of the final product does not make any recognition to the efficiency of the extraction process that only focuses on the recovery

rate from the mining process. We would like to suggest the ministry works with the VBF Mining Working Group to re-work the coefficients withinArticle 6 to allow the degree of mineral processing as well as mining recovery to be considered.

- Article 13 ofDecree 203 is designed to cover the refund for mineral investigation and exploration fee, which enterprises are already paying. Therefore, we suggest the ministry work with the VBF Mining Working Group to re-work the calculation to ensure there is no doubling up of Government fees and charges. Investment in exploration and mining is a long termundertakingwith a large capital investment withmuch risk and long pay back periods. As a result, investors are seeking a stable and fixed investment outlook so that they can undertake investments and ensure the principles of fairness between State enterprises and communities.

Ms. Do Thi Hong – Chairwoman, Luc Yen Marble Association, Yen Bai

- Directive 2, dated January 9, 2012, banned all exports of block stones.Most quarries in Vietnam focuson mining and few invest in downstream processing.Given the market's needs and that most products are sold as block stones, this new directive isa barrier for manycompanies.

- Taxes and fees: Marble producers have also had to bear taxes and fees similar to other mining companies such as royalties, export tariff, corporate income tax, environmental protection fee.The export tariff alone increased from 17% in 2012 to 25% from January 1, 2013 and 30% from June 9, 2013. The current mineral tax rate of 6% will increase to 9% in February. Meanwhile, the world economy is still in recession and selling output is difficult, whileproducers are also facing competition from replacement products.For the industry to receive adequate support and investment, each municipality only needs 10-20 well functioning companies to make a huge contribution to State coffers.

- Decree 203: Regardingthe mining rights fee formula, the "q" parameter has a large bias.As this "q" has such a large bias, will the determined mining rights feeensure fair treatment among businesses and adequate revenue for the Government?

  Regarding"g", the price used for determination of mining rights fee:it is computed on a mean basis.In accordance with Yen Bai People's Committee regulations, the mineral tax base disaggregates the price for marble and values products by dimensions. Meanwhile, the license does not separate products by a percentage of the dimension, but the decree suggests using a mean valuethat requires percentage rates for different products. The General Department of Geology advised using the first three-year product ratios from tax declaration sheets to calculate the mean proportion of each product and subsequently the mean tax base. However, many companies have not even released any products to make such a three-year mean price calculation possible.

- The timeframe in the formula is $t_{annum} = \frac{t}{x-4}$, for the granted license, whichwith the typical 30% for marble for example would suggest the mean mining rights term is 26 years.Mining operations initially require huge investment in early years with virtually no outputs and some companies take up to five years to roll outa first batch of products.But in this decree, mining rights is divided equally among the years.This is financially unfair for producers, who must taxes with no income.The decree also does not address how a delayed tax payment is managed.

- The initial date for the mining rights fee determination wasJuly 1, 2011, two and a half years overdue.For companies that have becomeoperational since then, repatriation of profits in the case of foreign companies and distribution of earnings for domestic producers, with the retrospective collection of mining rights feedate from2011 to date will present a serious problem in terms of accounting and sources of funds management.Therefore, we recommend a waiver of retrospective mining rights fee collection between July 1, 2011 and the time this decree came into effect.

- The“q” factor must also be re-examined, as itis too high for marble.A reasonable way to compute this “q” factor is needed, either by referencing prospecting files or calling a reserve board meeting to decide how the reserve should be recalculated to bring the “q” value close to real output.Also, the “g” value is without a firm basis for calculation and the Ministry of Finance is urged to provide a workable way to calculate “g”.

- Various policy changes:With respect to the royalties policy, Circular 42 of 2007 set the royalties rate at 5%, whereas Circular 124 of 2009 set this rate at 7%, Circular 105 of 2010 set it at 65% and Resolution 712, effective from February 1, 2014 set it at 9%.The royalties before Circular 42 of 2007 was actually a reasonable as the price base is set onsite.However,Circular 105 defines the mining tax for export minerals as the FOB price, butthe tax base will include a large array of costs from the mining site to sales of products, where producers must also pay inland transportation and logistics costs.Levying based on the FOB price will cause companies to move away from direct exportation and consider exports through middle agents.This will potentially lead to unhealthy competition and tax evasion.Onsite mining rights fee determination is the most equitable option.

- Export tariff policy: The pre 2008 0% tariff rate was raised to 7% from 2008, 17% from 2010, 25% from2013and 30% from June 9, 2013.A cubic meter of export marblewill have a9% royatlties from 2014, plus a 30% export tariff, mining rights fee andconcession granting fee making a total tax rate of 40% over export revenue for each cubic meter of rock.

  We suggest relevant ministries and line agencies review applicable taxes and fees, most specifically themining rights fee, through a broad-based review of other applicable taxes and fees.

II. RESPONSE BY RELEVANT MINISTRIES, AGENCIES

Mr. Ngo Van Minh – Head of Geology and Mineral Economics Authority, General Department of Geology and Minerals

- The Mineral Law of 2010 came into effect from July 1, 2011, rendering determination of mining rights fee effective from that date.All information relating to the implementing decree drafting process was published on websites and forwarded to relevant institutions.

- The Mineral Law specifies that mineral rights are granted through auctionand non-auction options are only available to special areas and minerals.Only mining licenses granted prior to the Mineral Law coming into effect aresubject to mining rights fee computation, the lowest bid price from auctions.

- The mining licensing process has been defined byyears of experience with different approaches, based on geological, mining and industrial reserves. Decree 203 was

developed to provide a more facilitating environment for miners and this explains the five-year precollectionperiod for licensed projects or to the middleproject term.

- Mining rights fee formula:The Mineral Law formula is based on the parameters ofreserves, royalties base, variables associated with mining methods, consideration of economic and social challenges and concession granting fees.The mining rights fee represents the Government's property right for mineral reserves that existsunder the earth's surface.Reserves are regulated by the Government through geological data and unextracted reserves.Ban Phuc Nickel's comments regarding mining rights fee computations using extractable reserves reveals that while the formula was used for the geological reserve, with multiplication by the k1 ratio or recoverable factor (0.6 or 0.9), it is actually the extractable reserve.As a result, only the extracted portion is levied upon, not the portion remaining in the ground.

- Comments by the Marble Association: The reserve confidence interval is 121 and 122, which are 80% or 50% and can be positive or negative.To determine the reserves at different grades, asidefrom recognition by relevant regulators and national mineral reserve boards, the mineral reserve data from companies ismostly used.Since themining rights fee was previously unrequired, miners did not pay as much attention to the accuracy of reserve data as is the case now.

  In the case of tiling stones and marble, the question revolves around the reserve quota.Decree 203 allows businesses to make recommendations for concerns pertaining to reserve determination.

  A second parameter in the formula is the "g" value (mining rights fee price base):The Government reserves its property rights through the mining rights fee. This is why the Government defines the mining rights value through the royaltiesbase. Decree 203 sets the royalties base unit of measurement as dong per reserve unit.

  While different minerals such as marble, nickel or wolfram entail different computing methods, there is sufficient scientific evidence to set the price for a reserve unit of measurement, converted from actually extracted products. Nevertheless, the "g" value under Decree 203 has been authorized for determination by individualprovincial People's Committees. Considering current socio-economic and logistic conditions, the "g" value will first be set by provincial People's Committees, before being passed down to the provincial departments of Natural Resources and Environment as well as Finance, which set the "g" values for different minerals in specific mining zones.

- The "r" ratio: The current levels are 1%-5%.These rates are built on the types of minerals, the degree of investment in prospecting, invested capital and a fast or slow cost recovery rate.

- Masan's wolfram mining rights fee proposal: For metallic minerals, the 2% rate is the most common level and has been introduced through thorough examination.

Mr. Pham Ngoc Thach - Tax Policies Department, Ministry of Finance

- Decree 203 defines how to calculate and how much the mining rights feemay be, not as a tax or fee.

- The "q" and "g" values in the mining rights fee formula: Article 7, Decree 203, sets the mining rights fee levels based on the royalties base generated and posted by provincial-

level People's Committees. Article 7 consists of three paragraphs, which address three different events.Paragraph 1 states that each mineral in the mining area is only subject to one mining rights fee, Paragraph 2 requiresthe use of the mean value of different prices andParagraph 3 states that minerals lacking an associated royalties base or for which the royalties base must be updated to remain in compliance with prevailing regulations. The Natural Resources and Environment Department, as a lead agency, will work with various agencies to reach applicable prices, to be later reviewed by the Finance Department and submitted to the provincial-level People's Committees for approval.Ifcompanies feel the current mineral right fee is too high, low or unjust considering operating conditions or nature of products or product lines, they canraise the issuewith the Natural Resources and Environment Department.

Mr. Ngo Van Minh – Head of Geology and Mineral Economics Authority, General Department of Geology and Minerals

- As defined by the Constitution, natural resources and minerals beneath the earth's surface belong universally to the people, whose ownership is represented by the Government.

  If mining activities take place and the Government receives no part of the recovered materials, the Government's ownership and property rights for natural resources and minerals will no longer exist.The mining rights fee is to materialize the Government's property right.The process will be completed through auctioning, with the lowest bid price being the mining rights fee.

Appendix 1 – List of Participants

No.	Name	Title	Organisation
Representatives from Ministries			
1	Mr. Nguyen Noi	Deputy Director General	Foreign Investment Agency – Ministry of Planning and Investment
2	Mr. Quach Ngoc Tuan	Deputy Director	Legal Department– Ministry of Planning and Investment
3	Mr. Ngo Van Minh	Head of Geology and Mineral Economics Authority	General Department of Geology and Minerals of Vietnam
4	Mr. Pham Ngoc Thach	Tax Policy Department	Ministry of Finance
5	Ms. Pham Thuy Hanh	Deputy Director	Legal Department, Government Office
6	Ms. Le The NguyetAnh	Deputy Manager of Policy Department	Foreign Investment Agency - Ministry of Planning and Investment
VBF Members			
1	Ms. Duong Thu Minh	Staff	PricewaterhouseCoopers
2	Ms.Vu Hong Cam Van	Staff	Ban Phuc Nickel Company
3	Mr. Dang Chi Lieu	Lawyer	Baker&McKenzie
4	Mr. Nguyen Van Sua	Deputy Chairman	Vietnam Steel Association
5	Mr. Dominic Heaton	Director	Masan Resources
6	Mr. Le Thanh Tung	Staff	Nui Phao Co, Ltd
7	Ms. Nguyen Hong Phuong	Staff	Nui Phao Co, Ltd
8	Ms. Do Thi Hong	Chairwoman	Luc Yen Marble Association, Yen Bai
9	Mr. Harish Japaria	Representative	Vietnam Alliance Minerals Co, Ltd
10	Ms. Tran Ngoc Anh	Vice President	Ban Phuc Nickel Company
11	Ms. Ta Diu Thuong	Representative	Phuoc Son Gold Company/Bersa

Labor

REPORT FROM HR SUB WORKING GROUP

Presented by
Mr. Colin Blackwell
Head of Human Resource Sub-group

Firstly, I would like to thank the Ministry of Labour for the excellent corporation with the business community. I would like to highlight a few issues which I am glad to say the Ministry of Labour is already assisting in resolving.

1. Work Permits

Further to the recent implementation of this circular No. 03/2013/TT-BLĐTBXH, we would like to provide you with some feedback as well as highlight other recurrent issues that our members have experienced:

While the new regulation is clearer, we recommend that the qualification requirement for experts is either a university degree (or higher) or vocational qualification which recognizes them as experts or a 5-year work experience. For example, a Korean engineer might be an expert in an important piece of manufacturing equipment, but has less than 5-year experience. Current definition is not clear enough which has resulted in rejections of dossiers for qualified experts which have a skill that is not currently available in Vietnam.

Another concern regards the special circumstances for English language teachers. Within this very specialised industry, there are internationally recognized qualifications, which should be acceptable in place of the degree or 5 year experience. It must be remembered that the main thing that these teachers are bringing to the market is native proficiency of their own language, which by definition that cannot be done by a local national. Having a large specialized foreign language teacher workforce in Vietnam is a positive benefit for the economy, and encourages foreign investment.

Since the new circular took effect, the labour department in Hanoi and Bac Ninh province request work permit applicants who have been in Vietnam for just a couple of days before the application date of Work Permit to apply for a Local Police clearance Certificate in addition to the overseas one. This doesn't apply in HCMC and other provinces. Requesting a Vietnamese police clearance certificate for someone who has just arrived in Vietnam for couple of days does not seem to be relevant and is most likely the result of a misinterpretation of Circular #3 by some department of labor.

Furthermore, we would like to emphasize the non-compliance issue that Multinational companies face when sending a Foreign employee to Vietnam on a very **short term mission** to perform work activities such as deliver training to the local registered entity or contractor, conduct internal audit at company's or contractor's site, install specific equipment, etc.... It is not realistic to request these foreign nationals to apply for a work permit considering the heavy administration burdens and processing time vs the duration of their mission in Vietnam, sometimes just couple of days. Therefore, we respectfully request to include such "short term activities" in the list of foreign nationals not having to report to labor department/apply for work permit.

2. Overtime

Vietnam is competing globally for new manufacturing and business activities and it needs to be as competitive as possible. The current overtime limit is significantly below the global average.

The following table is an overview legal permissible maximum working overtime:

Country	Overtime per year
China	1872
Thailand	1872
Malaysia	1248
Singapore	864
Germany	624
France	468
Vietnam	300

In practice, a very low overtime cap is difficult to enforce given the need of most companies to be flexible and adapt their plan with the work load in particular circumstances. It also disadvantages workers who happily volunteer for additional work and higher income. We would like to suggest an overtime limits capped at 800 hours for all industries and in up to 1200 hours for specific industries. One alternative to this has been suggested by the Japan Chamber of Commerce and proved to be very successful in Japan is their 'Article 36 Agreement' where companies, employees and trade unions voluntarily agree on a mechanism for paid overtime as needed. We would be delighted to provide MOLISA more information on this.

3. Trade Union

We would like to propose a clearer and simplified Trade Union fee paid by enterprise as follows:

- Trade Union law regulated: enterprise must pay 2% of the salary funds which is taken as basic for the payment of social insurance for employees. It is contrary to international practice as Japan, Korea, and Thailand etc. The reason is that Trade Union shall be established in the voluntary basis by employees and this is unreasonable if enterprises have to pay Trade Union fee for Trade Union operation.

- Currently, General Labour Federation regulate that Grassroots Trade Union have to send 35 % of Trade Union fee paid by enterprise to higher Trade Union. This is unreasonable because:

    - If having to send Trade Union fee to higher Trade Union, should send Trade Union fee paid by employees to organize Trade Union activities for employees.
    - Higher Trade Union does not have enough manpower to implement activities for all enterprises.

- The regulation about 2% of the salary Funds is unreasonable because there is no unity about definition of salary Funds among enterprises.

- Currently, enterprises which primary Trade Union have not yet been established received requirement of paying 2% of the salary funds to higher Trade Union to establishing Grassroots Trade Union at these enterprises. It is unreasonable because Grassroots

Trade Union shall be established in the voluntary basis by employees so higher Trade Union can't affect to establishment of Grassroots Trade Union at enterprises.

4. Education and Training

The Vietnamese workforce has become more qualified and professional than ever; however, there is still a gap between the educational standards and those of more developed countries. The gold-standard education of today focuses on individualized teaching that allows for students' differences such as their learning speeds and styles. Adapting teaching methodologies to accommodate student differences results in the best learning outcome.

Students in Vietnam are currently required to perform at the same speed and produce the same repetitive tasks regardless of abilities or skill level. Therefore, some students are left behind and best students are not challenged. The educational style has been internalized into the culture leading to a cyclical chain of events where each generation teaches the next in the same way without improved outcomes. This teaching style that expects the same behaviour and results from all students is also reflected in the workplace with staff who are unable to take initiative or think proactively.

As an example, Phu Quoc is rapidly developing their tourism industry. While this is excellent for the local economy, this is challenging for new hotels to recruit and quickly train people (who are farmers and fishermen) to become internationally professional employees suitable for five star hotels. Good examples of the private sector managing similar situation were in Danang where all of the hotels agreed one standard training system. This type of initiative could be introduced in more places and the government would be very welcome to become more involved.

Once again we would like to thank the MOLISA for its adoption of the many recommendation from VBF. We would like to invite the MOLISA to discuss these issues in a meeting that we can raise more issues which are also important.

RECOMMENDATION TO DRAFT CIRCULAR GUIDING THE IMPLEMENTATION OF A NUMBER OF ARTICLES OF DECREE NO. 102/2013/ND-CP DATED SEPTEMBER 5TH 2013 OF THE GOVERNMENT DETAILING THE IMPLEMENTATION OF A NUMBER OF ARTICLES OF THE LABOUR CODE REGULATING FOREIGN NATIONALS WORKING IN VIETNAM

Prepared by
HR Working Group

Article	Revision/Supplement	Rationality/Justification
Chapter I **SCOPE AND SUBJECTS OF APPLICATION**		
Article 2. Interpretation of Terms		
1. Contracted service providers as stipulated in point d clause 1 Article 2 of Decree No. 102/2013/ND-CP are foreign nationals who have been employed for at least 24 months by a foreign enterprise having no commercial presence inVietnam, and meet all the conditions applicable to "specialists" as regulated in clause 3 Article 3 of Decree No. 102/2013/ND-CP.	1. Contracted service providers as stipulated in point d clause 1 Article 2 of Decree No. 102/2013/ND-CP are foreign nationals who have been employed for at least 24 months by a foreign enterprise ~~having no commercial presence in Vietnam~~, and meet all the conditions applicable to "specialists" *or "technicians"* as regulated in clause 3 Article 3 of Decree No. 102/2013/ND-CP.	**<u>1. WTO Commitments v.s. the Decree</u>** • We understand that this definition is directly adopted from the interpretation of the concept "Contractual Service Supplier" (CSS) in Vietnam's Commitments to the WTO on Services ("**WTO Commitment**"). • However, our opinion is that such direct adoption is not appropriate in this case. Indeed, the use of this term in WTO commitment refers to the permitted duration of stay of foreign individuals in Vietnam (maximum 90 days), which basically is a right entitled by the foreign individuals. In such case, as it is a right (to stay in Vietnam), the law makers tend to limit the applicable subjects.

		• In contrary, the use of this term in Decree 102/ 2013/ND-CP ("**the Decree**") entails the obligation to apply for work permit that foreign labor has to fulfill. In such case, as it is an obligation, the concept should be broad enough to cover all applicable subjects. • Therefore, it can be seen that the purposes of definitions pursued by the Decree and the WTO commitment are entirely opposite. So, it is not reasonable to adopt directly the concept in WTO Commitment to the Decree. **2. Direct reason of suggested revisions** • According to GATS, there are 3 types of commercial presence, namely representative offices, branch, and entity. If this provision consists of the term "having no commercial presence in Vietnam", this provision shall not be inclusive to 2 following types of foreign employees. In the other words, it is arguable that the following foreigners are not subject to work permits when they come to Vietnam to provide services.

		- First, foreign employees are sent to Vietnam by a foreign parent company which has already established a representative office in Vietnam. - Second, foreign employees are sent to Vietnam by foreign parent company which has already established an entity in Vietnam. These situations might arise when there are differences between the parent company and the commercial presence in term of clients or business activities. • Therefore, we recommend omitting the term "having no commercial presence in Vietnam" to widen the applicable scope of these legal instruments. • We suggest to include "technicians" because in some cases, the services must be provided by technicians who can directly deal with technical problems.
2. People who offer services as stipulated in point đ clause 1 Article 2 of Decree No.102/2013/ND-CP are foreign nationals who neither live in Vietnam nor receive remuneration from any sources in Vietnam, participating in activities regarding the representation of a service provider so as to	2. People who offer services as stipulated in point đ clause 1 Article 2 of Decree No. 102/2013/ND-CP are foreign nationals who ~~neither live in Vietnamn or~~ *do not* receive remuneration from any sources in	This is to cover the cases of foreigner who is a dependent (of other foreigners working under a legal work permit in Vietnam) and participate to offer services for other enterprise. However, this foreigner

negotiate the consumption of such provider's services, under the condition that these people neither offer such services directly to the public nor directly perform tasks concerning the supply of such services.	Vietnam, participating in activities regarding the representation of a service provider so as to negotiate the consumption of such provider's services, under the condition that these people neither offer such services directly to the public nor directly perform tasks concerning the supply of such services.	does not receive any remuneration in Vietnam
3. People who are responsible for commercial presence's establishment as stipulated in point h clause 1 Article 2 of Decree No. 102/2013/ND-CP are managers or executives of a legalentity, responsible for establishing in Vietnam the commercial presence of a service provider originated from another country, under the condition that these people do not directly performtasks concerning the sales or supply of the services, and such service provider has its business operated mainly in the territory of another country and has had no commercial presence inVietnam yet.	3. People who are responsible for commercial presence's establishment as stipulated in point h clause 1 Article 2 of Decree No. 102/2013/ND-CP are managers, executives, *specialists, or technicians* of a foreign legal entity, responsible for establishing in Vietnam its commercial presence ~~of a service provider originated from another country~~, under the condition that these people do not directly perform tasks concerning the sales or supply of the services, ~~and such service provider has its business operated mainly in the territory of another country and has had no commercial presence in Vietnam yet~~.	**1. Direct comments and suggestions to this Article** • We understand that the term "People who are responsible for commercial presence's establishment", like the term in Article 2.1 of this Circular, is adopted from the WTO Commitment. As we explained above, the purposes of defining the terms in the WTO Commitment and this Decree/Circular cannot be exactly similar due to the opposite natures of these instruments. • Therefore, to ensure the appropriate application of the Decree, we recommend the following: - Omit the wording "and has had no commercial presence in

		Vietnam yet". The rationale of this omission is similar to what we previously explained in Comment (2) to Article 2.3 above. The inclusion of this term in this provision shall significantly limit the applicable scope of this Article comparing to the practice. Indeed, if this term is used, this provision shall not be inclusive to situation when foreign entity looks to establish an entity after having already established a representative office or an entity in Vietnam. - Supplement "specialists and technicians" to the scope of this provision to avoid confusions. In practice, specialists and technicians also take part in the process of establishing commercial presence in Vietnam. The omission of "specialist and technician" shall lead to two possible versions of interpretation (1) specialists and technicians are not eligible to participate in the process of establishing commercial presence; and (2) if specialists and technicians are eligible, they will not be subjected to work permit like mangers and executives.

		- Replace the term "service provider" with "legal entity". The use of the term "service provider" indicates that the scope of this provision does not cover manufacturers. Thereby, it could be interpreted that foreigners coming to Vietnam to establish a commercial presence of a manufacturers are not regulated by this Decree, and thus, not subject to work permit. - Omit the term "such service provider has its business operated mainly in the territory of another country". This term is unnecessary in this circumstance since the main operation of foreign legal entity obviously takes place outside Vietnam. Moreover, it also causes confusion since the Decree fails to provide a test to examine when an entity is considered to be operating mainly outside Vietnam. **2. Further comments on how to realize this regulation** Moreover, we would hope that this Circular is responsive to our following questions:

		- Who is the applicant for the work permit of foreign individuals? According to the Decree, the "employers" will be in charge to apply for the work permit. However, it is unclear who the term "employers" encompasses. It can be interpreted the term "employers" indicates the foreign company or users of foreign labor enshrined in Article 2.2 of the Decree. In the context of no commercial presence in Vietnam, no relevant entity/ organization mentioned in the list under Article 2.2 can be the applicant for work permit of foreign individuals coming in Vietnam to establish a commercial presence. - Does the applicant have to submit any other documents, beside that mentioned in Article 10 of the Decree, when applying for work permit? Specifically, does the applicant need to submit annual plan on foreign labor usage to People's Committee as regulated under Article 4 of the Decree. - When a foreign individual is considered to be participating in

		the process of establishing commercial presence. For example, if foreign individual comes to Vietnam solely for the purpose of investigating and researching Vietnamese investment environment before making actual decision to invest in Vietnam, will such individual be considered to taking part in the process of establishing commercial presence. According to the WTO commitment, both intra-corporate transferees and persons responsible for setting up a commercial presence are able to enjoy advantageous visa conditions. Why are these two types of individuals, under this Decree, subject to different treatments in term of work permit i.e. the persons responsible for establish commercial presence are subject to application for work permit and intra-corporate transferees are not.
5. Commercial presence as stipulated in clause 1 Article 3 of Decree No. 102/2013/ND-CP is any form of business operation or professional organisation, including the establishment, acquisition or maintenance of a legal entity, or the establishment or maintenance of a branch or representative office, within the territory of a country for the purpose of service supply.	5. Commercial presence as stipulated in clause 1 Article 3 of Decree No. 102/2013/ND-CP is any form of business operation or professional organisation, including the establishment, acquisition or maintenance of a legal entity, or the establishment or maintenance of a	According to the reasons previously explained, the inclusion of the term "for the purpose of service supply" will significantly limit the scope of the Decree as it fails to encompass toward manufacturers. Therefore, we recommend omitting

	branch or representative office, within the territory of a country ~~for the purpose of service supply~~.	this wording.
Chapter II **IDENTIFICATION OF POSITIONS ALLOWED FOR THE EMPLOYMENT OF FOREIGN NATIONALS**		
Article 3. Demands on the employment of foreign nationals		
1. On an annual basis before December 1st, employers (except for contractors) with demands on the employment of foreign nationals must submit a written report as regulated in clause 1 Article 4 of Decree No. 102/2013/ND-CP on these demands as of last year to the Department of Labour, Invalids and Social Affairs in provinces and central-affiliated cities (hereinafter referred to as Department of Labour, Invalids and Social Affairs – DOLISA) where the employers' headquarters are based, following **Form No. 1** issued in attachment to this Circular. This report details the demands in terms of the quantity, professional knowledge, experience, salary level, working period (starting and ending time). For enterprises, agencies, and organisations established after December 1st and having demands on the employment of foreign nationals, a report must be submitted on the 1st of the next month, following **Form No. 1** issued in attachment to this Circular. 2. Employers who have already had demands on the employment of foreign nationals registered in compliance with clause 1 of this Article but		• According to Article 4.1, users of foreign labor are required tosubmit explanatory report for the unavailability of Vietnamese labor pool for a job position, among others, to competent People's Committee and such report shall be subject to approval of corresponding competent authority. • However, this Decree fails to clarify what criteria that People's Committee needs to take into consideration to examine "unavailability of Vietnamese labor pool for a job position". This Circular needs to address this issue so as not to leave People's Committee wide discretion to interpret and apply this term to its liking. • There should be further elaboration on the approval and response process by the relevant

undergo changes in these demands must submit a report on the additional demands at least 10 days before the official employment of foreign nationals to DOLISA where the employers submit their previous report, following **Form No. 2** issued in attachment to this Circular. For enterprises, agencies, an organisations established after December 1st and undergoing changes in the demands on the employment of foreign nationals, a report on additional demands must be submitted, following **Form No. 2** issued in attachment to this Circular. 3. Before December 15th annually, DOLISA shall compile within its area all the demands on the employment of foreign nationals by each position and report to the provincial-level People's Committee for approval. Before January 15th annually, DOLISA shall release a written notification regarding each position allowed for the employment of foreign nationals for each employer as per the approval of provincial-level People's Committee, following **Form No. 3** issued in attachment to this Circular.		authorities to advise enterprises of their revised staffing plans/requirements that have been submitted. The draft Circular has only mentioned about enterprises' responsibility to report when there is a revision to the staffing plan submitted initially but have not indicated the approval process and for how many days the approval results are to be notified to enterprises. • The 1st December timeline is only relevant for Point 1 of this Article as it refers to the annual report to be submitted before 1 December. Unlike annual report, revised report due to changes in staffing plan/demand can occur at anytime throughout the year, hence submit at any time during the year. Therefore, the 1st December timeline is not relevant and inappropriate in this section.
1. On an annual basis before December 1st, employers (except for contractors) with demands on the employment of foreign nationals must submit a written report as regulated in clause 1 Article 4 of Decree No. 102/2013/ND-CP on these demands as of last year to the Department of Labour, Invalids and Social Affairs in provinces and central-affiliated cities (hereinafter referred to as	On an annual basis before December 1st, employers (except for contractors) with demands on the employment of foreign nationals, *need to adjust the quantity or positions offoreign employees for the current foreign work force or extend the period of using foreigners for the current position*	In practice, when making a report onthe demand for foreigner, we are guided to report on the new position, or the position needed to extend. Hence, the foreign who are undertaking the position, having a work permit and does not need to extend it in the year is not covered in

Department of Labour, Invalids and Social Affairs – DOLISA) where the employers' headquarters are based, following **Form No. 1** issued in attachment to this Circular. This report details the demands in terms of the quantity, professional knowledge, experience, salary level, working period (starting and ending time).	*using foreign employees...*	the report. In case, this report is required for all positions (including the current and future position in the year) please provide specific guidance and apply the rules consistently in all provinces.
For enterprises, agencies, and organisations established after December 1st and having demands on the employment of foreign nationals, a report must be submitted on the 1st of the next month, following **Form No. 1** issued in attachment to this Circular.	For enterprises, agencies, and organisations established after December 1st and having demands on the employment of foreign nationals, a report must be submitted ~~on the 1st of the next month~~ *latest on the first day of the next month*, following **Form No. 1** issued in attachment to this Circular	
2. Employers who have already had demands on the employment of foreign nationals registered in compliance with clause 1 of this Article but undergo changes in these demands must submit a report on the additional demands at least 10 days before the official employment of foreign nationals to DOLISA where the employers submit their previous report, following **Form No. 2** issued in attachment to this Circular.	2. Employers who have already had demands on the employment of foreign nationals registered in compliance with clause 1 of this Article but undergo changes in these demands must submit a report on the additional demands at least 10 days before the ~~official~~ employment of foreign nationals *or submit the work permit application dossier to the local DOLISA* where the employers submit their previous report, following **Form No. 2** issued in attachment to this Circular.	The phrase "the official employment" may be misleading to the official signing of labor contractswhile employees need to wait until the work permit is granted to proceed with the labor contract. Under this regulation of least 10 days, we also understand that the People's committees of provinces and cities, and DOLISA will issue the official responding letter within 10 business days in order to give sufficient time for submittingthe work permit application.

For enterprises, agencies, an organisations established after December 1st and undergoing changes in the demands on the employment of foreign nationals, a report on additional demands must be submitted, following **Form No. 2** issued in attachment to this Circular.	~~For enterprises, agencies, an organisations established after December 1st and undergoing changes in the demands on the employment of foreign nationals, a report on additional demands must be submitted, following **Form No. 2** issued in attachment to this Circular.~~	Both enterprises established before or after December 1 need to use form 2 so it is not necessary to re-state this point.
3. Before December 15th annually, DOLISA shall compile within its area all the demands on the employment of foreign nationals by each position and report to the provincial-level People's Committee for approval.		
4. Before January 15th annually, DOLISA shall release a written notification regarding each position allowed for the employment of foreign nationals for each employer as per the approval of provincial-level People's Committee, following **Form No. 3** issued in attachment to this Circular.	4. Before ~~January 15th~~ *December 31th* annually, DOLISA shall release a written notification regarding each position allowed for the employment of foreign nationals for each employer as per the approval of provincial-level People's Committee, following **Form No. 3** issued in attachment to this Circular. *The enterprise, agencies and organizations reporting the change of demand of the employment of foreign nationals, the DOLISA reports to the Chairman of the provincial People's Committee for getting the approval letter within 5 working days and informs in written notification on each*	It is too long between report submission and acceptance (45 days), which adversely affects companies' worker recruitment, especially at the beginning of the year. This period should be cut down to 30 days and completed no later than December 31 annually. (Canon)

	position allowed for the employment of foreign nationals for each employer as per the approval of provincial-level People's Committee, following Form No. 3issued in attachment to this Circularwithin 10 workingdays after receiving reports of enterprises and organizations	
Article 4. Contractor's demands on the employment of foreign nationals 1. Tendering dossier, requesting dossier prepared by the investors must detail theemployment of foreign nationals as stipulated in clause 1 Article 5 of Decree No. 102/2013/NDCP, following **Form No. 1** issued in attachment to this Circular. 2. Prior to the employment of foreign nationals as regulated in clause 3 Article 5 of Decree No. 102/2013/ND-CP, contractors are obliged to submit a written request to Chairman of the provincial-level People's Committee where the foreign contractors carry out their tender package or tender winning projects concerning the employment of Vietnamese nationals intopositions which are supposed to be held by foreign nationals, together with a certification from the investors, following **Form No. 4** issued in attachment to this Circular. 3. In case there are demands for amending and supplementing the number of employees already certified in tendering dossier, requesting dossier in accordance with clause 3 Article 5 of Decree No. 102/2013/ND-CP, foreign contractors must report		

to Chairman of the provincial-levelPeople's Committee where the foreign contractors carry out their tender package or tender winning projects concerning the scheme for amending, supplementing employment demands, together with a certification from the investors, following **Form No. 2** issued in attachment to thisCircular. 4. Before January 15th annually, investors are obliged to submit a report detailing their demands on the employment of foreign nationals to DOLISA, following **Form No. 5** issued in attachment to this Circular.	*5. Chairman of the provincial-level People's Committee where the foreign contractors carry out their tender package or tender winning projects informs in written the acceptance on the amendments of needs of using foreign nationals from the investors, following* ***Form No...****issued in attachment to this Circular within 10workingdays of receiving the adjustment report*	
Chapter III **ISSUANCE OF WORK PERMIT**		
Article 5. Dossier requesting issuance of work permit		
3. A document certifying that the foreign nationals neither commit any crimes nor face any criminal prosecution as stipulated in clause 3 Article 10 of Decree No. 102/2013/ND-CP, implemented as per following guidelines:	a) In case of foreign nationals ~~have stayed~~ *is staying in Vietnamfrom six (06) months and overor had lived in Vietnam over six (06) months and the final exitting day is within X (recommended maximum date is 12 months) month from thedate of work*	The term "have stayed" is unclear. Wondering if the following cases are required for the police record in Vietnam? (1) The foreigner is re-assigned back to Vietnam after many years (1-10

a) In case the foreign nationals have stayed in Vietnam before, it is required to have a criminal record issued by a Vietnamese authority and a document proving that these individualsneither commit any crimes nor face any criminal prosecution in accordance with the foreign country's laws issued by an authority of this country.	*permit application*, it is required to have a criminal record issued by a Vietnamese authority and a document proving that these individualsneither commit any crimes nor face any criminal prosecution in accordance with the foreign country's laws issued by an authority of this country.	years) working in another country. (2) The foreigner came to Vietnam before but stayed for a very short term. (a few weeks to a few months).
3. A document certifying that the foreign nationals neither commit any crimes nor face any criminal prosecution as stipulated in clause 3 Article 10 of Decree No. 102/2013/ND-CP, implemented as per following guidelines: ... b) In case the foreign nationals have never stayed in Vietnam, it is required to have adocument proving that these individuals neither commit any crimes nor face any criminal prosecution in accordance with the foreign country's laws issued by an authority of this country.	b) In case the foreign nationals have never stayed in Vietnam *or have stayed in Vietnam for less than 6 months*, it is required to have adocument proving that these individuals neither commit any crimes nor face any criminal prosecution ~~in accordance with the foreign country's laws~~ *based on the foreign country's laws who foreing reside before moving to Vietnam, the country which foreign national is the citizen or permanent resident* issued by an authority of this country.	One of the requested documents for police record application in Vietnam is the certificate of registration or residence book at the local police. It is the responsibility of the landlord to register for the foreigners, so, many of the foreigners are not well aware about this requirements and they do not follow up appropriately with the landlord. The foreigner may meet a lot of difficulties to get this certificate or book for police record application, especially when they left Vietnam for a long time. Therefore, the Vietnamese police record is mandatory for the foreigner who has lived in Vietnam,

		we suggest to narrow down the subjects of the applications. The suggested time (12 months) is for your reference and consideration only.
4. A document certifying that the foreign nationals are managers, executives, specialists or technical employees as stipulated in clause 4 Article 10 of Decree No. 102/2013/ND-CP, implemented as per following guidelines: ... b) For those who are specialists, it is required to have a document recognised by the authorities certifying that these individuals are specialists or a document proving that these individuals are specialists and suitable for the positions they are supposed to hold in Vietnam.	b) For those who are specialists, it is required to have *(1)* a document recognised by the authorities, *the employers* certifying that these individuals are specialists; or a document proving that these individuals are specialists, *including*: - *qualification of bachelor or engineer or higher;* and *(2) such abovementioned documents aresuitable* for the positions they are supposed to hold in Vietnam.	• In practice, the majority of the certificates of employment issued by overseas employers. Therefore, we suggest to state clearly that the certificates from employees are accepted. • In cases the specialists have many years of experience but they can not (or very difficult) obtain the certificate of employment from the hostemployer for some unexpected reasons, the certificate of the current company for the previous position should be acceptedor at least for a few ofspecial industries, such as the oil and gas industry. Suggest additional regulations on this issue • Article 3.3 of the Decree states that the specialist is the one, among others, who acquired, at least, qualification of engineer or bachelor degree. • The draft Circular provides that individuals, to be qualified as

		specialists, must, among others, have a documents certifying that such individuals are specialists. • We are wondering whether the documents mentioned in this Draft Circular entail qualification of engineer or bachelor degree. We recommend that the Circular needs to address this issue to avoid confusion.
	Propose to add: *For those who are specialists working in technical fields such as foreign language teaching, skill training, it required to have university degree in the specific fields or have 05 years of experience in their majors, in case of the the university degree is not in specific filed, it is required to have more specialized training certificate.*	Foreign language teaching is a specific work that requires the recruitment of native teachers with standard pronunciation to provide speaking sessions to learners. Thus, the teachers should be required to have university degree and specialized training certificate in line with international standards. This requirement will fit in practical conditions and needs of teachers and learners.
4. A document certifying that the foreign nationals are managers, executives, specialists or technical employees as stipulated in clause 4 Article 10 of Decree No. 102/2013/ND-CP, implemented as per following guidelines: ...		

c) For those who are technical employees, it is required to have a degree or a document certifying that these individuals have been trained for technical majors abroad with a minimum period of 01 year and a document proving that they have at least 03 years of experience in their majors, suitable for the positions they are supposed to hold in Vietnam.	For those who are technical employees, it is required to have a degree or a document certifying that these individuals have been trained for technical majors abroad with a minimum period of 01 year ~~and~~ *or* a document proving that they have at least 03 years of experience in their majors, suitable for the positions they are supposed to hold in Vietnam.	In South Korea, there are 650 Technical High Schools that have been established in various fields (including textiles& garments, electronics, IT, design, automobile, computers, etc) in order to train students to develop an expertise in their chosen field (the so-called "Meister High School"). In accordance with Article 3. 4 of Decree 102/2013/ND-CP on foreign labors on September 05th, 2013 (Decree 102), these Korean nationals will be categorized as"technical employees". In accordance with Article 5. 4. C ofthe Draft Circular implementing Decree 102, unless they have at least 03 years of experience, they will not be able to obtain work permit. This means that Korean companies in Vietnam will not be able to hire Korean workers who graduated from Meister High School" or a 2-3 year technical colleges.In Vietnam, a skilled workers shortage is a great problem in such various fieldsastextile and garments, IT, electronics, computers, automobile, and etc, Therefore, the Vietnamese government should ease the strict work permits conditions specified under Article 5. 4. C) so that foreign companies in Vietnam, such as,

		Korean companies in Vietnam can hire foreign nationals who graduated from Meister High School" or a 2-3 year technical colleges so that these foreign workers can transfer technology and knowhow to their Vietnamese colleagues. + Specialists and technical workers: Acquiring "written verification of specialist status by the relevant government agency" for specialists and "certification of professional technology training and work experience" for technical workers is not possible in Japan and many other advanced countries. The reason is that the highly developed training system in these countries eliminates the need for professional or occupational training centers as in Vietnam. Instead, every major corporation often has their own training centers. These centers provide professional training and the required skills for the employees to meet the company's job requirements, while also enabling employees to develop their potentials to the full. Based on staff performance and input quality, a company may issue "specialist certificates" or "certificates of professional technology training and work experience" for those who

		qualify. Accordingly, to meet the current requirements, we recommend that: "certificates of professional technology training and work experience" or "specialist certificates" issued by corporations are considered fully legal as if they are granted by a relevant government agency. + Furthermore, the requirement for technical workers to meet both requirements for professional training and work experience is unreasonable, given the often much higher level of technology advancement of more developed countries than Vietnam. Technical workers there, when they finish their training, often have so much more knowledge that their Vietnamese counterparts lack. We therefore suggest that technical workers should need only one of the two requirements to qualify.
Article 7. Cases eligible for re-issuance of a work permit		

2. Change of first name, last name; date, month, year of birth; nationality; passport number; workplace address compared to those printed on previously issued work permit. Change of workplace address as stipulated in clause 2 of this Article is a change when the employers appoint, move, or delegate the foreign nationals to work full time at another branch, representative office or establishment of the employers which is located within the same province, city.	2. Change of first name, last name; date, month, year of birth; nationality; passport number;workplace address; *job title* workplace address compared to those printed on previously issued work permit. Change of workplace address as stipulated in clause 2 of this Article is a change when the employers appoint, move, or delegate the foreign nationals to work full time at another branch, representative office or establishment of the employers which is located *within the same province*, city *in different province, city*.	+ If an employee is transferred to another subsidiary that is in the same province or city, it is not necessary to re-issue the work permit since the guest worker in this case still remains within the jurisdiction of the Labor-Invalids-Social Affairs Department of the same municipality. Re-issuing a new work permit will therefore create unnecessary administrative complicatedness for businesses. + Only if employees move between different municipalities, a new work permit should be needed.
Newly proposed	*Article 10. Guest workers who are not subject to obtaining work permits* *Apart from people specified in Article 7, Decree 102/2013/ND-CP, the following additions have been made:* *i) Foreigners who are legal representatives of companies in Vietnam as appointed by the company owners;* *k) Foreigners sent by a parent company to its subsidiary in Vietnam for less than three months for the purposes of:* *+ Participating in meetings, briefings and discussions on work plans, business strategies, governance decision making, plan and implementation schedule management; dissemination of new policies; collection of information for*	+ People listed in Article 10 all have very short stays in Vietnam (under 90 days) for purposes of meetings, training, support and so on, and not for permanent employment at the entity in question. Insisting on those people to obtain a work permit will create a stiff procedural challenge for businesses and may cause interruption to their operation. + Furthermore, according to Article 8, Decree 102/2013/ND-CP, to prove that a guest worker is not subject the work permit requirements, the employer also has a lot of paper work to do. As such, even if a person

	reports; monitoring; audit; *+ Supporting the development of new projects, new products, new systems; assisting problem-solving, resolution of issues pertaining to product quality, production management for new projects, new products and new systems;* *+ On-the-job career development and internship;* *+ Internal training.* *l) Foreigners coming to stay in Vietnam for less than three months for observations and surveys of the investment climate, procedures associated with the development of new projects or expansion of existing projects in Vietnam; studying information, procedures, and negotiating agreements and contracts;* *m) Foreigners coming to stay in Vietnam for less than three months to conduct review, audit, evaluation of product quality, work environment and business performance of businesses; renew international quality, environment etc. certificates for businesses;* *n) Foreign guests from the parent company, other subsidiaries, other companies, government officials visiting Vietnam for less than three months for observations, research and learning of a business' business operation.* *Individuals listed in I, k, l, m and n above are not required to go through the*	is outside the affected zone, it may take a company as much time as it needs to get a work permit. To provide a more liberal administrative environment for investment and ease bottlenecks that companies may be facing, we suggest that people listed in Article 10 as mentioned above who are not subject to work permit requirements as well as employers are relieved of the need to authenticate that a guest worker does not need a work permit.

	verifying procedure for not being subject to obtaining a work permit as required in Article 8, Decree 102/ND-CP.	
Chapter IV ORGANISATION OF IMPLEMENTATION		
Article 13. Responsibilities of the employer		
		• We suggest that the Circular must modify its wording from "employer" to "user of foreign labor". Indeed, there are few differences between the "employer" and "user of foreign labor". • According to Labor Code, employer is the one who enter into contract with labor. Therefore, there exists situations when "user of foreign labor" is not indeed "employer". For instance: - when a parent company sends an employee to assist its subsidiary entity in Vietnam. In this case, the employer, the one who maintains contractual relationship with the employee is the parent company and the user of foreign labor is actually the local entity, as regulated under Article 2.2 of the Decree. - when an offshore service provider sends a foreigner to

		Vietnam for service provision, the employer is service provider, but the user of foreign labor is the local entity who has a service contract with the offshore service provider Therefore, the wordings of the Circular should be changed from "employer" to "user of foreign labor" to ensure the consistency of these legal instruments.
3. To prepare dossiers requesting the issuance or re-issuance of a work permit for foreign nationals working in Vietnam.For foreign nationals who have been granted with a work permit but are appointed, moved, or delegated to work full time at a province, city different from the one where they are working, or work in a different position for the employer, the issuance of work permit shall be proceeded in accordance with Section 3 of Decree No. 102/2013/ND-CP.	For foreign nationals who have been granted with a work permit but are appointed, moved, or delegated to work full time *in the same position* at a province, city different from the one where they are working, the *re-issuance* of work permit shall be proceeded in accordance with *Clause 1 Article 14* of Decree No. 102/2013/ND-CP. For foreign nationals who have been granted with a work permit but are appointed, moved, or delegated to work full time *in a different position* at a province, city different from the one where they are working, the issuance of work permit shall be proceeded in accordance with Section 3 of Decree No. 102/2013/ND-CP.	Specific clarification: in case of appointment, movement or delegation of work from a province to another province and the work position unchanged, the work permit should be re-issued. In case of appointment, movement or delegation of work from a province to another province and the position changed, the work permit should be newly issued
5. To fully execute a labour contract signed with a	5. *For the case of implementation of*	To avoid misunderstanding from the

foreign national working in Vietnam as regulate by the laws. To submit a written notification on the conclusion of the labour contract,together with a copy of the signed labour contract and a copy of previously issued work permit, to the DOLISA which previously granted this foreign national with work permit.	*labor contracts under Article 2.1, point a of Decree 102/2013/ND-CP, the employer is obliged to fully implement*, to fully execute a labour contract signed with a foreign national working in Vietnam as regulate by the laws. To submit a written notification on the conclusion of the labour contract, together with a copy of the signed labour contract and a copy of previously issued work permit, to the DOLISA which previously granted this foreign national with work permit. *In case of foreign workers moving internally within a company however, employers will only need to furnish a copy of the granted work permit to the DOLISA that issued the work permit for such guest worker.*	other cases have to submit to the labor contract Employees moving internally within the same company will not have a different employment contract with the company. Hence there will be no employment contract to present to the DOLISA.
9. Periodical report: Investors to report periodically before the 5th of the first month in every quarter to DELISA on the status of the recruitment and administration of foreign nationals working for all contractors during the quarter right before that as stipulated in clause 5 Article 5 of Decree 102/2013/ND-CP, following **Form No. 18** issued in attachment to this Circular.		The clause should indicate who can sign the document on behalf of the Investor. Can the legal representative of the Investor (the one whose name is on theInvestment Certification) sign this report? Or can the legal representativedelegate some other managers to sign this report?
Article 15. Implementing effect 1. This Circular comes into effect since …		

2. This Circular shall replace Circular No. 31/2011/TT-BLDTBXH dated November 3rd 2011 of MOLISA guiding the implementation of a numbers of articles of Decree No. 34/2008/ND-CP dated March 25th 2008 of the Government and Decree No. 46/2011/ND-CP dated June 17th 2011 of the Government amending and supplementing a number of articles of Decree No. 34/2008/ND-CP dated March 25th of the Government regulating the recruitment and administration of foreign nationals working in Vietnam. 3. Approval of the use of foreign nationals for issuance of a work permit before January 15th 2014: a) For employers who have previously registered demands on the employment of foreign nationals in 2014 as stipulated in clause 7 Article 19 of amended and supplemented Decree No. 34/2008/ND-CP dated March 25th 2008 of the Government and in clause 10 Article 14 of Circular No. 31/2011/TT-BLDTBXH dated November 3rd 2011 of MOLISA before November 1st 2014, DOLISA shall compile these demands and report to Chairman of provincial-level People's Committee for approval.		
b) Employers who have not yet reported about demands on the employment of foreign nationals must within 15 days since this Circular comes into effect submit a written report about demands on the employment of foreign nationals to DOLISA where the employers' headquarters are based, following Form No. 1 issued in attachment to this	b) Employers who have not yet reported about demands on the employment of foreign nationals must within ~~15~~ *30* days since this Circular comes into effect submit a written report about demands on the employment of foreign nationals to DOLISA	Employers need time to understand the legal consequences of and comply with the new Work Permit regulations. Therefore,15 days are too short. At least it must be 30 days.

Circular. If failing to submit such report on time, the employers shall be identified as having no demands on the employment of foreign nationals. In case of any obstacles during the implementation, comments should be conveyed to MOLISA for on time guidance and amendment.		

PROPOSAL FOR EASING WORK PERMITS CONDITIONS

Prepared by
KorCham

Proposal for easing work permits conditions; we request to change the conditions so that we can hire graduates of "meister high schools" or 2-3 year technical colleges.

According to the new Decree 102, which became effective on November 1 this year, in order to obtain a work permit foreign workers are required to submit a bachelor degree (a certificate of graduation from a university) **and** a certificate of at least 5 years work experience in their fields.

On the one hand the new decree could help authorities temporarily deal with the long-festering problem of unskilled foreign workers usurping locals' jobs, but on the other hand, this new requirement makes it impossible for foreign graduates and/or foreign professionals to obtain the work permits. In our opinion this condition is too strict and unnecessary.

Currently, in South Korea, there are 650 Technical High Schools that have been established in various fields (including textiles, electronics, IT, design, automobile, computers, etc) in order to train students to develop an expertise in their chosen field (the so-called "Meister High School", established in 2010).

Although graduates from these high schools have a high-level of expertise due to their 3 – year technical training, Korean companies in Vietnam are having a problem with hiring these experts due to Vietnam's foreign work permit conditions which require a bachelor degree (a certificate of graduation from a university) and at least 5 years work experience in their fields.

Currently in Korea there is no large textile factory, therefore Korean graduates and/or professionals should be employed by or temporarily reassigned to Korean textile factories in Vietnam to develop professional expertise. Otherwise, there won't be any hope for the Korean textile industry.

Also for some fields, such as IT, electronics, computers, automobile, etc, where a skilled workers shortage is a great problem in Vietnam, the Vietnamese economy needs highly skilled foreign workers.

Therefore, we propose that the government ease the strict work permits conditions so we can hire foreign workers who graduated from Meister High School" or a 2-3 year technical colleges. For some fields, such as IT, electronics, computers, automobile, etc, foreign workers only need to have either a bachelor degree **or** 5 years work experience to obtain the work permits.

COMMENTS TO DRAFT CIRCULAR DETAILING DECREE NO. 102/2013/ND-CP DATED SEPTEMBER 5TH 2013 OF THE GOVERNMENT

Prepared by
EuroCham

Documents for comments:

- Draft Circular guiding the implementation of a number of articles of Decree No. 102/2013/ND-CP *('Draft Circular')*
- Decree No. 102/2013/ND-CP dated September 5th 2013 of the Government detailing the implementation of a number of articles of the Labour Code regulating foreign nationals working in Vietnam *('Decree 102')*

ARTICLES	CONCERNS
Draft Circular, Article 3, Clause 1: On an annual basis before December 1st, employers (except for contractors) with demands on the employment of foreign nationals must submit a written report as regulated in clause 1 Article 4 of Decree No. 102/2013/ND-CP on these demands as of last year to *the Department of Labour, Invalids and Social Affairs in provinces and central-affiliated cities* (hereinafter referred to as Department of Labour, Invalids and Social Affairs – DOLISA) *where the employers' headquarters are based.*	1) We are concerned about this new regulation in general, because it tightens unnecessarily control on foreign workers, while the current regulations are already heavy and complicated more than enough for companies employing foreigners. It looks like Vietnam is creating more obstacles to FDI contrary to the political will to open the country to the world. It is suggested to eliminate this requirement. 2) This clause should clarify that the employers submit reports **to DOLISA only** and receives approval by People's Committee **via DOLISA only**; in other words, employers do not directly contact People's Committee. That point should be emphasized because Article 4 of Decree 102 makes readers understand that employers are required to directly submit the report to People's Committee.

	3) This clause should clarify whether the report includes the employment demands for the branches/ rep offices **located in another city or province**. For example, can HCM City DOLISA receive and get approval for the employment demands in Da Nang or Ha Noi?
Draft Circular, Article 3, Clause 4: *Before January 15th annually*, DOLISA shall release a written notification regarding each position allowed for the employment of foreign nationals for each employer as per the approval of provincial-level People's Committee	1) We have doubt that any People's committee in big cities like HCMC, Hanoi, Danang, Haiphong... is able to validate in proper way the request regarding foreigners hired for each company. There are too many companies and too many different positions that they may need every year. Therefore, we wonder about authorities' capability to understand in-depth such business reality so as to approve. We are very concerned that the new measure will just lead to administrative burden, and delays in receiving approval involving issues for company's operations. 2) This clause should indicate also the **schedule of approval notification for employers' supplement report,** if any (the report following Form No. 2 as mentioned in Clause 2 of this article).
Draft Circular, Article 5, Clause 2: A health check document as stipulated in clause 2 Article 10 of Decree No. 102/2013/ND-CP prepared *in compliance with the Ministry of Health's regulations.*	This clause should indicate which regulations written in which document
Draft Circular, Article 5, Clause 3 a): In case the foreign nationals have stayed in Vietnam *before*, it is required to have a criminal record issued by a Vietnamese authority *and* a document proving that these individuals neither commit any crimes nor face any criminal prosecution in accordance with the foreign country's laws issued by an authority of this country	"Before" is not clear enough; the clause should indicate **for how long.** 06 continuous months? 6 discontinuous months? Or...? And the clause should indicate **the authority to issue the criminal record** (for example, Justice Department). Decree 102/2013 does not indicate the requirement for both documents (one issued in Vietnam and one issued in the

	foreigner's country). Decree 46/2011 requires only one of those 2 documents (i.e. only the criminal record issued in Vietnam). → Why should this Circular require both 2 documents instead of only 1 as per the regulation in recent years? It will be more reasonable and acceptable to the employers and foreign laborers if the current regulation is kept: **to provide only one document (criminal record in Vietnam only),** not both one issued in Vietnam and one issued overseas.
Draft Circular, Article 5, Clause 3 b): In case the foreign nationals have never stayed in Vietnam, it is required to have a document proving that these individuals neither commit any crimes nor face any criminal prosecution in accordance with ***the foreign country***'s laws issued by an authority of this country	The clause should indicate "the foreign country". Is it the country where the foreigner holds the nationality, or the country where he/she lived for a period of time (should indicate how long the period is) before relocating to Vietnam?
Draft Circular, Article 5, Clause 4 b): For those who are specialists, it is required to have a document ***recognised by the authorities*** certifying that these individuals are specialists or a document proving that these individuals are specialists and suitable for the positions they are supposed to hold in Vietnam.	What type of document by which authorities is expected to be provided?
Article 5	It will be clearer and more comprehensive if this circular mentions **items 5, 6, 7, and 8 in Article 10 of Decree 102** as well.
Draft Circular, Article 7, Clause 2: Change of workplace address as stipulated in clause 2 of this Article is a change when the employers appoint, move, or delegate the foreign nationals to work full time at another branch, representative office or establishment of the employers which is located within the same	For example, a university's staff moved from teaching in one campus to another will be considered as a new staff to new workplace. The work permit cannot be lodged for re-issuance for that reason → Have to apply for a work permit for new employee at the new workplace. In case, due to these transfers, the number of employee increases over the registered number

province, city.	to People Committee. We would request an expedited or simpler process for the current work permit to be re-issued for the new location (same position) and to have the process to reduce the overall foreign labour total in one location and add it to another location so that the overall total of foreign hires remains the same, and this would not be counted as an 'additional demand for hiring' (requiring the process of advising DOLISA 10 days prior etc) but for the process to allow a re- assignment.
Draft Circular, Article 13, Clause 5: To fully execute a labour contract signed with a foreign national working in Vietnam as regulate by the laws. To submit a written notification on the conclusion of the labour contract, together with a copy of the signed labour contract and a copy of previously issued work permit, to the DOLISA which previously granted this foreign national with work permit.	This is applicable only in the form of employment not for an assignment where there is no labor contract. Further specification is required.
Draft Circular, Article 13, Clause 9 a): ***Investors*** to report periodically before the 5th of the first month in every quarter to DOLISA ...	The clause should indicate who can sign the document on behalf of the Investor. Can the legal representative of the Investor (the one whose name is on the Investment Certification) sign this report? Or can the legal representative delegate some other managers to sign this report?
Decree 102, Article 7, Clause 1 refers to the cases in which foreign nationals are exempted of work permit and that includes clause 4 article 172 of the new labor code 10/2012/QH13: "Foreigner coming to Vietnam with a period of less than 03 months to offer services".	Could the circular provide clarification and guidance on this? Does "services" include intangible services such as training, consulting, auditing, after-sales services (for software/hardware products)?
Decree 102, Article 10, Clause 8 e): The foreign workers mentioned in Point h Clause 1 Article 2 of this Decree must have the paper made by the service provider that sends the foreign workers to Vietnam to establish its commercial presence.	What document will exactly be requested from the overseas company which is establishing commercial presence in Vietnam? This should be specified in the guiding circular.

Decree 102, Article 14 on the Procedure for re- issuing the work permit	The Eurocham HR committee had highlighted the issue of not accepting Work Permit **renewal applications more than 15 days** vs. 30 days (as before) **before its expiry date.** This is a critical timing issue, as in many situations, companies won't have enough time to extend visa / temporary Residence Card for the expatriate and family members on time. It is expected to have a clause in the circular to offer more flexibility in case of critical timing issue.
OTHERS	The new draft circular still does not bring anything new regarding foreign nationals working in Vietnam on very short term missions and this is a concern for many international enterprises bringing experts from overseas for an expertise or for quality audit, install equipment, or provide training to local employees for couple of days or weeks. Requesting these foreign nationals to obtain a work permit is unreasonable and as per the current law, they are not entitled to conduct these activities on Business visitor status only.
	No timeframe is specified as when the People's Committee will respond and issue the approval letter after DOLISA sent the request for recruitment of foreigner from companies.
	Some of our questions concerning the **Draft Circular for the 102 Decree** concern provision of Documents for work permits. The context is an employer in the Education Sector who engages (new hires or renewal of contracts) for approximately **200** foreign workers at a specialist/ manager/professional/expert level per calendar year. We need to clarify what documents are required for these cases which are not covered/not clear in the Draft circular:

	1/ **Change of position or title in the valid work permit**: A foreigner who has been issued with a work permit which is **valid**, who wishes to work for **the same enterprises (apply to work for the same company again and internally transferred)** at a **different position** to that written in the work permit. E.g. Lecturer re-employed to a higher/same level lecturer role in the same school. **Can we avoid having to get a new Work Permit for an internal transfer? O**r can we have an expedited process for the current Work Permit to be re-issued with just a title change? 2/ A foreigner who has been issued with a work permit which is **currently valid** and who wishes to work for other enterprises at **the same position** written in the work permit 3/ A foreigner who has been issued with a work permit which is **currently valid** and who wishes to work for other enterprises at the **different position** written in the work permit. 4/ A foreigner who has been issued with a work permit which is **currently invalid**, annulled and who wishes to work for other enterprises at the **same position** written in the work permit. 5/ A foreigner who has been issued with a work permit which is **currently invalid**, annulled and who wishes to work for **the same enterprises (resigned and apply to work for the same school again)** at the **same position** written in the work permit. E.g. Lecturer re-employed the following semester after a break. 6/ A foreigner who has been issued with a work permit which is **currently invalid**, annulled and who wishes to work for **the**

	same enterprises (resigned and apply to work for the same school again) at the **different position** written in the work permit. E.g. Lecturer re-employed to a higher/different lecturer role in the same school. 7/ **Education Sector**: How do we determine the categories in the Labor code (e.g. Are Lecturers/Teachers Specialists? And if Lecturers are specialists then what is the document recognised by the authorities that would be acceptable to 'certify that these individuals are specialists. It is still unclear, and therefore would potentially be interpreted differently by each province. Is it a Degree in Teaching; or a MBA/higher qualification in their subject matter.

COMMENTS ON DRAFT CIRCULAR ON GUEST WORKERS

Prepared by
Language Link Vietnam/Apollo/ACET

In implementing Article 170, Labor Code of 2012, in effect from May 1, 2013 and the government's Decree 102/2013/NĐ-CP, dated Sep. 5, 2013, providing specific implementing details for the Labor Code on guest workers working Vietnam, in effect from Nov. 1, 2013; and after reviewing the draft implementing Circular for the above mentioned Decree 102/2013/NĐ-CP; we, in representation of foreign direct investment (FDI) academic institutions that are currently active in Vietnam in the foreign language training sector, including Language Link Vietnam, Apollo and ACET, would like to highlight a number of concerns and recommendations with your esteemed agency as follows:

Issue 1:
In the government's Decree 102/2013/NĐ-CP, dated Sep. 5, 2013, providing specific implementing details for the Labor Code on guest workers working Vietnam, Article 10.5 on the composition of the (new) work permit application and Article 14.3.b on the composition of the application for work permit extension require a *"letter by the Chairperson of the provincial level People's Committee accepting use of expatriate employees".* That means in both cases: initial work permit grant and work permit extension, written acceptance by the provincial level PC Chairperson is required.

In compliance with these provisions, as soon as the Decree came into effect from Nov. 1, 2013, *we filed written reports and applications for using foreign workers in line with the requirements of the Hanoi City PC and Hanoi Department of Labor-Invalids-Social Affairs, without any feedback from the said agencies so far. This is creating a bottleneck in our getting work permits for new employees and renewal of the soon-to-expire work permits for exiting teachers.*

Such impediment has also unwittingly placed the subject practitioners at risk of breaking the law on using foreign workers or failing to perform training agreements with their partners, resulting in indemnity claims that may be significantly damaging to the institutions.

Our recommendation for Issue 1:

1. To the City People's Committee:
To help remove the bottleneck, we **recommend** that: *the Chairman of the City People's Committee gives specific directives to his assisting and advisory teams to take on the role of releasing the office's written acceptance for use of expatriate employees, based on which applicants may file their applications for new and renewed work permits in accordance with prevailing rules."*

2. To the Ministry of Labor-Invalids-Social Affairs:
An implementing Circular providing specific procedures, responsibilities and timeline to pool together the local need for use of foreign workers at every job position and report of the same to the provincial level PC Chairperson for approval needs to be released soon. At the same time, the Circular should also add the "others" category as mentioned above.

Issue 2:
In accordance with the Labor Code and Decree 102/2013/NĐ-CP, foreign employees may only be used for such jobs as Managers, executive directors, consultants and technical

workers (in three categories). Evidence however shows that in practice, another existing and legally accepted group of foreign workers other than these three categories ***(including English teachers)*** have not been mentioned in both the Decree and draft implementing Circular. This makes it difficult for academic institutions like us to hire foreign employees in teaching jobs (while the institutions have been using locally expatriate teachers who had work permits issued by the Department of Labor-Invalid-Social Affairs for many years now.

Our recommendation for Issue 2:
In reference to the Decree and draft Circular, we find that these directives only include three groups of workers (job positions), together with qualification requirements as outlined in the table below (numbered 1-3).

To help clear the obstacles for foreign-owned institutions engaged in English training in Vietnam and guarantee the expected applicability of normative instruments, we recommend adding to the Circular a 4th group as listed in the table below.

Adding such a category in the Circular will be a math with the tables included in the Circular (as the table on qualification has an "others" column, and the job position section also has an "others" column, it is highly recommended that an "others" group is provided in the Circular, apart from the three statutory groups of managers, executive directors, consultants and technical workers.

No.	Targeted job position	Required qualifications	Notes
1	Manager and executive director	Bachelor's or equivalent degree Or 5 years of work experience	Referred to in Decree 102/2013/NĐ-CP and its draft implementing Circular
2	Consultant	Consultant as certified by the employing entity; Bachelor's or equivalent degree, and 5 years of work experience	Referred to in Decree 102/2013/NĐ-CP and its draft implementing Circular
3	Technical worker	One year of relevant professional training and 3 years of work experience	Referred to in Decree 102/2013/NĐ-CP and its draft implementing Circular
4	Others *(to be added as recommended by educational institutions); These may be parties performing work contracts as specified in Article 2.1.a) of the Decree, with elaboration of who they might be*	Bachelor's or equivalent degree Or 5 years of work experience; *As with second language teachers having a non-teaching Bachelor's degree, an international standard language training certificate is required.*	This 4th group is suggested to be included in the implementing Circular to Decree 102.

SUMMARY OF ROUNDTABLE DISCUSSION ON THE DRAFT DECREE PROVIDING IMPLEMENTING DETAILS FOR SPECIFIC PROVISIONS OF THE LABOR CODE RELATING TO FOREIGN WORKERS IN VIETNAM

- *Time:* *14:00, Monday, January 13, 2014*
- *Venue:* *Ministry of Planning & Investment, 6B Hoang Dieu, Hanoi*
- *Participants:* *Appendix 1*

I. CONTENTS

- Summary of comments and inputs by the Human Resources sub-group, Vietnam Business Forum (VBF), relating to the draft Decree on foreign workers in Vietnam
- Response by representatives of the Ministry of Labor, Invalids and Social Affairs (MOLISA)
- Open discussion.

II. MEETING SUMMARY

Mrs. Nicola Connolly – Head, Human Resources Sub-Group

- Vietnam is following in the footsteps of other countries represented under the VBF, which have legislation for the employment of foreign nationals in a host country. The biggest concern for the VBF and its member chambers is that Vietnam is becoming less attractive in terms of regulations for the employment of foreign nationals in Vietnam. There are two central concerns. The first is the administration the paper work compared to other regional countries. For example, in Singapore this can be done online. Considering Vietnam has a highest Internet penetration in Asia, online options need to be considered.

- The other main issue is Vietnam's competitiveness in regards to Thailand. The Human Capital Institute with Adecco produced the Global Talent of Competitiveness Index in October last year, in which Vietnam rated 82nd out of 103 countries. The main reason for this outcome is issues related to the ability to train, retain and grow talent in Vietnam. Countries that scored the highest where countries that allowed open movement for workers, both domestic and foreign nationals. If Vietnam wants to attract talent and retain it, it needs to allow greater mobility of foreign and domestic workers. There is a lack of talent and a skilled workforce in Vietnam, making the transfer of experience and skilled sets between domestic and foreign companies' employees necessary. As seen in the work permit survey in 2012 and 2013, the shortage of local candidates for positions with technical expertise was the main reason companies employed foreign nationals in Vietnam.

Mr. Kim Jung In – Chairman, Korea Chamber of Business

- KorCham has 2,700 companies in Vietnam employing more than 50,000 people. In the last VBF forum, we raised the issue of requirements to qualify for work permits, such as the requirement for five years work experience and graduate level educational. Combined, this is too strict and not applicable to the industrial field.

- As mentioned by Ms. Connolly, in Vietnam the shortage of skilled workers is a great problem in all industries. Foreign workers only contribute to some specific industrial fields like IT and electronics which require high skill levels. In Korea, there are 650 meister schools and technology colleges that can fulfill all the demands from industries like IT and electronics. So an employee who holds such a work certificate is actually very qualified and this should be seriously considered by the Vietnamese Government. In

conclusion, regarding the definition of the work permit, the requirement should be either five years' work experience or a university level education. Secondly, in a specific field where technical expertise required, it should be granted on a case-by-case basis where needed.

Mr. Laurent Quistrebert – Representative, HR and Training Committee of EuroCham

- In regards to the Draft Circular and Decree 102: The implementation of the Circular and Decree 102 in different provinces of Vietnam, since November 1, has been extremely complicated and inconsistent between Ho Chi Minh City, Hanoi, Vung Tau and different provinces. This has confused companies and provincial labor officers, which has delayed the work permit application process.

- In many countries, the work permit application process is centralized, but in Vietnam it is managed by province. It is suggested that companies and investors be able to send questions and to MOLISA to provide clear answers. Better coordination between the MOLISA and different provinces is essential.

- Another issue of concern is short-term assignees who work in Vietnam for less than 90 days. The new Labor Code and Decree 102 do not list this category of short-term assignees as work permit exempted anymore. This is a significant concern, especially for workers who install equipment or provide training for a limited time. For the business community, it is unrealistic to apply for work permit which may take up to three months to send an assignee to Vietnam for one week. Urgent clarification on this point is sought.

Mrs. Nguyen Kim Dung – Representative, VBF's Training and Education Sub Committee

- Regarding the judicial background, Circular 08-2008 only required either of the two judicial background statements: for work periods less than six months, only a judicial record issued by a foreign country was needed. For longer assignments, both judicial records were required. This is seen as reasonable and this regulation should be unchanged. Regarding granting new and extended work permits, Article 7 of the draft relating to updates of existing work permits if a working location changes, specifies that workers relocating to another place within a same city, a work permit update will be required and those moving to another province or city will need a new permit. This will create a real challenge for foreign teachers, who could work for several subsidiaries within a city or in different branches. This work permit requirement, therefore, will be extremely burdensome.

- With respect to acquisition of a new permit for employees relocating from one province or city to another by the same employer, it is recommend the draft be revised to allow for updates instead of a new permit issuance. According to the draft, to get a new permit the applicant must prepare the judicial record all again, which must comprise both types of records as required by the current draft. In comparison, the previous Decree 46 only required additional submission of a medical check-up record and copies of other credentials certified by a notary public for those working in a province or city. It is suggested the draft be revised to require workers moving from one province to another who still work for the same employer to obtain a permit update rather than an entirely new permit.

- Decree 102 and the draft Circular mention three kinds of workers – executive managers/directors, consultants and technical workers. However, foreign language teachers appear to be neglected - but they still require a college degree and five years'

work experience. We propose that non-national foreign language teachers are included and a college degree or five years' work experience be required. If the college degree presented is not one designated for the same line of work, an international standard language teaching certificate will be attached. Such a regulation would be comparative to that of Singapore. Therefore, it is respectfully suggested that the drafters include non-national foreign language teachers in the mix with the suggested qualification levels.

Canon Representative

- Regarding the draft implementing Circular to Decree 102, in the case of work permit updates for internal relocation of employees within a same business, from one province to another, a new work permit should not be needed.

- In relation to work permits for technical workers, Decree 102 and the implementing Circular require technical workers to have a degree or certificate for a dedicated technical training period of at least one year in a foreign country or documents proving they have three years work experience. For Japanese companies like Canon, however, re-issuance of certificates for technical training for at least one year is difficult to comply with, as no Japanese public services will authenticate such certificate issuance. Normally, such a certificate would be granted by a corporate group for its employee. So, is a one-year technical training certificate granted by the corporate group acceptable? Furthermore, in case of employees not subject to the work permit requirement, the draft Circular and Decree indicate that even if they are relieved of the work permit, they still must go through procedures to substantiate they are exempted from getting a work permit. Meanwhile, for Japanese companies, there can be large numbers of people entering for stays of less than three months, as many as 500 people a year. As such, requiring those not subject to the work permit requirement to complete procedures to prove they are exempted would be burdensome. So, for workers in Vietnam for three months or less, a work permit should not be required nor procedures to prove they are exempt.

Mr. Pham Tri Trung – Lawyer, Baker & McKenzie

- Regarding definitions in the draft and Circular on service providers and offshore consignment into Vietnam to set up commercial presence in Vietnam, the definitions refer to service providers or people entering Vietnam to establish local commercial presence for a parent company that does not have a presence in Vietnam. However, "commercial presence" has been defined in WTO documents as inclusive of representative offices, branches or companies. These companies may be reacquired or startups and the need for commercial presence may overlap with other companies having representative offices in Vietnam. So, personnel from the parent company may be sent to provide services.

- In relation to terminology, the term "employer" should be referred to exactly as having been defined in the Decree. The Decree says "non-national employers", meaning that an employer should be interpreted as someone who subscribes a work contract in the definition of the Labor Code of Vietnam. Meanwhile, there may be a wide range of different instances, such as internally transferred employees or service delivery workers, where the Vietnam-based companies are not necessarily the employers.

- Determination of the need for foreign workers: It is unclear on what grounds a chair of a provincial level People's Committee can approve plans for use of non-national workers. While referred to in the Decree, no specific criteria are provided in the Circular.

- The definition of "residence": How long should the residential period and in what circumstances would someone need to obtain a criminal record check in their resume from their home country and Vietnam? Drawing from the Investment Law, a director as the legitimate agent of a company must be resident in Vietnam. But in accordance with the Residence Ordinance, a residential person must have made some contributions to the revolutionary cause to be qualified for resident status considerations. The Ministry of Planning and Investment (MPI) website had the case of a person holding a temporary residence paper would be called a resident person.

- Criminal record check: Executive directors or managers may be resident in multiple jurisdictions, so are judicial records required from all these countries?

- Article 2.1.i of the Decree referring to managers, executive directors, consultants and technical workers subject to restrictions: For non-national workers to enter Vietnam to work, they must be managers, executive directors, consultants or technical workers. It is confusing to make this one of the criteria required for non-national employees who also must obtain a work permit. Once they enter Vietnam, they have already met the requirement of being an executive personnel, manager, director, consultant, but still such a status is made a precondition for getting the work permit.

- Workers mandatorily required to obtain a work permit: Non-nationals come to Vietnam to set up commercial presence in the country. In the WTO context, non-nationals who want to set up a commercial presence in Vietnam may stay for either 60 or 90 days. But, do they require a work permit?

Response from Mr. Le Quang Trung – Deputy Director of Employment Department, Ministry of Labors, Invalids and Social Affairs

- Foreign investors are encouraged to come to Vietnam to do business and have created five million jobs, directly and indirectly, with many non-national workers active in industries that contribute to Vietnam's development. Regulations pertaining to foreigners in Vietnam to work have been renewed twice a year on average in recent years. The is because ongoing development entails emerging issues to be addressed to meet the country's socio-economic development and create opportunities for foreign workers to do jobs local employees are not able to.

- First, as the Labor Code consists of seven Articles on non-nationals working in Vietnam, Decree 102 should provide guidance within those seven Articles. Any change to this should be passed by the National Assembly. As we start drafting the Circular, it should be kept in mind that guidance should only be provided for what needs to be guided in Decree 102. So we advised municipal Departments of Labor, Invalids, Social Affairs that by May 2013, all provisions of the Labor Code should be into implementation. From November 1, 2013, Decree 102 must be implemented. Initially interpretations by some municipalities were not consistent. In response, through this business forum and dialogues with investors, we revisited the expectations with local governments and agencies, especially in Hanoi and Ho Chi Minh City, to ensure proper adoption. Regarding consultation with the business community, we have released writing requests for comments to all foreign business associations in Vietnam, numerous international agencies, other associations and major foreign companies between November 1 and 30. However, we only received feedback from EuroCham and Canon. We now need to look at how inputs are solicited and provided for better efficiency in future occasions as we sent out requests, but got very little feedback.

- Secondly, regarding the terminology used, in addition to terms used in Decree 102, we did added terms in the draft Circular based on WTO service commitments. In terms of administrative procedures, as training periods or levels of education and work experience certificates were greatly discussed by the business community today, this is already addressed in Decree 102. In the case of consultants or technical workers, if the foreign certificate indicates the holder is a consultant, there is no need for the other two papers and this will be elaborated upon in the Circular.

- The third issue is judicial records. The law states that a certification confirming a clean criminal record in Vietnam and other countries should be presented, so this is a regulation of the law and Decree 102. Regarding questions on whether a certificate from the departure country or other countries where a person has previously lived is needed, Decree 102 requires a foreign certificate with a six-month validity period following release. So only certificates authenticating that the holder is not in conflict with the law and has no prior criminal record, with a six-month validity period, will be accepted. Regarding the health certificate, this is a legislative requirement from the Ministry of Health and we have informed all provincial departments that Circular 14/2013 should be followed. For people staying in Vietnam for less than three months to work, the existing law requires a work permit, except for emergency services. For general service provision, the Labor Code has rulings in place and Decree 102 also specifies exemptions from work permits. We have 11 international schools in Vietnam and all are not subject to the work permit requirement. Holders of Master's and Doctorate degrees or equivalent coming to research or teach for less than 30 days are also not required to obtain a work permit. In the case of work permit renewal, only those relocating to another province and to stay there for the entire time will be subject to this requirement. If they do not stay there for the entire stay in Vietnam, they will be waived of the requirement. For non-nationals setting up a foreign presence in Vietnam, Article 10.8.d, Decree 102, states that the credentials presented by the assignees will be the administrative grounds for issuance of a work permit.

- In total, we have eight comments on 17 issues, to be carefully examined to finalize the Circular and our intention is that we will make adjustments as needed to meet any practical needs that emerge. To that end, even after the circular is released, we will still request the Foreign investment Office to hold dialogues to achieve the best results possible. In turn, we suggest the business community, together with us and the Foreign investment Office, conduct a study to explore international laws and best practices on how to attract a workforce with technical skills to meet local needs. Ms. Ngoc from the Foreign investment Office will be a focal contact, together with AmCham, EuroCham, AusCham and KorCham, to sketch out a research proposal on this, given the existence of offshore migration projects and other domestic migration ones. Yet, the migration of foreigners into Vietnam has not been addressed yet.

Mrs. Nguyen Thi Bich Ngoc – Deputy Director, Foreign Investment Agency, Ministry of Planning and Investment

- From the MPI's perspective, it understands that making changes to a Circular is easier than for a Decree and a circular is also a normative instrument as once it comes out, it should provide a high level of practicability. After this meeting, while the drafters have absorbed the opinions raised, another round of comments by the business community may still be needed within a week before the Office takes issues to the Ministry leadership.

- Based on the outcomes of this meeting and written recommendations by the business community, specific responses on which proposals can be accepted, which provisions can be changed or reasons why a proposal is objected to or how legislation can be revised, it should be kept in mind that flexibility will make it easier for the drafting team to work.

- To contribute to the draft circular, circular-level issues must be looked at and not concerns with decrees or other laws. We would appreciate if the business community gave more comments on parts of the circular that need more technical contributions. This feedback will be much appreciated.

Mrs. Nicola Connolly – Head, Human Resources Sub-Group

- Through the VBF, more input will be provided for the Circular with further discussion. Regarding surveys, EuroCham has undertaken a survey on work permit comparisons and this would be good for future comparisons and surveys on the employment of foreign nationals.

Mrs. Nguyen Thi Bich Ngoc – Deputy Director, Foreign Investment Agency, Ministry of Planning and Investment

- The business community has received some concrete information to provide further inputs to the Circular, while the MPI will work with stakeholders to explore international best practices to better inform related regulators on issues, so policies are more viable and consistent with international practices.

Appendix 1 – Participant List

No.	Name	Tittle	Organization
Representatives from relevant Ministries			
1	Mrs. Nguyen Thi Bich Ngoc	Deputy Director	Foreign Investment Agency, Ministry of Planning and Investment
2	Mr. Le Quang Trung	Deputy Director	Employment Department, Ministry of Labors, Invalids and Social Affairs
3	Mrs. Phung Viet Cuong	Division Deputy Manager	Department of Planning and Investment
4	Mrs. Le Thi Nguyet Anh	Deputy Manager of Policy Division	Foreign Investment Agency, Ministry of Planning and Investment
5	Mr. Duong Manh Hung	Division Deputy Manager	Employment Department, Ministry of Labors, Invalids and Social Affairs
VBF Members			
1	Mrs. Nguyen Kim Dung	Head of Legal	Representative of VBF's Training and Education Sub Committee
2	Mrs. Nguyen Thu Thuy	HR/External Relations Manager	Apollo
3	Mr. Ha, Man Choong	Lawyer	KORCHAM
4	Mr. Kim, Jung In	Chairman	KORCHAM
5	Mrs. Nicola Connolly	Head	HR Sub - group

6	Mr. Laurent Quistrebert	Representative	HR and Training Committee of EuroCham
7	Mrs. Mai Lan Anh	Senior Manager, Global Immigration - Human Capital	Ernst & Young
8	Mrs. Nguyen Thi Thanh Huyen	Senior Manager, Global Immigration - Human Capital	Ernst & Young
9	Mr. Pham Tri Trung	Associate	Baker & McKenzie
10	Mrs. Nguyen Thi Phuong Trang	Paralegal	Baker & McKenzie
11	Mrs. Nguyen Hoang Anh	Paralegal	Baker & McKenzie
12	Mrs. Nguyen Thi Tuyet Nhung	Legal Affairs, GD Office, Planning Center	Canon Vietnam
13	Mrs. Dam Phuong Mai	Legal Affairs	Canon Vietnam
14	Mr. Daniel Carl	Economic Officer	U.S. Embassy
15	Mrs. Le Minh Thu	Lawyer	VILAF
16	Mrs. Le Thi Hoang Yen	HR Director	British Council in Viet Nam
17	Mrs. Nguyen Khanh Cam Chau	Economic Specialist	US Embassy

Enterprise Law

COMMENTS ON DRAFT ENTERPRISE LAW

Prepared by
Baker & McKenzie (Vietnam) Limited

NO.	ISSUE	ARTICLE	RECOMMENDATION
1	Payment of business registration tax at the application for enterprise establishment	Article 30.5	Among conditions to be met for issuance of an enterprise registration certificate ("**ERC**"), business registration tax must be paid. Normally, any tax should be paid under an enterprise tax code, which can only be obtained only upon the establishment of the company. As such, business registration tax should be paid after the enterprise establishment.
2	Contribution of charter capital within 90 days from the date of the enterprise establishment	Articles 49.2 and 75.2	The owner(s) must fully contribute the charter capital within 90 days from the date of the enterprise business registration certificate. This is not feasible for an enterprise with large charter capital. Furthermore, the setup of the bank account and all other steps leading to such will take almost 3 months. The current 36 months should be retained.
3	Conflicting regulations	Article 75.3	A single member LLC must register to amend the amount of charter capital in accordance with the actually contributed amount in case of failure of capital contribution as commitment within 90 days. This seems to be registration of capital reduction. However, per Article 88.1, a single member LLC is not allowed to reduce charter capital.
4	Foreign name of an enterprise	Article 41	The Draft limits foreign languages that an enterprise may use in its name to English, French, Russian and Spanish. Why would the limitation be in place? Why are these languages selected?
5	Content of the ERC	Article 31	An ERC must specify personal information of the representative at law of the enterprise. In practice, this may cause difficulties for the enterprise's operation when it demands to change the representative at law. The information regarding the representative at law should be required to be provided to the Enterprise Registration Website, and be changeable by the enterprise, and be searchable by third parties to verify.

NO.	ISSUE	ARTICLE	RECOMMENDATION
6	Rights of a member	Article 51	It is advisable to amend from "capital contribution portion" to "portion of actually contributed capital, unless otherwise provided by the company charter".
7	Convening a Meeting of the Board of Members	Article 60.3 Resolution 71 approving the WTO accession	Article 60.3 should delete "Member[s] [and] authorized representative[s] of member[s] must attend and vote at meetings of the Board of Members" since this is unnecessary. Meetings should proceed if there is sufficient quorum. Also in this Article, the formalities for convening a meeting should clearly provide that the members may attend by means of telephone and other electronic communication means, as long as the members are able to discuss on voting on issues in the meeting agenda.
8	Director or General Director of One Member Limited Liability Company must not be a related person of the Board of Members/President or people who have the authority to appoint the Board of Members/President	Article 82.3(b)	It is recommended to delete this provision for one member limited liability companies. If applying this provision, it would be difficult for the companies to appoint personnel. As this is a matter of the internal management of an enterprise, the enterprise owner should have the right to decide on this matter.
9	Responsibilities of members of the Board of Management, Director or General Director and other managerial personnel	Article 141	Need to clearly define what is "failure to properly perform", "failure to fully perform", "failure to timely perform" or "contrary to regulations", from which, a manager who violates even a very minor error may be prosecuted.
10	Is it necessary to require General Meeting of Shareholders ("**GSM**") approval for any changes to the Company Charter?	Article 114	Article 114 requires an GSM approval to amend the Charter. The Charter of the company includes a lot of information, such as legal rep, office, branch, address of the head office. As such, if the Charter must be approved by the GSM, then all of such administrative changes (legal rep, rep office, branch, address of the head office, which are subject to the approval of the Board of Management only) will be *de facto* subject to GSM approval, which is burdensome.

NO.	ISSUE	ARTICLE	RECOMMENDATION
			We suggest that this Article provide that GSM approves only those changes to the Charter that are not under the authority of the Board of Management. Also, in the provisions relating to the administrative procedures to effect the changes (as decided by the Board or the GSM as the case may be), only the relevant Board or GSM resolutions be required to submit, not the Charter. The Charter can be treated as the internal document of the company only.
11	Authority of the representative at law	Article 31	In practice, the authority of the representative at law is usually restricted or limited in the company's charter. However, this restriction is not expressed in the ERC. Thus partners do not recognize such restriction. We suggest that the EL include a provision where the enterprise will have the obligation to upload such information to the Enterprise Information Website. For such a regulation to work, the Enterprise Information Website must be accessible by enterprises, so that they can upload these particular information to, and such information be searchable by third parties.

COMMENTS ON THE DRAFT LAW ON ENTERPRISES (LOE)

Prepared by
Vilaf

I. Major comments

1. Definition on "foreign investor"

The wording of this definition of the Draft is not consistent with Draft Law on Investment.

The Draft provides a new definition on foreign investor. However, the proposal under the Draft is inconsistent with the definition on foreign investor under Decision 88 and Decision 55 of the Prime Minister guiding the acquisition of foreign investors into domestic companies. Under Decision 88 and Decision 55, the foreign ownership cap to determine whether a company is considered a foreign investor is 49%. On the other hand, the Draft provides a higher foreign ownership cap at 50%.

It is suggested to change the foreign ownership cap under the Draft from 50% to 49% for consistence with other regulation.

2. Business right

Article 9.1 of the Draft LOE provides that the enterprises only can carry out conditional business upon satisfaction to the relevant conditions of such business sector. This provision implies that enterprises might choose and conduct businesses that are not under conditional sectors at their own discretion, even if such business lines are not registered in their BRC. It is unclear whether this provision implies that enterprises are free to conduct non-conditional business without registration with the authorities or not. For the avoidance of doubt, this provision should further provide the clarification on these points. This provision should also further clarify whether FIE are also able to conduct non-conditional business that was not registered in their IC or not?

3. Voting ratio

The provisions on voting thresholds of multi-member LLC of the current LOE and the Draft LOE may trigger uncertainty and confusion when compared with the provision on the same of Resolution 71[1] of the National Assembly approving Vietnam's accession to the WTO. In particular, Resolution 71 provides that a LLC is entitled to provide in its charter the majority vote necessary (including 51% majority) to pass decisions of the Members' Council.

[1] Resolution 71/2006/NQ-QH11 of the National Assembly dated 29 November 2006 approving Vietnam's access to the WTO ("**Resolution 71**")

It is not clear whether Resolution 71
(i) only applies to joint-ventures operating in the service sectors committed by Vietnam in the WTO Commitments, or
(ii) broadly applies to all limited liability companies.

We understand that the LOE shall be applied to both domestic and foreign invested companies. Thus, the voting ratio should be applied the same to all companies regardless of capital sources. It is suggested that the majority voting ratio of 51% as guided by Resolution 71 should be applied.

II. Detailed comments

No.	Issues	Comments
1.	*Governing scope (Article 1 of the Draft LOE)*	The governing scope according to this Article 1 of the draft LOE excludes the "operation" of enterprises. However, Article 3.1 of the Draft LOE regarding the application of the current LOE still provides that the "the establishment, management organization and operation of enterprises shall comply with this Law and other provisions of relevant laws". Therefore, the word "operation" should not be removed from Article 1 of Draft LOE.
2.	*Definition of "capital contribution" and "capital contribution portion" (Articles 4.4 and 4.5 of the Draft LOE)*	There are certain provisions in the draft still using the phrase "capital contribution portion ratio" (e.g. Articles 17.3(b), 49.2 and 59.1(b)), while according to Article 4.5, "Capital Contribution Portion" means the ratio itself. These provisions should be amended for consistence with Article 4.5.
3.	*Definition of "charter capital" (Article 4.6 of the Draft LOE)*	Articles 49.1, 75.1 and 90.1 of the Draft LOE already provide for the "Charter Capital" of 2 member LLC, single member LLC and JSC, respectively. While the definition of Charter Capital of JSC under Article 90.1 is consistent with Article 4.6 of the Draft LOE, the definitions of Charter Capital of LLC under Articles 49.1 and 75.1 are not. Please consider to remove either Article 4.6 or Articles 49.1, 75.1 and 90.1 for consistency.

4.	*Definition of "Founding shareholder" and "Person establishing the company" (Article 4.13 and 4.18 of the Draft LOE)* "Founding shareholder" means a shareholder holding at least 1 ordinary share and sign in the application for issuance of the business registration certificate of a joint stock company. "Person establishing the company" means organizations, individuals who contribute capital to establish a new company and sign in the application for issuance of the business registration certificate of that company.	We suggest the amendment to the definition of "Founding shareholder" as follow: *""Founding shareholder" means a shareholder holding at least 1 ordinary share and sign in the application for establishment ~~issuance~~ of ~~the business registration certificate of~~ the joint stock company."* The same suggestion for the definition of *"Person establishing the company".* We note that there is no Article 4.12 in the draft LOE.
5.	*Authorized representative (Article 4.16 of the Draft LOE)* *Authorized representative* means an individual who is authorized in writing by a member of a limited liability company or a shareholder of a joint stock company where such member or shareholder is an organization to exercise such member's or shareholder's rights in the company in accordance with this Law.	Articles 4.16 and 17 of the Draft LOE appear to govern authorized representatives of institutional members/shareholders of a company only. These articles reflect wordings of Article 4.14 of the current LOE and Article 22 of Decree 102[2]. This narrow concept of authorized representative raises a concern on whether individual member of a limited liability company or individual shareholder of a joint stock company is allowed to appoint authorized representative. This approach may violate the rights of an individual to have his/her authorized representative as stipulated in Article 143.1 of the Civil Code 2005. Thus, the Draft LOE should revise to provide equal right to the individual and institutional shareholders/members.
6.	*Definition of "Related party" (Article 4.23 of the Draft LOE)*	Article 4.23(b) refers to Article 4.15. However, Article 4.15 is about the definition of "corporate managers", which is not relevant to Article 4.23. The reference Article 4.23(b) under the Draft LOE must be revised.

[2] Decree 102/2010/ND-CP of the Government dated 01 October 2010 guiding the Law on Enterprises ("**Decree 102**")

		Article 4.23 only provides for the "related persons" of a company, and does not specify the "related persons" of an individual. This causes dificulties when determining whether a transaction will be considered as a "related party transaction" under Articles 70.1(b), 142.1(a) and (c) of the Draft LOE, since there is not legal basis to determine who would be considered as related persons of individuals (such as the GD, BOM member, Authorised Representative of Member). Please consider adopting the definition of "related person under Article 6.34 of the Law on Securities.
7.	*Definition of "Foreign investor" (Article 4.30 of the Draft LOE)* Item (c) of Article 4.30 provides that foreign investors include, among others, a company established in Vietnam and falls into the following categories: (i) One or more members, shareholders are foreign entities holding <u>more than</u> 50% of the total ordinary shares or charter capital of a JSC, LLC. (ii) The majority of partners of a partnership have foreign nationality. (iii) The owner of a private enterprise is <u>a foreigner</u>.	The wording of this definition of the Draft is not consistent with Draft Law on Investment. The Draft provides a new definition on foreign investor. However, the proposal under the Draft is inconsistent with the definition on foreign investor under Decision 88 and Decision 55 of the Prime Minister guiding the acquisition of foreign investors into domestic companies. Under Decision 88 and Decision 55, the foreign ownership cap to determine whether a company is considered a foreign investor is 49%. On the other hand, the Draft provides a higher foreign ownership cap at 50%. It is suggested to change the foreign ownership cap under the Draft from 50% to 49% for consistence with other regulation.
8.	*Definition of "Foreign investment" (Article 4.31 of the Draft LOE)*	We cannot find the term "Foreign investment" used alone under the Draft LOE. Only the term "Foreign investor" is found. Beside, foreign investment falls into the governing scope of the LOI, not the LOE. This definition thus is unnecessary and should be removed.
9.	*Right to conduct business activities of the enterprises (Article 9.1)*	This provision implies that enterprises might choose and conduct businesses that are not under conditional sectors at their own discretion, even if such business lines are not registered in their BRC. It is unclear whether this provision implies that enterprises are free to conduct non-conditional business without registration with the authorities or not. For

		the avoidance of doubt, this provision should further provide the clarification on these points. This provision should also further clarify whether foreign invested companies are also able to conduct non-conditional business that was not registered in their IC or not?
10.	*Definition of "legal representative" (Article 16.1 of the Draft LOE)* A *legal representative* of an enterprise means an individual representing the enterprise in performing rights and obligations resulting from transactions of the enterprise, acting as plaintiff or defendant on behalf of the enterprise before arbitrators or the courts, and performing other rights and obligations in accordance with the laws.	The scope of representation of a legal representative as provided for in Article 16.1 of the Draft LOE does not include the establishment of transactions on behalf of the enterprise. Regarding the application of the multi legal representative model, the Draft LOE does not (i) deal with the situations when the decisions of the legal representatives conflict; (ii) provide mechanism to divide the authorizations and responsibilities among the legal representatives; and (iii) clearly indicate whether one legal representative has the power to amend or terminate transactions or contracts executed by the other legal representative; and (iv) clearly indicate whether the legal representatives must jointly or individually fulfil each obligation of a legal representative as required by enterprise regulations and whether they must be jointly and severally responsible for losses/damage resulting from failures to fulfil such obligations. The Draft LOE should further provide mechanism to deal with issues at 5.2 or require the charter of the company to clearly provide the same in case the multi legal representative model is applied.
11.	*Number of the legal representative of a company (Article 16.2 of the Draft LOE):* A partnership, LLC, JSC may have more than 1 legal representative. In this case, the company's charter must	The drafter should revise the numbering of this Article. There are two articles numbered with 16.2. Having more than 1 legal representative shall be convenient for the company in the way that in case there is any incident happening to the only

	specify the number of legal representatives of the company, the title of each one and register all of them with the licensing authority.	legal representative (such as death, imprisonment, termination of labour contract etc.), the company can still operate normally with the presence of other legal reps. However, there will be several downsides associated with this option, in particular: - The Draft LOE does not provide for a mechanism to divide the authorizations and responsibilities among the legal representatives; - It is likely to have disagreement among the legal representatives over who sign what, or making decisions on different matters of the company. The Draft LOE does not deal with the situations when the decisions of the legal representatives conflict; - The Draft LOE does not clearly indicate whether one legal representative has the power to amend or terminate transactions or contracts executed by the other legal representative; and - The Draft LOE does not clearly indicate whether the legal representatives must jointly or individually fulfil the duties of a legal representative as required by enterprise regulations and whether they must be jointly and severally responsible for losses/damage resulting from failures to fulfil such obligations; and - Many legal representatives in one company will likely lead to more frequent amendment to the company's BRC with regard to changes related to the registered information of such legal reps in the BRC. The Draft LOE should take into account the above points to decide whether or not to apply the multi legal representative model. If applied, then the Draft LOE must provide for the mechanism to deal with said-above issues or require the charter of the company to clearly provide the same.
12.	*Requirement of the residence of the legal representative (Article 16.2, 16.3 and 16.4 of the Draft LOE):*	This requirement is remained unclear under both the current LOE and the Draft LOE. A common concern is what and how to determine a person "resides in Vietnam". Should the legal representative stays in Vietnam more than 183 days (as provided under the tax regulation) or obtains the permanent residential card under the immigration regulation in order to

		satisfy this requirement? Another concern is whether the person appointed as legal representative of a company must satisfy this requirement before or after he is appointed as legal representative.
13.	*Right to make capital contribution/purchase shares in other companies (Article 20.1(a) of the Draft LOE)*	The term "listed companies" should be changed to "public companies" to be consistent with Decision 55.
14.	*Contracts prior to business registration (Article 21 of the Draft LOE)* 1. Person(s) establishing an enterprise may sign contracts for the purpose of establishment and operation of an enterprise prior to and during business registration. 2. Where the enterprise is established, the enterprise shall assume all rights and obligations resulting from contracts stated in clause 1 of this Article unless otherwise agreed by contracting parties. 3. If the enterprise is not established, the person(s) who signed the contracts pursuant to clause 1 of this Article shall be solely or Person(s) establishing the enterprise shall be jointly liable for the performance of such contracts.	It is not clear under the both the LOE and the Draft LOE if the costs borne by the person(s) establishing the enterprise for the purpose of establishment and operation of the enterprise could constitute capital contribution into such enterprise or operating costs of the enterprise if the enterprise is actually established.
15.	*Capital contribution to multi-members LLC (Article 49.1 of the Draft LOE)*	There is already a general definition of "charter capital" under Article 4. Please consider removing Article 49.1 as it provides an additional definition on charter capital.
16.	*Capital transfer (Article 54.2 of the Draft LOE)*	The requirement that the parties must apply for amended BRC only after the completion of the transfer may causes a lot of difficulties to the parties in the capital transfer transaction. We noted that Decree 43 also requires the parties to submit, among other things, the "evidence of completion of

		capital transfer" at the time of applying for the amended BRC in case of capital transfer. This is because in practice, the transaction of purchasing shares/capital contribution portion is often completed when the amended BRC is issued by the authority, registering the purchaser as the new owner of such shares/capital contribution. In order to provide the evidence of completion, the purchase price shall have to be made prior to the issuance of the amended BRC/IC, which is very risky for the purchaser. Therefore, these provisions should be removed.
17.	*Voting thresholds of multi-member LLC (Article 61.2 of the Draft LOE)* The Draft LOE keeps it unchanged regarding the voting thresholds of multi-member LLC under the current LOE. Accordingly the decisions of the Members' Council will be passed if they are approved by a number of votes representing at least 65% of the aggregate capital of attending members for basic matters or at least 75% of the aggregate capital of attending members for key corporate matters.	The provisions on voting thresholds of multi-member LLC of current LOE and the Draft LOE may trigger uncertainty and confusion when compared with the provision on the same of Resolution 71 of the National Assembly approving Vietnam's accession to the WTO. In particular, Resolution 71 provides that a LLC is entitled to provide in its charter the majority vote necessary (including 51% majority) to pass decisions of the Members' Council. It is not clear whether Resolution 71 (i) only applies to joint-ventures operating in the service sectors committed by Vietnam in the WTO Commitments, or (ii) broadly applies to all limited liability companies. We understand that the LOE is applied to both domestic and foreign invested companies. Thus, the voting ratio should be applied the same to all companies regardless of capital sources. It is suggested that the majority voting ratio of 51% as guided by Resolution 71 should be applied.
18.	*Contracts, transactions subject to approval of the Members' Council (of a LLC) (Article 70 of the Draft LOE)*	Same as the current LOE, the Draft LOE still requires the draft contracts or notices on major contents of expected transactions to be displayed at the head office and branches of the company Since the draft contracts or notices on major contents of transactions may include confidential information, it may not be appropriate to require the

		public display of such draft contracts or notices. We propose the Draft LOE remove the above requirement on display of the draft contracts at the head office and branches office of the company.
19.	*Capital contribution to single member LLC (Article 75 of the Draft LOE)*	Article 75.2: Article 6.3 of Decree 102 provides that the time limit for capital contribution of Single-Member LLC is 36 months from the date of issuance of BRC. However, the Draft LOE reduces the time limit for capital contribution to only 90 days. Article 75.3: Article 75.3 of the Draft LOE is contrary to the provision of Article 76.1 of the current LOE (i.e. Article 88.1 of the Draft LOE). Article 76.1 of the current LOE and Article 88.1 of the Draft LOE provides that Single-Member LLCs are not allowed to reduce the Charter Capital. However, this Article 75.3 of the Draft LOE, on the other hand, allows the Single Member LLC to reduce the Charter Capital by carrying out the re-registration of the actual contributed Charter Capital if its owner does not fully contribute the Charter Capital within 90 days. Article 75.4: The phrase "personal responsibilities" - "chịu trách nhiệm cá nhân" provided in this provision seems has not covered the case where the owner is an institution. For the avoidance of doubt, this provision should be further revised.
20.	*Right of the owner of single member LLC (Article 76.1(d) of the Draft LOE)*	This provision of the Draft LOE removed the right of the Members' Council or the Chairman of the Single-Member LLC with regards to the decisions on the investment projects valued at 50% or more of the total value of the assets of the Single-Member LLC. According to this provision, all the investment decisions of the Single-Member LLC should be approved by the institutional owner. This might cause delay in implementing investment decisions of the Company since seeking the approval from the institutional owner might take time.

21.	*(General) Director (Article 82 of the Draft LOE)*	Article 82.1: This provision has clarified the provision of Article 70.3(b) of the current LOE that Director shall not be the related person of the Chairman of the Company, but the Chairman might itself hold the position of the director of the Company. Article 82.3(b): This provision does not clarify whether the Director/General Director of the Single-Member LLC shall not be the related person of "the person authorized to directly appoint the member of Members' Council or the Chairman of the company" or shall not be that person itself. This provision, therefore, should be further amended to clarify this point.
22.	*Contracts with related person (Article 87 of the Draft LOE)*	Article 87.1: This new provision allows the Single-Member LLC to specifically provide in the Charter that the transactions between the Company and its related persons do not need any approval at all. In addition, the provision of this Article 87.1 does not clearly clarify whether the approvals of all the Members' Council, Director/General Director, and the Inspector are required for the Related Party Transactions or only the approval of the Members' Council is sufficient. The approval from Director, Inspector is only required if the Single-Member LLC is organised under the structure of Chairman, Director, and Inspector. As such, this provision should be further amended to clarify this point. The amendment of the phrase: "authorised representative" to "member of the Members' Council" in Article 87.1(b) has removed the scope of application to the transaction between the Single-Member LLC and the Chairman. Article 87.3: This new provision might be implied that the Related Party Transactions will be only treated as invalid if it satisfies 2 conditions at the same time: a) if such Related Party Transactions were not entered in accordance with the relevant provision of Draft LOE; and (b) such Related Party Transactions must cause damages to the Company. It is unclear if

		the Related Party Transactions were not entered into in accordance with Draft LOE (i.e. were not approved by the Members Council or the Chairman, Director, and Inspector etc.), but does not cause any damage to the Company, then such Related Party Transactions are invalid or not?
23.	*Capital contribution to JSC (Article 91 of the Draft LOE)* The Draft LOE increases the time-limit of 90 days under the current LOE to 120 days from the date of issuance of the BRC. Specifically, "within 90 days from the date of issuance of the BRC, the BOM must notify the shareholders about the time-limit for making capital contribution. The shareholders must contribute capital in full within 30 days from the date of receiving such request."	It appears from the draft that prior to the expiration of the 120 days period provided under Articles 92.1 and 92.2 of the Draft (90 days and 30 days), a shareholder is still allowed to transfer his right to purchase the registered shares to another person. This is because: 1. According to Article 91.3, during this period, the voting right of a shareholder shall be calculated based on his registered shares, and 2. According to Article 91.4(a), only after the expiration of 120 days period that a shareholder is prohibited from transferring his right to purchase shares.
24.	*Obligations of shareholders (Article 94.1 of the Draft LOE)*	This article should be amended into "within 120 days from the date the company is issued with the BRC" or "within 30 days from the date of being notified by the Board" for consistence with the new capital contribution schedule of JSC under Article 91.2 of the Draft LOE. The term "related peron in the company" used in this article should be clarified, since this is a broad term. Otherwise, the wording of Article 80.1 of the current LOE should be remained.
25.	*Issue of shares (Article 101.1 of the Draft LOE)*	The Draft LOE is not clear on the different between "Share issuance" (Article 101.1) and "Share offering" (Article 104). According to the Draft LOE, there are two scenario: 1. "Share issuance" is merely the increase of the number of "authorised shares". After increasing the number of authorised shares, in order to increase the charter capital, the company must "offer" its shares according to Article 104; or

		2. "Share issuance" (Article 101.1) and "Share offering" (Article 104) are separate and different procedure: 2.1. "Share issuance" means the increase of charter capital (i.e. increase the number of issued shares) by increasing the number of authorised shares. We note that the increase of the authorised share does not always increase the charter capital, since the authorised shares includes the issued shares and unissued shares. If only the number of unissued shares is increase, the charter capital does not change. In this case, the wording of Article 101.1 should be amended to clearly state this. 2.2. "Share offering" means increasing the charter capital by offering the unissued shares without increasing the total amount of authorised shares. Please clarify which understanding is right.
26.	*Private placement of JSC (Article 102 of the Draft LOE)*	The term "issuing/issuance" and "offering/offer" are used in consistently in this Article. Moreover, the Draft LOE should make clear on how to determine the completion of the private placement: Should it be (i) the payment date or (ii) the date when the investor is registered into the Shareholders' Registry or (iii) on the satisfaction of both (i) and (ii) above. The Draft LOE should also define private placement as issue of shares to the investors who are not existing shareholders of the company to avoid any confusion with the normal capital increase of a JSC (where shares are issued to all existing shareholders).
27.	*Issue of shares to existing shareholders (Article 103.5 of the Draft LOE)*	The term "issue" ("phát hành") should be replaced by "registering the purchaser into the Shareholder Registry" to avoid confusion.
28.	*Share offering (Article 104 of the Draft LOE)*	Please see our comments about Article 101 of the Draft LOE.
29.	*Terms of a member of the Board of Management (BOM) and number of BOM members (Article 130.2)*	The drafter should revise the numbering of this Article. There are 2 Article 130.2.

	Same as the current LOE, the Draft LOE states that in case members of the BOM complete their terms of office altogether, such members shall continue working as members of Board of Management until a new BOM member is elected and takes over the management, unless otherwise stipulated by the charter of the company.	Both the current LOE and the Draft LOE do not provide the time-limit for the new BOM members to be elected. For avoidance of any delays in such procedures, the Draft LOE should include a proper time-limit for the election of the new BOM members.
30.	*Independent members of BOM (Articles 130.5, 113(b) and 130.6 of the Draft LOE)* According to Article 113.1(b) and 130.6, the independent BOM member shall act as an inspector of the JSC which is not subject to the requirement of establishing a board of inspector.	The Draft LOE provides for 2 kinds of BOM members, managing members and independent members. According to Article 130.5, an independent BOM member is a member not having any direct or indirect interests in the company other than the interests of being a BOM member. Members of the BOM is entitled to participate and discuss the matters subject to BOM's approval, but not entitled to vote, except the company's charter provides otherwise. The rights and obligations of the independent BOM members shall be same as members of the Supervisory Board. In our opinion, this provision is not reasonable. If the purpose of having independent BOM members is to make the operations/activities of the BOM is more transparent, sense of justice and for the best interests of the company, the independent BOM members should have same rights and obligations with other BOM members, including voting right. Otherwise, the role of independent BOM members shall overlap and confuse with that of the Supervisory Board and even makes the management organization of the company become cumbersome. We suggest that: - The LOE should only requires independent BOM members in some special situations such as in public companies, companies in financial sector (eg: banks), companies with more than 50% State capital. - The independent BOM members should have same rights and obligations with other BOM members. - The LOE should provide criteria of independent BOM members.

31.	*Criteria of BOM members (Article 131.3 of the Draft LOE)*	Article 131.1c of the Draft LOE does not include the situation where a child of the BOM member (either biological or adopted) is a major shareholder of the company. A shareholder holding less than 1% of the voting shares of the company may still meet conditions under Article 131.1d of the Draft LOE to be an independent BOM member. However, such person may not satisfy the requirements of "having no direct or indirect interests" prescribed by the definition of an independent BOM member at Article 130.5. In other words, the qualification at Article 131.1d is redundant and should be removed.
32.	*Duties of the managers (Articles 140.1(b) and 140.1(c) of the Draft LOE)*	Both the current LOE and the Draft LOE require the managers to ensure the maximum legitimate interests of, and be loyal to the benefits of, the shareholders of the company. However, the current LOE and the Draft LOE do not clarify that in case there are conflicts of interests and benefits among shareholders then interests and benefits of which shareholder(s) should the managers ensure and be loyal to. If the obligations with respect to interests and benefits of shareholders are only applicable when there are no conflicts of interests among shareholders, then the interests and benefits of the shareholders should not be distinguished from the interests and benefits of the company as a whole.
33.	*Rights and responsibilities of the Head of branches of a company*	Both the current and the Draft LOE do not have any provisions on the rights and responsibilities of the Head of branches. As the operations of branches and representative offices of the companies incorporated in Vietnam are very popular, the Draft LOE should consider providing the rights and obligations of head of branches and representative offices.

COMMENTS ON LEGAL ISSUES CONTAINED IN THE DRAFT ENTERPRISE LAW

Prepared by
DFDL Mekong

I. General comment

Generally the draft (**"Draft Enterprise Law"**) to amend the Law on Enterprises № 60/2005/QH11 issued by the National Assembly of Vietnam (**"Enterprise Law"**) has resolved ambiguous issues of the current Enterprise Law and hence will create a detailed regulatory framework for both Vietnamese enterprises and foreign investors to follow. For instance, the issue relating to a definition of "foreign investor" which has remained unclear for a long period of time has been clarified under the Draft Enterprise Law. Additionally, the Draft Enterprise Law has unified and integrated certain issues which have been governed by other implementation regulations, such as the management of State owned enterprises, social enterprises into one law.

However, besides the significantly good points set out in the Draft Enterprise Law, we would like to provide below our recommendations to some remaining issues for further improvement.

II. Specific comments

1. Names of founding shareholders in the Enterprise Registration Certificate after the lock-up period

Under the current Enterprise Law, if within 3 years (the "**Lock-up Period**") after the issuance of the Enterprise Registration Certificate (the "**ERC**") a founding shareholder of a joint stock company transfers its shares to another party which is not a founding shareholder, the company must conduct the amendment procedure to amend the name of founding shareholder in the ERC. However, after this Lock-up Period, the amendment procedure of the ERC is no longer required. In fact, after the Lock-up Period, the legal status of founding shareholders is similar to that of normal shareholders.

As a matter of practice, after the Lock-up Period the founding shareholders of a joint stock company whose names remain in its ERC may no longer be founding shareholders or even shareholders. The Draft Enterprise Law keeps this content which may lead to the misunderstanding of information on founding shareholders of the joint stock company.

Therefore, we suggest that Draft Enterprise Law should set out an amendment procedure of the ERC to remove the name of founding shareholders after the Lock-up Period.

2. Supplementing the requirement on information disclosure of the joint stock companies

Either the current Enterprise Law or the Draft Enterprise Law do not contain any provisions to require joint stock companies to disclose information on major shareholders as those applicable to public companies. However, the information disclosure is not only necessary to public companies but also to joint stock companies in order to improve the transparency of all types of enterprises.

Therefore, we suggest setting out the provisions on information disclosure of major shareholders of joint stock companies in the Draft Enterprise Law.

3. Voting ratios of Members' Council of multi-member limited liability companies

After joining the World Trade Organization ("**WTO**") in 2006, the National Assembly of Vietnam issued Resolution No.71/2006/QH11 dated 29 November 2006 ("**Resolution 71**") to affirm such accession. An appendix issued with Resolution 71, outlining issues directly applicable to Vietnam's commitments, reduces the voting ratio of board of members with regard to limited liability companies, and shareholders' general meetings (the "**GMS**") with regard to joint stock companies to 51% instead of 65% as set out in the current Enterprise Law. The changes brought forth by Resolution 71, however, have not been clarified by subsequent regulations, leaving investors unsure of the applicability of the updated ratio.

Under the Draft Enterprise Law, the updated ratio (51%) has been applied to the voting of joint stock companies' GMS. However, for multi-member limited liability companies, the Draft Enterprise Law remains (please see Article 61 of the Draft Enterprise Law). Since the choice of voting ratios is a crucial matter for most enterprises and the legal treatment of all types of companies should be equal, we suggest that the voting ratio of 51% should be also applied to multi-member limited liability companies.

COMMENTS ON THE DRAFT LAW ON ENTERPRISES

Prepared by
HSBC Vietnam

1. Article 4 - Point 24 & 25

1.1. Draft stipulation

Article 4: Definition of terms:

"24. Foreign individual is an individual that does not hold Vietnamese nationality.
25. Foreign organization is the organization established in foreign country as per foreign law and regulations."

1.2. Observation / Implementation difficulties

There is no definition of foreign investor in Article 4 of this draft law. However, the word "foreign investor" is used in Article 39 of this draft which causes confusion in understanding and implementing.

On the other hand, currently, there is no consistent definition of "foreign investor" across the market. Various definitions in Ordinance on Forex control and guidance for implementation of Law on Investment and Securities Law (ie Decision 55/2009/QD-TTg by Prime Minister on Foreign Ownership Limit in Vietnam securities market, Decision 88/2009/QD-TTg of Prime Minister Regulations on Capital Contribution, Purchase of Shares by Foreign Investors in Vietnamese Enterprises) are leading to misunderstanding and difficulties in implementation of investors.

1.3. Recommendation

We propose to amend this point as below:

"24. Foreign investors are foreign investors as stipulated in Law on Investment"

2. Article 39 – Point 3

2.1. Draft law regulation

"Article 39. Transfer owning rights of contribution asset:

3. Payment of buying, selling, transferring shares and contributions and receiving dividend operations of foreign investor must be implemented via capital account of that investor opened in Vietnamese banks, except asset payment."

2.2. Observation / Implementation Difficulties

As stated in Point 1, there is no definition of "Foreign Investors" in this Draft law.

Besides, we understand that payment of buying, selling, transferring shares and contributions and receiving dividend operations of foreign investor must comply with the stipulations of foreign exchange control.

2.3. Recommendation

In conjunction to our recommendation at Point 1 above on the definition of foreign investors, wepropose to amend this point as below:

“3. Payment of buying, selling, transferring shares and contributions and receiving dividend operations of foreign investor must ***comply with the stipulations in regulations of foreign exchange control”***

3. Article 127 - Point 4

3.1. Draft stipulation

“Article127. Shareholder registration book

4. In case a shareholder changes his permanent address, he shall notice the company immdiately for timely update in company’s registration list of shareholders. The company would not be responsible for failure to contact the shareholders if the company is not updated with the address change by the shareholders.”

3.2. Observation

In case the investor has sent the noticeof his permanent address change to issuing company for updating in company’sShareholder registration book, but the letter aremisdirected in delivery process, the investor may have difficulty receiving information from issuing company because the new address is not updated. This problem can be solved if issuing company has a mechanism to confirm with the investor uponreceipt of the investor’s notice.

3.3. Recommendation

We propose to amend this point as below:

“4. In case a shareholder changes his permanent address, he shall notice the company immdiately for timely update in company’s registration list of shareholders. **Issuing company must confirm with the shareholders on their updates of address change in the Shareholder registration book**. The company would not be responsible for failure to contact the shareholders if the company is not updated with the address change by the shareholders.”

4. Article 142 - Point 7

4.1. Draft stipulation

“Article 142. Authority to convene the Shareholder meeting

7. Those who convene the Shareholder meeting must conduct the following in preparation for the meeting:

a. Make the list of participating shareholders;
b. Provide information and resolve complaints in relation to the list of participating shareholders;
c. Prepare meeting agenda;
d. Prepare meeting materials;
dd. Prepare draft law resolutions of the meeting;
dd. Determine meeting time and venue;
e. Send meeting invitations to each shareholder who is entitled to attend the meeting as stipulated in this law;
f. Other preparation for the meeting.”

4.2. Observation

As per our observation, where the election of members of Board of Management and Board of Supervision is a voting item in the meeting, detailed candidate list is currently not included in the meeting materials provided by the issuing company. Consequently, in case entitled shareholders send their proxy to attend the meeting and cast the votes on their behalf, the investors do not have sufficient information to instruct their proxy to cast the votes.

4.3. Recommendation

We propose to amend this point as below:

"7.Those who convenes the Shareholder meeting must conduct the following in preparation for the meeting:

a. make the list of participating shareholders;
b. provide information and resolve complaints in relation to the list of participating shareholders;
c. prepare meeting agenda;
d. prepare meeting materials;
dd. prepare draft law resolutions of the meeting, ***including detailed candidate list for election of members of Board of Management and/or Board of Supervision (if election is a voting item)****;*
dd. determine meeting time and venue;
e. send meeting invitations to each shareholder who is entitled to attend the meeting as stipulated in this law;
f. Other preparation for the meeting."

5. Article 145 - Point 1

5.1. Draft stipulation

"Article145. Invitation of the Shareholders' Meeting

1. Person who convenes the Shareholders' Meeting must send a meeting invitation to all shareholders eligible to participate in the meeting of shareholders no later than 7 days prior to the opening date of the meeting, unless different longer timeline stipulated by the company charter. Meeting invitation must include name, headquarter office, company code; name, permanent address of shareholders, meeting time and location, requirements to participants."

5.2. Observation

As per the stipulation in the existing Law on Enterprises and in this draft law, joint stock companies are required to provide draft resolution for the Shareholder meeting at least 07 days prior to meeting date. In the meanwhile, regulations on Information disclosure applicable for public joint stock companies in Securities Law require that draft resolution for the Shareholder meeting must be provided at least 15 days prior to meeting date.

We find that only few companies issue draft resolutions 15 days before the meeting date as stipulated in the relevant regulations (From our observation, the current earliest timeline for publishing draft resolution is 7 calendar days before meeting date and only 22 per cent of the issuers release it by that time). They do, however, publish something called meeting contents or meeting agenda, and the draft resolution when published usually contains the

same items. Thus far, in the absence of a draftresolution, we have been relying on the meeting contents or agenda to convey to you the items that will be put to vote.

5.3. Recommendation

We propose a consistent regulation on the timeline to publish draft resolution for the Shareholder meeting applicable for joint stock companies to ensure smooth implementation. We propose the amendment to this point as below:

"1. Person who convenes the Shareholders' Meeting must send a meeting invitation to all shareholders eligible to participate in the meeting of ***shareholders no later than 15 calendar days*** *prior to the opening date of the meeting, unless different longer timeline stipulated by the company charter. Meeting invitation must include name, headquarter office, company code; name, permanent address of shareholders, meeting time and location, requirements to participants."*

6. Article 145 - Point 3

6.1. Draft stipulation

"Article145. Invitation of the Shareholders' Meeting

3. The meeting invitations must be enclosed with documents as below:
a) Meeting agenda, relevant materials and draft law decisions proposed to be adopted at the meeting;
b) Voting ballot;
c) Standard form of authorization."

6.2. Observation

As per our observation, there are many cases where entitled foreign shareholders sign a POA to authorize an individual to attend the meeting and cast the votes on their behalf. Issuing companies often require that the POA is notarized and/or consularized before presented at the meeting for the entrance registration. The process of notarization and consularization in foreign countries may take up to one month to complete. In the meanwhile, there is no market-standard format of the POA. Consequently, foreign shareholders cannot start executing the POA (ie signing, notarisng and/or consularising) until the issuing company announces the accepted template for their meeting (which is often no sooner than 7 days prior to meeting date). Therefore, we would propose that a standard template for the POA is stipulated in this Law or in the guidance for implementation of the law to support foreign investors to exercise their benefits.

On another note, as per our observation, some issuing companies are sending meeting invitations and meeting materials in Vietnamese to foreign investors. This causes difficulty to foreign investors when processing information to exercise their voting rights in Vietnam market.

6.3. Recommendation

We propose that a market-standard template of the POA is stipulated in this law and relevant regulations. The proposed amendment to this point is as below:

"3. The meeting invitations must be enclosed with documents as below:

a) Meeting agenda, relevant materials and draft decisions proposed to be adopted at the meeting;

b) Voting ballot;
c) Standard form of authorization ***(as stipulated in this law/guidance on implementation of this law).***

Meeting invitations and meeting materials sent to foreign investors must be made in English or bilingual"

Besides, we propose amendment to Point 1 Article 146 to regulate on using standard form of authorization. We would be pleased to provide a sample of the standard POA template for your reference upon your request.

7. Article 146

7.1. Draft stipulation

"Article146. Shareholders' attendance in Shareholder meeting

1. Shareholders can physically attend the meeting, attend via online conference or authorize a person to attend the meeting with a written Power of Attorney. In case the shareholder being an institution has not appointed an authorized representative as stipulated in Point 3 Article 19 of this Law, they can authorize another person to attend the meeting.

The authorization for representatives to participate in the meeting must be made into formal document following the form of issuing company. Authorized persons must present authorization documents when registering to attend the meeting.

....

3. Shareholders are considered to have participated and casted the votes at the Shareholder meeting in the following cases:

a) Physically participate and vote at the meeting;
b) Authorize an individual to participate and vote as their proxy at the meeting;
c) Participate and vote via online meeting or via other forms;
d) Send voting letters to the meeting via fax or email."

7.2. Implementation difficulties

Clause 3 of Article 146 of the Draft law states that shareholder is considered to have participated and voted in Shareholders' meeting when he/she distributes voting cards to the meeting via post, fax or email. However, Clause 1 of the same Article does not mention form of giving voting cards via original documents/fax/email. We propose to amend this point to make it consistent between laws and facilitate the implementation.

Besides, in case voting cards are sent by the investor but are not delivered to issuing company due to technical error or loss in delivery, the investor would get trouble in executing his/her voting rights. We propose issuing company to confirm with the investor upon receiving voting cards in original/fax/email.

7.3. Recommendation

We propose to amend this point as below:

"1. Shareholders can physically attend the meeting, attend via online conference, ***send their votes to the meeting via post/fax/email,*** *or authorize a person to attend the meeting with a written Power of Attorney****or authorize a person / an agent to submit the votes on their***

behalf via post/fax/email given a written Power of Attorney is in place. *In case the shareholder being an institution has not appointed an authorized representative as stipulated in Point 3 Article 19 of this law, they can authorize another person to attend the meeting.*

The authorization for representatives to participate in the meeting must be made into formal document ***following the form regulated by this law/by relevant guidance on implementation of this law****. Authorized persons must present authorization documents when registering to attend the meeting.*

....

3. Shareholders are considered to have participated and casted the votes at the Shareholder meeting in the following cases:

a) Physically participate and vote at the meeting;
b) Authorize an individual to participate and vote as their proxy at the meeting;
c) Participate and vote via online meeting or via other forms;
d) Send voting letters to the meeting via post, fax or email."

In case the votes are casted via method defined in point d of this article, issuing company must confirm with the shareholders on their receipt of the votes via fax/email/letter within 1 working day upon their receipt"

8. Article 151 – Point 4

8.1. Draft stipulation

"Article 151. Authority and method to approve a decision via Postal Ballot

4. Voting letters must be signed by the individual shareholders or by the authorized persons/legal representatives of institutional shareholders. Voting letters sent back to the company must be contained in sealed envelopes and no one has the right to open them before counting votes. Voting letters sent back to the company after the time specified on voting letters' content or already opened are ineligible. Voting letters not sent back to the company are treated as non-voting letters."

8.2. Observation

For foreign investors, sending voting cards in original via post to issuing company will be time consuming and costly. The voting letters can possibly be lost during delivery process. Meanwhile, sending their votes via fax/email will save time and cost for the investor. Therefore, we propose to accept votes sent via fax/email. This is also consistent with regulations in Clause 146 as mentioned above.

8.3. Recommendation

To make it consistent with stipulation in Article 146 - Point 3.d. of this draft law, we would propose amendment to this point as below:

"4. Shareholders can send their voting letters to the issuing company via the following methods:

a) votes in original letter whichmust be signed by the individual shareholders or by the authorized persons/legal representatives of institutional shareholders. Voting letters sent to the company must be contained in sealed envelopes and not be openedbefore vote

counting time. Voting letters sent to the company after the time specified on voting letters' content or already opened are ineligible;

b) votes sent to issuing company via fax or email which must be kept confidential until vote counting time. Votes sent to the company after the time specified on voting letters' content or already disclosed before counting votes are ineligible;

Issuing company must confirm with the shareholders on their receipt of the votes via fax/email/letter within 1 working day upon their receipt"

Not sending voting letters or sending voting letters without answers are considered as non-voters."

9. Article 152 - Point 1

9.1. Draft stipulation

"Article 152. Minutes of shareholder meetings

1. The content of shareholder meeting shall be recorded in the meeting minutes and might be recorded and stored under other electronical forms. The minutes must be written in Vietnamese, and might be additionally written in foreign languages and must include the following contents:

a) Name, headquarter office, company code;
b) Meeting time and location;
c) Meeting program and contents;
d) Chairman and secretary;
dd) Summary of the meeting and comments on each item of the meeting's content.
e) Number of shareholders attending the meeting and their total voting shares of participants, appendix of list of shareholders, representatives with their relative voting shares and shares;
g) Total votes for each voting issue, in which shall be written in details number of eligible votes, ineligible votes, number of agree, disagree and abstain; related voting results on total of voting shares of participants;
h) Resolutions which have been approved and their vote percentage
i) Full name, signatures of Head in charged and secretary.
Minutes written in Vietnamese and in foreign languages are with equal validity. In case of different contents between Vietnamese version and foreign language version, the Vietnamese version will prevail."

9.2. Observation

As the participation of foreign investors in Vietnam market is rapidly increasing, we propose to mandatorily require an English version of the meeting minutes, at least applicable for public companies and medium to large scale non-public companies (with charter capital of VND 100 billion or more).

9.3. Recommendation

We would propose amendment to this point as below:

"1. The content of shareholder meeting shall be recorded in the meeting minutes and might be recorded and stored under other electronical forms. The minutes must be written in Vietnamese ***and both in Vietnam and English for those public companies and non-public***

***companies having charter capital of VND 100 billion or more**, and might be additionally written in **other** foreign languages.*

The minutes must include the following contents:

a) Name, headquarter office, company code;
b) Meeting time and location;
c) Meeting program and contents;
d) Chairman and secretary;
dd) Summary of the meeting and comments on each item of the meeting's content.
e) Number of shareholders attending the meeting and their total voting shares of participants, appendix of list of shareholders, representatives with their relative voting shares and shares;
g) Total votes for each voting issue, in which shall be written in details number of eligible votes, ineligible votes, number of agree, disagree and abstain; related voting results on total of voting shares of participants;
h) Resolutions which have been approved and their vote percentage
i) Full name, signatures of Head in charged and secretary.
Minutes written in Vietnamese and in foreign languages are with equal validity. In case of different contents between Vietnamese version and foreign language version, the Vietnamese version will prevail."

Investment Law

COMMENTS ON INVESTMENT LAW

Prepared by
Baker & McKenzie (Vietnam) Limited

No.	Comments	Current provisions	Recommendation
1	Many provisions of the Investment Law are duplicates of other provisions of the Enterprise Law and other specialized laws. They cannot resolve the urgent need to reduce administrative procedures and create a favourable environment to attract investment when foreign investment to Vietnam is decreasing and competition from other countries is growing. The suggested adjustments of Investment Law 2015even create more administrative procedures for foreign investors with 2 steps of licensing and duplicates of contents in each step, also duplicate provisions from specialized laws such as land law, construction law. In practice, Investment Law 2005 has not been really necessary to the business operation of enterprises so far. It seems the only difference, also annoyance, that Investment Law brings about is the redundant procedures of investment certificate issuance, which are not transparent and are applied subjectively by competent authorities.	Article 1, which is scope of application of the Investment Law (provisions for investment activities for business purposes in Vietnam), and Article 3.1 defines "Investment" (investors invest capital to conduct investment activities), are completely redundant because this is the scope of application and main content of Enterprise Law, indicated by the spirit and various articles throughout the Enterprise Law. While Enterprise Law already provides that enterprises have the right to proactively choose the business lines, location and form of investment and operation (Article 8, the Enterprise Law) and are entitled to conduct business lines subject to conditions after satisfying all the business conditions as required by the law (Article 9,the Enterprise Law), the requirement for established enterprises to have an investment project and apply for investment certificate in accordance with Investment Law is completely redundant.	Consider removing the Investment law, or removing all provisions for investment project and investment certificate since they are completely unnecessary.
2	Provisions on sectors entitled to investment incentives and subject to investment conditions (understood as restricted sectors) are quite general and contradictory.	Particularly, 3 major sectors including culture, health and education are listed under Article 22 (sectors subject to investment incentives) and Article 24 (sectors subject to investment	It is suggested to review if those sectors need restrictions and adjust accordingly following the

		restrictions). The methods for handling projects under Article 22 and 24 are very different, how can investment certificates be possibly considered to be issued in a transparent and consistent manner?	need of the nation.
3	Investment Law returns to the old approach on the application of investment incentives, which links with the issuance of investment certificates. In my position, enterprises do not need to follow any other procedures to enjoy investment incentives. The tax Law and land Law already specify cases in which enterprises can enjoy incentives and to follow the provisions from such specialized laws is the need. Investment licenses used to contain incentives before and investment certificates now remove such incentives to ensure the equality between all enterprises. Why does the old mechanism apply?	Article 33 of the draft Investment Law imposes obligation on investors which requires them have to obtain investment certificates to enjoy investment incentives. This implies that if enterprises cannot obtain investment certificates promptly, they will not enjoy investment incentives.	It is suggested to amend Article 33 in the way that enterprises enjoy investment incentives in accordance with specialized laws and the requirements for application for and issuance of investment certificate be removed. It is a right of enterprises to enjoy investment incentives and should not be subject to begging-granting mechanism.

4	Also as to whether issuing an investment registration certificate is necessary, if the Investment Law is aimed at creating an open investment environment, this administrative procedure should be eliminated. Without this procedure, the remaining provisions and specialized laws still well resolve State administration issues related to business activities of enterprises. - Particularly, when an investor establishes an enterprise, such (foreign) investor must fully submit its legal documents, register business lines and industries, explain its capability of meeting conditions for investment into Vietnam, and give explanations on operation location/area of the enterprise. All these criteria coincide with contents of the investment project and Investment Registration Certificate. With respect to a foreign investor, its legal documents must be legalized and can only be used within a period of 3 months. For each procedure of business registration and investment registration, such investor needs to have their legal documents legalized again. Foreign investors do absolutely not know why the State of Vietnam requests them to submit such kind of documents for times. - With respect to those enterprises rendering services under Vietnam's international commitments, they do not have any investment project (as defined in Article 3.6) as their activities are all conducted in the territory of Vietnam and they do not need to spend medium-term and long-term funds on any area or location. - In terms of timeline, it is a period of 30 working days to get an Investment Registration Certificate as	Conditions of the procedure for issuing an Investment Registration Certificate, as provided under Articles 41 to 47, are unnecessary, just multiply administrative procedures, and waste more time and money of both investors and the State of Vietnam.	It is suggested eliminating the procedure for issuing the Investment Registration Certificate and allowing enterprises to implement the enterprise registration and administrative procedures after [such] enterprise registration in accordance with the provisions of laws specializing in environment, construction, land, tax, credit, etc.

	required by law (similar to the timeline under current regulations which is 15 to 45 days), however, it is 4 to 6 months in practice. It is also provided that an investor may get an Enterprise Registration Certificate after 15 working days, this may also last 4 to 6 months in practice. - In terms of dossiers (Article 45), these kinds of dossiers include those already submitted when applying for an enterprise registration (documents related to an investor's legal status, explanation on financial capacity, premise use rights, explanation on investment project), and also include other dossiers that would overlap other administrative procedures (construction dossiers with respect to projects having construction works) and would overlap the section of environmental impact assessment or application for construction permit. Who would finance the preparation of construction dossiers at this time if they do not know whether and when they could get an Investment Registration Certificate? - Contents of verification (Article 46): nothing new compared to the verification for business registration.		
5	Non - discrimination principle has not been fully reflected (Article 7.1 of the IL) as the IL includes a separated section applicable only to Foreign Investor (Articles 60-22).	Under Article 61, the registration authority proceeds with the establishment registration of foreign investor within 15 days; however, the corresponding duration applicable for domestic enterprises is 5 days under the Enterprises Law. The "15 days" may last months, based on practical expertise.	It is suggested to amend Articles 61 and 62 to cut the duration to 5 days complying with the Enterprise Law in order to implement Vietnam's international commitment.

	Investment guarantee in the event of changes in laws and policies principle in the case of changes to legislation making policy (Article 10 of the IL) is a welcome principle, but it may not have been fully implemented by the authorities in practice.	BC Furniture Export LLC is an enterprise with foreign-invested capital which was issued by HEPZA with an Investment Certificate in 2006 to conduct international commercial services in accordance with the pilot programme on expanding the functions of Tan Thuan EPZ. The Certificate is valid for 34 years. The investor has invested millions of dollars in building warehouses in Tan Thuan EPZ and currently has around 30 employees. Decree No. 164/2013/ND-CP dated 12 November 2013 amending and supplementing some articles of Decree No. 29/2008/ND-CP on EPZs and IZs, stipulates that an export processing enterprise licensed to conduct commercial activities must establish its own branch outside itself and the EPZ in order to conduct these activities. The General Department of Customs issued Official Letter No. 1047 dated 27 January 2013 requesting departments of customs around the provinces and cities to immediately implement this provision. In reality, the ministries have not issued any guidance to implement this provision, and in reality, an application for a branch establishment licence for commercial activities will be considered by the Ministry of Planning and Investment as a new project (in accordance with recent guidance from the MPI, even though in reality, the enterprises are completely passive and they do not have any new investment project), and the average time for the issuance of such licence is 4-6 months.	This case showed that the Government, in general, may not have fully respected the commitment described in the Investment Certificate of the enterprise. The enterprise beseeches competent authorities, such as the HEPZA, the General Department of Customs, Tan Thuan EPZ Customs, allow the enterprise to continue implementing the project within the remaining duration as mentioned in the Investment Certificate

		In the case of BC Furniture, they have had to completely cease their business operations because the customs office of Tan Thuan EPZ no longer allows them to export and import products. Many business projects have been abandoned and the employees are at the risk of losing their jobs.	

COMMENTS ON THE DRAFT LAW ON INVESTMENT (LOI)

Prepared by
VILAF

I. MAJOR COMMENTS

1. Governing scope

The Draft limits the governing scope of the LOI to direct investment activities only. Direct investment under the Draft comprises of: establishment of new company, investment in form of contract, investment development, M&A activities except securities under the Law on Securities.

The purpose of the Draft is to avoid the overlap between the LOI and the Law on Securities. However, there is still concern on whether the acquisition of securities can be actually excluded from the governing of the LOI. It should be noted that securities as defined under the Law on Securities is very broad which also comprises shares of public-unlisted companies. In addition, except securities companies, fund management companies, securities investment companies which are established under the Law on Securities, almost public companies are incorporated under the Law on Enterprises and subject to both Law on Enterprises and LOI. Thus, the exclusion of the acquisition of securities should be re-considered for consistence with the Law on Securities and avoid gap in implementation.

2. Definition on foreign investor

The Draft provides a new definition on foreign investor. However, the proposal under the Draft is inconsistent with the definition on foreign investor under Decision 88[1] and Decision 55[2] of the Prime Minister guiding the acquisition of foreign investors into domestic companies. Under Decision 88 and Decision 55, the foreign ownership cap to determine whether a company is considered a foreign investor is 49%. On the other hand, the Draft provides a higher foreign ownership cap at 50%.

It is suggested to change the foreign ownership cap under the Draft from 50% to 49% for consistence with other regulation.

3. Licensing procedure

Currently, foreign investors shall apply Investment Certificate which also serves as business registration certificate of their company established in Vietnam. Under the Draft, the foreign investors shall firstly obtain business registration certificate and then apply for Investment Registration Certificate. That means the foreign investors must pass 2 different licensing procedures. The new licensing procedures proposed under the Draft would create a burden on the investors as they need to process with 2 different licensing procedures. Furthermore, if the foreign investors invest in a conditional business which requires a sub-license, they would also follow an additional licensing procedure. That would make the investment into Vietnam less attractive.

We are also aware that the Draft does not require all projects to obtain Investment Registration Certificate. However, the current proposed wording of the Draft still too broad

[1] Decision 88/2009/QD-TTg of the Prime Minister dated 18 June 2009 issuing regulations on capital contribution and purchase of shareholding by foreign investors in Vietnamese enterprises ("**Decision 88**")

[2] Decision 55/2009/QD-TTg of the Prime Minister dated 15 April 2009 on percentage participation of foreign investors in securities market ("**Decision 55**")

that would cause almost foreign invested projects to subject to the Investment Registration Certificate.

4. Investment conditions

It is provided under the Draft that the relevant ministries shall issue list of investment conditions for each specific conditional investment sector. We note that investment conditions or market access conditions are already provided under the specialized regulations and the Commitments of Vietnam on joining World Trade Organization. Thus, list of investment conditions issued by the ministries would be unnecessary. Furthermore, creation of new list on investment conditions would lead to confusion, overlapping and even inconsistence between the documents and in implementation.

II. Detailed comments

No.	Issue	Comment
1	*Direct vs. Indirect Investment (Article 3.2 of the Draft LOI)* The current LOI provides for 2 forms of investment: direct and indirect. The Draft omits such separation. Instead, there is only 1 form of investment being direct investment, which is actually the combination of direct and indirect investment under the current LOI, including the following activities: establishment of companies; investment in form of contracts; capital contribution, share purchase and acquisition, M&A. Securities investment under the Law on Securities is not considered direct investment and thus not governed by the LOI.	Please see our comments in Section I-1 above.
2	*Definition of "Foreign Investors" (Article 3.4 of the Draft LOI)* Instead of the general definition under the current LOI, the Draft LOI makes it clear that foreign investors include 4 cases, which, among others, are enterprises with from 50% [voting] charter capital held by foreign individuals/offshore organizations and the subsidiaries of the above enterprises (i.e. from 50% of the [voting] charter capital).	Please see our comments in Section I-2 above. In addition, we concerns that if an increase in the foreign investor ownership in a "domestic investor" causes such "domestic enterprise" to become "foreign investor", what investment procedures and conditions shall be applied/required for such conversion from "domestic investor" to "foreign investor". A similar issue is triggered when a decrease in the foreign investor ownership in a "foreign investor" causes such "foreign investor" to become "domestic investor".
3	*Definition of "Foreign Invested Companies" (FIC) (Article 3.6 of the Draft)* Foreign Invested Companies are defined to be the companies having ownership from Foreign Investors.	The Draft simply defines that foreign invested companies are companies having foreign ownership. By this definition, companies with 1% of foreign ownership are considered foreign invested companies. We note that the Draft defines that companies having 50% or more of foreign ownership are considered foreign investors.

		Thus, it is understood that companies with less than 50% of foreign ownership are considered domestic companies. Thus, if such companies establish or acquire shares in another domestic companies, whether the the newly established companies or the acquired companies are considered foreign invested companies. It should be noted that in this circumstance there is no participation of foreign investor but still have foreign ownership. Thus, please consider this definition by providing a foreign ownership cap for determination of foreign invested companies. That would also make the licensing procedure to be consistence and transparent.
4	*New investment projects vs Extended investment projects (Article 3.9 of the Draft)*	There are some concerns regarding the definition on extended investment projects as follows: - Is capital increase considered extended projects if the capital increase does not lead to any change in the capacity, technology and scale of the projects? In many cases, increase of capital just because of the increase of operation costs and expenses. - What is the improvement of business capacity and how to determine it? Moreover, the definition on "new investment project" is also questionable on how to determine a new project is an "independent project" compared to the existing project and do not fall within "expansion of existing project".
5	*Investment Forms (Article 21 of the Draft)*	Under the Draft investment for development of business is considered as an investment form. In our opinion, this should be a purpose of the investment, not an investment form.
6	*Article 29.4 of the Draft regarding CIT exemption to technology*	Article 29.4 of the Draft should be removed for being in line with

	transfer activities has been repealed by Article 2.4(l) of the Amended Law on CIT dated 19 June 2013, which took effect on 01 January 2014.	the Amended Law on CIT.
7	*Applicable entity of Investment Registration Certificate (Article 43 of the Draft):* Option 1: Investment Registration Certificate applies to both local and foreign investors. Option 2: Investment Registration Certificate applies to foreign investors only.	We agree with Option 1 as it secures equal treatment between local and foreign investors, which is one of the principles of the Draft under Article 4.3 and 7.1, and also Vietnam's Commitments upon the participation to WTO. Furthermore, the Draft requires the investors to apply the Investment Registration Certificate. This is contrary to the requirement under Article 60.3 of the Draft that the company established by the foreign investors shall apply the Investment Registration Certificate. If the Draft proposes to have 2 different licenses for the establishment and operation of a foreign invested company in Vietnam, it should make clear that the foreign investors shall apply to establish their company firstly and then the company shall apply Investment Registration Certificate. Provisions of the Draft should be consistence on this.
8	*Establishment of companies by foreign investors (Article 60 of the Draft):* The Draft omits the regulation under the current LOI that the Investment Certificate is also the Business Registration Certificate of FICs. Instead, these 2 papers are separate from each other and subject to different licensing procedures. Accordingly, in order to carry out investment activities in Vietnam, foreign investors must go through 2 steps: (i) to set up a company in Vietnam following the procedures under the Law on Enterprises; (ii) to apply for Investment Registration Certificate for the projects falling into the categories subject to Investment Registration Certificate under Article 43, such as projects with land lease, land allocation from the State, projects	Please see our comments in Section I – 3.

	on conditional investment sectors, etc.	
9	*Procedures for capital contribution, capital and share purchase by foreign investors in Vietnamese companies (Article 61 of the Draft)*	It is still questionable under the Draft on whether the domestic company upon the acquisition of foreign investor is required to obtain Investment Registration Certificate.
10	*State management over industrial zones, export processing zones, high-technology zones (Article 70 of the Draft)*	There is no definition on high technology zones wile definitions on economic zones, export processing zones are provided.

COMMENTS ON LEGAL ISSUES CONTAINED IN THE DRAFT INVESTMENT LAW

Prepared by
DFDL Mekong

I. General comment

The draft (**"Draft Investment Law"**) to amend the Law on Investment № 59/2005/QH11issued by the National Assembly of Vietnam (**"Investment Law"**) has been drafted to reduce discrimination between domestic and foreign investors and hence create a level playing field for the investors investing in Vietnam. Furthermore, the Draft Investment Law has clarified ambiguous issues of the current Investment Law such as the concepts of foreign investor and direct/indirect investment.

However, we would like to provide below ourcomments to certain specific provisions of the Draft Investment Law for further improvement.

II. Specific comments

1. Procedure to obtain the investment registration certificate

Article 43 of the Draft Investment Law sets out two options relating to the procedure to register an investment project with the following main contents:

- Option 1: the investors must conduct the procedure to obtain the investment registration certificate for projects falling under certain types (e.g., projects requiring conditions, or projects requiring a report of environment impact assessment).

- Option 2: investment projects of domestic investors are not required to obtain the investment registration certificate. Foreign investors must conduct the procedure to obtain the investment registration certificate for projects falling under certain types.

We opine that the option 2 above will create a discrimination in treating domestic and foreign investors, which violates Vietnam's WTO commitments and other international treaties. Therefore, we suggest that the Draft Investment Law adopt the option 1.

2. Procedure to contribute capital, acquire capital and shares of foreign investors in Vietnamese enterprises

Article61 of the Draft Investment Law sets out that the Vietnamese enterprises that receive capital contribution or sell their contribution capital or shares to foreign investors must conduct the procedure to amend the enterprise registration certificate (**"ERC"**). However, this provision seems to contradictthe Law on Enterprises № 60/2005/QH11 issued by the National Assembly of Vietnam (**"Enterprise Law"**).Under the Enterprise Law (both the draft and current Laws), when normal shareholders or founding shareholders transfer their shares to an investorafter the lock-up period, the company is not required to amend its ERC to reflect such transfer of shares

Therefore, we suggest the Draft Investment Law to clarify the above amendment procedure of ERC and ensure consistency with the Enterprise Law.

3. Conditions for overseas direct investment

Article 64 of the Draft Investment Law provides two options as follows:

- Option 1: the investors register the direct investment capital with the competent authority governing foreign exchange activities.

- Option 2: the Ministry of Planning and Investment grants an overseas investment certificate to the investors.

We suggest that the Draft Investment Law adopt the option 1 to avoid unnecessary investment procedures which would have caused the time-consuming and complicated issues to the investors under option 2. Additionally, regulations on foreign exchange control are sufficient to manage and govern the overseas investment activities of the investors.

COMMENTS ON THE DRAFT LAW ON INVESTMENT

Prepared by
LOGOS Law Firm

1. Article 3.4. Definition of foreign investor

The definition of foreign investor in the draft seems unclear, complicated and may lead to inconsistent interpretations. A proposed amendment is therefore given below:

4. Foreign investors include:
a) Non-nationals who are individuals holding foreign nationalities and institutions formed in other countries in accordance with foreign countries' laws;
b) Institutions formed in Vietnam in the following fashions:
- Having one or more shareholders being non-nationals owning more than 50% of the shares issued[1] *in case of joint stock companies;*
- Having one or more members being non-nationals owning more than 50% of the charter capital in case of limited liability companies.

2. Definition of foreign invested enterprises

In the draft: "*Foreign invested enterprises are businesses having foreign investors' ownership*". In the meantime, another definition has been given in the Land Law No. 45 of 2013: "*Foreign invested enterprises encompass foreign wholly-owned enterprises, joint venture companies and Vietnamese companies which foreign investors buy into, merge with or acquire in accordance with investment-related laws*". A consistent definition is recommended throughout the local legal system.

3. Article 18.4. Type of investment: Merger and acquisition

This type of investment needs to be looked further into and made in sync with Vietnam company laws. According to the current Enterprise Law and draft revised Enterprise Law, available types of investment not just include merger but other forms such as division, split-up and amalgamation. The new draft has no definition of acquisition. In Vietnamese laws, acquisition of a company is actually buying 100% of the company's shares or paid-in capital. Accordingly, as the Enterprise Law has no provisions on acquisition, the Investment Law should not try forced inclusion of acquisition.

If changes are made to this provision, other related parts of the draft should also be considered for alteration, including Article 3.2, Article 22 and Article 61.

4. Article 18.5. Type of investment: Business development investment

Should "business development investment" really be defined as a type of investment? Or is this just another investors' right? This type of investment is defined simply in Article 21 as:

Article 21. Business development investment
Investors may conduct business development investment in the following ways:

1. Expansion of scale, upgrade of capacity and business prowess;
2. Upgrade of technology, improvement of product quality and reduction of pollution.

[1] According to the Enterprise Law, issued shares are shares allowed to be released that have been paid for in full by shareholders to the issuing company. The charter capital of a joint stock company is the total nominal value of issued shared. The language of the draft is therefore acceptable.

These are more investors' rights and therefore do not need to be made a stand-alone Article, but rather be integrated in Article 16.

5. Article 27. Enactment of the lists of investment incentive sectors and areas, conditional investment, and prohibited investment

Article 27.2 neglects to mention industrial park administrations. Does this mean that industrial park authorities may make the rules on areas of prohibited investment, conditional investment, and investment incentives that go beyond the boundaries of the law?

6. Article 33. Procedures to claim investment incentives

Is it really necessary to require that entitled investment incentives are indicated in the Investment certificate based on the eligible investment incentivized sectors and areas, and the substance of the project? In fact, a large number of projects are technically entitled to incentives stated in the Investment certificate, but do not actually benefit from such incentives if they fail to meet the preconditions for such prerogatives in accordance with tax-related laws.

This provision has unintentionally created more administrative burden for investors in seeking to realize their eligible incentives. Existing investment certificates only put it generally that investors are entitled to incentives as defined by law. This provision seems reasonable and this Article 33 should only give references to other specialized laws to avoid creating more procedural burden for investors.

7. Article 39. Development of residential houses, service facilities and utilities for workers in industrial parks, export processing zones and economic development zones

The fact is that many investors in industrial parks, especially major manufacturers, have huge demand for workers and are prepared to build accommodations for workers or workers' leases, but unfortunately, this is not allowed by the existing law. With this new rule, investors are encouraged to build and develop houses for workers in industrial parks. Nevertheless, it should be further elaborated that businesses are encouraged to develop residential houses, service facilities and utilities for workers in industrial parks, export processing zones and economic development zones: i) in accordance with the approved zoning plans for the industrial parks, export processing zones and economic development zones; ii) and meeting any existing commercial rules specified in the laws on housing, real property trading and related specialized laws.

8. Article 43. Procedures of investment certification

According to Article 7.1 of the draft law: "The State safeguards fair, reasonable and non-discriminatory treatment between domestic and foreign investors in investment activities in accordance with the requirements and road maps specified in the international treaties that Vietnam is a party to". Thus, Alternative 2 relieving domestic investors from the need to obtain an investment certificate is contradictory to the fair treatment rule embraced by Article 7.1.

9. Article 44. Investment project documentation

One of the must-have documents in the project dossier in application for the investment certificate is:

i) The project outline:

The inclusion of this document is too generic and should be made in more details in the law. A project outline as defined in Article 3.7 is a "combination of proposals for mid-term and long-term engagement of capital to execute investment activities in a specific location and

within a specific time line". Investment projects are also divided into new investment projects and expanded investment projects. So what should be found in the project outline that investors need to prepare and submit to the Investment certifying authorities?

ii) Documentations on investors' site use rights. In case the project needs to apply for land allocation or land leases from the government, the investor shall lodge *applications for land allocation or land leases in line with the prevailing land laws*.

The requirement of filing applications for land allocation or land leases while the investor is applying for the investment certificate is difficult to comply with and in conflict with the current land laws. This provision is even inconsistent with Article 48.1 of the draft law.

In accordance with existing laws, investors may only initiate procedures to apply for land allocations or land leases once they have obtained the investment certificate. The application for land allocation or land lease must include the approved project outline. Furthermore, with projects that need land clearance, the application also needs to integrate an approved land clearance plan. Completing formalities for land allocation or land leases will take a lot of time and costs, thus asking for this procedure to be done while also applying for the investment certificate seems not an optimal plan, and related land laws and regulations should be reviewed. At this stage, it will suffice if the investor can present documents proving that he/she is the legitimate title owner of the land parcel reserved for the project, for example, acceptance of the project location by a relevant authority.

iii) Construction documentations in accordance with building laws for projects that involve construction works

The current construction laws refer to myriads types of construction documentations. What exactly does the construction documentation here refer to? Take for example building projects that need to present a construction and development report, the preparation of the report alone will require significant time and costs. This procedure currently comes later when the investment certificate has been granted. As such, it would be better to require some specific types of documents pertaining to building projects at the stage of investment certification, including the overall layout plan, design alternatives and so on.

10. Article 46. Validity period of investment projects

Currently, the validity period of projects stated in the investment certificate is decided by the certifying authority depending on individual projects. Investment projects in the service sector are allowed for a maximum project period of 5, 10, 20 or 30 years in the investment certificate. Application of this rule seems inconsistent and may vary by large proportions between different provinces and cities in Vietnam. This may lead to numerous misconducts in the process of investment certification. This calls for the need to restrict discretion by investment certifying agencies for different investment activities.

For projects entitled to land allocation or land leases, the active period of the project *started following the government's handover of the land to the investor.*

This rule seems likely to create problems for investment certifying agencies in recognizing a project's active period. In accordance with Circular 93/2011/TT-BTC, the timing of land handover to the investor is defined as follows:

a) In case of handover of land for which land clearance has been completed, the actual time of handover is when the decision of land handover is made by the relevant authority.
b) In case of land for which land clearance has not been done, the actual time of handover is when the land, for which land clearance has been completed, is handed over in line with the schedule specified in the approved project outline. If the land clearance is not finished on time as specified in the approved project outline, the actual time of land handover is when the post-clearance land is delivered in the field.

This provision is therefore recommended to change to "In case of projects entitled to land allocation or land lease, the active period of the project is the term of the land allocated or leased by the government."

Bankruptcy Law

SUMMARY OF ROUNDTABLE DISCUSSION ON DRAFT LAW ON BANKRUPTCY (AMENDED)

- *Time:* *9:00 – 12.00, Tuesday, December 17, 2013*
- *Venue:* *Hilton Hotel, No. 1 Le Thanh Tong Street, Hanoi*
- *Participants:* *Appendix 1*

I. GENERAL OVERVIEW OF AMENDED BANKRUPTCY LAW PROJECT

Mr. Nguyen Van Cuong - Deputy Director, The Institute of Judicial Science, The Supreme People's Court

- The Bankruptcy Law ("BL") of 2004 has nine Chapters and 95 Articles. Thethird draft of the revised BL adds three more Chapters and includes 124 Articles in total.

- Different points of view surround a number ofissues related to the draft law. These include:

  + Subjects of application: Article 2 of the draft law only applies to enterprises and cooperatives that are subject to the Enterprise Law and Cooperative Law, and not to individuals, cooperative groups, schools and some other education levels.Individuals, cooperative groups and home-based businesses are currently not well regulated and notrequired to register capital.The inclusion ofthese entities in the draft law may even be more burdensome for procedural administration and asset liquidation.Some countries, however, do have insolvency rulings for individuals and cooperative groups.This will be further examinedand may result in morechanges to the draft law or a different law may be developed for these parties.

    For private academic institutions, the Education Law has provided various winding-up schemes for application andsuch colleges may involve subsequent treatment for students.The BL has not included this group because of its special treatment needs.If these colleges are included in the Enterprise Law soon, regulations on bankruptcy of academic institutions will follow, but this will require special control by the Ministry of Education and Training.

    There is a view that enterprises that are allowed to exist under sublegal regulations should also be included in the BL.In truth, theseenterprises are old-fashioned and should be upgraded to formal business status to be subject to this law.

  + What determines if an enterprise or cooperative has falleninto bankruptcy? Article 3 of the draft law defines that an enterprise or cooperative is deemed to havefalleninto bankruptcy when it has an unsecured or partially secured, undisputed mature debt, for which repayment claim has been made by the creditor, but the enterprise or cooperative in question fails to repay such due debt. Some of the current questions include, what is undisputed and what is a mature debt? Two different views have emerged during the law-making process. One is to keep Article 3 intact as mentioned above. Article 3 sets out to materialize Resolution No. 03, dated Apr. 28, 2005, of the Justice Council. Moreover, Article 3 of the 2004 BL is already reasonably close to common international practices. The other opinion is the term for being in a bankruptcy situation should be replaced by being in a state ofinsolvency. Laws fromother countries mostly use the term "insolvency". Insolvency may be explained asa business or cooperative that fails to repay a due debt as claimed by the creditor

will be deemed to be in a state of insolvency. The drafting team leans toward the second option.

+ Regarding therights and obligations for filing a petition for instigation of bankruptcy procedures in Article 4 of the draft law, two options are on the table. The firstoption states that a creditor has the right to request the initiation of bankruptcy proceedings ifabusiness or cooperative fails to perform its obligation of repaying a due debt within three months following the creditor's claim.The second option allows thecreditor the right to request the initiation of bankruptcy proceedings for a business or cooperative if such a business or cooperative fails to perform its obligation of repaying a due debt valued atVND200 million or more within three months ofthe creditor's claim. of the first option has emerged as the favorite as the VND200 million threshold is viewedas unnecessary, while there areschools of thought that six months or three months would be more suitable, while others suggest that during three month period, a business in distress may have sufficient time to initiate fraudulent conveyances.

  There is also a body of thought that if it is not possible to call a General Shareholder's Meeting, a group of shareholders owning 10% of stock should be entitled to request commencement of bankruptcy proceedings. The current draft law still containsthe 20% rate fromthe 2004 BL.

+ The filing of a bankruptcy petition for a credit institution is potentially challenging as some believe there should be specific regulations for this type of entity. Article 155 of the Law on Credit Institutions on insolvency treatment for credit institutions specifies that after the State Bank of Vietnam (SBV) has released a dispatch terminating special monitoring, terminating application or allowing the non-application of solvency recovery measures, if the credit institution in question still fails to bail itself out of a bankruptcy situation, itshall file a petition to the court asking for commencement of bankruptcy proceedings under applicable bankruptcy laws. Upon receipt of the credit institution's petition for instigation of bankruptcy procedures under Paragraph 1 of Article 155, the court shall initiate procedures in response to such a request for bankruptcy declaration and without delay start procedures for liquidation of the credit institution's assets under applicable bankruptcy laws. Article 156.1 of the Law on Credit Institutions specifies that if a credit institution is declared bankrupt, asset liquidation procedures will be subject to prevailing bankruptcy laws and regulations.

  Two different streams of opinion exist on this issue: The first believes that under the Law on Credit Institutions, once the SBV has released a dispatch terminating special monitoring, terminating application or allowing non-application of solvency recovery measures, the credit institution is obliged to file a petition for commencement of bankruptcy proceedings at court if it is unable tobail itself out of the bankruptcy situation.Other parties like creditors are still entitled to file a petition for initiation of bankruptcy proceedings as normal. This is because the Law on CreditInstitutions specifically applies only to credit institutions that voluntarily file a petition for initiation of bankruptcy proceedings.The second stream of opinion argues that insolvency of credit institutions is in itself a special situation, given the involvement of depositors and the risk of knock-on effects and negative impacts on the national economy.As such, the aforementioned petition filing parties, creditors and the credit institution, must be put under special control by the SBV. And only after such special control is finished, can the court consider requests for commencement of bankrupt

procedures, bankruptcy declarationand cut off all other steps including meetings of creditors, business recovery and asset liquidation. Asset liquidation for credit institutions, according to the second stream of opinion, should be subject to Government instructions as it involves how depositors' money is treated.

+ In terms of authority in general, Article 10 of the draft law states that management of bankruptcy cases should be delegated to a provincial level court. However, there is a view that such delegation to courts may mean that authority is given to district and provincial courts, within their respective jurisdictions.There is also a thought that the People's Supreme Court should be in charge of handling bankruptcy proceedings for businesses and cooperatives founded by Government ministries and ministerial level agencies. This is becausebankruptcy cases often involveassets located in different districts and provincesor even another country, out of a district level court's jurisdiction.

+ Regarding asset management and liquidation for businesses and cooperatives in distress, Article 12 of the draft law specifies that lawyers holding atrustee practice certificate may be appointed by the court to act as atrustee.The Government defines qualifications, prerequisites and procedures for atrustee's practice certification and public administration arrangements for trustees. There is general agreement with such rulings on trustees. Regarding qualifications for trustees, there is a belief thatprofessionals inother fields of expertise should be included, such as thosewithexperience in business administration, auditors and Bachelor's degree economists, not just lawyers as stated in Article 12 of the draft law. There should also be a clear definition of the rights and obligations of trustees and how the court may monitortrustees. Furthermore, remuneration as well as training and certificate granting mechanisms should bein place for trustees.

  Based on the above-mentioned inputs, Article 12 may be revised as follows: Lawyers and individuals with experience in business administration, auditors with threeyears' working experience and a Bachelor's degree in law, Bachelor's degree in economics, finance who have acquired a trustee's practice certificate may be appointed as trustees by the court.

+ In response to comments that creditor committee regulations couldbe designed togive creditors the right to form a creditor committee, particularly where hundreds or thousands of creditors are involved, action is clearly needed. To assemble a creditor committee, permission fromtwo-thirds of creditors should be sufficientto form a committee and such a committee will have a chairman, vice chairs and members towork with the official receiver and court to take care of bankruptcy and asset management procedures for the business or cooperative in question.

+ Bankruptcy of parties with foreigninterests: For a business with a foreign investment component, but formed under Vietnam'sEnterprise Law, Vietnamese law will apply. Regarding delegation of authority for asset stock-taking and liquidation, Vietnam has its own judiciary delegation laws and is party to various bilateral and multilateral agreements on cooperation in the execution of verdicts and realization of delegated powers in asset management and closeouts. The draft law will feature an Article to further address this issue, with reference to the Law on Judiciary Delegation and Law on Civil Proceedings in relation to businesses with a foreign ownership component.

Mr. Phil Smith – Director, Restructuring Services, KPMG

To clearly define insolvency, moving away from the term "fall into bankruptcy", is a good idea as it would help with the drafting and clarify certain aspects of the law. Regarding the cash flow test envisaged in the current law verses the balance sheet test of insolvency, the cash flow test of insolvency is favored. In practice if a creditor makes an application to the court, typically in other jurisdictions, the debtor would have a chance to effectively defend that application. At that point of the argument surrounding balance sheet insolvency, the ability to quickly raise funds can be pointed to. But, greater protection of creditors' rights and interests is needed.

- The amendments in the draft law arepositive in terms of the shift towards creditors' rights, particularly the appointment of the trustee. However, some clearly stated objectives or a mission statement on the law of assets is needed. In other jurisdictions, particularly Australia, this helps balance the interests of various stakeholders' rights and creditors' shareholders. In Vietnam, a clear view on the rights of creditors verses shareholders is needed. There also needs to be greater focus on rehabilitating companies that are viable and have a viable business future as well as a clear focus on liquidizing companies to maximize returns for creditors.

- The appointment of an independent trustee and the role of the executor is a positive development. Regarding the appointment of the committee of creditors, this is sensibleas long as the committee's role is clearly defined as such a committee should not make it more difficult for an independently appointed trustee to actually take action under the law, so it should be a consecutive body.

  The role of the trustee in the draft law is unclear. Is the trustee actually an executive body able to make decisions on behalf of debtors or is it more supervisory and reports to the court? Attention should also be focused on two provisions in Article 13.g on administration, while Article 43 seems to very clearly define the role of supervisory. In other jurisdictions, both methods are used. The liquidator or trustee with executive power has advantages to protect creditors'rights in terms of taking quick and necessary action to preserve value for the benefit of creditors. This means creditors are less reliant on debtors if the debtors essentially retain power control of the operating business. Article 42 provides provision for the court to effectively appoint a special manager if it believes management of the business is inappropriate or ineffective. This provision may give some comfort to creditors, but only if it is actually implemented in practice.

  The draft law envisages trustee and executor roles, but these roles do not appear to be cleary defined. In most laws and jurisdictions around the world the party would be an inside person with a number of advantages, in terms of inherent knowledge in the business so when the company formally becomes bankrupt or goes into a formal liquidation process, the administrator or trustee has already been in the business to build up knowledge tocarry forward into the liquidation assets disposal phase. This helps to not only maximize the value of the assets as you do not have two parties doing the same functions, but also you do not need to set a fee or have two sets of proportional costs.

  An earlier discussion also focused on a possible restructuring mechanism that could be within the BL or external. However, an out-of-court restructuring mechanism is not in place and there is concern that given the potential volume of insolvency cases, having everything channeled through the court system may slow down the ability to effectively

restructure viable businesses. Therefore, the introduction of an out-of-court restructuring mechanism within or outside the law is important.

There is also a question on how bankruptcy charges and fees will be calculated and who must bear these costs. This is clearly a key consideration for creditors considering to petition for the bankruptcy of an enterprise. While Article 19.1 provides that applicants must pay bankruptcy charges in advance this may prevent creditors from making applications. Furthermore, it is unclear whether they would be entitled to reimbursement from debtors'assets. Article 19, Point 4 provides for bankruptcy charges to be borne by the property of the enterprises which fall into bankruptcy. However, reimbursement is unclear. Article 23.5 refers to the potential for compensation to be sought if damages are caused as a result of failure to submit petitions to open bankruptcy procedures. We should head towards insolvent trading provisions, but it is unclear how this provision would operate and who would be compensated. Another mechanism for insurance in the wider application of BL in other jurisdictions is for a certain State or authority to be mandated or required to exercise creditor rights to instigate petitions for bankruptcy procedures. For example, in Australia taxation authorities are required under certain conditions to file for a bankruptcy. This is a powerful mechanism for small insolvent debtors where bank creditors or other creditors do not want to engage the court's time in liquidating a small debtor.

If this law is intended to promote the rehabilitation of enterprises it is important new money can be channeled into an organization and suppliers/trade creditors continue to do business with the debtor that is insolvent. This necessitates new debts, followed by the commencement of bankruptcy proceedings or procedures. Suppliers will only supply if they have confidence they will be paid back.

In terms of an operational provisions, Article 66 requires the trustee to prepare lists of creditors and it appears such listing would be prepared with debt reclaiming papers submitted by creditors. However, it isunclear whether the trustee will also be responsible for adjudicating such claims. The trustee or independent insolvency administratorsmust have the ability to strike out erroneous claims. We also recommend a requirement for the board of directors or debtors to clearly sign a statement of affairs at the commencement of bankruptcy procedures, setting out their views on behalf of the company to define creditors and debtors to give a reference point for external administrators to perform adjudication functions.

Regarding the conduct of the creditors' meeting and voting on rehabilitation proposal, Article 81 provides more than half of the unsecured creditors representing two-thirds or more of the total unsecured debt amounts required for a valid meeting. In reality with a big administration with many small creditors, this threshold would be impossible. In Australia and Hong Kong the quorum requirements to hold a valid meeting are two creditors. When voting on a proposal to accept rehabilitation or place the company in liquidation, the voting majority is calculated on those who participate in the meeting, those who either attend the meeting in person or via a proxy mechanism. But, it essentially excludes those who fail to turn up, which is important to note.

Mr. Sandy Shandro - Senior Consultant, The World Bank Group

- Regarding the creditors' meeting, the quorum provision in Article 81 will not work in practice. In the vast majority of cases it will be impossible to have a valid creditors meeting if these provisions remain in the law as drafted. In Australia the quorum requirements are the trustee plus one creditor or the trustee plus a lawyer for a

creditor or the trustee plus a proxy holder for a creditor who can participate in person or even by telephone. Although creditors are central to bankruptcy procedures, in reality many creditors are not interested in taking an active part in proceedings. Also, Article 81.2 requires an additional condition that people who open bankruptcy proceedings under Article 79 are obliged to participate in a creditors' meeting or the meeting is invalid. This provision should be deleted because bankruptcy is a collective procedure based upon public interest and the appropriate administration of insolvent debtors.

Mr. Dao Ngoc Truyen - Management board member, Hanoi Bar Association

- An information monitoring system could bemainstreamed in business bankruptcy laws to provide information on businesses going bankrupt, in distress or under bankruptcy proceedings.

- Asset management process and financial indicators of the business: We recommend referralto a number of provisions inexisting specialized laws such as the Accounting Law, with applicable accounting and auditing standards, to make provisions as concise as possible.

- It is useful to design a flowchart for bankruptcy procedures with specific steps for three basic scenarios:

  + Voluntarily ceasing or terminating: Examples include businesses created to make credit purchases, obtain loans or acquire a taxpayer identification number and then vanish. Apart from winding-up these businesses, specific enforcement action should be taken.

  + Declaration of bankruptcy regardless of the business's request.

  + Application for bankruptcy.

- Trustee: These provisions will be helpful as many lawyersare also experts in economics whohave been active in the business environment.

- The creditor committee: If a creditor committee is to be in place, itsrights and obligations should be clearly defined to avoid another step in the procedural chain which lengthens bankruptcy proceedings.

- Delegation of authority: The draft law needs to be clearly designed by indicating the scope ofVietnam's BLand howforeign laws are applicable, such ashow a local courtrecognizes a verdict by foreign arbitrators.

Mr. Sandy Shandro - Senior Consultant, The World Bank Group

- IFC agrees with introducing the new profession of trustees into bankruptcy regimes in Vietnam. In other countries, the function tends to be performed by people with an accounting background, but lawyers are eligible to qualify as insolvency representatives. For Vietnam, people need to be identified to form part of the initial group of trustees, but significant work is needed to train such candidates and necessary administrative infrastructure is needed to create and regulate this new profession. Regarding executors, IFC has not recommended the inclusion of executors in the law, because the trustee has necessary institutional knowledge of the formal function in the case of liquidation. But if executors remain in the law, it is essential to avoid overlaps in

their function because itwill create very significant additional delays in procedures which will add additional costs to creditors.

Ms. Nguyen Thi Dieu Hong – Legal Department, VCCI

- Trustees: A narrative statement of an operating mechanism, including the authority certifying official receivers and administrative regulations for these individuals, is needed.

  Remuneration for trustees: Remunerationfor trusteesis one of the key determinants of incentives, time commitment and performance of these practitioners. Article 7.8 of the draft law states that remuneration for trustees comes from the bankruptcy fee, which is subject to fee and levy laws as specified in Article 19.2 and the court's set advanced payment to trustees as per Article 27.4. For this ruling to be effective, in addition to qualifications expected of a trustee, remuneration for trusteesis also a question to be determined, for example, through negotiations between creditors and the trustee.

- Article 123 of the draft law on prohibition of taking on new positions after a business or cooperative is declared bankrupt: Article 123.2 states that holders of management positions in a business or cooperative operating in conditional lines of business or public services delivery that is declared bankrupt must not incorporate a business or cooperative, or become a business or cooperative manager within one to three years, following such business or cooperative being declared bankrupt. This is harsh for management position holders in a business or cooperative being declared bankrupt and may result in bias towards bankrupt businesses. The draft law should remove such biases over time so businesses, creditors and debtors see bankruptcy as a normal part of economic life. It is suggested Article 23.2 be removed. The draft law may introduce punitive measures applicable to these individuals if they fail to voluntarily file for bankruptcy when a company is in distress or if there are signs or actions of fraudulent conveyances.

- Article 52.3 on asset liabilities forjoint obligations and guarantees: Where the guaranteed person or both the guarantor and guaranteed party become insolvent, the guarantor and guaranteed party will be jointly accountable under applicable laws. The ruling on joint liability in this case belies the true nature of the guarantee relationship envisaged in the Civil Code. Article 298 of the Civil Code specifies that a joint civil obligation is one that should be performed by multiple parties and the entitled party may request any one of those liable parties to perform the entire obligation. In a guarantee deal, the guarantor's liability only comes into play if the guaranteed party fails to fulfill its liability or it requires a trigger prerequisite, whereas a joint obligation hasno preconditions to ask one of the jointly liable parties to perform the obligation. We suggest revision of Article 52 to reflect the nature of the guarantee relationship in accordance with the Civil Code.

Mr. Nguyen Van Cuong - Deputy Director, The Institute of Judicial Science, The Supreme People's Court

- Remuneration for trustees: TheGovernment will define compensation for trustees. However, it should be noted that part ofthe feeshould be paid in advance by the party requesting commencement of bankrupt procedures. Allowing the party requesting initiation of bankruptcy proceedings to negotiate with the trusteeon a fee level covered by the assets under bankruptcy proceedings may lead to agreement on a high level appropriate to the business's assets. A fee schedule is needed to avoid such abuses of

the remaining assets of the business in bankruptcy. TheGovernment's rulings will be provided, duly taking into account current market and socio-economic conditions.

- Article 123 of the draft law: The suggestion is duly noted. Article 123, however, only provides bans on businesses or cooperatives holding public assets. The draft will be rephrased and further clarified.

Mr. Tran Anh Hung – Partner, Bross & Partners

- Article 2 – applicability: The BL'smain purpose is to target businesses and cooperatives, rather than small-holding individuals or home-based businesses. Other groups such as entities practicing law or private notary offices should be added.

- Article 3 – definition of businesses and cooperatives falling into bankruptcy: The provision refers to unsecure or partially secured debts. However, there are alsocases of secured debt where the security is insufficient to cover due debt amounts, especiallyforproperty developers'bank loans, given that the property market has fallen belowvaluation points.

  A new featurecompared to the 2004 BL is the adding of the term "undisputed", but it maylead to debate on what is an "undisputed"debt. Therefore, it should be removed from this provision.

- Article 4 - rights and obligations of the party filing for instigation of bankruptcy procedures: The drafters introduced two options. Like the majority, we think the first option is favorableplausible, but the three-month period should be shortened to insure that once repayment claim is made, failure by the business or cooperative to make the repayment will trigger the right of creditors or other stakeholders to file a petition for initiation of bankruptcy proceedings.

- Article 5 – obligation to notify businesses and cooperatives falling into bankruptcy: There have been cases of businesses and cooperatives owing large sums of money pertaining to social security contributions or taxes, so there should be a separate provision underliningthat tax administrations or social security authorities also have the right to file a petition for bankruptcy declaration, similar to creditors or other stakeholders such as companyemployees.

- Article 7 - terms and definitions: There is no definition of who a debtor is, along withthe relationship of thedebtors and list of debtors with the assets of the business or cooperative in question, and its bankruptcy status. Also, pinpointing the definition of debtors as well astheir rights and obligations will significantly affect bankruptcy procedures and steps. There should be a separate provision elaborating upon debtors and the definition of debtors.

- Article 33 – negotiations between creditors requesting commencement of bankrupt procedures and the business or cooperative in distress: There should be a provision ruling out or barring such negotiations. Examples may include negotiations onfraudulent conveyance purposes by the business or cooperative in distress, or signs implying that negotiations will affect the legitimate rights and interests of other creditors. In this case, the court may disallow such negotiations and proceed with bankruptcy procedures as defined by law.

- Article 50 – order of priority in asset allocation: There should be rulings on priority closeout paymentsin asset allocation for creditors who file a bankruptcy declaration request, because creditors will assume obligations as defined by the BL once filing for declaration of bankruptcy against a business or cooperative.These obligations include, but are not limited to, being involved in procedures with creditors or paying bankruptcy fees.

- Article 57 – voiding a civil transaction: The right to claim a declaration of a civil transaction null and void should be added for secured creditors or partially secured creditors, and not just unsecured creditors and other stakeholders.

- Provisions pertaining to the meeting of creditors: Article 80.1.(h) states that the "conclusion is made in writing and shall be passed by more than half of the unsecured creditors representing two-thirds of the total unsecured debts". This requirement of approval by more than half of unsecured creditors representing two-thirds of total unsecured debts should be removed. Instead, it issuffice to have creditors representing at least two-thirds of total unsecured debts to approve the resolution to proceed with the creditor meeting or decisions associated with the creditor meeting.

- Prerequisites for business rehabilitation procedures: The draft law should only provide a single business rehabilitation plan developed by the business or cooperative in question, or the person assuming the responsibility of business recovery. Itisunwise to allow creditors more rightsas it may lead two or more plans submitted to court, butno guidanceonwhich plan the court should favor.

Mr. Nguyen Van Cuong - Deputy Director, The Institute of Judicial Science, The Supreme People's Court

- "More than half ofunsecured creditors": This is a technical computation based on the total debt amount, not the number of creditors.

- A question to consider: Should priority be given to creditors filing for commencement of bankruptcy procedures in the division of remaining assets?

Mr. Sandy Shandro – Senior Consultant, The World Bank Group

It is essential to remember the basic principle of bankruptcy is collective proceedings. Any further financial incentive or advantage to the petitioning creditor would be inconsistent with the fundamental basis for the BL. Furthermore, creditors themselves should not be able to submit plans for the restructuring of debtors as it could cause confusion. It is instructive to look at the United States, which has more restructuring experience than many other countries. In the US, a debtor who files for bankruptcy is given "aperiod of exclusivity", generally 180 days when no one else has the right to propose a plan. Creditors can be influenced through the creditor committee which will seek to influence the debtor. So a compromise for the current draft law is to permit creditors and other parties to send plans to trustees.

The notion of just having a cash flow test is in accordance with international best practices. The present version of the law includes a three month period in which the debtor can make a payment. The problem with giving the debtor time to pay beyond the due date is that in the collective proceedings, the debtor may be completely insolvent and unable to pay any of its creditors, but one vigilant creditor could file a petition to start collective proceedings. The debtor could raise money to pay off this creditor within one or three months, but it does not

solve the problem of the debtor. There is also a risk of debtors hiding assets and the debtor engaging in new transactions with new creditors who will not get paid.

Representative of Vilaf

- Provision on voiding a transaction: The 2004 Bankruptcy Law has provisions ontransactions with prior signs of fraudulent conveyances, that within three months from the court's acceptance of the petition for bankruptcy may be deemed void. In this draft law, however, this timeline is missing. This may be understood that transactions with signs of fraudulent conveyances that a business may engage before the commencement of bankruptcy procedures may be voided by the court. This regulation may lead to practical impediments, because it is not easy to identifya transaction intended forfraudulent conveyance purposes, from a normal asset sale by a business, that may affect the interests of bona fide assignees thatpreviously entered into transactions. The draft law should set a specific cut-off time to set aside transactions deemed void due to foul play.

- Trustees: The draft law statesthat a lawyer may become atrustee. But allowing trustees to get involved in running a business in bankruptcy may lead to concerns, as it may not be a job that properly accommodateswhat a lawyer may do under the Counselor Law.

- Obligations of the guarantor and guaranteed party when both are in bankruptcy to be jointly accountable for assets: It would be useful if the drafters clarify the definition of "joint liability"here. The current draft provisions seem be conform to the existing regulations of Decree 163 on secured transactions. However, we still need a clearer definition of "joint liabilities" between the guarantor and guaranteed party in case both become insolvent. Also, as Decree 163 on secured transactions has provisions for situations where a guarantee liability emerges, we suggest the draft further elaborates when such a guarantee liability may emerge where the guarantor should come in within the scope of this BL.

- There are no mechanisms to monitor or verify information pertaining to businesses going bankrupt. Information on business going bankrupt is virtually inaccessible in the process of legal due diligence associated with mergers and acquisitions. The draft law can provide rulings on a generic mechanism and provision of information relating to bankruptcy of businesses.

- The current provisions in the draft look to the introduction of case lawin bankruptcy proceedings. How will regulations on case law be actually implemented in the civil law system in Vietnam?

Ms. Tran Thi Hong Hanh – Secretary General, Vietnam Banks Association

- Article 3 refers to unsecured, partially securedand undisputed mature debt, for which a repayment claim has been made by the creditor, but the enterprise or cooperative in question fails to repay such a due debt. This provision seems obscure. Defining"undisputed" as well as which authority is allowed to release notices on undisputed debts should be clarified. To what extent a "due debt" not repaid is understood should also be made clear. For example in case of a bank, if a loan is unpaid for will the bank take steps to restructure such a loan and what happens with loans in workout or under interest break schemes?

- The right to petition for the initiation of bankruptcy proceedings fora credit institution: Under the Law on Credit Institutions, a credit institution may voluntarily file for

bankruptcy once the special control period is over. The draft law provides active and passive scenarios, where creditors ask for commencement of bankruptcy procedures, then the BL proceedings will set in. When the BL applies, negotiations, rehabilitation plan development and other stages will be needed. What is the SBV'srole ifa credit institution is petitioned for bankruptcy by request of creditors? Creditorsmay be those who loan to the credit institution and depositors.

- Asset management: There is no clear definition of the responsibilities and powers coupled with bankruptcy process procedures and steps of the trustee, executor and enforcement authority. If only one trustee is appointed for a proceeding, will (s)he have sufficient ability to ensure effective asset management? When banks grant loans secured with movable assets or inventory, they may work with the police in the process. But will atrustee, without such a supporting entity, be able to productively administer assets? Secondly, atrustee must be familiar with finance and accounting, apart from law expertise.

- Meeting of creditors, list of creditors: Article 78.3 of the draft law may be interpreted that all secured creditors are kept at bay from the meeting of creditors. We recommend adding secured creditors tothe list of eligible creditors, along with guaranteed creditors whose guarantee obligations are met.

Mr. Nguyen Van Cuong - Deputy Director, The Institute of Judicial Science, The Supreme People's Court

- The BL only addresses unsecured debts that become due, but not repaid and without dispute. Disputed debts are subject to Chapter 12 provisions in the draft. As for banks, the law mostly addresses security assetssubject to security agreements. This has to do with the BL, because when a business goes bankrupt, secured and unsecured assets may be involved. Unsecured and secured assets will be reported to the court hearing the bankruptcy case. The court is responsible to set aside secured assets for processing in accordance with security agreements.

- Trustees: The draft law does not limit appointing only one trustee for a bankruptcy case. Sometimes, as many as five official receivers may be needed and the trustees are entitled to contract external services, such as bringing in auctioning agents and evaluators.

Representative of Vietnam Banks Association

- Article 78.3 states: "The following persons may attend the meeting of creditors: guarantors, after repaying the debts on behalf of the business or cooperative falling into bankruptcy; where they will become unsecured creditors". We suggest the drafters consider one more scenario, as with credit institutions and bankswhen guarantees are solicited for a business to take a loan, security may not be required. However, occasions abound where a business wants a credit institution to become the guarantor to take a loan from another credit institution. In this case, the credit institution would require security from the business. If the guarantor becomes an unsecured creditor, this is not acase of using security assets for guarantee purposes.

Mr. Pham Tien Sy – Legal Deparment, The State Bank of Vietnam

- As the provision on the meeting of creditors does not mention secured creditors or unsecured creditors, may it be interpreted that such a meeting of creditors may encompass secured and unsecured creditors? As for secured creditors, the secured

part will be given priority in closeout and the unsecure part treated similarly to unsecured creditors in terms of prioritization in asset allocation.

- Credit institutions going bankrupt: Credit institutions have unique traits that may separate them from other types of business, regulated by the Law on Credit Institutions and fall under the administration of a line agency (the SBV).Credit institutions may receive deposits and raise funds for lending, face asymmetrical maturities of funds and numerous liquidity risks. As such, under the Law on CreditInstitutions, whenever a credit institution has asetback in terms of liquidity, the SBV may initiate re-financing measures or use other liquidity support tools. When a credit institution is at risk of insolvency, it may be put under a special control scheme, where the SBV strictly controls the operation of the credit institution and take action to recover the credit institution's solvency and normal operation, including the use of re-financing and special loan tools.

  The current regulations of Decree 05, guiding bankruptcy proceedings of credit institutions, recognize parties entitled to petition for bankruptcy of credit institutions as well as regular businesses, including creditors, employees, shareholders, shareholder groups and the credit institution itself. Nevertheless, given the sensitivity and immense implications the bankruptcy of a credit institution may cause, Decree 05 specifies that only the court initiates bankruptcy proceedings ona credit institution if the SBV has released a dispatch terminating or indicating non-application of action to recover the credit institution's solvency. The draft law should build on this by requiring that regardless of the party petitioning for bankruptcy, there should be a SBV dispatch (to terminate special monitoring or indicate non-application of action for solvency recovery or terminate use of solvency recovery actions), before bankruptcy procedures are initiated.

Mr. Nguyen Van Cuong - Deputy Director, The Institute of Judicial Science, The Supreme People's Court

- If a bank owes an amount that was used to build its headquarters, will creditors ask the court for a bankruptcy declaration or should they lodge a petition withthe SBV?

Mr. Sandy Shandro – Senior Consultant, The World Bank Group

Article 4.6 in the draft law only imposes an obligation to file when special control is terminated, but thereis nothing about when a member of the public tries to wind up a bank, which could be disastrous as there could be a run on a bank. In abank insolvency, one of the objectives is to maintain stability and avoid systemic risk. So the IFC/World Bank view is that the best way forward isbanks should have a separate regime and not to try to address the problem by making a number of incomplete exceptions in the BL itself.

Mr. Nguyen Hong Nang – Head of Legal Department, ANZ

- Provisions on trustees: There should be more rulings on executors, because the definition of rights and responsibilities between executors and trusteesisunclear. It is suggested that the part on executors should be removed and that the right to appoint someone to handle asset sales will rest with the meeting of creditors and trustee through negotiation. If the receiver regime stands, there is a need to draw a more distinct line between the two.

- Articles 79 through to 81 provide on the quorum for the meeting of creditors. This rate is too great and impractical. Calling a meeting of creditors should be simpler to speed up the bankruptcy process.

Whether to attend a creditor meeting is a right of creditors. If creditors do not want to attend, it means that they have waived their right to do so. To make sure creditors can exercise this right, regulations on notifying creditors should be better formulated.

- Provisions on liability closeout: Liability closeout isone of the most important provisions for bankruptcy. Ithelps guarantee the parties to a transaction, especially creditors engaging in multiple transactions with the insolvent business, to avoid credit risks. The inclusion of liability closeout in this provision of the draft law is a positive step. However, the drafters couldconsider further clarifying this provision on liability closeout to make sure its interpretation and application of liability closeout in bankruptcy is different than the liability closeout defined by the Civil Code. Liability closeout under the Civil Law has relatively narrow coverage and applies only to transactions of similar nature where both parties have comparable obligations. In bankruptcy, liability closeout should be widened to cover different types of transactions and many more types of assets.

- Business rehabilitation process: At this stage, more creditors may emerge. One of the most important considerations will be the debt incurred during the rehabilitation process or debt incurred after commencement of bankruptcy procedures pertaining to rehabilitation, which should be prioritized for repayment over debts incurred prior to commencement of bankrupt procedures. Otherwise, the chance for a business to recover will be slim.

- Provisions on guarantee for the guarantor, guaranteed and joint liabilities: Do creditors or guaranteed party have the right to claim repayment from businesses in insolvency which are the guarantor and guaranteed at the same time and for the entire amount of debt? Thisrelates to how much of the pie creditors get from the meeting of creditors and the assets of the businesses. If the meetings of creditors at both businesses give creditors a 100% share of the assets they deserve, there should be a mechanism to make sure creditors not get more than they deserve.

- Out-of-court mechanisms to deal with bankruptcy procedures or rehabilitation should be introduced. Such mechanisms will ensure the business and creditors discuss recovery opportunities for the business. Any rehabilitation agreements reached should be formalized by recognition of the court.

Appendix 1 – Participants list

No.	Name	Title	Organization/Company
Government Representatives			
1	Mr. Chu Trung Dung	Deputy Director of International Cooperation Department	The Supreme People's Court
2	Mr. Nguyen Van Cuong	Deputy Director	The Institute of Judicial Science, The Supreme People's Court
3	Ms. Bui Thi Dung Huyen	Head of Department for Research of Trade and Civil Legislation	The Institute of Judicial Science, The Supreme People's Court
4	Ms. Phan Thi Thu Ha	Department for Research of Trade and Civil Legislation	The Institute of Judicial Science, The Supreme People's Court

5	Ms. Vu Thuy Hang	International Cooperation Department	The Supreme People's Court
6	Mr. Ha Tuan Hiep	Specialist, International Cooperation Department	The Supreme People's Court
7	Mr. Nguyen Van Tien	Deputy Judge of Economic Court	The Supreme People's Court
8	Mr. Nguyen Van Quang	Head of Department of Operations, Economic Court	The Supreme People's Court
9	Mr. Phan Tien Sy	Legal Department	The State Bank of Vietnam
10	Ms. Luu Huong Ly	Department of Economic and Civil Legislation	Ministry of Justice
11	Mr. Hoang Ngoc Thanh	Deputy Judge of Economic Court	The Hanoi People's Court
Business Representatives			
1	Mr. Sandy Shandro	Senior Consultant	The World Bank Group
2	Mrs. Pham Lien Anh	Operations Officer	IFC
3	Mr. Nguyen Van Lan	Senior Operation Officer	IFC
4	Mr. Phil Smith	Director, Restructuring Services	KPMG Vietnam
5	Ms. Lien Truong	Head of Legal & Compliance Department	Sumitomo Mitsui Banking Corporation, Hanoi Branch
6	Ms Le Thu Ha	Officer of the Legal & Compliance Department	SMBC Hanoi Branch
7	Mr. Nguyen Hong Nang	Head of Legal	ANZ Bank (Vietnam) Limited
8	Mr. Tran Tuan Phong	Partner	V I L A F
9	Mr. Tran Xuan Hung	Lawyer	TMI Associates
10	Mr. Tran Viet Anh	Lawyer	TMI Associates
11	Mr. Luu Xuan Vinh	Managing Associate	Indochine Counsel
12	Mrs. Dang Linh Chi	Lawyer	Baker & McKenzie
13	Mrs. Tran Thi Hong Hanh	Secretary General	Vietnam Banks Association
14	Mr. Tran Anh Hung	Partner	BROSS & Partners
15	Mr. Youngdae Kim	Partner	BROSS & Partners
16	Mr. Pham Ba Linh	Senior Associate	Frasers Law Company, Hanoi Branch
17	Mr. Phung Quang Cuong	Lawyer	NHQuang and Associates Law Firm
18	Mr Dinh Huy Hoang	Senior Manager of Legal & Compliance Dept.	Shinhan Bank
19	Mrs. Nguyen Thi Dieu Hong	Expert	VCCI
20	Mr. SAKAKIBARA Takashi	Chief Advisor	JICA, Projects on "Vietnam Bank Restructuring Support"
21	Mr. Hara Takashi	Chief Expert	JICA, Projects on "Vietnam Bank Restructuring Support"
22	Mr. Nguyen Anh Tuan	Managing partner	Bizconsult

Land & Property

COMMENTS ON THE DRAFTLAW ON REAL ESTATE BUSINESS AND LAW ON RESIDETIAL HOUSING – DRAFT 2014

Prepared by
VBF Land Sub - Group

We would like to present our comments on amendments made in the draft Law on Real Estate Business which shall replace the Law on Real Estate Business No. 63/2006/QH11 ("**Draft LREB**") and the draft Law on Residential Housing which shall replace the Law on Residential Housing No. 56/2005/QH11 ("**Draft RHL**").

I. DRAFT LREB

1. Permitted scope of real estate activities available to foreign investors

The Draft LREB has recognised our recommendation in the previous report by inserting a number of rights of the Vietnamese residing overseas who conduct real estate business. We note however that such rights are still not applied to foreign organizations and individuals and therefore there is still the difference and inequality between the scope of operation of domestic investors/ Vietnamese residing overseas and foreign investors in the field of real estate business. In particular, foreign investors are not allowed (i) to purchase houses, construction buildings for sale, lease, lease-purchase; and (ii) to invest in construction of technical infrastructure works on allocated land, land got from assignment, land under lawful using right for assignment, lease of land already having technical infrastructure thereon.

Further, the previous draft allows enterprises with foreign owned capital to lease out construction works, including office space areas which have been leased/purchased by such enterprises. We note however that the Draft LREB has removed such right.

Recommendation: As recommended in the previous draft, we request that the foreign and domestic investors should have the same rights and obligations, including the rights set out in Clauses 1(b) and (dd) of Article 8 of the Draft LREB. Also, we suggest reinstating the right to lease out construction works, including office space areas which have been leased/purchased by foreign organizations and individuals in the previous draft to Article 8 of the Draft LREB.

2. Conditions for establishment of enterprises engaged in real estate business/for registration of investors of real estate projects

a. Condition on establishment an enterprise and register the real estate business

Article 9.1 of the Draft LREB stipulates that any organization or individual providing real estate business services must establish an enterprise or co-operative. According to the laws on investment, organisation or individual may also conduct real estate business by way of entering into a business cooperation contract without establishment of a legal entity. Therefore, we suggest adding this form in addition to the establishment of enterprises.

Recommendation: We suggest adding "*or sign business cooperation contracts with the entities conducting real estate business*" to Article 9.1.

b. Condition on legal capital

Article 9.1 of the Draft LREB provides that enterprises conducting real estate business *must have legal capital* and *the Government shall provide for a specific legal capital for*

conformity with socio-economic development conditions of each period. Since a specific amount of legal capital is not provided, this clause may cause concerns and uncertainties to investors. Also, when investors apply for real estate business permission, the licensing authorities shall assess the investment capital to consider if the investment capital is sufficient to implement the project and the investors are capable of conducting such project.

Recommendation: The requirement on legal capital is unnecessary and should be removed.

3. Real estate evaluation business

According to Article 59.1 of Draft LREB, enterprises doing real estate evaluation services shall have to meet conditions in accordance with laws on pricing. It is unclear if this requirement only applies to new companies established after the date of validity of this Draft LREB. If the provision applies to existing companies, it is unfair andwill cause concerns and difficulties to the enterprises already established and currently providing real estate evaluation services.

Recommendation: We therefore suggest that such requirements under Article 59.1 should apply only for a newly established company which is set up after the date of validity of this Draft LREB. Further, there should be a transitional provision stating that enterprises which have already been established before the new Law on Real Estate Business takes effect shall not be governed by Article 59.1 of Draft LREB.

4. Purchase of houses and buildings in association with transfer of land use right

Article 17.2 of the Draft LREB stipulates that *the sale of areas in buildings with mixed uses and several purposes must be associated with the land use right, the right to use common areas and equipment and furnishings under common ownership in such buildings*. Further, *the land use right of owners after purchasing areas within a mixed use building shall be under common ownership and must throughout follow either of the forms being long-term and stable or lease.* Please note that the Draft LREB has removed definition on "*mixed use buildings*" and has not from the previous draft, as such, it is unclear if this concept refers to buildings with mixed use purposes for residential, office, commercial and service centres as stipulated in Decree 71.

It is not necessary for the land use right of owners which purchasing areas within a mixed use building to be under common ownership. This provision should refer to land use right of *common areas and equipment and furnishings under common ownership in such buildings* only.

Also, please note that in practice, a mixed use building usually includes the area of apartments for sale, office for lease and/or commercial centre area. Pursuant to the Law on Land, residential land is the land allocated on a long-term and stable basis. Furthermore, when purchasing apartments in mixed use buildings, the purchase price is often included the value of land use right (including land costs such as site clearance, land rental/land use fees, etc.). Meanwhile, with respect to the area of office for lease and/or commercial centre, it is determined as land for business and commercial purposes, and as such the investors are only allowed to lease such land. Therefore, it must be clarified that form of land use rights should follow the land use purpose e.g. long term and stable use for residential components and lease for the non-residential components.
Further, the Draft LREB fails to mention the transfer of ownership of common areas in cases of selling houses and buildings not in a mixed use buildings or in cases of villas/individual residential houses having common areas within a residential project.

<u>Recommendation</u>: We suggest amend the third sentence of Article 17.2 of the Draft LREB that "*the land use right of owners after purchasing areas within a mixed use building regarding the common areas and equipment and furnishings under common ownership in such buildings shall be under common ownership and the land use purpose of the areas purchased shall be long term and stable use for residential components and lease for the non-residential components*. Further, we suggest these provisions shall apply to the transfer of ownership of the common areas in non-mixed use building projects, villas and individual residential housing projects with common areas as well.

5. Assignment of real estate project

(a) Whist the previous draft combines assignment of the whole or a part of a real estate project in the same provisions including conditions/procedures for assignment and responsibilities and obligations of the parties, the Draft LREB has split to 2 separate provisions including assignment of the whole real estate project and assignment a part of real estate project land area with the similar conditions and procedures. Please note that the Law on Land, provides that, although foreign invested companies are entitled to receive the assignment of the project, they are still prohibited from receiving land area/land use right from a party not being the State or its shareholder. Therefore, such amendment may cause confusion for the authorities and the investors in implementation of project assignment transactions.

<u>Recommendation</u>: We therefore request re-inserting the relevant provisions under the previous draft combining the assignment of the whole or a part of a real estate project.

(b) Article 42.3 provides that the project assignee must be an enterprise lawfully incorporated and registered to conduct real estate business. We note that these conditions can apply to assignees being domestic investors and foreign investors who already have existing projects in Vietnam; however they cause many difficulties to investors being foreign individuals and organisations who make investment in Vietnam for the first time with the investment project being the assigned project. This overlapping and conflicting regulation has restricted the rights to receive transfer of real estate projects of foreign investors who make investment in Vietnam for the first time and also caused big difficulty and delayed many real estate transfer projects.

<u>Recommendation</u>: We therefore suggest adding the phrase "*except for investors being foreign individuals and organisations who make investment in Vietnam for the first time*" to Article 42.3 of the Draft LREB.

(c) Articles 39.3 and 42.3 of the Draft LREB provide that investors receiving the transfer of the entire real estate projects shall make a deposit as a commitment to continuously implement the project. Please note that a big amount of deposit will cause adverse impact to investors, as they have to perform their payments to the transferor as well as have to deposit monies.

<u>Recommendation</u>: We suggest thatthe making of the deposit should be subject to agreement between the parties.

6. Conditions applicable to real estate made available for business

According to Article 7.1(b) of Draft LREB, the residential housing and construction buildings which have already been used to be made available for business must have the quality "*in accordance with the real situation*" of that residential housing and construction buildings

instead of "*as agreed by the parties in the contract*". It is however unclear how to determine the "real situation" and who shall have authority to determine such "real situation" of the residential housing and construction buildings. Also, the amendment is not necessary since the decision on sale and purchase of the existing house is a commercial issue and should be as agreed by the seller and the purchaser.

Further, pursuant to Article 7.1(e), the required dossiers and documents for houses and buildings to be made available for business shall include (i) the certificate of land use right, ownership of residential house and other assets attached to the land (the "**Certificate**") with respect to existing houses and buildings; or (ii) the construction permit (for applicable cases), documents of the project and the drawings, design for construction which have been approved, and documents regarding inspection and acceptance of construction completion of technical infrastructure serving such properties with respect to houses and building to be established in the future.

Please note however that the Draft LREB has no provision on the cases of houses and buildings under new urban area projects, residential housing projects which have been completely constructed but have not been issued with a Certificate. However, this may be deemed as existing houses and buildings and not the assets to be established in the future, and this type of houses and buildings should not be restricted from being made available for trading just because the Certificate has not been issued.

In addition, the provision on project dossiers is too general and unclear; therefore, in application of such provision in reality, relevant State authorities in each locality may have different requirements regarding the documents included in project dossiers.

Recommendation: We suggest reinserting the relevant provision in the previous draft stipulating that the quality of residential housing and construction buildings which have already been used shall be agreed by parties. Further, we suggest adding the following paragraph to Article 7.1(e) as follows "*In the case of houses or buildings that will be formed in the future and houses and buildings under new urban area projects, residential housing projects not being issued with a Certificate, there must be a Construction permit or an project file with design drawings for building execution, construction progress that have been approved*". Also, required documents in the project dossiers should also be clarified

7. Definitions

Please note that there arenew terms mentioned in the Draft LREB including "*real estateproject withmixed use and several purposes*" in the Article 4.13 and "*buildings with mixed use and several purposes*" in Article 17.2 which have not been defined.

Recommendation: We suggest adding definitions of "*real estateproject withmixed use and several purposes*" and "*buildings with mixed use and several purposes*" for clarity purpose.

8. Types of real estate permitted to be made available for trading

Article 6 of the Draft LREB lists out a number of real estate allowed to be made available for business and also removes the terms "*other types of real estate stipulated by law*" from this provision. In practice, there may be other kind of real estates which are not listed in the list of the real estate allowed to be made available for business in the Draft LREB and therefore such amendment shall cause difficulties to the transactions regarding such real estates. Therefore, it is not necessary to list down the real estate allowed to be made available for business which may prevent the flexibility of the investors in investing in the real estate projects.

Recommendation: We suggest reinstating the current provision of the LREB.

9. Making capital contribution by project development right

Article 18.4 of the previous draft permits the capital contribution by project development right. However, this provision has been deleted under the current Draft LREB.

Recommendation: We suggest re-instating such right by adding it as a new clause 8.4 under the Draft LREB. Also, detailed regulations should be issued separately regarding this right, including the approval from a competent State agency that the enterprise has the right to develop the project, the method for price valuation and regulations on transfer of this right.

10. Publicity of information about properties made available for business

The current regulation of the Law on Real Estate Business as well as Article 11 of the Draft LREB have no specific regulations regarding the time to publicise information about properties, and the cases in which the publicity of information about properties is required. The case of transfer of a real estate project between investors may be excluded from the cases in which the publicity of information about properties is required since this transfer is a private transaction between the two investors and the publicity of the price for project transfer may cause adverse impact to the project as well as to the business operations of the concerning investors.

Recommendation: We suggest that the case of transfer of a real estate project between investors be excluded from the cases in which the publicity of information about the properties is required.

11. Contracts for real estate business

The Draft LREB stipulates that an enterprise conducting real estate business must adopt contracts for real estate business stipulated in Article 15.1including (i) contract for sale and purchase of existing houses and buildings or house, construction buildings to be in the future; (ii) contract for transfer, lease of land use right; (iii) contract for lease, lease-purchase of existing houses and construction buildings or to be formed in the future; (iv) contract for lease-purchase of existing house, construction buildings or house, construction buildings to be formed in the future; and (v) contract of transfer of the whole real estate project. Please note that this list of contracts for real estate business is quite short and does not include other types of contracts for real estate business which may exist in practice and as such it may cause difficulty to enterprises conducting real estate business in conductingits business.

Further, Article 15.3 of Draft LREB stipulates that the Ministry of Construction shall provide specific regulations on the content of each type of real estate business contracts. It is not necessary to stipulate the detailed contents since it is already a requirement that all such contents must be consistent with the law. It is sufficient to provide principles which parties must adhere to. Furthermore, due to the potential difference in characteristics of each locality, it is difficult to provide for a detailed content to be applied consistently in all localities

Recommendation: In avoidance of mistakes in listing types of contracts for real estate business which may cause difficulty to enterprises conducting real estate business and organisations and individuals making real estate transactions, we suggest adding "*other*

contracts for real estate business in accordance with the provisions of law" to Clause 1 of Article 15. Further, requirement for detailed/specific regulations should be removed. The Draft should only provide for the basic contents required to be set out in the contract. Enterprises engaged in real estate business shall prepare, register the template of contract and use such registered template in its real estate transactions (such as regulations on registration of contract template in law concerning protection of consumers' interests).

12. Payment for real estate transactions

According to Article 16.1 of the Draft LREB, the payment for real estate transactions in which both parties are organizations must be made via a commercial bank in Vietnam; in other cases, parties can make payment either via a commercial bank in Vietnam or directly to each other. We are of the view that parties should be allowed to freely agree and select the method of payment for a real estate transactions.

Recommendation: We therefore suggest removing Article 16.1 of Draft LREB to ensure that parties have the right to freely select the method of payment.

13. Real estate trading floor business

Article 55.2 of the Draft LREBstipulates that "*A real estate trading floor may not take part in investment, sale and purchase, lease-purchase of real estate but may only act as an intermediary to conduct the sale, lease, lease-purchase of real estate pursuant to the authorisation of investors and be entitled to a fee for making transactions via the trading floor in compliance with the provisions of this Law*". However, the Draft LREB fails to specify if this also apply to cases of the trading floors formed by enterprises, co-operatives conducting real estate business which use the legal status as enterprises, co-operatives conducting real estate business to operate [the trading floor].

Recommendation: We suggest that Article 55.2should exclude the cases of the trading floors formed by enterprises, co-operatives conducting real estate business which use the legal status as enterprises, co-operatives conducting real estate business to operate [the trading floor].

II. DRAFT HOUSING LAW

1. Rights of residential housing owners

There is a significant improvement in the Draft RHL by adjusting rights of housing owners being foreign organisations and individuals so that domestic organisations and individuals, Vietnamese overseas and foreign organisations and individuals have more equal rights in acquiring, owning and dealing with residential houses.

Accordingly, foreign entities including foreign organisations and individuals owning houses in Vietnam by way of purchase, lease- purchase, donation, or inheritance shall have the same rights given to the domestic organisations and individuals. However, there are certain discriminations that still exist:

(i) Foreign entities may only own residential houses in commercial residential housing development projects with a higher price than the price provided by the Government from time to time;
(ii) Foreign entities cannot own but only receive the value of the houses if the houses are not within a commercial residential project;
(iii) The term of ownership in case of foreign individuals shall be 50 years (which may be extended), or the term as recorded in the investment certificate including its extension in case of foreign organisations. Please note that according to the previous draft, the

maximum term of ownership for foreign organisations and individuals is 70 years, which can be extendable; and

(iv) Foreign organisations can only use houses for the purpose of accommodation for their staffs and are not allowed to use residential houses for leasing, office spaces or other purposes.

In addition, the Vietnamese residing overseas are lacking the following rights:

(i) To lease-purchase;
(ii) To lend, to permit others to reside with them; and
(iii) To make capital contribution by residential house.

As we have expressed our concerns for many times, the restrictions to foreign organisations and individuals in owning residential houses in Vietnam shall restrict the access to several sources of capital necessary to develop the real estate market and also cause significant impact to investment activities in other fields in Vietnam.

Recommendation: In general, we suggest removing the above discrimination between domestic organisations and individuals, Vietnamese residing overseas, and foreign organisations and individuals with respect to residential housing ownership by vesting in the Vietnamese residing overseas and foreign organisations and individuals all the rights as same as those of domestic organisations and individuals. This again will allow the access to several sources and create benefits in real estate field bringing big interest to Vietnam.

2. Conditions for sale and purchase, lease, lease-purchase of commercial residential houses

a. Pursuant to Article 28.2 and 28.3 of the Draft RHL, one of the conditions for a commercial residential house to be traded is *having written approval of the provincial-level residential housing management agency that the house is qualified to be sold, leased, leased-purchased*. Please note however that the Draft RHL fails to clarify the criteria which shall be applied by the residential housing management agency to determine if a residential house is qualified to be traded. We are of the view that as long as the other conditions set out in Article 28.2 and 28.3 are satisfied, the house is already qualified to be traded. Therefore, there should be no additional written documents and approval from the authority are required.

Recommendation: We suggest deleting Article 28.2(c) and 28.3(c) of the Draft RHL.

b. Article 28.2(c) stipulates that one of the conditions for sale of commercial residential houses being *"signing security agreement with financial institutions or commercial banks"* shallapply to all commercial residential houses for sale. Thisprovision however does not apply to house for lease. According to Article 118, the investor must pay a security transaction fee to the financial institutions/commercial banks which have been calculated on the basis of the total sale prices of the houses to be formed in the future which are available for sale. In case that the investors cannot hand over the houses on time as agreed in the sale and purchase agreement or go bankruptcy during the implementation of the project, the relevant financial institution/commercial bank have to (i) refund the paid amount to the purchasers; (ii) replace the investor to continue the implementation of the project to hand over the houses to purchasers. Since the financial institutions/commercial banks are not eligible to conduct real estate project in practice, this provision is impractical and causes obstacles to investors and financial institutions/commercial banks.

Recommendation: We therefore suggest reverting to the previous proposal of either an insurance policy or payment of monies into a deposit account.

c. Pursuant to Article 28.3, the condition on completion of the main technical infrastructure and social facilities of a residential housing area with respect of the sale of fully-constructed residential houses is unreasonable and contrary to the principles set out in Article 28.1 and 28.2 in which the sale of residential houses to be formed in the future is permitted. Also, please note that pursuant to Article 4.22, any residential houses the construction of which has been completed but has not been checked and accepted to put into use shall be deemed as a residential house to be formed in the future and therefore conditions in Clause 2 shall apply. As such, the provision in this Clause 3 conflicts and overlaps with that in Clause 2.

Recommendation: We suggest removing Article 28.3.

d. Regarding Article 28.4: The advance payments are usually made by the purchaser in progress and as agreed by the seller and the purchaser. We are therefore of a view that this is a civil relation and the parties should be free to make agreement and decision on this and the Draft should not set a maximum amount of advance payment as provided for in this Draft RHL. Also, the provision on advance payment should apply to the cases of lease of residential houses to be formed in the future.

Recommendation: We suggest amending Article 28.4 as follows "*Advance payments paid in transactions of sale and purchase and lease of residential houses (including residential houses to be formed in the future and fully-constructed residential houses) shall be as agreed in the contract between the investor and customers, in accordance with the proportion of completion of housing works and the approved project implementation schedule*".

e. Regarding Article 28.5: Since the Draft LREB permits the lease of residential houses to be formed in the future, the restriction of signing a contract regarding the lease of residential houses to be formed in the future are inconsistent with the Draft LREB and should be removed.

Recommendation: We suggest deleting Article 28.5 allowing the lease of residential houses to be formed in the future to be consistent with Article 23 of the Draft LREB.

3. Conditions to be met to be entitled to develop commercial residential houses

Article 24.2 of the Draft RHL set out that foreign investors attending in development of residential housings in Vietnam for the first time shall need to satisfy the following conditions (i) *being an enterprise or co-operative established and operating in accordance with the provisions of law*; and (ii) *Having sufficient legal capital and capital for placing deposit and carrying out each residential housing development project in accordance with the law concerning real estate business*. Similar conditions to be met to act as investors of projects for upgrading, re-constructing apartment buildings are also set out in Article 110.3 of the Draft RHL. Please note that these provisions currently cause difficulties to investors being foreign individuals and organisations who make investment in Vietnam for the first time. Pursuant to the laws on investment, a foreign investor who makes investment in Vietnam for the first time must have an investment project to be entitled to establish an enterprise and obtain an investment certificate. However, these provisions require foreign investor who makes investment in Vietnam for the first time to set up a company before it can be engaged in a project as required by the laws on investment. The vicious cycle of

procedure and these overlapping provisions have caused many investment activities of foreign investors impractical in reality, made the licence issuing authorities confused, caused big obstacle and delay to several real estate projects in general and commercial residential housing development projects in particular.

Recommendation: We suggest replacing the current provisions under Article 24.2 and 110.3 of the Draft RHL by the following:

(a) "Being an enterprise or co-operative established and operating in accordance with the provisions of Vietnamese law except for investors being foreign individuals and organisations who make investment in Vietnam for the first time;

(b) Having registered to conduct real estate business in accordance with the laws on real estate businessexcept for investors being foreign individuals and organisations who make investment in Vietnam for the first time;

(c) Having sufficient legal capital and capital for placing deposit and carrying out each residential housing development project in accordance with the law concerning real estate business."

4. Responsibility for constructing social residential houses

Pursuant to Article 16.1 and Article 19.3 of the Draft RHL, an investor of a project for commercial residential housing development *must reserve a certain area for residential housing construction in the project for which the technical infrastructure system has been invested and constructed for construction of social residential houses in accordance with the regulations of the Government.* Article 55.3 provides that the investor must reserve at least 20% of the land area for lease of social housing.

Please note that pursuant to Article16.4 of the Draft RHL, social residential houses in urban areas of special type, type 1 and type 2 must primarily be apartment buildings. According to that, the requirement that investors of individual residential housing projects, particularly high-class villa projects, must reserve 20% of the land area for construction of apartment buildings to be used as social residential houses is inappropriate and impractical. It is realised from the practice that investors of projects for commercial residential housing development must not necessarily reserve [land/house] from the land funds, housing funds right under their projects for commercial residential housing development for constructing social residential houses to be handed over to the State, but the investors may choose other methods such as (i) to arrange another land area in other location equivalent to 20% of the land fund under the concerning project to construct social residential houses, (ii) to exchange [value of] 20% of such land fund under the concerning project to a monetary amount to be paid to the budget so that the local authorities may actively use such amount to invest in development of social residential houses in the locality in compliance with the zoning plans; or (iii) to associate with the investor of other project to jointly contribute social residential houses on the land area on which the project of associated investor is carried out.

Recommendation: We suggest adding the provision that the investors shall not be obliged to reserve [land/house] from the land funds, housing funds right under their projects for commercial residential housing development for constructing social residential houses, but they may choose other methods such as make contribution by monetary payment, by arranging another land fund in other projects, or associate with investor of other project to jointly make contribution, to Articles 16.1, 19.3 and 55.3 of the Draft RHL.

5. Receipt of advance paymentby customers

Pursuant to Article 66.3 of the Draft Housing Law, *for purchase and sale of residential*

housing, investors are only allowed to receive payments made in advance by customers according to construction progress of residential houses, but (i) for domestic investors, must not exceed 70% of the value of the house before handover of such residential houses and 95% of the value of the house before issuance of the Certificate; and (ii) for foreign investors, must not exceed 50% of the value of the house before handover of such residential houses and 95% of the value of the house before issuance of the Certificate.

Please note that thediscrimination between domestic and foreign investors will cause difficulties and negative impacts to the attraction of the foreign capital to Vietnam. If a maximum amount must be fixed, we recommend using the same amount for both domestic and foreign investors. There should also be a clear provision that advance payments can be collected for lease of residential houses to be formed in the future.

Recommendation: We suggest amending paragraph 2, Article 66.3 of the Draft RHL as follows: "*withrespect to the sale and purchase, and lease of residential houses to be formed in the future, the investors shall be entitled to receive advance amounts paid by customers according to the housing construction progress subject to negotiation and agreement with customers*".

6. Time of transferring residential housing ownership

Pursuant to Article 14 of the Draft RHL, the time of transferring residential housing ownership shall be effective as from different point of time subject to each type of transactions. In particular,

(i) where it is purchase and sale, lease-purchase of housing between individuals and individuals, the time of transfer of housing ownership is when the purchaser or the lease purchaser has made adequate payment of such purchase or lease purchase of housing;
(ii) Where it is donation or exchange of housing between individuals and individuals, the time of transfer of housing ownership is when the donor or the exchanger of housing has handed over such housing to the recipient of such donation or exchange;
(iii) Where it is purchase or lease purchase of housing between the investor and the purchaser or lease purchaser, the time of transfer of housing ownership is when the investor has handed over such housing to the purchaser or lease purchaser;
(iv) Where it is inheritance of housing, the time of transfer of housing ownership is from the opening of such inheritance in accordance with the law on inheritance.

Please note that according the current law on land, the time of transferring the land use right in respect of transactions of exchange, transfer, lease, sub-lease, bequeathal, donation, mortgage of land use right, assets attached to the land, capital contribution by land use right, assets attached to the land shall be the time of registering such transaction at the Land use right registration office. Also, the Civil Code stipulates that "*the transfer of ownership rights with respect to real estate shall be effective as from the time of registration of ownership"* and "*where the law requires that ownership rights with respect to asset which is the subject matter of a contract for sale and purchase must be registered, such rights shall pass to the purchaser upon completion of the procedures for registration of the ownership rights with respect to such asset*". Therefore, we request that the provisions on transfer of ownership in the Draft RHL must be consistent with the provisions of the law on land and the Civil Code so as not to cause confusion to parties involving in transactions and competent bodies when disputes on time of transferring ownership arise.

Recommendation: We suggest amending Article 14 of the Draft Housing Law in the direction that the time of transferring the ownerships in all transactions shall be the time of

registering the transaction at the Land use right registration office or the time of issuance of the Certificate to purchasers, lessees-purchasers, recipients of donation, recipients of houses in housing exchange transactions, recipients of bequeathal, recipients of capital contribution for the purpose of consistency with the provisions provided for in the law on land, the law on enterprises and the Civil Code.

7. Residential housing contracts

Article 122.5 of the Draft RHL chooses the 2nd option proposed in the previous draft in which notarisation/certification is required in case of sale and purchase donation, exchange, capital contribution, mortgage of residential housing except for the case where (i) donation of donated houses; (ii) enterprises conducting real estate business or housing management agency selling, leasing, lease-purchasing residential houses; (iii) assignment of residential housing sale and purchase agreements; (iv) leasing, lending, permitting others to reside with them, authorizing another person to manage [their residential houses] shall not be required to be notarized/certified except where the parties wish to do so.

Recommendation: We suggest replacing this provision by the 1st option which provides that notarisation/certification is not compulsorily required which is a more convenient and favourable to the investors.

8. Warranty

Article 84.4 stipulated that the main structural parts of a residential house shall be beams, pillars, floors, ceilings, roof, walls, pavings, tilings, plasterings.

In practice, if the parts being the pavings, tilings, plasterings are also deemed as the main structure and thus are guaranteed in accordance with the current provisions, e.g. 60 months for apartment buildings from 9 floors or more, it is too onerous to the investors.

Recommendation: We suggest the drafting committee re-consider and remove the parts being the pavings, tilings, plasterings from the main structure.

9. Areas under common ownership

Article 12.1 of the Draft RHL provides that owners shall have the ownership over the residential houses and have the right to jointly use the public facilities works within that housing development. It is however unclear what public facilities works include.

Recommendation: We suggest having further clarification on what public facilities works include.

10. Financing for residential housing development

Article 64 of the Draft Housing Law is provisions in which list out forms of financing for developing residential houses. We suggest removing these provisions since in view of the current difficult real estate condition, investors should be encouraged to mobilise capital from any sources permitted by law in accordance with the provisions in relevant laws. Therefore, the listing of sources of capital and forms of financing which the investors are permitted to mobilise in this Article is unnecessary and causes difficulties as well as restricts the investors from mobilising capital for their projects.

Recommendation: We suggest removing Article 64 of the Draft RHL.

11. Purchase of commercial residential houses to arrange for use as houses for relocation

According to Article 45.1(c) in the Draft RHL,the Draft RHLfails to clarify whether the investors of commercial residential houses is obliged to sell commercial residential houses to the State for use as houses for resettlement upon request. If this is the case, then the fact that investors may not on their own initiative decide the selling price for their houses on negotiation basis is unfair and may cause disadvantages to the investors.

Recommendation: We suggest amending Clause 45.1(c) as follows *"the purchasing price of commercial residential houses to be used as houses for resettlement shall be decided by the entities/organisations having authority to purchase residential houses for resettlement with reference made to the prices provided by an independent organisation with real estate price evaluation function and is subject to the agreement of the investor.*"

12. Transitional provisions

There should be transitional provisions to deal with on-going residential housing projects pursuant to the old law regarding the satisfaction of conditions stated in this law.

Section III

BANKING & CAPITAL MARKETS

Banking

TENTATIVE AGENDA FOR THE MEETING BETWEEN THE STATE BANK OF VIETNAM AND BANKING WORKING GROUP - VIETNAM BUSINESS FORUM

1. Circular 05/2014/TT-NHNN guiding the opening and use of foreign portfolio investment (FPI) accounts in conducting FPI activities in Vietnam

Circular 05/2014/TT-NHNN was issued on 12 March 2014 and will become effective as from 28 April 2014. During the process of preparation for implementation, we face a number of difficulties as follows.

Article 5 provides for different types of indirect investment activities in Vietnam. Article 5.1 and 5.2 also imposes an additional condition that foreign investors, who are non residents and carry out foreign indirect investment activities in Vietnam (in short, foreign investors), must not directly participate in management and administration of enterprises. We, however, face a difficulty of how to determine whether or not such foreign investors directly participate in management and administration of the enterprises and would like to seek the SBV's guidance on this issue.

Article 7.1 of Circular 05 does not state that foreign indirect investment account ("FIIA") can receive wages, bonuses and lawful incomes of foreign investors while Art. 14.2(b) of Decree 160 states so. As Decree 160 is still in effect, we understand that these FIIA can receive the credits as above mentioned.

Article 9.2(a) of Circular 05 allows FIIA to be closed if the foreign investors discontinue their indirect investment activities in Vietnam and the balances of FIIA can be transferred to direct investment VND capital accounts to be opened (VND FDIA). However there are no provisions on the receipts and payments of this VND FDIA for the banks to follow. Also it is silent on whether or not the enterprises have to open capital account in FCY in accordance with Article 11 of Decree 160 and whether or not the foreign investors are allowed to sell VND in VND FDIA to buy FCY to make capital contribution to such capital account in FCY.

Article 9.2 (b) of Circular 05 provides that in addition to FIIA used for foreign indirect investment activities in Vietnam, foreign investors may open and use direct investment capital account for foreign direct investment activities in Vietnam in accordance with regulations on foreign exchange control for foreign direct investment in Vietnam and other relevant regulations. However, current regulations on foreign exchange control keep silent on this type of account (there are only provisions on capital accounts of foreign direct investment enterprise under Decree 160).

2. Publication of financial statements

Under Article 14 of Decision 16/2007/QD-NHNN issued by the SBV on 18 April 2007 in respect of issuance of the regime of financial statements applicable to Credit Institutions ("Decision 16"), it is required that credit institution ("CI") must publish its financial report on its head office and operating venues; on a national or local newspapers; on its website; in press conference etc… It is, however, unclear whether this publication is required for all of the mentioned mass media or means above, or either of them would satisfy the requirement. As the publication of financial report sometimes is a sensible issue, in particular for non joint stock bank, we would require SBV to set some clarification on this matter for full compliance of our members.

Apart from listed banks who have to follow information publication requirement of stock exchange regulators, we recommend that submission of the financial reports to State SBV

and publish on newspapers should be sufficient to meet the purpose of publication for banks operating in the industry.

Specifically for foreign bank branches (FBB)
BWG appreciated that the purpose of this requirement is to provide transparency to the public about financial positions of relevant CIs. However, BWG would like to propose to SBV that an exemption should be considered giving to FBBs for this requirement with the following reasons:

1. FBBs are not a legal entity which only represent an overseas branch of its Head Office Bank ("HOB");
2. FBBs are established with guarantee by their HOB undertaking to take full responsibility of all obligations and commitments of FBBs operating in Vietnam which do absolutely provide a high level of protection to their customers;
3. FBBs are required to submit quarterly and annual financial statements to SBV so their financial positions are transparent to regulator;
4. FBBs are operated differently with other CIs (e.g. local Vietnamese banks and local incorporated foreign banks) as FBBs are largely supported by their HOB in all aspects including financial so individual FBB's financial statements may not completely be reflected the full financial position which will mislead the public to certain extent.
5. FBBs are established and operated in various models such as two separate FBBs operated in two different cities under the same HOB or a local incorporated foreign bank operated in the country while its HOB maintains an operation of FBBs. As such, the disclosure of financial statements of individual FBBs will make confusion to the public.

Recommendations:
In order to maintain transparency and ensure a strong financial position of FBBs to operate in Vietnam, BWG recommends SBV to consider implementing the followings which replace the current requirement under Decision 16:

- Require FBBs to disclose their HOB's annual report or audited financial statements (i.e. Group consolidated financial reports which include FBBs') at the location where FBBs operate and/or on their websites (if applicable); and
- Require FBBs to submit their HOB's annual report or audited financial statements to SBV in order to ensure the financial position of their HOB remain strong as required by SBV to guarantee or support the operations of FBBs in Vietnam.

3. New Regulations on AML, Decree 116 and Circular 35
Following the issuance of these pieces of legislation, meetings have been organized between BWG members and the SBV. A number of issues have been clarified and BWG members have been advised that a new circular addressing our concerns will be issued. However so far this new circular has not been issued and all banks are implementing based on Q&A and verbal clarification from SBV which are not a strong legal ground. We respectfully request SBV to soon issue this Circular to mitigate legal risk exposures to banks.

We would like to raise one particular and challenging issue regarding obtaining the personal information (i.e. government ID number/issuance date/expiry date/issuance authority, private address & tel number) for the purpose of verifying the identification of beneficial owners or incremental information for enhanced due diligence (i.e. financial

report). Since customers reject providing these personal or sensitive financial information while no public resource for this personal information or legal documentation is available, no third party can provide verification service in Vietnam at the moment as well as data privacy law prohibits data sharing outside the home country, it is quite challenging for banks to obtain such information requested by the law.

We understand that screening requirement is applicable for the identification information of our direct customers, thus the incremental information for enhanced due diligence purpose and not for the purpose of verifying customer identification are not subjected to screen.

We also respectfully recommend to self-identify the customers who are subjected to 6-month renewal cycle being Extremely High Risk customer due to negative news regarding significant breach of local regulations, abnormal financial capability or SAR, etc.

4. Cross Border Fund Transfer (simplifying documentation):

Making payments after the goods arrive and CDs can be obtained
Decree 160/ND-CP dated 28 Dec 2006 and Circular 01/1999/TT-NHNN dated 16 April 1999, stipulate requirements for banks to obtain supporting documents for cross-border foreign currency payments and buying foreign currencies against Vietnam Dong ("VND"). And the bank's individually assesses and decide on the supporting document requirement. SBV does not regulate specific document requirement.

Banks in Vietnam currently require below supporting documents from clients for cross border fund transfer related to imported goods: Custom Declaration, Sales contract/ Purchase order (or Master Agreement) and Invoice.

Clients using Electric Customs Declaration (ECD) already provide all information related to imported goods such as Purchase Order/ Sales contract/ Invoice, etc. via e-Custom system and this information is reviewed, verified and confirmed by Custom.

We, therefore, suggest to only obtain ECD which was signed & stamped with "custom clearance" by Custom Office with information on date, amount, CCY, Purchase Order number, Invoice number, Beneficiary name, etc... And the bank will check the payment amount is equal or less than the amount stated in the ECD. So, we will not require the submission Invoice/ Purchase Order/contracts on transactional basis.

Making payments before the goods arrive for imports under LCs
For imports under LCs, normally under UCP, banks commit to make payments upon the fulfillment of the LC conditions and must make payments even before the goods arrive. As such customers cannot collect Customs Declarations ("CDs") upon payment and banks can rely only on other trade documents such as contracts, invoices, bill of ladings etc to make payments. Banks can collect CDs only after making payments. This causes a tremendous work for banks to follow up with the customers for CDs and in most cases customers are reluctant to provide as payments have been made. We therefore seek the guidance from the SBV not to collect CDs from the customers for imports under LCs for the above reasons with a condition that customers will undertake to provide CDs upon the receipt of the request from the bank or the relevant state authority.

5. Entrustment Loans (Removing complexities in Liquidity Management)
Many local corporates and MNCs operate with multiple subsidiaries or entities. In some setups, they would like to manage payments and collections from separate accounts but do

not have any issue with commingling of the funds residing in these accounts. This can be achieved through sweeping and pooling structures, where funds are swept from individual company account into one concentration account. The set up permits the most efficient use of working capital e.g reducing funding costs and maximize return on surplus funds, improve visibility, and manage their funding needs through intercompany borrowings.

In Vietnam this is governed by Circular 04, and there are many complexities and challenges in the implementation. This needs to be simplified in order to fund an alternate source of financing for companies.

6. Some unclear guidelines on the use of foreign exchange within Vietnam
Relevant departments: FX Management Department, Legal Department

Under the Circular 32/2013/TT-NHNN on restriction of the use of foreign exchange within the territory of Vietnam, there are some unclear guidelines and requirements which cause difficulties for banks in terms of implementation, including:

- For payments relating to import, export entrustment contracts, actual amount or contract amount will be considered for payment given they are usually different (Article 4.6)
- What is the basis for banks to check payments relating to a tender package through international bidding are in conformity with provisions of the Law on tendering (Article 4.7). Furthermore, foreign contractors are deemed as residents as stated in the Article 4.7. It is, however, foreign contractors are not specifically incorporated in the categories of residents under the amended Ordinance on Foreign Exchange Control. This creates confusion and we are looking forward to SBV's clarification in this regards.
- How banks can verify eligible payment for buying goods, services at international sea ports (Article 4.11.b)
- Can export processing enterprises make payment in foreign currency remittances when purchasing both goods and services from domestic market for export purposes. Besides, are there any guidelines for banks to check if purchased goods from the domestic market by export processing enterprises will be used for production, processing, recycling or assembling export goods or for export? (Article 4.12.a)
- According to Article 14.4, residents and non-resident organizations are allowed to make agreement and pay salary, bonus, allowance in foreign currency by cash or bank transfer as agreed in labor contract with foreign employees who work for the organization. Under this provision, can wage payment service providers, on behalf of its clients being organizations, conduct salary payment to foreign employees who are working for the clients? We respectfully request SBV to elaborate this concern.

We would like SBV to provide clarifications on the above-mentioned points for implementation.

Capital Markets

CAPITAL MARKET WORKING GROUP REPORT

Presented by
Mr. Kien Nguyen
Capital Market Working Group

I. The privatization of State-owned enterprises and public establishment of sectors that are not sensitive to national security

Comments

- The state coffers remain stretched despite the huge need for public spending and investment. Revenues from taxes have become smaller as the economy is going through a difficult time and also due to the reduction of the import tax in alignment with WTO commitments. Most recently (in the 4th quarter 2013), the government has applied for an increase of the State budget deficit to rise from 4.8% to 5.3% of GDP.

- To our understanding (as at 23 May 2014), the gross market value of the 12 top State-owned companies among the top 20 largest companies listed on the Ho Chi Minh City Stock Exchange is US$ 18.5 billion in market capitalisation, approximately, accounting for 41% of the value of the entire HCMC Stock Exchange. The ownership of 50% alone in these 12 companies is worth US$ 6.3 billion. Selling part of the State-owned shares in these companies will easily resolve the state budget deficit in the current difficult time, instead of cutting the mandatory minimum wage or maximizing revenue from other sources. Companies, after the sale, will still be subject to local Vietnamese regulations, operating in Vietnam, paying taxes and employing local people.

- A large number of the companies in which the government is the majority shareholder are not operating or doing business in the areas classified as "sensitive" or "restricted", for examples, companies manufacturing consumer goods or fertilizers.

- State-owned enterprises have been treated more favorably in terms of policies and access to loans compared to the private sector. This creates an unfair playground between the two, hampers the development of the private sector, while the public sector is inefficient and does not offer good products or services. This also further impairs the competitiveness of Vietnamese companies' goods and services as a whole when they entering regional and global markets.

Recommendations: Based on the experience of countries in the region, we recommend the following:

- Increase foreign ownership in and decrease the State ownership by selling shares in companies operating in the areas not classified as "sensitive" or "restricted";
- For the first step, reduce the State ownership in some listed companies by around 35%. Later on, there should be a further reduction.
- Accelerate the equitisation process in 100% State-owned companies.
- Narrow the list of sensitive business lines.

II. Draft Law on Investment

1. Subject and Scope

1.1 Observations

The Draft Law does not make a clear distinction and does not clearly stipulate that the forms of investment governed by the Law on Investments (**LoI**) are only applicable to non-public companies, and that other investments in public companies will be governed by the Law on Securities (**LoS**).

1.1.1 Article 5(2)(a) of the Draft Law states:
The public offer of securities, the listing of, transfer of, trading of, and investing in securities and securities-related services are governed by the LoS.

1.1.2 We understand that the Draft Law suggests that:

(a) securities-related subjects and securities-related businesses are governed by the LoS; and

(b) the scope and subject of other investments, especially direct investments, are governed by the LoI.

1.1.3 We also understand that:

(a) The current LoI was passed by the Parliament in 2005;

(b) The LoS was passed by the Parliament for the first time 1 year later, in 2006;

The LoS, for the first time, introduced a new concept of "public companies" (including "non-listed public companies" and "listed public companies").

1.1.4 We note that as the LoI was passed before the LoS, the LoI did not make a distinction between public companies and other companies. As a result, although the Draft Law has suggested the LoS governs investments related to securities, the Draft Law does not specifically state that the LoI only applies to non-public companies (including limited liabilities companies, non-public shareholding companies, and partnerships).

1.1.5 As the the Draft Law does not clearly states that the LoI will only apply to non-public companies, the Draft Law contains ambiguous provisions as set out in items 2, 3 and 4 of this submission.

1.2 Suggestions
The Draft Law should clearly state that the forms of investment governed by the LoI will only apply to non-public companies, and that the LoS will apply to investments in public companies.

2. Article 21 of Draft Law

2.1 Observations

2.1.1 Article 21(1) of the Draft Law states:
Investors have the right to invest in the forms of capital contribution, purchase of contributed capital, and **purchase of shares in enterprises** operating in Vietnam.

2.1.2 One of the key activities governed by the LoS is the sale and purchase of shares in listed companies.

2.1.3 Article 21(1) of the Draft Law does not clearly stipulate if the "**purchase of shares in enterprises** operating in Vietnam" under the LoI includes the sale and purchase of shares in public enterprises (including non-listed public and listed public companies)?

2.1.4 Currently, the purchase of shares in public companies including non-listed public and listed public companies) is mostly governed by the LoS.

2.1.5 Questions then arise as to whether the sale and purchase of shares in public companies will be governed by:

(a) the LoI or the LoS?

(b) both the LoI and the LoS?

(c) only by the LoS?

2.2 Suggestions

We suggest as follows:

2.2.1 Option 1: The provisions on the subject and scope of the Draft Law should unambiguously state that investments in public companies, including the transfer of, investment in, and trading of shares in public companies are governed by the LoS.

2.2.2 Option 2: Article 21(1) of the Draft Law be amended as follows:

Investors have the right to invest in the forms of capital contribution, purchase of contributed capital, and **purchase of shares in enterprises** operating in Vietnam. The purchase of shares in public companies is governed by the Law on Securities.

3. Definition of "Foreign Investor"

3.1 Observations

3.1.1 Article 3(3) of the Draft Law defines "foreign investors".

3.1.2 We understand that under the Draft Law, this definition will be applicable to most of enterprises, including public companies (both unlisted public and listed public companies).

3.1.3 A question then arises as to whether this definition will be applicable to the LoS (and also to other laws and regulations)?

If the definition is applicable to listed public companies for which the Government will allow the increase in foreign ownership to more than 51%, there will be some consequences as follows:

(a) a listed public company, for instance Vinamilk, may be a domestic company today (when the foreign ownership is lower than 51%), but may become a "foreign

investor" tomorrow if the foreign investors acquire more than 51% of the listed shares.

(b) also under the definition of "foreign investor" under Article 3(3) of the Draft Law, when Vinamilk becomes a foreign investor, all subsidiaries of Vinamilk, which Vinamilk owns more than 51%, will also become foreign investors. This will directly affect some rights of Vinamilk and its subsidiaries, especially the land use rights.

(c) likewise, Vinamilk can be a foreign investor today (when the foreign ownership is higher than 51%), but can become a domestic investor when the foreign shareholders reduce their ownership of Vinamilk listed shares below 51%.

3.1.4 We, as foreign investors, do not understand the underlying reasons for the Vietnamese Government to differentiate foreign investors and domestic investors in respect of areas/business lines, which are not subject to restricted investments, prohibited investments, or conditional investments. For areas/business lines, which are not subject to restricted investments, prohibited investments, or conditional investments, in our view, there is no need for the application of the definition of "foreign investor".

3.1.5 The differentiation between foreign investors and domestic investors investing in areas/business lines, which are not subject to restricted investments, prohibited investments, or conditional investments, goes contrary to the WTO's rules of national treatment.

3.1.6 In addition, Article 8(1) of the Draft Law states that "foreign investors are entitled to remit the legitimate capital and assets overseas". The following questions then arise:

(a) whether the Vietnamese Government is ready for a domestic listed public company, for instance Vinamilk, after it becomes a foreign investor as referred to in item 3.1.4(a), to remit its capital and assets overseas under Article 8(1) of Draft Law without obtaining any further licenses and permits?

(b) if yes, whether Vinamilk needs to obtain an offshore investment licence to remit its capital and assets overseas?

3.2 Suggestions

We suggest that the Draft Law amend the definition of "foreign investors" so that this definition will only apply to:

3.2.1 **non-public** companies; and

3.2.2 companies trading in, or doing business in, areas/business line which are subject to restricted investments or conditional investments.

4. Article 5(2)(a) of the Draft Law

4.1 Observations

4.1.1 Article 5(2)(a) of the Draft Law states:

The public offer of securities, the listing of, transfer of, trading of, and investing in securities and securities-related services are governed by the LoS.

4.1.2 The following questions and matters arise from the listing of areas governed by the LoS under Article 5(2)(a):

(a) whether the LoI or the LoS governs the private placement of shares to foreign investors?

(b) currently the LoS governs the private placement of shares in public companies to investors, including foreign investors. So, whether the LoI only governs the private placement of shares in non-public companies to foreign investors?

(c) Whether or not the LoI governs foreign investors investing in securities investment funds (close-ended, open-ended, and exchange-traded funds)? (Currently the investments in those funds are governed by the LoS)

(d) the LoS currently does not have definitions of "securities transactions", "trading in securities", "investing in securities" and "securities-related services" as referred to in Article 5(2)(a) of the Draft Law.

4.2 Suggestions

We suggest that Article 5(2)(a) of the Draft Law be amended as follows:

Investments in public companies, securities investment funds, or securities related activities will be governed by the LoS.

III. Facilitating foreign investors' activities in Vietnam market

Vietnam market has become increasingly attractive to global investor community these days. Foreign investors are looking for more information about the market in preparation for their investments. One of the main channels which are used by them as a reference for market penetration decision is the market classification by international organisations based on their analyses of market accessibility level.

To support for its sustainable economic development, Vietnam is also looking forward to attracting stable and long-term foreign indirect investments from qualified institutional investors. It is crucial that necessary changes are made to address foreign investors' concerns on market accessibility level and to improve Vietnam's maket in the MSCI's classification.

We acknowledge that the SSC has set out clear objectives and plans to increase the ranking of Vietnam in MSCI's market classification from Frontier Market, currently, to Emerging Market. Among the concerned issues, we would like highlight the outstanding issue below which needs joint efforts from other related ministries:

1. Foreign investors' information accessibility issues

Comments

Foreign investors need all information related to their investment activities in Vietnam. However, information accessibility encompasses the many issues surrounding availability, accessibility and affordability of information. Foreign investors are encountering difficulties when accessing certain information and knowledge that are being freely shared in the local websites to facilitate their research of Vietnam market.

Almost all local authorities manage to upload on their websites the legal documents which are comprehensive and well-arranged, however, only Vietnamese versions are available. Regulatory news in Vietnamese are published in a timely manner while English version follows after several working days.

Information on corporate actions, meetings and relevant meeting materials published in the websites of local joint stock companies are also in Vietnamese only. In some cases, even the meeting invitation and template of voting letter sent to foreign investors in hard copies are in Vietnamese.

Due to these linguistic barriers, foreign investors cannot find sufficient information in preparation for their investment in Vietnam. It even leads to incomplete understanding about Vietnam government's policies towards foreign investments in the market. This issue is also seen by foreign investors as unequal treatment as they do not have access to the information as timely as domestic investors do.

Recently, State Securities Commission (the SSC) has shared the news that they are planning to publish on their website English version of all legal documents in 2014. This is in an effort to support foreign investors to have better understanding of the legal framework of Vietnam securities market. Though, it is understood that foreign investors would also need access to the legal documents related to their investment activities issued by other regulatory bodies (i.e. State Bank of Vietnam, Ministry of Finance, Ministry of Planning and Investment, etc.) and to news, announcements, documents, etc. provided by local joint stock companies. Hence, there should be integrated actions by all regulators and market participants.

Suggestions
To address the accessibility issues, we would suggest the below:

For regulators:

- Regulatory news/issuance of new legal document should be published in the websites of local authorities in both Vietnamese and English on the same day. Key points of the news must be summarised in English version to ensure the same amount of information is delivered to foreign and domestic investors at the same time.

- Full English translation of the legal documents should be published on the websites of the relevant regulatory bodies within 15 working days from the issuing date. (English version is for reference only)

- A detailed action plan should be introduced to ensure English translation of all effective legal documents are made available on the website of the relevant regulatory bodies at the soonest possible.

For companies:

- News/announcements on corporate actions, meetings or other company events should be published in both Vietnamese and English on the same day in the websites of non-public companies with charter capital from VND 100 billion and all public companies.

- Meeting invitation, voting letter template and meeting materials (including draft resolution) sent to foreign investors should be made in English or bilingual.

- Shareholder meeting minutes should be published in both Vietnamese and English on the same day in the websites of non-public companies with charter capital from VND 100 billion and all public companies.

Section IV

INFRASTRUCTURE

PPP Regulations

PPP DRAFT DECREE
WITHER PRIVATE SECTOR INFRASTRUCTURE INVESTMENT?

Prepared by
Mr. Tony Foster
Mr. Tran Tuan Phong
Infrastructure Working Group

1. The participation of the private sector in building Vietnam's infrastructure is important. Otherwise State borrowing will increase at even more alarming rates than is currently the case, or infrastructure will fail to keep pace with the country's potential.

2. The Ministry of Planning and Investment is preparing a draft Decree which will replace both Decree 71 dated 9 November 2010 on PPP pilot regulations and Decree 108 dated 27 November 2009, as amended, on BOT (the ***Draft Decree***). The Draft Decree is currently being revised yet again, based on public comments.

3. There are numerous problems with the current Draft Decree which could cause substantial difficulties in attracting private foreign capital.

4. The VBF infrastructure group would like to focus on a few critical items, some of which, if not remedied, will either stop project financing of infrastructure projects in its tracks or at least lead to substantial delays while the problems are worked through.

Scope

5. There is a fundamental issue in the Draft Decree. It is not clear whether State support for a project is only possible through the PPP mechanism, or whether a project with State support somewhere (e.g. rent-free land) can still be implemented as a normal joint venture.

(a) If the former, many projects will have to be done as PPPs and the institutional machinery for PPPs will swiftly be overwhelmed.

(b) If the latter, then when <u>exactly</u> does a project have to be implemented through the PPP mechanism?

Recommendation: The Draft Decree should clarify the criteria by which projects will be deemed to have to be implemented as PPP projects.

Abolition of BOT regulations

6. The Draft Decree will replace Decree 108 on BOT. While there have not been many BOT projects in Vietnam (and even fewer that have been project financed, which is their main purpose), at least they were a known quantity and investors had a reasonable idea of the outlines of what was involved at the time of starting a development. The Draft Decree will terminate this possibility before it is clear whether and how a PPP will work. This appears slightly rash. It would be better to abolish BOTs once PPPs have a solid track record (which may be years down the road).

   Recommendation: Amend the Draft Decree to provide a sunset clause for the BOT regulations that is the date in the future when two things have happened: (i) a committee of wise men in the Vietnamese government have opined that PPPs are

working well, and (ii) an additional period of x years has elapsed (so that investors can plan appropriately).

Transition of existing BOT projects into new PPP regime

7. There are quite a number of major projects being developed as BOT projects at the moment. In the power sector alone, there are BOT projects at Van Phong, Vinh Tan, Vung Ang, Quang Ngai, Long Phu, Duyen Hai and Nam Dinh, among others. The issue of what would happen to these projects, on which developers have spent untold millions of dollars, if the BOT regulations were to be repealed, needs to be considered carefully. The current proposal, which is set out below, leaves open untold numbers of questions.

   (i) A project that was proposed prior to the effective date of the Decree will have to go through a re-selection and re-approval process under the PPP regulations, unless otherwise approved by the Prime Minister.
   (ii) If a Feasibility Study was approved prior to the effective date of the Decree then it does not have to be re-approved under the PPP regulations.
   (iii) Projects established based on agreements with the Authorised State Bodies (ASB) prior to the effective date of the Decree will follow such agreements with the ASB.
   (iv) Projects with a "decision on investor selection" prior to the effective date of the Decree do not need to carry out investor selection procedures again.
   (v) Projects with Project Contracts that have been initialled prior to the effective date of the Decree do not need to re-negotiate the Project Contract.
   (vi) If the Project Contract has not been initialled, but certain items have nevertheless been agreed, those items do not need to be re-negotiated.
   (vii) Project having the Project Contract officially signed prior to the effective date of the Decree will be implemented in accordance with the Project Contract and the investment certificate.

8. All BOT projects that have not been financed (i.e. all except for Phu My 2-2, Phu My 3 and Mong Duong 2) will be adversely affected by this transaction, some seriously affected.

   Recommendation: Amend the Draft Decree to provide a sunset clause for the BOT regulations that is the date in the future when two things have happened: (i) a committee of wise men in the Vietnamese government have opined that PPPs are working well, and (ii) an additional period of x years has elapsed (so that investors can plan appropriately).

Foreign currency guarantee

9. One of the key bankability hurdles for most infrastructure projects is that they have to sell their output in Vietnamese dong, but the only long-term financing available is in dollars. If there is no government guarantee of convertibility (at the same exchange rate) of dong into dollars, and of the availability and remittability of dollars, financing of a dong-revenue project on a project basis is effectively not possible at the current point in time.

10. The current position of the government in the Draft Decree seems to be to address the issue head on by limiting the availability of government FX guarantees.

    Recommendation: The FX guarantee provision should affirm the possibility of obtaining a convertibility, availability and remittability guarantee. For example "Any convertibility, availability and remittability guarantee must be approved by the Prime Minister." We

realise there are economic and political issues, but caution against a flat denial of such guarantee, as this would send a negative anti-investment message. If a positive outcome is not possible, the Decree on PPP should simply remain silent on the issue.

Governing law

11. Another consistent bankability issue has been the difficulty of using a well-known system of laws for the project documents. While Vietnamese law is of course widely used in Vietnam, it is not as developed as English law and does not give lenders the certainty they need when lending on the basis of the assets and cash-flow of a project. The alternatives on this issue in the Draft Decree allow for the application of foreign law if it does not contradict the laws of Vietnam (option 1) or the Law on Investment (option 2).

12. If these alternatives are carried through into the final Decree, there will be a major financing issue because the conditions are not likely to be provable without a legal opinion from the Ministry of Justice. Unfortunately, there is a clause on what legal opinions the Ministry of Justice can give – and it does not cover some of the documents that will need such a legal opinion.

    Recommendation:
    (a) The parties should be allowed to decide what law governs their contracts.
    (b) If that is not possible, the range of opinions that the Ministry of Justice can give should not be limited.

Dispute settlement

13. The Decree allows any dispute arising between the ASB and a foreign investor during the implementation of the Project Contract and guarantee agreements to be settled by arbitration or by the courts of Vietnam or by a foreign arbitral tribunal as agreed upon by the Parties. The Project Company is not a foreign investor.

    Recommendation:
    (a) Contracts involving the Project Company, such as the Power Purchase Agreement, should be entitled to select foreign arbitration.
    (b) The provision should also include further clarifications to deal with persistent problems in enforcing arbitration awards in Vietnam.

Feasibility Study

14. The feasibility study report requirements appear to be input based (technical specifications, components etc.).

15. The Draft Decree includes a catch-all stating that other contents may be required in accordance with the laws.

    Recommendation: The Draft Decree should contain more flexible provisions for the detailed contents of a feasibility study. It should be output-based to the extent possible.

Project Contract clauses

16. The Draft Decree is too prescriptive in respect of the numerous specific detailed contents expected to be contained in the Project Contract. All sectors are different, and there are major differences between new build and rebuild projects.

    Recommendation: The Draft Decree should raise the general principles and give the parties the right to negotiate the detailed contents of the Project Contract.

Land

17. The Draft Decree states that investors will be in charge of conducting land clearance, compensation and resettlement procedures.

18. The investors will be exempt from land use fees/rental in accordance with the Law on Land. The Land Law does not permit the mortgage of land if the rent has not been fully paid. This has been interpreted to mean that land that is exempt from land rent cannot be mortgaged. This is an important issue for banks.

19. The Draft Decree is silent on the right to mortgage the land use rights to lenders. So it fails to address the issue completely.

    Recommendation:
    (a) The bankability of the Project should be enhanced by greater clarity on the mortgage rights to which lenders would be entitled in respect of land.
    (b) The Draft Decree should provide the comfort that the ASA will be in charge of land clearance, compensation and resettlement procedures.

Investment Certificate

20. Pursuant to the Draft Decree, an additional evaluation procedure will be required for the issuance of the investment certificate for the Project Company. There is a concern that the licensing authority will reopen the commercial details of the Project and this could cause further delays to an already cumbersome development process.

    Recommendation:
    The Draft Decree should slim down the procedures for the issuance of the investment certificate in the context of PPP.

Conclusion

21. The Draft Decree contains many areas which need further clarifications. The areas that are not bankable need to be further amended before the draft is finalised and the Decree is issued. Otherwise foreign private sector infrastructure development could come to a halt, though as there is so little of it anyway, it would not be a grinding halt and may be barely perceptible.

TOWARDS COMPLETING VIETNAM'S LEGAL FRAMEWORK ON PUBLIC PRIVATE PARTNERSHIP

Prepared by
LNT & Partners

*Public-Private Partnerships ("**PPP**") has become one of the most important instruments of economic policy in Vietnam. The Vietnamese Government recently published the new Draft Regulations on Public-Private Partnership Investment Form (the "**Draft**") which was earmarked as an amendment to the current Decree No. 108/2009/ND-CP and Decision No. 71/2010/QD-TTg on PPP investment. However, due to an unsuccessful track record of PPP, the shortcomings of the country's current legal regime are still present. This article takes a look at the significant changes and shortcomings under the new Draft, as well as examines international practice in the field as a basis for devising recommendations to form a more comprehensive and efficient system for PPPs.*

I. KEY HIGHLIGHTS OF THE UPCOMING REGULATIONS ON PPP

A. Governing Scope

In comparison with the current regulations, the Draft supplements provisions to govern the management and procedures of state participation in PPP projects. Under these new provisions, the preparation, approval and disbursement of state funds to implement PPP projects must comply with the current regulations on managing state funds spent on development investment, as well as regulations on managing and using state property.

However, in order for the purpose and nature of investment projects attracting participation of public and private sectors to be consistent with international practice, the Draft is devised with specific preparation, approval and implementation mechanisms. These include preparation and approval for the list of projects, report of the pre-feasibility and feasibility study, mechanisms for selecting investors, and the implementation, supervision, management, settlement and transfer of the project.

B. General Definition of Investment under PPP form and the particular forms of project contracts

According to international custom, there is no unified definition of PPP projects. The forms of contract applied in PPP projects are various and subject to the need and conditions of private capital mobilization in each period. The United Nations defines PPP as innovative methods used by the public sector to contract with the private sector, who bring their capital and their ability to deliver projects on time and to budget, while the public sector retains the responsibility to provide these services to the public in a way that benefits the public and delivers economic development and an improvement in the quality of life.[1] Based on the definition of BOT, BTO and BT provided under Decree No. 108/2009/ND-CP, the Draft stipulates that investment in the form of a PPP constitutes a form of investment under which the contract is signed between a competent state agency and an investor to build, renovate, upgrade, expand, manage and operate the infrastructure projects or to provide services in specific fields provided in the Draft.

In addition to the forms of BOT, BTO and BT defined under Decree No. 108/2008/ND-CP, the Draft provides some other forms of project contracts which are designed based on model

[1] United Nations Economic Commission for Europe, Guide Book In Promoting Good Governance In Public Private Partnerships, ECE/CECI/4, United Nations, 2008.

project contracts of other countries, including:

- Build – Own – Operate (BOO);
- Design - Build – Finance – Maintain – Operate – Transfer (DBFMOT);
- Build – Finance – Operate – Maintain (BFOM); and
- Operate – Maintain (O&M).

C. Investment Sectors in PPP Form

Under the current PPP regime, sectors eligible for investment under a PPP form include:

- roads, road bridges, road tunnels and ferry landings;
- railways, railway bridges and railway tunnels;
- urban transport;
- airports, seaports and river ports;
- clean water supply systems;
- power plants;
- healthcare;
- environment (waste treatment plants); and
- other projects on development of infrastructure and provision of public services under the Prime Minister's decisions.[2]

In addition to the sectors above, the Draft provides an expanded list of sectors under which projects may be eligible for PPP funding. These include:

- education, training, sports infrastructure and working offices for state agencies;
- information technology, telecommunications infrastructure and agricultural production infrastructure; and
- public housing, leisure centers and cemetery infrastructure.

D. Government Contribution

The current PPP regime sets the maximum proportion of government contribution at 30%.

This ceiling amount is abolished under the Draft, which now maintains two positions on the maximum level of government contribution allowable. The first is that the State can contribute a maximum of 49% of the total investment capital. The second is that there no statutory limit on government contribution.

The proposal to abolish the statutory limit on government contribution towards PPP projects altogether has recently been approved by the authorized agency. Accordingly, state participation will be determined on the basis of the specific financial plan of each project.[3]

E. The Expenses Allocated from the State Budget

Under the current system, the State covers the expenses for making and announcing lists of projects and selecting investors, as well as expenses for formulating and appraising project feasibility study reports.

According to the Draft, in addition to those expenses, further expenses allocated from the State Budget will be allocated for preparing and managing the project, formulating and appraising the pre-feasibility study report, and inspecting the quality, value and

2 Article 4, Decision No. 71/2010/QD-TTg Promulgating the Regulations on Pilot Investment for Public-Private Partnership Forms dated November 09, 2010.

3 Clause 1(d), Notice No. 28/TB-VBCP dated January 21, 2014 on the Conclusion of Deputy Prime Minister Hoang Trung Hai – Head of the Steering Committee on Public-Private Partnerships.

practical conditions of the project.

The new Draft also allows for reimbursement to private sector investors for the cost of project proposals by the selected investor in cases where their proposals are rejected.

II. ISSUES TO BE ADDRESSED

A. Government's Guarantee

Under the Draft, the basic provisions for investment incentives and investor support have been carried forward from the current regulations on PPP. Accordingly, the investment incentives and support, guarantee of obligations for investors, right to mortgage assets, assurance for provision of public services and right to dispute resolution that are currently in force have been maintained in the Draft.

However, the investment guarantee and support mechanisms have still been unable to provide and foster a transparent investment environment to inspire investor confidence. There are three main reasons for this:

First, regarding the balance between foreign currencies and domestic currencies, the Government simply ensures that the money demand is equal to the money supply. The Government does not fix the exchange rate to hedge against exchange rate fluctuations.[4]

Second, the Government's guarantee of revenue will only be considered in specific cases based on the financial plans of the projects.[5]

Third and most important, the Government disregards political factors affecting the project implementation. Events that arise out of political reasons are almost always beyond the investors' control and may lead to unexpected (and adverse) implications. Therefore, as the head of the country's political environment, the Government should take into account political risks in PPPs. For this reason, it is recommended that stabilization clauses in PPP contracts are acknowledged.

B. Risk Allocation

In addition to political risks, the balance of PPP contracts also unveils the relationship between the public sector and the private sector in terms of risk allocation.

Risk allocation is one of the most common concerns expressed by foreign investors entering a partnership with the State. This is unsurprising, as the Government often neglects to properly assign the risks between the parties.

The issue, therefore, is how are the parties able to manage risk in a specific project contract?

In practice, the Government will often attempt to pass all the risks onto the investors. The investors, in turn, generally accept these risks but then seek to extend the completion schedule to raise expenses. Consequently, it can be said that PPPs in Vietnam lack contractual balance and fail to precisely reflect the nature of the partnership model.

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[4] Clause 1(g), Notice No. 28/TB-VBCP dated January 21, 2014 on the Conclusion of Deputy Prime Minister Hoang Trung Hai – Head of the Steering Committee on Public-Private Partnerships.

[5] Clause 1(g), Notice No. 28/TB-VBCP dated January 21, 2014 on the Conclusion of Deputy Prime Minister Hoang Trung Hai – Head of the Steering Committee on Public-Private Partnerships.

Articles 1, 17, 20 and 36 of the Draft stipulate that the rights, obligations and risk allocation of the public partner and the private partner must be clarified. Despite this stipulation, there is still a discernible failure in the risk management stages.

Therefore, in order to address the matter of identification, classification and allocation of risks in PPPs, Vietnam should consider the approach of other jurisdictions and adopt a reasonable approach by these countries' legislation and experts.

III. RISK ALLOCATION FROM AN INTERNATIONAL PERSPECTIVE – IMPLICATIONS FOR VIETNAM

A. Risk Classification

Empirical experience shows that the risks vary in terms of the criteria from classification, and differs depending on the size, nature and form of the contracts of the specific PPP projects.

Generally, the risks can be separated into two categories: global risks and elemental risks.[6] These risks are then further categorized. *Global risk* can be divided into four sections: political risk, legal risk, commercial risk and environmental risk. *Elemental risks* capture the risks associated with elements of the project – e.g., implementation risk and operational risk and, for some projects, financial risk and revenue risk. Elemental risks are more likely to be controlled or managed by the project team.[7]

B. Principle of Risk Allocation

There are three methods to handling risks arising out of or in relation to PPP projects: sharing risks, retaining risks and transferring risks. *Sharing risks* means the risks are distributed between the parties. *Retaining risks* means each party is to suffer from the loss caused due to the retained risks. *Transferring risks* means a party transfers risks to the other party to minimize the loss on its side.[8]

Malaysian experience affirms that "*the optimal sharing of risks [is where] risk is allocated to the party who is best able to manage it*".[9] Thus, it has been suggested that risks affected by political elements (e.g., public inquiries, approvals and regulatory barriers), finance (e.g., inflation and interest rate shifts) and the legal environment (e.g., enactment or repeal of statute and directives) should be retained by governments, whereas the risks controllable or manageable by the project team should be retained by investors. Risks arising out of supply and demand should be shared between the parties.[10]

Furthermore, under the European approach, decisions concerning the treatment of

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[6] Merna, A. and Smith, N.J. (1996), Guide to the Preparation and Evaluation of Build – Own –Operate – Transfer Project Tenders, Asia Law & Practice Ltd, Hong Kong, China.

[7] Norazian Mohamad Yusuwan (2009), Risk Management Practices amongst Quantity Surveyor (Qs) in Malaysian Construction Industry, RMIIDKP/i/OOI, p. 12.

[8] Charoenpornpattana, S. and Minato, T. (1999), Privatization-induced Risks: State-owned Transportation Enterprises in Thailand, in Proceedings of Joint CIB Symposium on Profitable Partnership in Construction Procurement (London: E & FN Spon).

[9] Public-Private Partnership Unit, Prime Minister Department, Public – Private Partnership (PPP) Guidelines, Clause 2(2)(viii).

[10] Liu, X. P., and Wang, S. Q. (2006), Risk Allocation Principle and Framework for PPP Projects, Construction Economics, 2(1), pp. 59-63.

PPPs stipulate that a private partner will be assumed to bear the balance of the PPP risk if it bears most of the construction risk, and either most of the availability risk (also referred to as performance risk) or most of the demand risk.[11] *Construction risk* covers events such as late delivery, low standards, additional costs, technical deficiencies and other external negative effects. *Availability risk* relates to the ability of the private partner to deliver the agreed volume and quality of service. *Demand risk* covers the impact of the business cycle, market trends, competition and technological progress on the continued need for the service. Changes in demand due to changes in government policy are excluded.[12]

The European approach can be construed as being more likely to impose the obligation to bear risks on private partners based on the factors raised in relation to the performance of projects.

On the contrary, the public partner normally bears the availability risk and demand risk. Under the circumstances of availability risk, the Government will be assumed not to bear such risk if it is entitled to apply penalties if the private partner does not meet the required quality standards. As for demand risk, the Government will be assumed to bear such risk if it is obliged to ensure a given level of payment to the partner independent of the effective level of demand expressed by the final user.

Hence, a principle of risk management can be generalized as follows:

- The Government should handle the risks arising from macro conditions.
- The investors should handle specific project risks.
- Both the Government and the investors should share the risks under both their control.[13]

EXAMPLE			
PARTY	Government	Investor	Both
RISKS	- Unfavorable economy - Delays regarding land - Taxation risk ...	- Defects in design - Equipment failure - Failure to meet the contract specifications ...	- Prolonged negotiation period prior to project initiation - Force majeure - Risk of early termination

C. Implication for Vietnam and Recommendations

As the Draft is currently just a framework for PPP activity, further decrees and

[11] Statistical Office of the European Communities, New Decision of Eurostat on Deficit and Debt: Treatment of Public-Private Partnerships, press release STAT/04/18 dated 11 February 2004, p. 1

[12] Editorial, Public Private Partnerships: The Challenges and Opportunities for Delivering Public Services in the 21st Century, 2010 Eur. Pub. Private Partnership L. Rev. 1 2010, pp. 10-11.

[13] Huynh Thi Thuy Giang (2012), PPP in development of Road Infrastructure in Vietnam, Ho Chi Minh City University of Economics, p. 30.

instructions are expected to come into play after new PPP regulations are issued. However, at a minimum, Government guarantees and risk management should be considered as key factors in the country's steps towards attracting and promoting PPP investment.

In light of influential texts by scholars of numerous jurisdictions and the approach taken by Malaysia and Europe, Vietnam should consider the following recommended action plan:

First, the principle of risk allocation should be adopted, which provides that the party with the capacity to control or manage the risk has the obligation to bear them.

Second, this principle of risk allocation should be certified and clarified not only in regulations, but also in the PPP contracts.

Third, in order to further ensure the balance in project contracts between the Government and the investors, the Government must make a firm investment guarantee and support regime for the investors.

COMMENTS ON DRAFTDECREE ON PUBLIC PRIVATE PARTNERSHIP

Prepared by
DFDL Mekong

I. Legal documents

The below comments are based on the following legal instruments:

- Law on Investment;
- Decree No. 108/2009/ND-CP on investment in the forms of Build – Operate – Transfer (BOT), Build – Transfer – Operate (BTO), Build – Transfer (BT) Contract, as amended by Decree No. 24/2011/ND-CP ("**Decree 108**");
- Decision No. 71/2010/QD-TTg promulgating the Regulation on the pilot investment in the form of public private partnership ("**Decision 71**"); and
- The draft Decree on the public private partnership investment form ("**Draft Decree**").

II. General comment

The Draft Decree has combined two documents (Decree 108 and Decision 71) guiding a wide range of investment models in the infrastructure sector in order to provide a more robust legal framework. As a matter of practice, although Decree 108 set an important milestone to promote private investment in the infrastructure sector, especially regarding roads and power projects, it still contains unclear regulations on the selection process for investors and how money would be raised to fund such projects. Meanwhile, Decision 71 which was issued in 2010 failed to attract private investors to PPP infrastructure projects because it did not clearly regulate the role of the state in guaranteeing the financial risks alongside the private investors

In the new Draft Decree based on the combination of Decision 71 and Decree 108, there is a new definition of PPP projects, in which a PPP project is an investment model implemented through a contract between a state authority and private investors to invest in infrastructure or public projects. Apart from contract forms of BOT, BTO and BT, PPP will include forms of build-own-operate, finance-operate-transfer, build-transfer-lease, and operate-maintain models.

We are in a view that the Draft Decree has been well drafted and could resolve the ambiguity and overlapping between Decree 108 and Decision 71 as well as make PPP models more attractive to private investors. However, we would like to note certain specific comments below.

III. Specific comments

1. Investment capital of the PPP project

Article 2.21 of the Draft Decree sets out two options to define the investment capital of a PPP project. It is advisable that the investment capital is defined under the option No. 2 that means the total investment capital mobilized for the implementation of the project calculated and determined in the stage of compiling the Feasibility Study Report in conformity with each project Contract form. The total investment capital of a project shall include: construction costs, equipment costs; land clearance and resettlement costs; operation costs, business costs and project management costs; investment advisory costs; financing costs, other costs and provision for costs.

The option No. 1 refers to the determination of investment capital under construction regulations. We opine that in order to attract private investors in PPP projects, it would be better to give more right for the private investors in agreeing with the State authorities on the investment capital rather than depending on the construction regulations. Also, the investment fields applicable for PPP projects do not only cover the construction projects which may fall under the regulation of construction law.

2. Minimum revenue guarantee

Article 66 of the Draft Decree sets out two options to determine the minimum revenue guarantee, including (i) the Government or the Prime Minister will decide and appoint an authority to provide the guarantee and (ii) the competent authority will decide the minimum revenue guarantee.

We suggest that the minimum revenue guarantee should be decided by the Government. By providing the Government's guarantee, the private investors may ensure the operation of PPP projects which have been jointly conducted between them and Vietnamese competent authorities. Additionally, the determination of minimum revenue guarantee by the Government is in line with the Investment Law (Article 66).

However, we note that having the participation of the Government may cause time-consuming procedures for the investors to obtain the Government's guarantee. Therefore, we recommend the Draft Decree to include more detailed provisions on the PPP projects qualified to the Government's guarantee as well as the procedure to obtain the guarantee.

3. Right to buy foreign currency

Article 68 of the Draft Decree sets out a list of transactions in respect of which PPP investors are allow to buy foreign currency from authorized credit institutions. This list is more restrictive than the list of permitted transaction in the general foreign exchange control regulations and there is a risk it may be interpreted as a limitation in respect of PPP projects (e.g., under the regulations on foreign exchange control, the organizational resident may make the internal transfer in foreign currency to its dependent units). Therefore, we suggest removing from the Draft Decree the list of transactions in respect of which PPP investors are permitted to buy foreign currency.

COMMENTS ON VIETNAM'S PROPOSED DRAFT DECREE ON PUBLIC PRIVATE PARTNERSHIP INVESTMENT

Prepared by
General Electric

GE appreciates the opportunity to provide general comments and recommendations regarding Public Private Partnerships (PPPs) in support of Vietnam's development of a PPP model to help accelerate the development of the Country's infrastructure.

GE has been working closely with the Government of Vietnam across several industry sectors for many years to support the growth of Vietnam's infrastructure including energy, aviation and healthcare. GE was one of the first American companies established in Vietnam after the US Embargo was lifted. GE established GE Vietnam Ltd, offering a wide range of products and services in the field of energy, healthcare and aviation. GE now employs more than 700 people in Vietnam focused on helping to bring a broad range of infrastructure capabilities to the country in what it describes as a "company to country" partnership. Since 2009, GE has invested more than USD110 million in its Hai Phong manufacturing facility which employs more than 600 staffs, engineers and other skilled workers. Wind turbine generators and other components manufactured in Hai Phong are exported to GE's service centers around the globe.

In the energy infrastructure sector, GE recently announced that it is supplying the wind turbines for Vietnam's first large scale 100 megawatt wind farm in the Mekong region. GE equipment has upgraded Vietnam's electricity power transmission capability in several projects for NPT across the country, and we recently celebrated our 20th year in Vietnam with the inauguration of an Engineering Centre, which will support the development of engineering talent for the oil and gas industry in Vietnam.

MPI estimates that from now until 2020, Vietnam will need USD$170 billion to develop its infrastructure, including transport systems, bridges, power plants, water supply networks and waste treatment plants and ports. Traditional capital sources such as government bonds and development assistance will not be adequate to meet the demand. Therefore the majority of the investment must be raised from domestic and foreign investors. The Vietnamese government hopes to attract more private investments via PPP projects.

The Draft Decree on Public Private Partnership (PPP) is a proposed plan for investment based on contracts signed between State authorities and investors to build or improve, upgrade, expand, manage, and operate infrastructure projects or to provide public services in the sectors which are eligible for PPP investments. It is a mechanism to manage and use incentives, supports and investment guarantees for projects, and it sets out the rights, obligations, and risks sharing between parties.

Vietnam's Ministry of Planning and Investment will be the standing body to support the Steering Committee in coordinating, managing and implementing in a uniform manner the public private partnership investment form policies on the nationwide scale.

Public-Private Partnerships (PPPs) vary from country to country, but generally consist of a long-term collaboration between the public and the private sectors in which the private sector assists the government through investments which address public problems. Through this long-term collaboration, private partners actively participate by

providing expertise and experience aligned with the government's objectives, leading to efficient execution of infrastructure and effective provision of public services.[1] As an alternative to direct government capital expenditures for infrastructure, PPPs can assist governments in accelerating the delivery of essential services in order to promote social and economic growth in the best interests of the public and private sector.[2] By leveraging the strengths of the public and private sectors, healthcare PPPs can help governments increase access to care, reduce healthcare costs, and deliver healthcare more efficiently.

Healthcare PPPs

Chapter 1 of the draft decree focuses on investment sectors such as transport, water, power etc. There does not seem to be a focus on what we call "soft infrastructure" sectors such as healthcare and education. Perhaps the definition of public services could be further defined to clarify if healthcare is to be a focus area for this PPP decree. We encourage Vietnam to develop a PPP model in healthcare, and we would be pleased to work with the Vietnamese government to share our experience with PPP models to improve quality of care while easing overloading in public hospitals. PPPs can increase private sector participation to upgrade facilities and equipment and improve staff training.

In healthcare PPPs, the private sector generally provides financing for the initial capital expenditures required to build and equip the hospital facilities, and risks are allocated among the respective parties according to how they can best be managed. As the Vietnam draft decree outlines, there are variations in PPP structures ranging from *Build and Finance*, in which the private sector partners build and finance a health facility while the public sector operates it, to *Design-Build-Finance-Operate-Maintain*, in which the private sector designs, builds, finances, operates and maintains a public facility. These different kinds of PPP structures contain varying degrees of private sector involvement, with corresponding changes in the allocation of risks between the private sector parties and the government.

Benefits of healthcare PPPs

By combining the strengths of the public and private sectors, healthcare PPPs can assist governments in more efficiently allocating scarce capital and budgetary resources required for developing and operating healthcare facilities, leading to greater efficiency and increased access to care. PPP healthcare procurements tend to ensure that facilities are completed to program and budget specifications, and can yield a more economic whole life cost than if the facility had been developed and delivered solely by the public sector. By delivering to time and budget, PPPs can also accelerate access to healthcare and potentially lead to better health outcomes For example, Turkey is currently procuring 22 new PPP hospitals, which when completed will add 28,000 hospital beds to the country's current capacity of 200,000 and lead to improved access to care. Generally, governments enjoy lower costs, greater efficiency and increased access to care by developing infrastructure through PPPs.

Best Practices

GE has had experience in a number of countries with various PPP models, and we would

[1] GUILLERMO R. ALBORTA, CLAUDIA STEVENSON, SERGIO RIANA, ASOCIACIONES PÚBLICO PRIVADAS PARA LA PRESTACIÓN DE SERVICIOS: UNA VISIÓN HACIA EL FUTURO, BANCO INTERAMERICANO DE DESARROLLO 6 (2011).

[2] HOSMAC – CII, PARTNERSHIPS IN HEALTHCARE: A PUBLIC-PRIVATE PERSPECTIVE 3, http://www.cii.in/webcms/Upload/Whitepaper%20on%20Partnership%20in%20Healthcare1.pdf

welcome the opportunity to work with MPI on sharing our best practices as MPI develops its guidelines for the PPP programs in Vietnam.

GE has engaged in multiple healthcare PPPs throughout the world. For example, in the UK GE participates in a PPP with University Hospitals to provide a comprehensive solution of medical and non-medical equipment. In Canada, GE is working with a regional hospital to provide the most current technologies to enhance quality care delivery and efficiency. GE has been a leader in developing Healthcare PPPs in India, including smaller care-focused PPPs in rural areas for underserved populations. In addition to these PPPs, GE has PPPs projects in the pipeline in the following regions: the Middle East, Africa, Latin America, India, China, Asia Pacific, Europe and North America.

In India, Wipro GE Healthcare led consortium which entered into a Public Private Partnership with Government of Maharashtra to upgrade and manage advanced healthcare equipment in District Hospitals. In a consortium which includes the Public Health Department of the Government of Maharashtra, Wipro GE Healthcare Pvt. Ltd. and Ensocare by Enso Group. The project will advance healthcare in the State of Maharashtra for setting up advanced diagnostic facilities at 22 Government district and women's hospitals. It will operate on a 24/7 hour basis and provide services using Government recommended rate cards for the benefit of the broader population.

In the Philippines, GE is exploring healthcare PPP models and opportunities with the Aquino government. GE is under discussion with the equipment supplier of a 500 bed hospital project with the Philippine Orthopedic Hospital, and looking at various opportunities and models.

GE has is also engaged with the Philippine Department of Health in a medical equipment PPP medical equipment model involving the installation of the GE PET-Scan at the Philippine National Kidney Transplant Institute. The machine is aimed to bring down the cost of cancer cell scanning/monitoring and make it affordable to common citizens.

GE has a company-wide, $6 billion initiative known as Health imagination to help address the need for sustainable health worldwide. This includes lowering costs by supporting innovation through GE technologies and services; improving care quality through efficiency in standards of care, general healthcare education and financing.

GE has also demonstrated the strength of PPPs in operating renewable energy projects and smart grids through our Ecomagination initiative in projects in the Middle East. GE has used a two-pronged strategy of sharing knowledge and skills, and promoting the use of Ecomagination products to support energy efficiency solutions.

By taking into account the wide range of lessons learned from many different types of partnerships, and aligning PPPs with a company's efforts at being a good corporate citizen, best practices in public-private partnerships include balancing the interests and needs of the entities involved with the goals of providing improved access or service for communities and beneficiaries.
Key areas to consider when structuring PPPs:

- Setting goals that maximize the strengths each partner brings to the table
- Communicating clearly

- Reducing and sharing risks across partners
- Involving multiple stakeholders for input, expertise, and thought leadership
- Mobilizing resources effectively and efficiently
- Maintaining flexibility and adaptability of the partnership as conditions change
- Achieving long-range goals
- Sharing lessons learned

Finally, we offer a few comments specific to the drafting of the document for your consideration:

Chapter I, Article 7 (page 6) – clause 6 requires repayment of "investment preparation costs and Project implementation costs" when the state budget covered those costs. Suggest a clarification that this applies when the cost for such activities was included in the Investor's proposal.

Chapter II, Article 16 (page 11) – clause 3 (b) could be tightened to relate the value and performance to the requirements specified in the contract.

Chapter III, Article 26 (page 16) – clauses 3 and 4 relate to publishing Project Proposal information, which by definition may be the Investor's Project Proposal. Publication of commercially sensitive information would not be advised, as it would have anti-competitive effects on the investor.

Chapter III, Article 27 (page 16) – Similar concerns as mentioned for Article 26.

Chapter IV, Article 45 (page 25) – There are conflicting choice of law clauses. Clause 1 allows for the agreement to "apply foreign law" to the contract, but clause 2 says that the application of the foreign law can't "contradict the laws of Vietnam."

Chapter VIII, Article 70 (page 33) – Contrary to Article 45, this requires Vietnam law in case of a dispute. We look forward to sharing more of our knowledge and experience with MPI.

SUMMARY OF ROUNDTABLE DISCUSSION ON THE DRAFT PPP DECREE

- *Time:* *14:00, Friday, April 4, 2014*
- *Venue:* *Ministry of Planning & Investment, 6B Hoang Dieu, Hanoi*

MEETING SUMMARY

Mr. Dang Xuan Quang - Deputy Director, Foreign Investment Agency, Ministry of Planning and Investment

- In response to operating needs and to promote private sector investment, the Ministry of Planning and Investment (MPI) during the past few months has worked on merging and providing amendments to Decree 108 on PPP (public-private partnership) and the Prime Minister's Decision 71 on PPP piloting.

- During this process, the MPI has received regular support and contributions from the business community.

Mr. Hoang Manh Phuong - Deputy Director, Legal Affairs Department, Ministry of Planning and Investment

- The MPI put together a taskforce, assembled from experts from various ministries and line agencies, in session since 2003 focusing on a legislative review and development of plans to revise and update Decree 108 and Decree 71. However, a new approach was taken with this draft to incorporate multiple issues at hand and while it is unlikely to reflect all recent inputs, it is hoped investors' key concerns and recommendations will be addressed.

- Some key features of the decree are:
  - With respect to the selected approach, this draft decree and the previous Decree 71 are two independent pieces of legislation with respective implementing processes and potentially different interpretations. This explains why all types of investment from Decisions 71 and 108 will be incorporated into the same normative instrument on PPP. In addition, this draft decree also seeks to address setbacks that emerged during the implementation process. To this end, we have attempted to adopt a comprehensive approach to partnerships in investment, such as the build-operate-transfer model (BOT). Furthermore, this draft decree was developed as a framework set of regulations to introduce fundamental principles in the areas of investment, contracts, projects and procedures for investment incentive effectuation. In addition, more simplistic procedures for smaller projects are introduced to especially cater for agribusiness and rural development.

  - Regarding the government's involvement in the draft, the purpose of the provisions are focused on equity to improve the feasibility and bankability of projects. However, it is important to note that in this draft decree there will be no restriction on equity. Instead, equity proportions will be considered on a project-specific basis and investor financing planning. Equity may be constituted from capital and other financial resources as long as it is measurable and resources could include budgets, bonds, ODA funding or other concessional loans. Overall, a key draft objective is to support development of infrastructure projects. There are two new considerations regarding government equity. The first involves equity planning, which is built on the draft Public Investment Law and in line with the existing Budget Law. It reflects the fact that the public investment plan is an annual medium-term one consisting of a

line item for the State Budget used for these type of activities in the near future. Meanwhile, the draft decree also introduces several provisions attributed to the management and use of government equity once committed to support investors. While some projects may have enjoyed State Budget support in practice, legally speaking budget use management and particularly how payments are cleared are not straight forward.

- Content on project preparation has also been significantly altered compared to Decree 108 and Decree 71. Decree 108 specifies that a relevant government body designs projects and registers them in the list. Investors can also propose projects not in the government's work plan. If an investor's project is accepted and selected by a relevant authority, the investor may be requested to prepare a feasibility study.

- Another part of the draft decree addresses research funding, which is insignificant at this stage but some donors have pledged to provide such capital. This is a start to set up PPP projects and is seen as a prototype at this stage.

- The section on investment support and guarantees was built on Decree 108 with some important updates, especially for foreign investors. The first regards foreign exchange guarantees, further to which relevant government agencies have yet to reach a consensus on foreign exchange guarantee for investors. However, work will continue to reach a solution. The second point concerns a minimum revenue guarantee, which is new in this decree. The pressing question is to know where and to what extent the government can offer its guarantee for minimum revenue. The third point is how legal consultation should be made. This is not a new issue, but Decree 108 did not provide specifics on general rules, only Ministry of Justice responsibilities in this regard.

- Dispute resolution has been addressed in Decree 108, the Investment Law and international agreements on investment. Contractual disputes will go on trial and review at an international arbitration agency. Vietnam has made commitments in different contexts, but the case of a governing foreign law adds greater complexity to the matter.

- Additionally, this draft decree also has a chapter on different parties' obligations in PPP project implementation, especially relevant government bodies' responsibilities in supporting investors. For example, in land clearance or support for MPI or Ministry of Industry and Trade (MoIT) projects in Hanoi or Ho Chi Minh City, such government bodies can provide support but are not responsible for land clearance.

Mr. Pham Sy Chung - LNT Law Firm

- Regarding the definition of PPP: While Article 2 of the first draft introduced a definition, there is another definition with a fresher approach for the drafters to consider: "PPPs are new methods employed by the public sector to enter into agreements with the private sector, where the private sector will use its capital and expertise to make investments and provide products in a timely manner, and the public sector has the responsibilities to provide community services to promote economic development and improve the quality of living."

- Article 2 on types of contracts lists nine types of PPP investment contracts, whereas in reality there may be a greater number. Such examples include Design-Build-

Finance-Maintain-Operate-Transfer (DBFMOT) and Design-Build-Finance-Operate-Maintain (DBFOM), two types of contracts drafters may integrate into the draft.

- The definition of "total invested capital" appears verbose and could be shortened to: "The total invested capital of a project is all capital raised for preparation, development and project creation." The long list introduced in the draft may miss some items and If such neglected events actually occur, there will be no legal grounds to make reference nor relevant guidelines to determine if such contracts can be considered PPPs.

- In addition, available investment guarantee mechanisms appear insufficiently defined:

  + In respect of foreign exchange guarantees, Article 68 specifies a 30% foreign exchange guarantee for investors. Investors can take a loan from an offshore creditor and thus repay it in foreign currency, whereas buying foreign exchange is difficult without government support. However, providing a foreign exchange guarantee is insufficient, as investors must be aware of fluctuating and potentially adverse exchange rates.

  + Also, the draft decree fails to mention political factors that may affect a project's progress. We suggest the draft decree includes provisions on obligated responsibilities for political risks that may emerge and jeopardize PPP projects to give investors a sense of certainty for project implementation. Any emerging issues related to political factors may be outside investors' control and leave them vulnerable.

  + The draft decree has no separate provisions on risks and just a section on risk allocation to various parties. The resolution referred to in Section 6 is only of principle value and not a specific risk management provision. It is suggested the drafting team offer more specifics on risk allocation in this draft.

- Regarding other concerns such as criteria to define projects of national importance introduced in Article 47, projects under the purview of National Assembly, conditional or Category A projects, the drafting team is encouraged to demystify what is considered a project of "national importance" to ensure the persuasiveness of this legislative instrument.

- In respect of the governing law issue raised by the Legal Affairs Department, if a foreign party's equity takes up 70%-80% and the government's stake is only 10%-20% in a project, reference to a foreign law may be accepted to give investors confidence in dispute resolution related to governing law. The drafting team could consider introducing a specific equity proportion threshold to trigger the use of a foreign law or other thresholds where domestic law kicks in to maintain sovereign integrity.

Mr. Tran Duy Hung - Senior Consultant, Dau Giay project

- Article 2.15 defines: "Investors are organizations and individuals undertaking investment activities under the Investment Law, Enterprise Law, Cooperative Law, this Decree and other relevant laws and regulations", which are construed as Vietnamese laws. With this definition, the draft decree appears to have neglected

foreign investors, who are legal entities formed under foreign laws and operate in other countries.

- In Article 32, a project's financial plan is by nature a base study, part of the feasibility study and an instrument for investors to assess a project's viability to make decisions on levels of equity. Article 32.2 states: "The project's financial plan is agreed upon in the project contract based on the following financial criteria", which seems impractical because a project's contract does not usually go into such detail.

- Current regulations in Paragraphs 4a and 4b state that interest rates for loans used as invested capital will be defined in the case of selective or single-source bidding, but such interest rates may confuse investors. In addition, PPP projects in developing countries like Vietnam not only involve the government and private sector, but also third parties such as financial institutions, donors and loan guarantee agencies. Thus, the draft decree may need a provision that addresses the capacity and role of these third parties in the PPP pathway and Vietnamese government planning.

Mr. Nguyen Quoc Vinh - Tilleke and Gibbins Consulting Co.

- Article 32.4.c indicates the relevant State agency should consult the *mid-term interest rate of the same mean maturity from at least three local independent financial institutions that have no relations with the investors.* We suggest removing the term "mid-term" because by definition, it refers to loans with a maturity of 1-5 years and this is rare for such projects. In addition, the wording "mid-term" may be in conflict with "same maturity". For example, with a 10-year loan, interest rates from three commercial banks could be needed for the 10-year loan. Overall, this wording and issue should be reconsidered.

- In respect of Article 53.1, in the Land Law of 2003 and 2013, for such projects the government is in charge of land clearance and compensation, not investors. Only with projects purely for profit-making purposes will investors directly negotiate compensation plans with dwellers, with possible government support for the investor. Clarification on this is needed from the drafting team.

- Regarding Article 63.4 specifying that institutional investors are entitled to land use fee exemptions for land allocated by government or land rental exemptions for the project period, it is understood the existing Land Law and upcoming version have no rulings on the rights and obligations of investors. What will happen with investors' interest in such land and appurtenances to the land? Will they be entitled to mortgage an entire block land or part of it?

- We propose including provisions defining "investor" and "foreign investor" and the outgrowth of these definitions.

Mr. Hoang Manh Phuong - Deputy Director, Legal Affairs Department, Ministry of Planning and Investment

- Comments on guarantees have particular importance and it is understood this needs particular clarification. However, even among relevant government bodies no agreement has been reached, especially in terms of governing law and foreign exchange guarantee.

- Foreign exchange guarantee: There are few countries in the world that would offer an exchange rate guarantee. However, foreign exchange conversion guarantee may have some merit but Vietnam's foreign exchange reserve is limited. In this transitional stage, making a commitment in this decree that the government will provide 100% foreign exchange guarantee for all projects is unrealistic. Revision of the Investment Law could be another route to explore, but any commitment should be based on available resources.

- There is agreement on the comment about political will. However, we are limited to making reference to it somewhere else in the decree outlining how political changes may entail changes to law and policies, how investors' interests and specific commitments in a contract may be affected.

- In terms of governing law, from a State administration perspective and in principle, using a foreign law to govern a project contract is acceptable. However, to use a foreign law, there should be specific requirements, such as law being aligned with international best practices, not in conflict with principles of Vietnamese laws or beyond any common practices. Complete reference to a foreign law may lead to unforeseeable risks.

- The part on financial mechanisms has been temporarily mainstreamed in Circular 6 of the Ministry of Finance (MoF) and Article 32 is expected to be further amended. Numerous investors have been consulted, but there have been difficulties in finding rules that meet market and public administration needs. Some municipalities proposed that in terms of profit, the government should introduce two thresholds: one based on the owner's equity at 16%-18% and another based on invested capital at 5%-8%. If we agree with this alternative, there is large scope for different calculations. So, the intention is to remove Article 32 from the decree. The MoF could provide more detailed and specific guidelines, but it is difficult to satisfy investors' requests and public administration requirements of several municipalities.

- Regarding the definition of "investor", we are working on a definition that cuts across this and other pieces of legislation. However, we will continue listening and further elaborate upon this topic.

- Simplification of procedures for smaller projects: In the drafting process, experts from various ministries helped introduce a common norm for smaller projects. However, the inputs varied significantly. In the end, ministries and line agencies will work with the MPI to provide implementing guidelines on this.

- Regarding third party interests, in the decree on ODA, relationships involving a third party have been addressed in more detail. This includes roles donors can play or procedures for project approval clearly specified in Decree 38. Between Decree 38 and this Decree is a link on how to use ODA and other concessional funding, which is also what third parties are particularly interested in. Furthermore, in this draft decree there is a capital pay-in period or periods where step-in rights set in. For any further details, specific inputs and contributions are needed for the policy-making process.

Representative from Vietnam Business Forum

- For the step-in rights referred to in Article 40 to be realized, acceptance by a relevant government agency is required. The question here is whether such acceptance by a relevant authority is needed, who the relevant authority is and how such acceptance is given. Normally, a loan agreement incorporates a step-in rights provision and the loan should at least be registered with the State Bank. Is this considered as "acceptance" from a relevant authority to comply with Article 40.2?

Mr. Hoang Manh Phuong - Deputy Director, Legal Affairs Department, Ministry of Planning and Investment

- In accordance with Article 40.2, in the course of negotiations some contracts may not be subscribed between the government and investors. Therefore, in relation to step-in rights, a relevant authority's acceptance is a right step. Nevertheless, whether acceptance of the contract is deemed acceptance in that sense will need further clarification. My personal view is it should be decided upon concurrently at the project agreement execution phase.

Mr. Nguyen Viet Ha - Frasers Law Firm

- Regarding the relevant government agency or entity subscribing PPP and BOT contracts, the step-in right only occurs if the debtors default. If approval cannot be given when the agreement is entered into, breaches of the contract will also affect the company in charge of the project. Prevailing BOT practices are conceptualized as whenever a new investor comes in, such investor will be reviewed to see if it is qualified before approval is given. If approval is granted as a matter of course, it should be so specified in the decree.

Mr. Hoang Manh Phuong - Deputy Director, Legal Affairs Department, Ministry of Planning and Investment

- Article 40 states that requirements, procedures and details about step-in rights should be defined in the project contract. The commitment entered into may be deemed a preceding commitment or agreement. In future, only if any legal events occur can the bank's step-in right kick in. However, this must be agreed upon by prior consent within the project, except for special cases such as guaranteed loans. If Article 40 is adopted, negotiations should still be conducted from when the contract is signed.

Mr. Nguyen Viet Ha - Frasers Law Firm

- It is understood the project agreement will have a step-in rights clause specifying related procedures. However, approval and when to approve are unclear. Are we referring to dependence on the approval of a relevant government agency, the agreement signing entity? If so, should this occur after.

Specialist, Legal Affairs Department

- In Article 40.2, requiring a relevant authority's acceptance, where the step-in right event occurs and the investors default should be explicitly agreed upon in the agreement. If such a legal event occurs as well as creditors and investors comply with agreed agreement terms, the government must accept the creditors' role in the project.

- The requirements, procedures and details of the step-in right are defined in the project agreement or other written agreements subscribed by the project developer and investors, when written agreements should be accepted by a relevant

government agency. One option is that the step-in right clause is built into the contract or if there is a separate agreement, the step-in right clause should be established before the contract execution point. Relevant authority's acceptance is needed when the step-in rights clause is not included in the contract. But when agreed upon separately between creditors and investors, will such agreements be accepted by the relevant authority? It is understood that acceptance needed in Article 40 should occur before or during the execution of the contract and not until a legal event. For a creditor, this is of very significant importance. Banks cannot accept risks upon the occurrence of a legal action, but need the relevant authority's acceptance of the step-in right at this point.

Representative from Vietnam Business Forum

- In Article 55 on project quality control, Paragraph 3 specifies the relevant State agency may hire a consulting institutional or individual agency with competence and capacity to support supervising investor and project developer obligations. In Vietnam, projects are often put under the direct supervision and quality control of a relevant government body. What will be the outcome with expenses to hire an external agency? Will the government or company be responsible? This expense for a 30-year project, for example, may be extremely significant.

Mr. Hoang Manh Phuong - Deputy Director, Legal Affairs Department, Ministry of Planning and Investment

- The scope of supervising work must be defined. At first, it was determined that supervision by a relevant State agency was limited. Ministries, line agencies and local government bodies will not take over consulting and supervising roles with similar responsibilities as investors. Nevertheless, hiring an external consulting agency can be necessary. If we assume the government will take on the expense, it would be accounted for as a project cost, so the cost recovery period could be longer.

Mr. Nguyen Viet Ha - Frasers Law Firm

- If investors incur more costs, they will claim such costs from the government or resort to other compensation claims. If the government wants to take over a supervisory role at an investors' expense, it will become a tax liability or a special cost that does not have any meaningful contribution to the project. If the government wants a supervisory role and has revenue from a project, it can be used to cover supervising costs.

Mr. Hoang Manh Phuong – Deputy Director, Legal Affairs Department, Ministry of Planning and Investment

- The draft decree was designed to allow use of development funds to cover additional costs. Should this occur, the MoF will not be able to guarantee the amount expected by the Ministry of Transport. If the MoF accepts an alternative, the recommendation still stands that investors pay back later.

- Land clearance: According to existing rules, land clearance responsibility falls with the local government or the State. This ruling, however, has actually proved impractical.

Mr. Nguyen Viet Ha - Frasers Law Firm

- The concern is about land allocation and this is unacceptable. When land is leased, the rent collected will be accounted for in the project price, which gives the project a greater chance for donor support. Draft decree 108 only has one option – land award.

This means land leasing must be adopted. Furthermore, the current Land Law does not allow for the offering of land use rights as security to foreign banks. New mechanisms, such as consistent legal consultations allowing for mortgaged land and new concepts such as guaranteeing agents accepted in Vietnam, should be introduced.

Ms. Vu Quynh Le – Deputy Director, Procurement Administration Department

- Land use fee exemptions provide incentives for investors. Feedback from investors, however, implied that such exemptions without related land rights would be meaningless.

- It is suggested the wording be changed to "entitled to exemption or reduction". If "reduction" is added, how great will the reduction be? As reported by Mr. Vinh, the Constitution and Land Law define the government's cost recovery obligations in public use projects. The drafting team will further work to find the optimal option.

Representative from Vietnam Business Forum

- Article 41.2 addresses partial assignment of a project, in which laws and regulations on investment, construction and related rulings are referred to. Investment and construction laws and regulations do not specify partial assignment of projects and only in the new Land Law and in generic provisions were they first mentioned. Therefore, specific procedures and approving agencies for the partial assignment of projects are needed.

Mr. Pham Sy Chung - LNT law firm

- Definition of investor: The current definition seems too generic and current rulings imply that "investors" are construed as having a legal status in Vietnam. "Investors" should be redefined to include foreign investors, domestic or international institutional and personal investors.

- In case of law and policy changes, it should be made clear that investors may continue to be entitled to incentives stated in a contract and investment license granted by relevant authorities.

Representative from Vietnam Business Forum

- Apart from the guarantee issue addressed in Article 46 of the decree, there are other types of guarantees. However, the current decree only provides for a contractual guarantee. Should other types of guarantees be included? Strict rulings are needed on when to provide guarantees, in what form and at what value.

Mr. Pham Sy Chung - LNT law firm

- If foreign investors pay 70%-80% or more of total invested capital, they would request the governing law to be a foreign law. However, the law employed must not be in conflict with domestic laws and subscribed international treaties.

Representative from PPP Office

- Sunset clause in Article 73 of the draft decree: The drafters' intent is to allow for the most flexible approach possible to this decree. Decree 108, however, does not have this provision. When an MOU is signed a number of questions to be answered, such as what has this Japanese investor done with the relevant State agency, how will the costs be determined, on whose account, what other expenses has the foreign investor paid and for what activities?

Representative from Vietnam Business Forum

- Before the agreement subscription, some research was undertaken using our own funds. When the project comes into implementation, we will account such expenses as paid-in capital with our partners.

- If expenses are covered by the Japanese party, there are two methods to account for expenses in the total invested capital, depending on the company. Some companies consider the expenses incurred prior to MOU execution as research and development costs and not project costs. Other companies will accumulate these expenses and integrate them into their financial plans. What evidence does a company need about how the money was spent? In the case of a corporate group with multiple partners, it may hire an external consulting agency. If so, what kind of agreement should the company have on how much to spend and for what?

- To facilitate the review process, Japanese investors submit applications to the MoIT, which is responsible for reassessment. The MoIT has two choices – take on the responsibility or hire an external consultant. In the employment of an external consulting agency to provide advisory support to the MoIT, should a consulting agreement be signed with the MoIT?

Ms. Vu Quynh Le – Deputy Director, Procurement Administration Department

- If an investor undertaken a feasibility study, would it be willing to set aside money for the MoIT to select and hire an external consultant for review? In this case, while the finances still belong to the investor, the contract execution and consultant coordination seem unconnected.

Representative from Vietnam Business Forum

- When investors change from BOT to adopting this PPP decree, there will be impingements on contract performance conditions and negotiations may lengthen. It is hoped the regulations are designed to protect investors from lengthy negotiations.

Energy

REPORT FROM ENERGY SUB WORKING GROUP

Prepared by
Energy Sub-group

Re –establishment Energy Sub Working Group

The re-establish of Sub Energy Working Group under the Vietnam Business Forum (VBF) Infrastructure Working Group, comprising of foreign technology providers; companies whose operations in Vietnam are partially run on renewable energy and; and key industry stakeholders, which are interested in supporting the government with the deployment of energy and renewable energy. The re-establishment has received support from many member firms of AmCham, Nordcham, CanCham, AusCham, Eurocham, and BBGV.

In support of government targets and Commercial Trade Agreements

The Group looks to facilitate Vietnam's Master Plan VII, which targets EVN to start privatization of electricity wholesale market and that renewable energy ("RE") reach 4.5% of total power capacity by 2020. This includes targets for wind energy to reach 1,000 MW, biomass to reach 500MW and other RE technologies to reach a total of 2,700MW by 2020. The proliferation of RE is in line with Vietnam's Green Growth Strategy, which targets a reduction in GHG emissions by 8-10% by 2020 over 2010 levels. However, as of today, RE markets are negligible in size or non-existent. International firms in Vietnam Chambers have extensive experience in these areas, the region and how trade agreements have promoted such development.

The timing is right for re-activating the sub- working group

Vietnam is experiencing surging demand for power with an average annual growth of 14.5% for a decade up to 2010 and above 10% in recent years. Meanwhile supply-side difficulties are being experienced including falling dependence on large hydropower, delays in scaling up of thermal power, import of coal at market price and continuous setbacks in the development of nuclear energy. Meanwhile, renewable energy is relatively fast to market, scalable and, once installed and commissioned, rely on Vietnam's natural resources for powering into the future.

Competitive Wholesale Market holds opportunity for Energy

Under Decision No. 26/2006/QD-TTg of the Prime Minister, Vietnam seeks to establish the Competitive Wholesale Market (CWM) between 2015 and 2022. CWM is particularly relevant for Energy and RE, which currently experiences little support policy from government. An efficient and well-regulated CWM in-line with fair trade agreement will enable significant deployment of RE capacity in a fairly short time frame, if correctly implemented.

Objectives of the Sub Working Group

The main objective of the Sub Working Group would be to facilitate with the government and private firms in developing new guidelines and policies related to Energy and especially RE deployment through consultation, research, sharing of best practice and dissemination of know-how and technical assistance. The proposed main activities are listed below:

- Providing expert consultation on new guidelines and policies
- Serving as a platform for knowledge transfer and technical assistance in green technologies
- Proposing practical solutions to significant market barriers
- Conducting market research and market studies

- Organizing workshops and training events aimed at multiple Energy and RE stakeholders, including policymakers, grid operators, local project developers and financiers.

Group support the following activities

1. MOIT requests to Provinces to conduct studies for Renewable Energy Development Plans.
2. MOIT revision of wind power Feed-in tariff and support incentives and biomass Feed-in tariff.
3. MOIT implementation of the Competitive Wholesale Market without intervention on price and market participants and with reasonable wheeling fees. If implemented as above, the CWM may help to significantly scale-up RE projects.
4. Governments of 13 Me Kong Provinces are piloting solar projects with 31 communities and private sector that is attracting $10's of millions of private investment to replicate affordable solar energy to those living in rural areas. Over 2000 communities have shown interest to replicate with affordable loans, payback in 3 yrs and solar guarantees of 25 yrs .
5. Clear and definitive application processes with well-defined success/fail criteria for access to feed in tariff, power purchase agreements and associated government approvals. To allow investors to determine whether prospective renewable energy prospects can meet the local regulations and to minimize uncertainty and the exercise of discretion in regulatory decisions.

Current concerns

1. The price that EVN agrees to pay independent power producers in accordance with government-subsidized power purchase agreements (Feed-in-tariff) is too low to provide investors any profit, or too little to guarantee for bank loans (7.8 USD cents/kWh).
2. As EVN is incurring major losses, only ODA funding is investing, no private foreign investors and banks are likely to accept EVN's plan to buy electricity from wind power plants, unless guarantees from the government of Vietnam are offered.
3. Professional wind power producers with high reliability and financial capacity have had no opportunities to enter the Vietnam market.

Recommendations and perceived benefits

1. Permitting trial of select wind, solar and bio-gas power projects where independent power producers may sell directly to end users through one-on-one power purchase agreements; and when needed Independent power producers will pay distribution and transmission fees to EVN. Such fees will have to be agreed upon as part of CWM above.

2. A power purchase agreement directly signed between an independent wind power producer and an end-user being for example a multinational company can be used by renewable power developers as security for loans applied with international banks, together with their own financial resources, for their investment in the power sector in Vietnam in the future.

3. MOIT work on solar feed-in tariffs

The renewable energy goals can be achieved if the direct power sale trials are successful without any guarantees from the government, or any power price offset by EVN. Direct power sales are working well in other emerging markets, such as India, Mexico, Brazil.

Port & Shipping

REPORT OF PORT AND SHIPPING SUB GROUP
VIETNAM BUSINESS FORUM

Prepared by
Port & Shipping Sub-group

1. Background

The importance of the themes that have been brought to the attention of this forum and other similar events, throughout last year and the first half of 2014, has not changed. This report now links the critical necessity of addressing these themes to the subject matter of today; that is, as Vietnam prepares for New Trade Agreements.

A quick reminder of the themes:

1. The development of an international transshipment hub in South Vietnam
2. Port Dues
3. Cabotage Law

Linked to these three core items is the obvious requirement for an improved integrated infrastructure and transportation plan. This is not a complicated concept. A supply chain is only as good as its weakest link. To illustrate this point; if the best equipped and best located port in the world has neither a road, nor a rail link to and from the industrial areas of the Country, then the port itself may as well be deemed of no use. Of far greater significance, the Country's ability to export and import goods in a productive manner, is simply reduced to an inefficient and expensive state of affairs.

The world is full of examples where GDP Growth increases in a direct correlation to the amount of capital invested in an integrated infrastructure and transportation plan; that means investments in roads, railways and ports.

Alongside the hard investments is the absolute need to ensure that the Customs' procedures within the Country are fair and non-competitive across all provinces, the eCustoms initiatives are rolled out completely as soon as is possible and that customers feel free to move their goods through any port they choose, without a concern related to the Customs' Authorities.

2. Introduction

With much emphasis on the preparation and implementation of the Trans Pacific Partnership, from a ports', shipping and logistics' perspective, Vietnam is ideally positioned to take full advantage of this opportunity. With its long coast line, its deep sea container terminals (that have already been invested in and built by both the state and private sectors), and its location on the main shipping routes, Vietnam has the potential to fully capitalize on this massive trade agreement.

Conversely, if the ports, shipping and logistics industries are not given this opportunity, the whole implementation of the TPP runs a serious risk of falling short of its potential and in the worst case scenario, the supply chain, in and out of Vietnam will not be able to cope with the increased business.

The good news is that to realize this potential, the solution lies within the borders of Vietnam, both within the powers of the state and within the capabilities of current private investors. It does not rely on other Countries to intervene, nor indeed from an initial point of

view, does it rely on further heavy investments. Of course, it is true that further investments in certain infrastructure projects will be required in the longer run, but we can say that within months and within the resources that exist today, great strides can be made if certain decisions are made in a timely manner.

I would like now to reiterate the core themes of the Port and Shipping Sub Group that need to be addressed if Vietnam is to take full advantage of the TPP.

3. Development of an International Transshipment Hub for South Vietnam

There remains a great opportunity now, for Vietnam to develop a regional container terminal hub for the Country in the Cai Mep region.

As vessel sizes become increasingly more vast (at an even more rapid pace, as trade agreements are agreed), and in order to create the scale therefore required at ports, it has been proposed that an international hub should be developed. As a direct consequence of that scale and development, the hub for local Vietnamese cargo is created. The prospect of a strong hub in this region will support the exporters and importers both for the North and the Southern Regions, as they all seek to reduce transit times to their markets and continuously aim to reduce their inventory levels. In this way, both the overall transport costs and the direct costs for both exporters and importers will be reduced.

The development of a hub will therefore have a direct and positive impact for all industries in Vietnam in terms of their international competiveness.

For this proposal to materialize, the Government must ensure that an integrated, coordinated and sustainable Port Policy across the whole Country should be put into place. Put in its simplest form, vessel sizes are getting bigger and bigger, whether Vietnam acts or does not act in this regard, and therefore Vietnam must create ports that are sufficiently large in terms of quay length, depth of water and size of cranes. The only cluster of Ports with these criteria is in Cai Mep and that is where the focus of attention must lie with immediate effect.

No focus and the TPP quite simply will not be as successful as it should be.

4. Port Dues

A great deal has been discussed about the level of Port Dues that are charged to the Shipping Lines in Vietnam. This report seeks to clarify an important issue and that is, if the Port Dues are reduced for each call that a vessel makes in Vietnam, more vessels start to call in Vietnamese Ports, and therefore the resultant income to treasury actually goes up ! So, reducing port dues per call will actually increase overall income to the Vietnamese Government.

A discount of 40% for navigation aid dues, tonnage dues and 50% for pilotage have been applied for mother vessels of →50,000 DWT calling in the Cai Mep-Thi Vai range of terminals since 1/1/2012 based on Circular 41.

This has been well received by the shipping lines that have vessels calling at the Cai Mep-Thi Vai terminals. However there is still an immediate requirement for a further discount of navigation aid dues and tonnage dues applied for all sizes of vessels calling at the terminals at all ports within Vietnam, in order to encourage shipping lines to introduce more vessels.

The reduction of dues per call, immediately increases the competiveness of Vietnamese ports, and thereby more business is attracted to Vietnam away from other hubs in Asia (e.g. Singapore and Hong Kong).

5. Cabotage Law

The announcement to allow some foreign flagged vessels to be able to carry empty and laden containers to and from Vietnamese ports for up to a period of 6 months is a welcomed one and is seen as a development in the right direction.

However, in order for a sustainable plan to be introduced by the Lines, there needs to be a longer period of validity. In effect, Vietnam continues to lose an opportunity if the period is not extended. In addition, since there is a need to deploy at least 3 vessels on the required port rotation, (thus entering the market), the permission to allow only some vessels, effectively prevents a meaningful solution.

The Port and Shipping sub-group continues to seek a further relaxation of the cabotage law, for a much longer period (e.g. at least 2 years); still with the ability to carry empty and laden containers. There also needs to be permission for any Line to be allowed to ship containers from one Vietnamese port to another, rather than simply allowing a certain number vessels across the whole industry.

Failing to make a significant relaxation, will at the very least slow down the development of a hub and may even block the initiative all together.

There are of course a number of Local Companies that operate smaller sized vessels and if these companies can provide an efficient service at a competitive price, one would expect them to gain business if a hub were to be launched.

6. Port and Shipping Sub Group's Recommendations:

- Support the current initiatives that are under way to combine two or more of the deep sea terminals in the Cai Mep Region.
- Reduce Port Dues' charges per call across all vessel sizes so that the overall income to Vietnam increases.
- Relax the cabotage law if local companies cannot produce an efficient service at a competitive price.
- Develop and publish the necessary transport infrastructure projects and be transparent with the level of planned investments over the next 10 years.
- Ensure that the Customs Procedures are fair and non-competitive across the provinces.
- Ensure that provinces cannot compete for the currently limited container business and thereby accelerating the already dire demand / supply challenge in Cai Mep Thi Vai range.

Section V

AGRIBUSINESS

AGRIBUSINESS WORKING GROUP
REPORT TO MID-TERM VBF on 5 June 2014, Hanoi

EXECUTIVE SUMMARY

In recognition of the increasing importance of the Agriculture sector to Vietnam's sustainable economic development and social stabilization, the VBF Agribusiness Working Group was born in February 2014 out of a round table workshop in HCMC. We had our initial meeting by videoconference between Hanoi and HCMC on 4 April. We had a subsequent meeting with officials from MPI, MARD and MOIT on Tuesday 20 May where we discussed the details of our paper. I am pleased to report that all of the proposals in our full report were considered and most have been agreed at that meeting. And I thank the attendees at that meeting for their participation and support of the Working Group.

The Agribusiness Working Group has been strongly supported by the IFC and VCCI to whom I formally record my thanks.

Our goal is to discuss and propose effective solutions to pressing agricultural sector issues. Our primary objective is to establish a forum for informing policy direction and to present opinions to maximize the agribusiness private sector's contribution to the Government's target to promote private sector investment in agribusiness for high value- added and sustainable agricultural development in Vietnam. All of this of course sits well with Vietnam's preparation for New Trade Agreements – the theme of this mid-term VBF.

Our Working Group is comprised of representatives from local and foreign companies, business associations and NGOs. In the interests of effectiveness and efficiency we decided to confine our initial work and report to four discrete areas of interest viz:

I. **Market Access**
II. **Technology**
III. **Quality Standards, and**
IV. **Policy Implementation.**

Below are the address the key issues that we have identified under each of these four headings. Later we will establish small sub-groups to look at other pressing issues as we identify them.

Firstly, **Market Access**

Market access limitations relate to a wide range of issues and we see three distinct markets:

1. Domestic market access for Vietnamese companies
2. Domestic market access in Vietnam for foreign companies, and
3. Foreign market access for domestic companies

Each of these markets faces particular difficulties ranging from consistency of product and quality management, supply chain and R&D technologies, licensing and foreign interest limits, tariffs, lack of strategic management and planning of production and supply, lack of clarity in policy, and inconsistent implementation strategies.

The solution seems to include a clearer and more open domestic and international market access strategy based on international standards and norms.

Secondly, **Technology**

We have identified four difficulties in Technology in Agriculture:

1. Registration procedure changes.
2. Procedural bottlenecks for introducing new technologies.
3. Good quality agricultural input competitiveness and adoption.
4. Selection and application of appropriate technologies suited to Vietnam market.

The key issues in Technology include a temporary ban on registration of crop protection products pending the outcomes of a review of the registration process by PPD, transfer of responsibility and control regarding fertilizers from one Ministry to another, and continuing review of registration of seeds by CPD. This lessens confidence, transparency and predictability in the market for introduction of new technologies. There are inordinate delays in finalizing the framework for new technology introduction due to bureaucratic issues in coordination across government functions. Improved technology and IP can lead to improved food safety, less counterfeit products in the market, increased yield and profitability while reducing the carbon footprint.

Applying the right agriculture technologies suited to Vietnamese farmers, primarily small landholders, is critical to driving productivity. A national focus on affordable technologies for small landholders is critical for a step change in agricultural productivity.

Thirdly, **Quality Standards**

The major areas of concern here are:
1. Seeds and Seedlings, and
2. Counterfeit Products

Vietnam is one of the leaders in the global rice exporting market, being the second largest rice exporter in terms of volume. However, the international perception of Vietnam rice is low and inconsistent quality which minimizes its export value. One of the main reasons for this is the situation of the seed industry in Vietnam, with more than 300 seed varieties in circulation, of which the vast majority is low quality.

There are more than 200 seed companies in the country, however, very few have sufficient resources for serious investment in the sector.

There are misleading Trademarks in retail shops, products are named very similarly (often with one letter difference in the name) so farmers are often confused and are not making correct purchase decisions.

There are many different companies in the market which leads to a lack of control during the registration process, and these results in the registration of products which do not have a proper dossier. There is also no enforcement of patent infringement. Companies assume that if they receive registration approval of their product there is no patent infringed, but MARD does not have a robust system to check on IP prior to registrations.

Fourthly, and finally, **Policy Implementation**

We have identified 7 issues in this area:

1. The role of local authorities and industry associations
2. Compliance
3. Burdens in implementing administrative procedures
4. Too many provisions in too many texts
5. Conflicts among legal texts
6. Default of guidance for implementation of Laws and regulations
7. Unreasonable legal provisions (particularly on re-import of exported goods)

Vietnam's agricultural industry is fragmented to regions with significantly different attributes at each locality. The governmental policies do not truly reflect both the general and local issues.

Industry associations inefficiently perform their roles in maintaining strong linkages amongst various stakeholders in the industries. Local authorities should be given more discretion to adapt policies into real practices at their localities.

Many agricultural policies are vague and this creates opportunities for corruption in the sector.

Food safety and quarantine inspections are cumbersome and ineffective.

There are too many legal documents on prohibited substances which do not assist management agencies and businesses in maintaining compliance. There should be focused and clear regulations on prohibited chemicals and antibiotics in animal feed products for example.

There are no clear standards or regulations on food processing and food safety is compromised as a result.

Many unreasonable regulations are in place, which make it difficult for businesses, leading to delays in exports, violation of delivery deadlines or result in businesses paying high storage fees, etc.

Conclusion

The Agribusiness Working Group, through the VBF, will continue to work closely with relevant Ministries, especially the Ministry of Planning and Investment, the Ministry of Agriculture and Rural Development, the Ministry of Industry and Trade and other State Agencies to assist the Government to identify and implement effective solutions to constraints and issues in the Agriculture sector to allow Vietnam to unlock its full agricultural potential.

The Agribusiness Working Group hereunder details the issues and makes proposals under each of the four subject headings detailed above. We appreciate the Government giving us, through the VBF, the opportunity to highlight the opportunities and obstacles in this most important and large business sector in Vietnam.

I. Market Access

Market access refers to the ability of private agriculture and food companies to access markets for their products. These products may be either fresh or processed. These companies may be domestic or foreign. Access refers to both access to Vietnam markets for foreign agriculture companies as well as access of Vietnamese companies to domestic and foreign markets.

The Working Group intends to focus on supporting policies to enable market access in these terms.

Key Issues

Market access limitations relate to a wide range of issues – many of which are so-called 'cross-cutting'.

Domestic market access for Vietnamese companies

1. Quality and consistency of the product (cross-cutting).
2. Input, process and supply chain technologies to improve quality and stability of quality.
3. Research and development of technologies in-house to develop company products.
4. Management capability to oversee and develop team and product quality.
5. Inconsistency of development and implementation of government policy.

Domestic (Vietnam) market access for foreign companies

1. Licensing and foreign interest limits as barriers to entry.
2. Tariff and Non-tariff barriers and custom controls.
3. Inconsistent/ incoherent policy development and implementation.

Foreign market access for domestic companies

1. There is limited understanding of market need – it is a supply driven market.
2. Anticipating markets.
3. Market information versus market intelligence and insight.
4. How to obtain more buyers – and diversify products?
5. Key issues are: how to change management style/ adopt and obtain new technology/ understand effective marketing strategies.
6. Quality control and inconsistencies in production and processing.
7. Non-uniformity – decreasing quality over time.
8. The need for value-added processing to expand the market – e.g. in aquaculture – filet production is consistent but without well developed value added processing, the market access is limited.
9. Overproduction of similar products – many examples of a 'rush for the same product' all at the bottom of the value chain – e.g. dragon fruit, Robusta coffee, basa fish.
10. Demand driven markets – local governments and local companies.

The result is competition at the bottom end of the market – and perpetual self-limiting the opportunity for market access. The comparative advantage becoming a perpetual disadvantage.

The solution includes a clearer domestic and international market access strategy based on international standards and norms which would be supported by:

1. 'Less and smarter policy' and fewer market access obstructions from government regulations;

2. increased substantive openness to foreign technology and investment to revitalise the agriculture sector and ensure it is of world standard; and consistent implementation of smart and progressive policy – anticipating the long term gains for millions of producers; healthier rural economies; competitive Vietnamese companies; and world class technologies and practices in place in Vietnam.

II. Technology in Agriculture

1. Registration procedure changes

Context

- The registration of all Crop Protection products is on a temporary ban until the First Quarter of 2015 due to a full review of the registration process by the Plant Protection Dept (PPD).

1.

- Fertilizer registration and control has been transferred to the Ministry of Industry and Trade (MOIT) from the Ministry of Agriculture and Rural Development (MARD) by decree 202/2013/NĐ-CP, in November 2013. As a result, procedures have been changed. Companies now wanting to register new fertilizer formulas are operating in a policy void.
- Registration of Seeds is undergoing review by the Crop Production Dept (CPD), potential changes to the registration process are unclear.

Outstanding problems/obstacles

- The inability to introduce new technology/products in time for the new season.
- Companies reduce investments due to a lack of visibility and predictability.

Proposal

- Guidance with the new process should be issued at the same time as changes and decrees are announced. Introduction of a formal consultation process, when major changes are planned, between authorities and companies to ensure a smooth transition would help.
- Ensure the new registration framework facilitates new technology introduction.

2. Procedural bottlenecks for introducing new technologies

Context

- Introduction of new technology e.g. GM Seeds, *Biologicals* and others require the development of an appropriate framework and governance. This requires significant coordination within and across Ministries and relevant government bodies and is often time-consuming.

Outstanding problems/obstacles

- They are substantive delays in finalizing the framework for new technology introduction due to bureaucratic issues in coordination across government functions. Timelines for finalization are delayed and postponed.
- Companies are unclear on planning new product introductions, and assessing commercial and technical viability in Vietnam.

Proposal

- Expedite review and finalization of new technology introduction procedures through timely coordination across functions and collaborate with key industry players for developing regulations for new technology introduction.

3. Good quality agricultural input competitiveness and adoption

Context

A recent report indicated that 50% of randomly tested fertilizers by authorities were off-spec. and the loss for the economy is estimated at $US 800 million. In addition, there has been a significant increase of counterfeit products, misleading growers and leading to the development of counterfeit manufacturing.

At the same time, public awareness and demand for traceability and food safety is increasing.

The Vietnam PPP Coffee Task Force's latest report indicated that GAP combined with good quality imported inputs can increase yield and profitability by 10% while reducing carbon footprint by 50%.

A lack of adequate quality testing infrastructure hinders the adoption of better technologies for higher quality output, hampering export competitiveness.

Outstanding problems/obstacles

- Lack of leadership activities to ensure safe and proper usage of inputs and low quality inputs distributed to farmers leads to environmental and safety issues.
- Good quality inputs are not affordable to small farmers as they cannot compete with companies cheating on formulas and/or not applying VAT.
- Good quality/environmental friendly input attracts a 6% import duty which increases the price to farmers and encourages farmers to use counterfeit products. This leads to a risk of loss of farmer's productivity over time and eventually soil acidification.
- Increased usage of low quality crop protection products adversely impact crop, soil and human health. There is a risk of increased usage of fertilizers while Vietnam is already one of the highest fertilizer consumers per hectare in the world.
- Lack of adequate quality testing laboratory infrastructure and third party investments limit realizing the benefits of better technology usage.

Proposal

- Strengthen IP protection measures through strict implementation of legal action against counterfeiters and enforcement at the market place. Address corruption at the local level and make it more difficult for small input companies to be opened and closed.
- IP requirements should be embedded in the registration framework to ensure IP protection is started from the registration point.
- Introduce education programs to promote balanced nutrition, appropriate product usage protocols to reduce over-usage of inputs.
- Mass media communication by government to explain the risks for the economy, for farmers and for the public if farmers use cheap counterfeit inputs.
- Ensure mandatory leadership programs by all companies for training on safe crop protection product usage and establishing a supporting stewardship infrastructure.
- HS codes should be different for NPK, based on technology used (blending vs nitrate based NPK)

- Implement a strict review of trademark registrations, and enforce removal of 'me-too' brands, logos, visuals etc.,
- Develop policies to encourage investors to develop quality infrastructure to enable testing, and monitoring of the quality of farm output.

4. Selection and application of appropriate technologies suited to the Vietnam market

Context
- Applying the right agriculture technologies suited to Vietnamese farmers, primarily smallholders, is critical to driving productivity. A focus on affordable technologies for small-holders is critical for a step-change in agricultural productivity.

Outstanding problems/obstacles
- There are ineffective outcomes if technologies that are not suited to smallholder farming are introduced.
- A high investment threshold required for inappropriate technologies will lead to poor adoption rates,

Proposal
- Effective consultation and partnership to encourage selection and usage of appropriate technologies.
- Policy measures developed to encourage a focus on locally adaptable technologies.

III. Quality Standards

1. Seed/Seedling

Context

Vietnam is one of the market leaders in global rice exporting, being the second largest rice exporter in volume. However, the large volume cannot guarantee a high export value for Vietnam's rice due to the perception of low and inconsistent quality by the global marketplace.

Part of the main reasons for this is the situation of the seed industry in Vietnam, with more than 300 seed varieties in circulation, of which a vast majority is low quality. There are more than 200 seed companies in the country, of which very few have sufficient resources for serious investment in the sector.

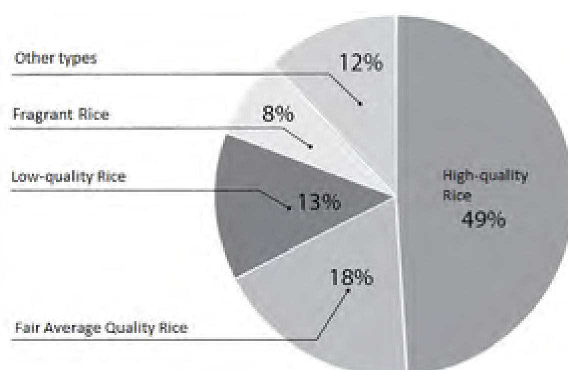

Chart 1: Vietnam's rice types for exports

However, the root cause lies in the fact that a master plan for input material production zones is non-existent. This requires collaboration between MOIT and MARD. MOIT will need to conduct market research and needs assessment for both the domestic and international markets so that orders can be placed with MARD to guide production.

The orders should indicate SPECIFIC TYPES (long, short, aromatic etc. types) and how many tons/crop or year (needs not place orders for any specific variety of rice given the existence of hundreds of such varieties). Based on such orders, MARD can start zoning work and coordinate production of different varieties that meet the same standards for such TYPES OF RICE.

However, the problem is that MARD does not have a master plan for input material production zones for export in place yet due to lack of information regarding market research and needs assessment.

Outstanding problems/obstacles

- **The rate of commercial seed usage is low** (~30% for conventional rice seed, ~40-50% for vegetables and fruit); a large majority of farmers re-use the seed they save from previous crops, leading to low productivity, low resistance to diseases, also resulting in low economical return.
- **Limitations in R&D and inadequate investment in R&D**; consequently, there is a limited number of seed varieties that can adapt to different climates across the country, and that are rapidly degradable. Therefore, the current situation is that too many seed varieties are recognized and utilized, resulting in inconsistency in the quality of agro-products. For example, Thailand only has 5-6 varieties in use, whereas Vietnam has 300, with tens of new seed varieties being recognized every year.
- **Inefficiency in the seed market mechanism due to subsidy policy**. Local authorities take advantage of these subsidy programs to support low quality, inefficient seed varieties that are not suitable for the local climatic conditions. Farmers, due to financial burdens, or being affected by the crop and seed structure and planning by the local authority, use the low quality varieties.
- **Lack of cooperation and linkage within the value chain**. For many products, high demand is not sufficiently met by supply; whereas for others, there is no market for products of high quality. The production chain elements such as SEED – PRODUCTION – PROCESSING – CONSUMPTION are not linked together. As a result, there exists many seed varieties that do not suit the tastes of the consumers.
- **Bureaucracy in the recognition procedures for new seed varieties** takes a vast amount of administration time, and demonstrates the lack of monitoring from science organizations. The consequence is that when the seed is accredited for commercial usage, it no longer meets market needs.
- **Fragmented farming** (due to the current land ownership policy) leads to difficulties in applying modern technologies in the agriculture and seed industry.

- **Human resources –** the quality of human resources in agriculture is not high, due to the lack of training and favorable remuneration policies. There has not been a mechanism to attract talent, and there is a shortage of well-trained leading experts.

Proposal

- **Public administration reform** in administrative procedures during the recognition process for new seed; and enhance the capacity of scientific supervision organizations,

to ensure that the new varieties are superior to the existing ones, to avoid low quality seed being used widely.

- **Removal of the distortive lobby practice** at the level of local authorities, to allow the farmers to use seed according to farming demand and market demand, rather than using the varieties that are chosen by the local authorities in their crop structure, but are not market-oriented.
- **Increased investment in R&D** for applying technologies, to limit the introduction and circulation of poor quality seed that does not suit market demand.
- **Creating a cohesive information exchange mechanism** among different segments in the production value chain in order for farmers to understand and effectively meet market demand, reducing the role of intermediaries/ traders (those who take advantage of farmers' lack of information for profiteering purposes)
- **Development of agricultural land policy to encourage land consolidation**; thereby encouraging long-term investment in arable land and application of science and technology in production.
- **Better focus on international cooperation and technology transfer,** together with increased investment in human resources policy, even as early as the vocational stage.

2. Counterfeit products

Context

For the Vietnamese government, it is important to secure the livelihood of farmers. To ensure this, it is important to have rules and regulations in place and enforced which protect the consumer/applicator and enable the farmer to export.

Outstanding problems/obstacles

- Confusing Trademarks in the retail shop, products are named very similarly (one letter different) so the farmer assumes this is a different product - this can lead to overuse and resistance issues.
- A large number of different companies in the market which leads to a lack of control during the registration process, this results in the registration of products which do not have a proper dossier.
- No enforcement of patent infringement. Companies assume that if they get a registration of the product there is no patent infringed, but MARD doesn't check on IP.

Proposal

- Align registration with an IP check to ensure from the beginning that products registered are not infringing IP.
- Ensure proper differentiation of brand names.
- Stronger enforcement at the provincial level of seizing counterfeit or IP infringing products.
- Stronger control of dossiers.
- We suggest that MARD bans registration of generic products that have at least 2 first letters of the product name that coincide with the proprietary name, as it may easily confuse consumers and jeopardize the reputation of the proprietary owners and the public as a whole.

IV. Implementation of policy

1. Role of local authorities and industry associations

Context

- Vietnam's agricultural industry is fragmented to regions with significantly different attributes at each locality. Government policies do not truly reflect the general and local issues.
- The industry associations inefficiently perform their roles in maintaining strong linkages amongst various stakeholders in the industries.

Outstanding problems/obstacles
- Difficulties arise in implementing policies in reality. Hence the root of many problems can not be comprehensively tackled.
- Conflict of interests amongst the parties occurs due to lack of co-operation.
- Unprompted development in the industry drives the demand and supply to be mismatched, causing instability and potential damage to the wealth of every stakeholder.
- The domestic agricultural industry is not sufficiently protected against international competition and threats.

Proposal
- Local authorities should be given more discretion to customise policies into real practices at their localities.
- There should be a requirement that within a certain number of days the local authorities must provide official guidance to implement the policies issued by higher level.
- Industry associations should be assigned specific responsibilities to help the implementation

2. Compliance

Context
- In principle, many policies in agriculture are vague in both understanding and implementation.
- Many policies provide encouragement without any particular obligation.

Outstanding problems/obstacles
- The policy implementers may take advantage of the vagueness of the policies to raise difficulties to target beneficiaries. This is where corruption may happen.
- Due to lack of transparency, the benefits from the encouraging policies may wrongly flow to other beneficiaries, whom the policies are not aimed at, causing waste of resources and inefficiency.

Proposal
- For principle based policies, local authorities have responsibilities to provide guidance on specific criteria.

3. Burdens in implementing administrative procedures

Context
- Circular 128/2013/TT-BTC requires quarantine and food safety testing on products (goods derived) from plants and animals which must be carried out at a Customs checkpoint following certain procedures,

Outstanding problems/obstacles
- The designated inspection location is unreasonable, causing cargo congestion, and time delays.

Proposal

- Circular 128/2013/TT-BTC should be amended so that businesses are allowed to bring imported frozen food products to their storage facility for quarantine and food safety inspection in accordance with current regulations instead of checking at the port checkpoint,

4. Too many provisions in too many texts

Context

Regulations on chemicals and antibiotics not allowed to be used in animal feed are currently mentioned in various documents, for example:

- Article 7 of Circular 57/2012/TT-BNNPTNT dated November 7, 2012 on the inspection, supervision, and penalties for the use of substances in the group of beta-agonist that are banned from breeding.
- Circular 61 /2011/TT-BNNPTNT dated September 12, 2011 promulgating the national technical regulation on animal feed.
- Circular 81 /2009/TT-BNNPTNT dated 25/12/2009 on the promulgation of national technical regulations on animal feed (4 Technical Standards), Decision No. 3762/QĐ-BNN-CN dated November 28, 2008 on management of melamine in livestock production and aquaculture, etc.

Outstanding problems/obstacles

- There are too many legal documents on prohibited substances which do not facilitate management agencies and businesses in referring and fully updating.

Proposal

- There should be focused and unified regulation on prohibited chemicals and antibiotics in animal feed in order for businesses to comply.

5. Conflicts among legal text

Context

In accordance with Decision No. 45/2005/QĐ-BNN, the Ministry of Agricultural and Rural Development has the quarantine function for "*Fresh milk, yogurt, butter, cheese, bottled milk and dairy products* ".

Under Article 63, 64 of Food Safety Law, MARD is only in charge of food safety management for *raw milk;* the Ministry of Industry and Trade is in charge of processed milk management.

Outstanding problems/obstacles

Currently, the Agency that has the quarantine function for processed milk is still unclear, making it difficult for businesses to export (businesses cannot export their products without a quarantine certificate from the competent authority)

Proposal

- There should be specific guidelines, clearly defining quarantine responsibilities in each case.
- The same products should be regulated under the same Ministry.

6. Default of guidance for implementation of Laws and regulation (Laws and regulations set frames only, no guidance for implementation, thus causing burdens for business)

Context

- Food Safety Law (Article 19) provides requirements for establishment of a food processing factory in accordance with standards prescribed by MARD.
- So far, there is no regulation from MARD on these standards.

Outstanding problems/obstacles

- Food processing manufacturing is potentially deemed as unqualified (since no clear standards or requirements are in place).

Proposal

- MARD should issue a legal document to specify hygiene standards of food safety for each type of food processing facility for businesses to implement.

7. Unreasonable/Unclear legal provision

Context

Circular 219/2013/TT-BTC on implementation of Value Added Tax Law, Decree 209/2013/NĐ-CP does not classify re-import of exported goods on the list of VAT exemption.

Outstanding problems/obstacles

- For exported goods that are returned (for many reasons: customers are unable to pay, a business has to take back all products, or barriers also make businesses take goods back, or due to packaging or quality issues, etc.), many enterprises have to suffer losses since the 2 way shipping cost is huge, so if goods are not re-exportable, businesses will suffer even bigger losses.
- Therefore, when goods are returned, if businesses have to pay VAT, businesses will suffer financial difficulties.
- This is an issue that Vietnam's Seafood Industry often encountered, and these regulations create many difficulties for businesses.
- Circular 48/2013/TT-BNNPTNT provides prescription on test procedures, safety certificate for seafood exports.
- The government has taken measures to address the issue of VAT frauds that are welcomed by exporters. However, further clarification is needed with regard to classification of semi-processed agro products that are not subject to VAT filling and declaration.

Proposal

- Add "returned export goods" to the category of goods which are not subjected to VAT under Circular 219/2013/TT-BTC
- Amendments should be made to Circular 48/2013/TT-BNNPTNT (especially on checklist, sampling rate, responsibility to pay and so on).
- Provide additional guidance on classification of semi-processed agro products that are not subject to VAT filling and declaration, possibly through a detailed list of products under this category

Section VI

TOURISM

REPORT ON TOURISM AND HOSPITALITY

Prepared by
Tourism Working Group

Overview
In 2013, the Tourism & Travel industry's direct contribution to Vietnam's GDP was VND 149,753 billion (4.6% of GDP), and this is forecast to rise by 8.9% to VND163,034 billion in 2014. The direct contribution of Travel & Tourism to GDP is expected to grow by 6.3% pa to VND299,846.0 bn (4.7% of GDP) by 2024[1].

The total contribution of Travel & Tourism to GDP was VND311,117 billion in 2013 (9.6% of GDP) and is expected to grow by 8.9% to VND338,660 billion (9.9% of GDP) in 2014. It is forecast to rise by 6.0% pa to VND 607,858 billion by 2024 (9.6% of GDP).

In the same year the sector directly supported 1,899,000 jobs (3.7% of total employment) and has attracted an estimated VND81,987 billion of capital investment.

In 2013 the Ministry of Culture, Sports and Tourism approved the establishment of a Tourism Advisory Board funded as part of the ESRT program. This Board is now active and meeting regularly.

In the first 4 months of 2014 Vietnam saw in increase in visitor arrivals of 27% over the same period in 2013, with significant increases seen in arrivals from China and Hong Kong by 47% to to 804,134 visitors – mainly to central coast highlighting the success of the Central Coast DMO; Russia – mainly to Cam Ranh but also Phu Quoc; Japan and Korea. We believe in part this increase may well be due to a drastic decline in the number of visitors to Bangkok because of the political unrest and travel advisories, although there is no anecdotal evidence to support this.

However, the recent disturbances over the East Sea have had a significant negative impact on visitor arrivals both tourists and business with hotels across the country suffering significant cancellations from group travel, MICE (Meetings, incentives, conferencing, exhibitions) and FIT's (Free Independent Traveler), because of concern over safety. Findings of our quick survey will be revealed in the first section of this report.

Phu Quoc is now an international gateway that offers a true visa on arrival system, which is already proving popular.

The authorities have also started to address the safety issues, which we have previously raised with the advent of Tourism Police in many major tourist destinations and hot lines for visitor help and complaints. Rogue taxis have been brought more to account and several cities now have tourist offices.

In spite of the progress the working group believes that Vietnam is missing out on opportunities to increase the number of visitors by a significant percentage and our issues and recommendations are discussed in the following section.

1. Impact of recent incidents on the tourism and hospitality

[1] Source: http://www.wttc.org/site_media/uploads/downloads/vietnam2014.pdf

As mentioned above, the recent incidents have been brought to special attention and had a significant negative impact on visitor arrivals to Vietnam in May and coming months.

Many multinationals suspended travel to Vietnam and for many of these the suspension remains in place.

Whilst Russian visitor arrivals have been largely unaffected, the main impact has been on visitors from China, Taiwan, Malaysia, Singapore and Australia.

Whilst it is difficult to quantifythe impact we conducted a survey amongst our working group members and participants in the Grant Thornton Hotel survey and this shows that almost all hotels and tour operators contacted are suffering from the effects of the disturbances with booking cancellations currently as far out as September.

The responses from 18 hotels show that:

	North	**Central & Highlands**	**South**	**Total**
Total room nights cancelled	4,216	4,805	5,924	**14,945**
Total room nights cancelled in %	28%	32%	40%	**100%**
Total amount loss in $	583,700	524,500	697,060	**1,805,260**
Total amount loss in %	32%	29%	39%	**100%**

(*) This is only the estimation received from the VBF's members and Grant Thornton's Vietnam Hotel Survey participants

In fact, total was over USD1.8 million **from just 18 hotels out of a total of 640 3, 4 and 5-star hotels and the total room nights that have** been cancelled out to July amount to 14,945 nights and one hotel reported cancellations out as far as September. In addition, we also noted that One golf course in Central of Vietnam had 500 golf rounds cancelled which bought a total fee loss of USD50,000. In terms of room nights and in terms of revenue lost (in both room revenue and F&B revenue), the South was the most affected, accounting for 40% of total room nights cancellation and 39% of total loss respectively for the period May to July 2014.

Travel Agents and Tour operators have also been quite badly affected. One of the travel tours companies has responded that the inbound FIT flight requests from the USA & Australia is down 20-30%. Australia has a travel advisory on travel to Vietnam.

The ministry and VNAT need to act swiftly with an international campaign, to show that Vietnam is still a safe destination to travel to and convince people and the Embassies, who have posted travel advisories, that the disturbances were an isolated one off event that will not reoccur.

At the same time the Government should also consider offering similar incentives to the travel and tourism sector that it has offered to other sectors, affected by the disturbances.

2. Visa exemption, visa waiver and transit visas

According to a report published by the World Tourism Organization (UNWTO) and the World Travel &Tourism Council (WTTC)[2], concluded that travellers see visas mainly as a formality that imposes a cost. If the cost of obtaining a visa - either the direct monetary cost imposed in the form of fees or the indirect costs, which can include distance, time spent waiting in lines, and the complexity of the process - exceeds a threshold, potential travellers are simply deterred from making a particular journey or choose an alternative destination with less hassle.

The report recommended that countries extend visa facilitation and move to a visa on arrival system, which could help generate between 6 to 10 million additional international tourist arrivals for ASEAN Members States by 2016. These extra arrivals would bring in between US$7 and U$12 billion in additional international tourism receipts andcreate between 333,000 to 654,000 new jobs by 2016.

The report also highlighted that Vietnam could potentially increase tourism arrivals by 8-18% if it were to move to a program of visa facilitation (i.e. Visa on arrival).

Currently, only Foreign Independent Travellers (FITs) who are ASEAN passport holders are exempt from visas for stays of up to 30 days, and only FIT's who are passport holders from Denmark, Norway, Finland, Sweden, Japan, Korea and Russia are allowed to enter the country for a period of up to 15 days without a visa. We believe that there are strong arguments for broadening the visa-exempt category and we would like to recommend the government for extending the pilot project to include the aforementioned countries.

The benefit of visa waiver programs is evident from the significant increases in visitors from visa-exempt countries:

Increase in 2013 over 2012	**Increase in 4 months 2014 over 2013**
Japan 4.8%	**8.5%**
Korea 6.8%	**6.7%**
Russia 71.1%	**37.4%**
Nordic Countries Negative	**15%**

In comparison high origin countries experienced the following in 2012 and 2013:

Germany -6% and -8.4%
France +4% and -4.4%
England +9% and +8% Positive with intro direct VN flights
Holland +2% and +3%
Australia 0% and +10%
USA 0% and -2.6%

Transit Visas

It is noted that China has liberalised it Visa requirements, allowing for tourists from 51 countries to receive 72 hour extended transit visa's on arrival which allow them to exit the airside of airport terminals into the cities and regions around Beijing, Guangzhou, and Shanghai and two other regional cities. This has led to an increase of tourism stop overs and spending by transiting passengers across a range of hospitality, transport, and

[2] Report in May 2012

tourism industries. Having visited China once for a stopover visit travellers will consider Vietnam as the safe, clean air alternative to stop overs to China.[3]

Current transit arrangements for some passengers transiting Vietnam on Vietnam Airlines to the EU from Australia have them arriving in HCMC and the onward flight to the EU is from Hanoi. The intermediate flight between HCMC and Hanoi is domestic, requiring passengers to have a 30 day tourist visa to complete a 4-6 hour transit of Vietnam airports.

Capacity constraints for regional Vietnam resort destinations, e.g. to be able to supply enough rooms to handle the demand from inbound tourists, tour operators and tourists are now looking to maximise locations available for stops in Vietnam as alternative destinations. Airlines hoping to maximise aircraft utilisation and destinations are looking for multi-city continuing flights in Asia and Vietnam. International Airlines are looking to exploit a one ticket, 'system pass' allowing 1 ticket hop on/hop off passes for Asian destinations. Competition from shared destination marketing is set to drive demand as the product is fully realised.

Given the advent of Low Cost Carriers (LCC's), the focus of travel ticketing is becoming point-to-point sales, without automatic transit and baggage connections enjoyed by IATA interline agreements. For a growing portion of travellers, the use of LCC's means that they must clear immigration and then customs to check in for their next flight on a multi leg journey. Currently this transit process is not addressed in Vietnam for transit passengers who do not intend to stay in Vietnam, but who need to check-in for a new flight as a transit passenger. There is an opportunity for differentiation in the regional marketplace to streamline the LCC and multi-carrier transit experience while promoting Vietnam as an airline transit hub that caters to airside/transit passenger check-ins.

While the focus has been on inbound arrivals for the majority of the discussion on for visa's and visa free travel, the growing outbound travel market is restricted from growth to the EU by the onerous visa qualification restrictions put on Vietnamese nationals in order to travel to Europe.

Recommendations: We propose that visa-exemptions are expanded to include countries that can potentially account for significant tourism revenue, such as the EU member states, the United States and Canada, Australia, Hong Kong and Taiwan. Visa-exemptions to these countries should generally be granted for stays of up to thirty (30) days.

We also suggest that an efficient "Visa-on-Arrival" procedure is established. Vietnam could possibly refer to the examples of Laos or Cambodia, where visas are issued and fees are collected upon arrival. The system should also enable qualifying passport holders to enter Vietnam for a period of at least fourteen (14) days without any documentation other than their passport. "Visa-on-Arrival" procedures and policies should be transparent and consistent, should include an explanation of the process, a set fee schedule and a consistent enforcement of these various airports.

Create an enabling environment to attract both carriers and travellers to transit in Vietnam and within Vietnam by facilitating transit visas, allowing international carriers to have multiple stop over points in Vietnam.

[3] http://www.travelchinaguide.com/embassy/visa/free-72hour/

The reducing or eliminating of the visa requirement for Vietnamese citizens to travel to EU countries should be considered as a focus point to be raised on a regular basis with counterparts in the EU community. Free trade access to communities/industry for development of both parties tourism industries and economies is equalised when both parties have visa free access. The ability for Vietnamese nationals to travel to EU for short stays allows for better understanding of bi-lateral economic opportunities available to be implemented in trade and tourism.

Our other suggestions include:

- Provide clearer guidance and information in arrivals halls regarding where the 'Visa-on-Arrival' process (where to obtain the visa, necessary forms, policies, fees schedule, set waiting times).
- Introduction of a queuing/numbering system for 'Visa-on-Arrival'.

3. Destination Marketing[4]

The VNAT, being an administrative body, generally follows the direction and guidance set out by the MCST on issues including marketing. On the one hand, this influence is justified as the MCST is responsible for monitoring the effective and efficient use of public funds. In addition, the VNAT may be responsible for tasks other than tourism marketing, for example tourism development and planning. On the other hand, in order to optimize national spending on marketing, we feel the VNAT should have greater autonomy in the areas of marketing and its position as the national marketing body needs to be enhanced.

Furthermore, as destination management involves cooperation between the service providers, to ensure continuous service chains and consistent marketing across the region, the current lack of effective regional coordination and Destination Management Organizations (DMOs) in Vietnam also poses functional and institutional challenges for the sector. We believe that marketing dependencies on politics, and overlaps with other authorities or ministries' activities need to be avoided. A high level of alignment between the public and private sectors, through effective stakeholder engagement and the reinforced role of DMOs, needs to be ensured.

The working group recognises that progress has been made in the above areas; in November 2012, the Vietnam Tourism Advisory Board (TAB) was also established under the guidance of the EU-funded Environmentally and Socially Responsible Tourism (ESRT) programme. Directly reporting to the VNAT, the TAB creates an official mechanism for direct dialogue and cooperation between Vietnam's private and public sectors. Under the ESRT, a National Tourism Marketing Strategy to 2020, and Action Plan: 2013-2015 were also prepared. This well researched Strategy and Action Plan have been based on international best-practice with the aims of bringing Vietnam up to par with its regional competitors.

Whilst there has been significant growth in Visitor arrivals in the first 4 months of 2014 - 27% over the corresponding period of 2013, tourists' stay in Vietnam tends to be relatively short and the repeat rate of visitors is low as there are limited entertainment and sightseeing options available at key tourist destinations. It is worth noting that a high percentage of Thailand's foreign visitors are regular/repeat visitors. Whilst we are seeing strong growth from Russia, China, Hong Kong and Taiwan, these are largely group travel and are lower spending tourists than FIT's from Europe and North America.

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[4]The term destination marketing refers to the strategic management and marketing of a specific tourism destination.

Recommendations: We believe that one of the most efficient ways to address the negative perception of tourism service standards in Vietnam is to continue a concerted promotional campaign on both national and international levels. Such campaigns should continue to highlight Vietnam's attractiveness due to its rich cultural heritage, outstanding natural beauty including beaches and friendly people. Whilst good progress has already been made in this area nationally and to a limited extent internationally, we feel that further minimal investments could significantly improve the visitor's introduction to and perception of Vietnam. For example, travel experience could be improved with measures such as enhanced flight-videos or the creation of a welcome video played in the immigration area explaining the immigration, customs and transport process and logistics.

However in order to accomplish these recommendations a significant budget is required much higher than the current one. The Government should recognise fully the contribution that Tourism currently makes to the GDP and employment and allocate sufficient funds for VNAT to compete with neighbouring countries who have budgets many times higher than the current one.

We also recommend the following specific measures:

- Legalise the mandate of the VNAT to take on the role of a National Tourism Organisation and become the sole tourism marketing authority for Vietnam
- Strengthening the role and functionality of DMOs.
- Fully adopt the proposed National Tourism Marketing Strategy and prepare annual Actions Plans before the end of a fiscal year to share with the industry. To finance this initiative, an incremental budget is recommended to be gradually increased as VNAT's capacities improve.
- According to the Government responses to the tourism working group of the Vietnam Business Forum 2013 the ministry is guiding VNAT in developing a tourism marketing and promotion fund. These funds should be best utilised to contribute to the enhancement of quality and effectiveness of tourism promotion and marketing both inside and outside Vietnam.
- Further support PPP and PPD initiatives particularly in the context of the TAB and regional DMO's.
- Facilitate the planning and creation of new tourist attractions. The focus should be on developing new attractions such as cultural sights, more sports facilities or adventure tourism.
- Allocating more funds to abovementioned tourism promotion campaigns and operating in close cooperation with the foreign private tourism/travel providers to make the best use of these additional funding opportunities.
- Designing promotional campaigns, including advertising and promotional films, in close cooperation with foreign tour-operators or large local operators which deal on a regular basis with foreigners.
- Incentivising environmentally and socially responsible tourism. Promoting higher standards of tourism could add value to the industry as a whole and result in higher-paid and better jobs in the industry.
- The working group welcomes the recent discussions on extended foreign home ownership and urges the Government to look at models adopted by countries such as Thailand. The authorities should review the accruing benefits of allowing foreigners, who do not possess three month multiple entry visas, to buy long term leases on holiday apartments and villas.

4. Education and Training

Issue description: The tourism and hospitality sector continues to experience serious shortages of adequately educated and trained human resources, on all levels and positions, from entry-level staff to supervisors, managers and executives. Despite various efforts from the Government and some progress made through international programme intervention and technical assistance, the education and training system remains largely inadequate to cope with the real demands of the hospitality and tourism industry. The problems in tourism and hospitality education and training are systemic and based on inherent shortcomings in the overall education and training system in Vietnam. In particular, the weakness of the technical and vocational education and training (TVET) has dramatic consequences for the tourism and hospitality sector as a whole.

Firstly, the regulatory framework of education and training remains complicated and cumbersome. With various ministries and government bodies involved, and decision-making processes overlapping and not streamlined, communication, coordination and reform remains inadequate and slow. Secondly, the overall strategic and pedagogical approach to education and training remains based on outdated models, which are not in touch with the needs of modern societies, open market economies or the industry. Thirdly, regulatory bodies as well established and influential academic institutions continue to take a rather 'abstract' than 'practical' approach to tourism and hospitality education. There is very little exchange and cooperation with the (domestic and foreign) private tourism and hospitality sector. Curricula, syllabi and teaching methods remain largely academic and theoretical in nature, and much of the training is being delivered by teachers with academic qualifications, but no or very little practical working experience in the sector. Lastly, the overall teacher education and training-of-trainers system remains inadequate.

Certain measures aimed at resolving the issue have been put in motion. In conjunction with the VNAT, the EU-funded ESRT programme conducted a nation-wide training needs assessment, with the purpose of providing up-to-date information on the skills and training needs of both public and private sector organisations and enterprises in the sector. Moreover, in view of the upcoming establishment of the ASEAN Economic Community in 2015, VNAT, with the support of the ESRT programme, is in the process of implementing the ASEAN Mutual Recognition Arrangement on Tourism Professionals (MRA-TP), which aims at establishing common competency standards for tourism and hospitality professionals and thus facilitating the mobility and transfer of human resources in the region. However, in spite of these commendable endeavours, the implementation of the MRA-TP in Vietnam is late and not very transparent. Each member state is to implement an accreditation body and competency standards on national level. At its current state, the Vietnam Tourism Certification Board ("VTCB") has not yet been formally approved and updated Vietnam Tourism Occupational Skills Standards ("VTOS") standards not published yet. The private tourism and hospitality sector in Vietnam has not been formally involved in the process, thus putting the uptake of VTOS from the industry and the effective implementation of the MRA-TP in Vietnam at risk.

Potential gains/concerns for Vietnam: Increasing the number of trained and qualified personnel in all sectors of the tourism and hospitality industry, would enhance the quality of products and services that are on offer. This, in turn, would have a positive impact on Vietnam's image and reputation. Better services also translate into greater competitiveness, more visitors hence increasing potential GDP contribution and revenue for the Government. As Tourism is a significant sector for the country, there might also be positive knock on effects in other industries, improving overall skill levels across the supply chain. This is likely to increase employment and wages for the local population.

Recommendations: Our members have the following specific recommendations:

- Introduce a national tourism certification scheme to ensure that a tourism company and its employees meet the core industry standards. For instance, support the roll out of revised Vietnam Tourism Occupational Standards (VTOS).
- Provide a legal status to the Vietnam Tourism Certification Board (VTCB) to implement the functions of ASEAN - National Tourism Professional Board (NTPB) and Tourism Professional Certification Board (TPCB) under the MRA-TP. Establish a VTCB board under participation of the domestic and foreign private tourism sector.
- Encourage industry and all training establishments to utilise the results of the Vietnam Training Needs Assessment 2013, which provides up-to-date information to complement MCST's plan for "Human Resource Development in Tourism till 2015 and Vision 2020".
- Implement a Tourism Industry Training Board to provide guidance/ input to MCST/ VNAT on the skills requirements for the industry.
- Make the implementation of VTOS standards for all training establishments and colleges mandatory on national level.
- Establish formal quality assurance and external verification measures to guarantee principles of MRA-TP in regards to competency standards and boundaries of local contextualization are kept.
- Introduce an industry internship for all students, including courses designed and developed by international experts in training programs on cross-cultural understanding and customer service skills.

5. Licensing of tourist-related services

If we are to be able to meet the quality standards required of the industry and to reach the employment targets set in the Tourism Strategy Plan, then the management of the industry through licensing is imperative. Licences for the provision of tourist-related services should only be granted to well-trained personnel with a formal education and qualification related to the service industry.This is also critically important with the free movement of labour within ASEAN from 2015.

Potential gains for Vietnam:

- Better service standards -→ attracts further investment and creates jobs
- Avoiding illegal activities – formal activities lead to tax revenue for government
- Health and safety standards

Recommendations: Our specific recommendations in this area are:

- Grant licences for tourist-related services only to well-trained personnel with a formal education or qualification relating to the service-industry, regardless of their nationality.
- Remove additional restrictions for foreigners to work as tour operators in the tourist-industry and improve the licensing process for tourism companies

6. Responsible Tourism Policy

Issue description: Responsible Tourism is increasingly endorsed and receiving high-level attention and commitment in important areas, as is evident through the Green Lotus Programme, the new Vietnam Tourism Marketing Strategy, and the development of Responsible Tourism Standards within the VTOS system.

In mid-2013 the EU-funded ESRT Programme set out to draft a Framework for a Responsible Tourism Policy. Taking into consideration the directives and priorities of

Vietnam's National Tourism Strategy and National Tourism Master Plan; recommendations from industry and professional bodies such as the Vietnam Tourism Association; and the Vietnam Business Forum Tourism Working Group/EuroCham Tourism and Hospitality Sector Committee and its Whitepaper 2013; the framework for the Vietnam Responsible Tourism Policy has been developed into "Policy Guidelines – Building Responsible Tourism in Vietnam", which are designed as a practical resource to assist with tourism policy making and legislation as well as working in the tourism sector (directly/indirectly) to identify and address key interventions and policy areas where increased sustainability and responsible actions should be formulated.

The foundations of the Responsible Tourism Policy Guidelines are based upon the following 6 pillars:

1. Apply good governance in tourism
2. Foster competitive tourism businesses and sustainable markets
3. Use tourism for socio-economic development
4. Build awareness and understanding of sustainable tourism
5. Develop a skilled tourism workforce with decent working conditions
6. Protect and sensitively promote natural and cultural heritage

For each pillar, key recommendations have been identified along with suggestions about which stakeholders need to take responsibility and what processes can be followed to create real change.

Potential gains/concerns for Vietnam: A comprehensive approach to pursuing Responsible Tourism with the support of the Responsible Tourism Policy Guidelines will guide Vietnam's tourism sector on a path towards long-term success as a sustainable, vibrant and attractive destination. It would also serve to enhance socio-economic benefits for the population help attract tourists for the future. The World Economic Forum Travel & Tourism Competitiveness report further highlights the need for Vietnam to develop its Tourism sector in an environmentally sustainable way.[5]

While recognizing the current activities and achievements, it is also important to note that more still needs to be done. Awareness, understanding, commitment, sharing responsibilities and taking action still require on-going support. It is important to continue with this process in a strategic manner, and at all levels. While 'higher-level' issues and action might take more time, they are ultimately essential and the process to address these issues must begin now. At the same time, practical examples and results are needed at pilot levels, such as specific destinations or even site level initiatives. Results at this level can play important roles in guiding, influencing and accelerating necessary change at higher levels. It should be noted that stakeholder collaboration is an essential component of responsible tourism.

Recommendations:

It is expected that the Policy Guidelines will serve as a reference for the development of the tourism law, endorsed by the government and organisations representing other important stakeholder groups.

- Support the adoption of the Responsible Tourism Policy Guidelines and Recommendations. The Responsible Tourism Policy Guidelines provide suggestions for

[5] The Travel & Tourism Competitiveness Report 2013, World Economic Forum, http://www3.weforum.org/docs/WEF_TT_Competitiveness_Report_2013.pdf

specific actions that can be taken on by sector stakeholders to affect real change and achieve impact in a timely manner.

- Encourage the Government of Vietnam and relevant tourism stakeholders to follow the Responsible Tourism Policy Guidelines, which will help create a competitive advantage necessary for Vietnam's tourism sector to mature and flourish, and continue to contribute to broad-based socio-economic development well into the future.
- Encourage authorities and businesses at regional/destination level to use the contents of the Responsible Tourism Policy Guidelines as a 'long list' of possibilities from which they could identify a set of key actions that match the issues and realities of each of their destinations.

Section VII

OTHER REPORTS

Automotive

SUMMARY OF ROUNDTABLE DISCUSSION ON AUTOMOTIVE ISSUES

- *Time:* *14:00, Monday, February 17, 2014*
- *Venue:* *Ministry of Planning & Investment, 6B Hoang Dieu, Hanoi*
- *Participants:* *Appendix 1*

Mr. Gaurav Gupta – Head of the Automotive Working Group, Vietnam Business Forum

- Despite having more than 20 players and 40 brands in Vietnam's automotive industry, the sector has not grown as per the expectations of Government and investors. The total industry in 2013 was responsible for 100,000 units, with CKDs at 80% of this volume. The overall capacity utilization of the industry is only ~20%, with a total available capacity of ~500,000 units.

- A key factor that drives investor and consumer confidence is stability and consistency in policies. With this in mind, the Automotive Working Group urges the Government to ensure its policies for driving cost competitiveness of CKD and growth are stable and consistent.

- The current market size is only 20% of total capacity and the key factor to drive the CKD industry's cost competitiveness is to eliminate the CKD and CBU cost gap. This is particularly important during the transition to the AFTA regime in 2018. Overall, this is a significant area of concern from future investment and planning perspectives.

  Providing adequate incentives linked to production of CKD to address the gap of CBU and CKD is key. Also, a common Special Consumption Tax ("SCT") approach on CBU and CKD is necessary as is imposing stricter controls on car imports such as verifying the declared value of imported cars and tightening the control of "used car" imports.

- To help the overall industry it is recommended SCT and VAT are reduced to increase the affordability of automotives. This will boost the overall industry and investors' confidence in the market. Financing support could also be provided to consumers for car purchases.

- For a level playing field, the key factor is applicability and eligibility of new incentives to allow sufficient time for players to align operations as per new policy requirements. This will enable fair policy implementation.

- Based on the review since December, it is understood the strategic car project has been paused, so it will not be discussed today.

- The Automotive Working Group requests the Government establish clear milestones to encourage investment of supply bases in the automotive industry. This is critical to the overall growth and competitiveness of the automotive sector.

- Two-wheeler industry:

  + One of Automotive Working Group members' key concerns in the two-wheeler industry is Decision No. 356 that limits the number of motorbikes in Viet Nam to 36 million units by 2020. Members feel that because of this factor and the recently increased SCT, the two-wheeler industry is being impacted upon.

Vietnam's motorcycle industry has served as a means of transportation to millions of people in the country and it will be helpful if the Government could share how it arrived at 36 million units as the number to limit two-wheelers on the road. This would allow businesses to plan accordingly.

+ The second area of concern is the SCT increase for motorbikes with capacities of more than 125cc. The use of 150cc scooters is similar to 125cc scooters, so they should not be considered a luxury good and it is requested the SCT structure be reviewed and the Automotive Working Group recommends SCT should not be applied to motorcycles.

- Common issues across two-wheeler and passenger-commercial vehicles:

  + The incomplete effectiveness of Law No. 32, to amend and supplement the Law on Corporate Income Tax. To avoid further delays, it is recommended the Government and the Ministry of Finance (MoF) use the already existing Decree 42/2009/ND-CP dated 07/5/2009 on the classification of cities for reference in determining geographical areas with favorable socio-economic conditions. Furthermore, the list of industrial zones considered "geographical areas with favorable socio-economic conditions" shall also be in the general list of areas entitled to tax incentives.

  + The legal and policy making process: The Government's attempt to reduce the registration fee is appreciated. However, it was made last year and it has taken a lot of time between the announcement and actual implementation. It is requested the Government review the timing between announcement and implementation because it affects the overall industry.

Mrs. Tran Thi Tuyet – Division Deputy Manager, Tax Policy Department, Ministry of Finance

Automobile-related issues

- Use of special consumption tax for CBUs and CKDs: As Vietnam is now a World Trade Organization (WTO) member country, there will be no special consumption tax rate discrimination between CBUs and CKDs.

- Special consumption tax policy for automobiles: The draft law being circulated for comment by other ministries and line agencies will not include changes that increase or reduce special consumption tax.

- Tax incentive and exemption for environment-friendly cars: The Special Sales Tax Law has introduced rulings on this. Specifically, cars running on gasoline combined with electricity or biofuel are subject to 70% of the tax rate applicable to cars of the same category. Cars running on biofuel are subject to 50% of the tax rate applicable to cars of the same category.

- Corporate Income Tax issues: Article 16, Decree 218/2013/ND-CP, provides a clear explanation of locations eligible for tax incentives and locations with advantageous socio-economic conditions.

Two-wheeler issues:

- Special consumption tax for two-wheelers: During the submission of the Special Consumption Tax Law to the National Assembly in 2008 for enactment, there was a view

that the special consumption tax should only be applied to 150cc or higher motorcycles. Nevertheless, many National Assembly members believed that 125cc or higher motorcycles were large-value items only affordable for wealthy users. As a result, it was thought that adding 125cc and higher motorcycles to the list of goods subjected to special consumption tax would restrict use of personal motor vehicles with larger engine displacement and reduce congestion and pollution. In the draft legislation currently under discussion, the parts on special consumption tax for two-wheelers will see no changes.

A member of the Automotive Working Group, Vietnam Business Forum

- Environment-friendly cars: As mentioned in the example, cars powered by electricity, gasoline and electricity or biogas are entitled to incentives at a tax rate that equals 70% of that applicable to other cars of the same category. However, to date both importers and local manufactures are not fully aware of the detailed specifications for different categories eligible for this 70% special consumption tax scheme.

Mrs. Tran Thi Tuyet – Division Deputy Manager, Tax Policy Department, Ministry of Finance

- Electricity-powered cars: The current SCT law defines a 25% tax rate for under nine-seater vehicles, 15% for 10-16 seaters and 10% for 16-24 seaters. For hybrid cars, a joint study with the Ministry of Science and Technology (MoST) indicated that hybrid cars did not meet requirements for cars running on gasoline combined with electricity, as the electricity power house works independently on these cars. This means cars that run on gasoline first and store electricity generated before running on electricity. Therefore, this type of car does not qualify for tax incentives listed in the special consumption tax schedule.

Mr. Pham Anh Tuan – Deputy Director of Heavy Industry Department, Ministry of Industry and Trade

- Strategic car issue: In a recent meeting, Government leaders gave guidance on the automotive industry development plan, with a focus on small trucks, tractors and agro-machinery that suit local road infrastructure. This means the strategic car concept will no longer be considered.

Mr. Gaurav Gupta – Head of the Automotive Working Group, Vietnam Business Forum

- One of the automotive industry's key concerns is to look at the cost gap between CKD and CBU for the same model. It is requested the Government look at measures to eliminate the cost gap between CKD and CBU. However, it is still unclear how the industry in its current state in Vietnam can survive in 2018 when importing parts from other ASEAN countries is free of duties.

- SCT: The Automotive Working Group respects the view that as for WTO, the SCT on CBU and CKD is the same. However, its recommendation is the approach on how the SCT is applied between CKD and CBU, which is where the gap arises between CKD and CBU.

- Customs: In some cases, imported cars are declared at values even lower than the cost of manufacturing. For example, a car imported into Vietnam at USD10,000 in declared value for import, but even in the home country where the car is produced, it is not that cheap. So the Automotive Working Group requests the Government look into this issue because it is also causing losses to the State in terms of customs duty.

- The Automotive Working Group would like to understand the benefits offered to the supply industry to operate in Vietnam. As Indonesia, Malaysia, Thailand are attractive to suppliers, what is the motivation to come to Vietnam?

- With regard to two-wheeler numbers: It is appreciated that the Ministry of Transport (MoT) has used an approach to calculate the number of cars, motorcycles on the roads of Vietnam till 2030. It is requested in the paper to explain to business community members what the approach is and how the 36 million limit on motorbikes in Vietnam was arrived at.

Ms. Dai Kha Quynh - Legal Manager, Piaggio

- Decision 356 on two-wheeler volume limit: How will this regulation be enforced? Moreover, it will seriously hurt the local two-wheeler industry. When this regulation is implemented, there is a need for transparency and disclosure of information on how many motorcycles have been registered for use so manufacturers know how to adjust production plans accordingly.

Mr. Nguyen Van Dzung - Hanoi Branch Director, Audi

- Cars running on gasoline and electricity: In contemporary trends, gasoline-electricity cars are a preferred type of automobiles. It is suggested a meeting be held with the MoST and MoF for further discussion. For example, some countries use CO_2/km as a benchmark to decide if a car is environment-friendly or not.

- Administrative procedure issues: Locally-built and imported cars go through an inspection process at the factory or where they are imported. When the cars are sold to consumers, they must be inspected again. The Ministry of Transport is urged to consider trimming the administrative burdens for dealers and consumers.

- Access to statistical data on registered vehicles in Vietnam is difficult for local automotive businesses. It is recommend that automotive companies receive accurate quarterly or monthly information on how many vehicles have been registered in Vietnam to support specific and long-term planning.

- The MoF's current ruling is that cars worth VND1.6 billion or more are not eligible for depreciation and VAT rebates. It is understood this policy aims to curb consumption of luxury goods. However for private car dealers, this is not a luxury good, just a means of doing business. The MoF is urged to reconsider allowing these vehicles to be subject to full depreciation and VAT rebates for car dealers.

Mr. Nguyen Ngoc Dung - Deputy Director of Transportation Department, Ministry of Transport

- How the 36 million motorcycle limit number was reached: The transport sector has its own transport strategy and development institute. Institute scientists are responsible for preparing preliminary project requests to the Ministry of Transport, which are then considered and reported to the Government. Based on transport need forecasts for passenger and freight, the number of vehicles needed may be calculated through back-tracking.

Appendix 1 – Participants

No.	Full name	Title	Organization/Company
Representatives from Ministries			
1	Mr. Do Nhat Hoang	Director	Foreign Investment Department, Ministry of Planning and Investment
2	Mr. Pham Anh Tuan	Deputy Director	Heavy Industry Department, Ministry of Industry and Trade
3	Mr. Nguyen Ngoc Dung	Deputy Director	Transportation Department, Ministry of Transport
4	Mrs. Tran Thi Tuyet	Division Deputy Manager	Tax Policy Department, Ministry of Finance
5	Mrs. Le Thuy Trang	Deputy Director	Industry Economics Department, Ministry of Planning and Investment
6	Mr. Le Thanh Quan	Deputy Director	Industry Park Management Department, Ministry of Planning and Investment
7	Mr. Nguyen Quoc Thang	C67 - Department of Traffic Affairs	Ministry of Public Security
8	Mr. Tran Van Ha	C67 - Department of Traffic Affairs	Ministry of Public Security
9	Mrs. Tran Thao Hanh	Manager	Foreign Investment Department
VBF members			
1	Mr. Gaurav Gupta	Head	Automotive Working Group
2	Mr. Nguyen Van Dzung	Audi Hanoi Branch Director	Audi
3	Mr. Temmy Wiradjaja	Director	Mercedes-Benz Representative Office Hanoi
4	Ms. Hoang Thi Kim Hue	External Affair	Mercedes-Benz Vietnam Ltd.
5	Mr. Ho Hai An	Senior manager of Corporate affairs Dept	Honda
6	Mr. Nguyễn Mạnh Hùng	Assistant Director	Honda
7	Mr. Pham Anh Tuan	General Manager of Strategic Planning Division Corporate Strategic Planning Group	Toyota Motor Vietnam
8	Ms. Tran Thu Mai	PR manager	Piaggio Vietnam
9	Ms. Dai Kha Quynh	Legal manager	Piaggio Vietnam
10	Mr. Ho Manh Tuan	First Deputy General Director	Honda
11	Mr. Ho Hai An	MGR of CP Dept.	Honda
12	Mr. Nguyen Manh Hung	CP Dept	Honda

COMMENTS ON THE DRAFT DECREE ON MEDICAL DEVICES

Prepared by
American Chamber of Commerce

We applaud Vietnam's efforts to create reasonable and necessary regulations for the important and rapidly developing field of medical devices. However, we believe that certain provisions of the Draft Decree, if enacted as currently drafted, would have negative consequences for the provision of cost-effective, reliable and safe medical devices for the health of the Vietnamese people, development of medical device manufacturing in Vietnam, Vietnamese human capital and the modern Vietnam economy.

The Vietnamese economy stands to benefit greatly from foreign direct investment in the field of medical device manufacturing - investments that offer Vietnamese workers better jobs with higher pay. Medical device manufacturing demands highly skilled workers and offers Vietnamese manufacturing an opportunity to transition from low-tech to higher-tech manufacturing - thus aiding the development of Vietnam's human capital. Moreover, the manufacture of medical devices is a high value-added industry that will be an essential component of Vietnam's future competitiveness in the global economy. This is exactly the type of technology that Vietnam needs to develop to move up the technologic value chain, consistent with a middle-income country. With proper regulation and Vietnamese government support, we are confident that medical device manufacturing will play an important role in Vietnam's growing economy.

That being said, of particular concern to our members is the broad scope of application of the Draft Decree - which applies to all medical devices manufactured in Vietnam, even those that are exported.[1]In reality, many medical devices are manufactured, but not used or circulated, in Vietnam. These products already meet the regulatory requirements of the nations in which they are used (e.g., the United States Food and Drug Administration). If the Draft Decree is implemented as currently written, the manufacturers of these medical devices would be subject to some unnecessary burdens. For instance, the Draft Decree does not make it explicitly clear whether medical devices manufactured in Vietnam, but are exported to foreign markets, would be subject to the clinical trial requirement in Vietnam before being exported. If so, this will discourage the expansion of existing investments and new foreign direct investment in medical device manufacturing in Vietnam. Therefore, in particular, we would like to suggest (i) stipulating that medical devices manufactured in Vietnam for export and not for use in Vietnam are not subject to clinical trial procedure in Vietnam; and (ii) adding medical devices manufactured in Vietnam for export and not for use in Vietnam to the list of medical devices exempted from registration for circulation in Article 22 of the Draft Decree.

Another macro issue that our members are also concerned with is that, when read together, Articles 25.1 and 25.2 of the Draft Decree may prevent foreign enterprises, or their ROs, from registering their medical devices for sale in Vietnam in their own names. Under Article 25.1 of the Draft Decree, a foreign owner of medical devices may register them by: (i) authorizing a Vietnamese enterprise to register the devices on its behalf, or (ii) registering the devices through the foreign owner's RO in Vietnam. Under Article 25.2, any organization registering a device must also: (1) set up a maintenance establishment in Vietnam, or (2) enter into contracts with other entities that are capable of providing

[1] Draft Decree, Article 1.

maintenance services in Vietnam. However, because of the limitations on the permissible operational scope of an RO, as stipulated in the Commercial Law, an RO may not legally create a maintenance establishment in Vietnam, or enter into contracts with maintenance services suppliers in Vietnam. Therefore, when combined, the provisions of Articles 25.1 and 25.2 appear to prevent foreign medical devices owners, and their ROs, from registering their medical devices for sale in their own names in Vietnam.

We appreciate the hard work that has gone into the preparation of the Draft Decree and respectfully request that our detailed recommendations and comments be given due consideration. We believe these measures can help reassure the business community that Vietnam's commitment to proper and necessary regulation of medical devices is compatible with healthy and growing foreign direct investment in the medical device manufacturing sector.

Section VIII

APPENDIX

VIETNAM BUSINESS FORUM
Hanoi, December 3, 2013

OPENING REMARKS

The Government of Vietnam – Mr. Bui Quang Vinh, Minister of Planning and Investment

Over the years, the business community has made continuous organizational and operating improvements, reflecting strong growth in the Vietnam Business Forum (VBF). In addition to traditional working groups, others have emerged to widen the VBF's coverage. This continuing development is evidence that the VBF is increasingly effective in reflecting the voices and expectations of investors. Thanks to constructive business community recommendations, the Government and its agencies have made serious efforts to build on these contributions in revising many important policies. In this Forum, "A new phase of economic reform – From Agenda to Action" is selected to highlight the importance of specific action for economic reform, with State-owned enterprise (SOE) reform at the center of the process.

International Finance Corporation – Mr. Simon Andrews, Regional Manager

Despite progress in the past 12 months, much remains to be done in Vietnam to develop a comprehensive plan to recapitalize the banking sector and improve accountability and transparency, especially in the SOE sector, with appropriate incentives for SOEs to operate efficiently and on a level playing field. Governance, accountability and transparency remain important as Vietnam needs efficient, effective and well-run businesses. While the country has the ingredients for economic success, the SOE and banking sectors have not kept pace with development and continue to allocate capital and resources poorly. Poor decision-making in any businesses is ultimately unsustainable, destroys value and undermines economic performance. While regional trade partnerships represent enormous economic opportunities for Vietnam, such as the Trans-Pacific Partnership (TPP), it will mean Vietnamese companies will need to compete in a global market. But, this competition will make Vietnamese companies stronger and better able to succeed in a dynamic and fast-changing global economy.

Anticipating these opportunities, the VBF has established two new working groups, the Governance and Transparency Working Group, which will work on cooperate governance and cooperate decision-making issues and the Agribusiness Working Group to address the opportunities regional and trade agreements present to the agriculture sector. As Vietnam prepares for these exciting new opportunities, the VBF stands ready to support businesses and Government to prepare for the road ahead in a new phase of economic reform.

SESSION 1: REVIEW OF INVESTMENT CLIMATE

Vietnam Chamber of Commerce and Industry (VCCI) – Dr. Vu Tien Loc, Chairman

Looking back on 2013, the business community in Vietnam recognizes Government efforts in maintaining macroeconomic stability. Investors' confidence also received a boost from Government endeavors to improve infrastructure systems and active engagement in negotiations for multilateral and bilateral international trade agreements. However, 2013 was another tough year for the business community with a significant number of

businesses closed down or ending in liquidation. Government attempts to assist businesses have had some positive impacts, but many businesses have yet to truly benefit. Businesses expect the Government to remain on track in stabilizing macroeconomic settings, containing inflation and sustaining growth. Two main pathways can be taken to improving Vietnam's business and investment climate, speeding up SOE reforms and initiating an accelerated agenda to improve the investment climate. With the first work stream, there is a pressing need to quickly reform SOEs. The VCCI's specific interventions include the strict application of market principles and disciplines in the operation of SOEs, non-discrimination between SOEs and the private sector, application of modern governance values to increase transparency for SOEs and segregating public administration from the role of State ownership. The Government also needs to push SOEs to rechannel resources to address more pressing needs.

Regarding the second work stream, the Government should work towards becoming a leading ASEAN nation in terms of liberalism and attractiveness of the investment climate. To achieve this goal, the Government needs to step up administrative procedure reforms in ways that allow regular reviews and reductions in compliance costs with increased dialogue between the Government and investors, adoption of electronic administrative procedures, increased human resources development and greater official accountability and integrity. Taking an active part in and promoting public administrative reform and fighting corruption, the VBF has assembled a dedicated working group for governance and transparency, with VCCI proposing Initiative 12 and Project 12 on business integrity.

American Chamber of Commerce (AmCham) – Mr. Steven Winkelman, Chairman

AmCham was hopeful the revised Constitution would have signaled that Vietnam's leadership was serious about economic reforms to stimulate private sector activities and help open SOEs up to greater competition. Vietnam is not the first country to face the difficult decision of dismantling inefficient SOEs, but AmCham believes reform is positive.

The TPP could also be positive for Vietnam's socio-economic development growth and renewal of the country's growth model. AmCham members are hopeful the TPP agreement will tear down trade barriers and set standards for workers' rights, environmental protection and intellectual property rights. Moreover, studies have shown that Vietnam has the most to gain than any country currently negotiating the agreement, with exports and GDP growth potentially greater than for other partner countries. Having Vietnam in the TPP is very important for the American business community as it will boost investors' confidence and help ensure Vietnam remains an attractive and competitive destination for foreign investors. Our members need to see more evidence of the Government's willingness to reform inefficient SOEs as well as address corruption and conflicts of interest. Without addressing fundamental governance issues, progress will remain challenging. AmCham believes in Vietnam and remains committed to working with its partners in the Government to improve the business investment climate.

European Chamber of Commerce (EuroCham) – Mr. Preben Hjortlund, Chairman

Despite some macroeconomic gains, there are still issues needing attention such as SOEs, where State companies getting favorable treatment are stunting economic growth. EuroCham believes the Government should reform these SOEs for a more competitive market. On a positive note, the EU-Vietnam Free Trade Agreement is expected to be concluded in 2014 and we believe such a deal will significantly benefit the EU and Vietnam. However, the full potential of the EU-Vietnam FTA may not be realized unless Vietnam fully

commits to international trading rules it has signed. EuroCham also believes the TTP will increase exports and enable greater private sector access to the market, while consumers will also benefit. Regarding fair pricing, the Government has made big efforts to remove price allocation measures. This is especially so in the case of EVN and in the renewable energy sector, where prices should be more favorable to encourage investment. Regarding taxation, there is currently an issue relating to coffee exports and VAT as the Government since January, 2013 has allowed enterprises to have their own VAT invoices. But, many of these invoices have not been approved in the provinces and only VAT invoices by an SOE can be approved. EuroCham members remain committed to invest in Vietnam, while a recently published Whitebook offers comprehensive details on a number of pressing issues with possible solutions.

Japan Business Association in Vietnam (JBAV) – Mr. Motonobu Sato, Chairman

Despite significant direct investment in Vietnam, Japanese enterprises are not satisfied with the current investment environment in the country. These investment issues are highlighted in the VBF booklet. Another area of concern is the privatization of SOEs, which is essential because it boosts restructuring of the Vietnamese economy, through greater value added and competition in the market. Open market momentum will be further gained through ASEAN+1, the TPP and Comprehensive Economic Partnership for East Asia. Japanese enterprises stand ready to further support Vietnam, but there needs to be desire for change. Clear decisions now need to be made as to which issues to address and which to dismiss.

Singapore Business Group (SBG) – Mr. Seck Yee Chung, Vice President

We have been encouraged by bright spots like growth and industrial production, but it is now time to look at SOE reform. SOEs are meant to be one of the key pillars of Vietnam's economy, but many SOEs operate inefficiently and suffer from losses that drag on the economy. Broadly speaking, SOEs either have commercial or non-commercial objectives. The latter serve social missions and maintain State management of natural resources and fundamental infrastructure, while commercial SOEs seek profits. Such objectives need to be clearly defined, with non-commercial SOEs focusing on core social missions and avoid investing in non-core businesses and commercial SOEs should be limited to follow market principles and allow for a level playing field. SOEs should also be accountable to stakeholders, to avoid inefficient operation and use of State capital. The Government must separate its role as a policy maker, as it must regulate a market with no discrimination between private sector companies and SOEs, while as a business owner it must ensure SOEs operate efficiently and sustainably which requires transparent guidance. To address the situation, the Government has set up the State Capital Investment Corporation, which after a promising start appears to need more time and resources to develop itself. On an encouraging note, it has just been reported that tax payments from SOEs have risen, in sectors including telecoms, petroleum and banks. This shows SOEs can perform and fulfill their role if properly management.

VBF Progress Report – Mr. Alain Cany, Co-chairman of VBF Consortium

In the last two years, more than 50 meetings between VBF working groups and the Government have taken place, which represents excellent progress. There has also been progress on macroeconomic stability, but inflation still needs watching. On the banking front, the issuance of Circular 2 is excellent news following much discussion in the VBF. Despite its planned implemented in June next year, many banks have anticipated it in the

way they manage their non-performing loans (NPLs). The establishment of the Vietnam Asset Management Company (VAMC) is also a positive step. The VBF hopes the Vietnamese stock market will benefit from the expansion of the margin ratio and the trading band increase on the Hanoi and Ho Chi Minh markets. Regarding investment and trade, the VBF also underlines the importance of negotiations on the TPP and various multilateral agreements with the EU and various countries. On a positive note, the abolishment of the so-called automatic import licensing scheme in September, 2012 is welcomed along with progress on income tax as well as on the long running Issue of advertising and promotion expenses, but more work is needed to abolish the cap. On tourism, the establishment of the Tourism Advisory Board is good news to promote Vietnam as is the extension of the visa waiver for seven countries which bring many visitors to Vietnam. On mining, the study on the proposal to increase royalties on minerals has been put on hold and it is hoped VBF discussions with various embassies will bring positive results. On investment and trade, a clear definition of a foreign-invested enterprise is urgently needed as firms still do not know six years after WTO accession. On infrastructure, the harmonizing of the two sets of PPP and BOT rules is needed, while the acceleration of Vietnam's integration with ASEAN will help the automotive industry. The newly approved Land Law is encouraging and the VBF recommends the enhancement of foreign participation in the real estate market and the streamlining of the land development approval process. On labour, the easing of work permit conditions for foreigners is required and the need for the Government to consider more autonomy for higher education and vocational training is in place.

SECTION 2: TOPICS TO BE DISCUSSED WITH GOVERNMENT

1) Banking

Banking Working Group - Mr. Tareq Muhmood, Head

- Much progress has been made in regards to reduced local interest rights, better liquidity, and reduced inflation to single digit territory and a stable exchange rate. There have also been several mergers of weak banks, more clarity around the NPL road map, excitement around Circular 2 and recent establishment of the VAMC. Within these various issues I would like to highlight the fruitful working relationship between the Banking Working Group and State Bank of Vietnam (SBV) as in many cases the SBV has digested constructive feedback and revised regulatory requirements to be more in line with international best practices and support the banking sector's evolution. Whilst much macroeconomic stability progress has been made in the past two years, several key issues remain - namely governance of the banking system, NPLs, governance of the VAMC and the sector's capital requirements.

Banking Working Group - Mr. Sumit Dutta, Representative

To address the issues highlighted by the Banking Working Group, it proposes the following:

1. Good governance: There is an urgent need to improve banking sector governance to international standard. This includes the issuance of measures to achieve better disclosure and transparency, improved risk governance, a broadened shareholder base, reduced influence of large shareholders and improved supervision for a better risk-based approach. This will require ensuring Basel II standards are implemented by 2015, so international accounting standards are adopted and implementation of Circular 2.
2. NPLs: Circular 2 will ensure consistency and disclosure levels.

3. VAMC governance: The VAMC has made a promising start with its first debt acquisition deal in October 2013 with other transactions following.

To ensure the VAMC's development the Banking Working Group suggests:

1. Public and detailed disclosure around assets transferred to the VAMC, as well as rules on the sale, purchase and management of NPLs are required. Effective solutions to evaluate assets at market prices without loses viewed as a criminal offense are also needed. The VAMC should not rush to dispose of transferred assets, but it is critical to understand the need for transparency to support confidence in the process. It is important to attract more investors, including foreign investors to speed up the banking sector's recovery.

2. A significant amount of right offs and amortization of VAMC bonds over the next five years are expected, so rules on capital raising options available to the banking sector are important. This involves clearly articulating permitted foreign ownership levels and this will vary depending on the nature of the bank. This is not just a matter of interest for foreign banks, but also for large private equity players, pension funds and fund managers operating in the region.

Response by the State Bank of Vietnam – Mr. Le Minh Hung, Deputy Governor

- **Governance:** One of key approaches to restructure credit institutions is to improve banking governance in line with international practices and standards, with a focus on risk management and internal control systems so banks can self-manage their operational risks, principally credit quality and liquidity. The SBV has issued numerous legal documents requiring credit institutions' improved internal controls and governance. The SBV will continue to examine regulations on risk management minimum requirements and prudential limits in banking operations, and introduce a roadmap for Basel II application to different types of credit institutions.

- **NPL settlement:** Recognizing the importance of settlement of NPLs, in May 2013 the SBV cooperated with ministries and industries to develop a master plan to deal with NPLs, with five solution groups to be executed until 2015: (1) credit institution solutions, (2) client/borrower solutions, (3) mechanism and policy solutions, (4) supervisory solutions and (5) establishment and operation of the VAMC. The robust implementation of solution groups resulted in credit institutions reporting positive developments in addressing NPLs with a decrease in the average growth rate. Regarding the implementation of Circular 2 for asset classification, the Circular has been delayed until June 1, 2014 to help enterprises/businesses access to funding support from banks, decrease lending interest levels and ease business difficulties. At the same time, it gives credit institutions and foreign bank branches more time to actively develop an implementation roadmap and prepare adequate conditions needed for full implementation of Circular 2.

- **VAMC:** Regarding public and detailed disclosure of VAMC, it is stipulated by law that VAMC will make the purchase, sale and settlement of NPLs public and transparent. Moreover, its policies have been made public on its website. In relation to asset evaluations at market prices, the SBV will work closely with the Ministry of Finance (MoF) and other agencies to develop a legal framework for the development of a debt trading market and publish a list of price appraisal entities and auditing companies eligible to participate in the settlement of NPLs to determine the value of corporates,

assets and NPLs at market prices. As regards the settlement of assets transferred to VAMC, after purchasing bad debts the VAMC will conduct classification of loans and clients. Loan restructuring methods will be considered and support will be given to clients/borrowers with sound repayment ability with the sale of assets the last consideration if repayment is likely to fail.

- **Capital:** During developing the NPL settlement masterplan for the VAMC's establishment, the SBV evaluated the effects of the VAMC's NPL settlement on credit institutions. The SBV believes income sources are sufficient to compensate for NPL settlement. With respect to foreign ownership in commercial banks, in accordance with WTO commitments foreign banks can operate in Vietnam as 100% foreign-owned, joint venture and share owners in Vietnamese banks. Besides, the SBV has submitted a new decree replacing Decree 69/2007/ND-CP enabling foreign investors to buy more shares in weak banks. The Government as well as the SBV encourage and facilitate share purchase by foreign investors to support Vietnamese credit institutions.

2) Capital Market

Capital Market Working Group – Mr. Terry Mahony, Representative

Regarding the equitization of SOEs:

1. Privatization helps balance a Government's budget as a source of funding. This is worth remembering as the Government recently applied for the State budget over-expenditure cap to be increased from 4.8% to 5.3% of GDP.

2. The issuance of new shares will increase the stock market's liquidity by making it more fluid and broad based, essential elements to build an emerging market's credibility.

3. By going public, a company must become transparent and reveal more information, which comforts investors. Open competition improves corporate performance and governance as investors expect managers to be accountable for performances.

4. Privatization is a catalyst to attract foreign investors and international underwriters must be engaged for global offerings, which will attract cornerstone and institutional investors. Also, at least 25% to 30% of the company must be offered.

5. Privatization spurs competition and enhances efficiency. Encouragingly, the Government has acknowledged Capital Market Working Group input about increasing foreign ownership in listed companies. It is important to remember that only through privatization can Vietnam still become a viable and acceptable stock market in the emerging market arena.

Response by Ministry of Finance – Mrs. Nguyen Thi Mai, Vice Minister

- Since 2001 to date, more than 3,000 out of 3,659 companies have been corporatized. Many mechanisms and policies on SOE restructuring and corporatization continue to be optimized to allow for smooth SOE reforms and equitization.

- On Capital Market Working Group recommendations pertaining to the further acceleration of SOE equitization and transformation, the Government has advised the MoF to focus on the following key areas:

+ Optimization of regulatory mechanisms and policies on SOEs: The Law on State Funding Management and Use is expected to be submitted to the National Assembly in 2014. Regulations on State administration as an owner of SOEs will be further reviewed, with a Government decree on loan management for businesses, in which the State owns 100% of charter capital, will soon appear.
+ Optimization of regulatory mechanisms and policies on SOEs transformation and equitization: Decree 59 on transformation of SOEs into shareholding companies will be revised to facilitate acceleration of SOE corporatization. Classification prerequisites and criteria for wholly SOEs will be introduced under Decision 929 to provide benchmarks for relevant ministries and line agencies to act upon in identification and implementation. Divestment from non-core business by State-owned corporate groups and enterprises will be accelerated, rulings on assignment of investments in non-listed shareholding companies will be enacted and further examinations will be made to revise regulations on public offerings of stock invested in by SOEs.

- Expansion of foreign investors' ownership and reduction of ownership in listed companies: The MoF is making proposals to the Government for amendments to Decision 55, which reflects the working group's inputs for recognition and modifications. Also, the stock market restructuring process has been set in motion to effectively promote the capital market's development.

3) Infrastructure

Infrastructure Working Group – Mr. Tony Foster, Head

The Infrastructure Working Group has a number of recommendations for reforms that will enable the private sector to ensure Vietnam's infrastructure is not a constraint on growth. The Government's request for the sale of non-core assets is a good step, but little is happening. Three things could make this easier: business assets could be packaged with correct documentation, liabilities relating to the business should be properly determined and the price of the business should be market value and not the original investment cost.

When TPP is implemented Vietnam can expect a surge in investment, but only if manufacturers are confident in power and other infrastructure. One way of doing this, pending the creation of a genuinely competitive electricity market, is making the private-to-private sale of electricity easier. The VBF also recommends realistic tariffs for all electricity, especially for renewables and realistic prices for domestic inputs, such as coal and gas, as this would enable PetroVietnam and Vinacomin to better compete. To assist project financing of power projects, the VBF suggests amending Official Letter 1604 to permit 100% foreign exchange guarantees or at least to set out firm guideline for criteria to be met. Finally, the Infrastructure Working Group is taking an active interest in the drafting of the PPP-BOT decree. If it is issued in an internationally accepted form, it will be the basis for new foreign investment in the sector. But, if it is issued in defective form, many potential foreign infrastructure investors will head elsewhere.

Response by Ministry of Industry and Trade – Mr. Tran Quoc Khanh, Vice Minister

- Power infrastructure: The Ministry of Industry and Trade (MoIT) is making every effort to roll out the seventh electricity master plan approved by the Government.

- Equitization of businesses in the energy sector: Energy is a vital sector in the national economy and any steps to corporatize energy sector businesses should be taken with precautions and specific estimations of benefits and costs. The MoIT has strictly complied with equitization plans for energy industry businesses as instructed by the Government.

4) Investment and Trade

Investment & Trade Working Group – Mr. Fred Burke, Co-head

- Clarification is sought on two urgent labour issues. The first is the de-dollarization policy, in that a draft new degree to replace Degree 160 has been seen, that has caused serious concern among expatriates working in Vietnam and their employers because it appears to eliminate the possibility of paying expats in US dollars, an important factor in attracting talent to Vietnam. Clarity on this issue is requested.

- The second issue is one of many coming out of the implementation of amendments to the Labour Code. The big issue is the work permit situation under Decree 102. In the old law a four-year university degree or five years' experience in the specified field of work was needed, which was already too strict. Now, both criteria must be met and this is unrealistic for the type of foreign talent needed for Vietnam.

- Moreover, for Vietnam's full benefit under the TPP it must attract the textile industry to get the TPP duty rates for garment exports. While such significant textile investment from countries like Korea is highly desirable, many of the vocational experts and engineers sent to work in plants will not have four-year university degrees. Meanwhile, in Ho Chi Minh City and other locations the processing of work permits has been suspended for unspecified reasons. Again, urgent attention is needed on this issue.

- Regarding the working group progress matrix, we need working groups' participation to measure progress in the years ahead. The matrix goes back to 2011, to give an idea of what is important to businesses, for example the most populated part of the matrix is land and SOE reforms as high priority areas. From 2011, there has been an encouraging 26% rate of achieving solutions. So, we need working groups to report issues experienced in day-to-day business, so we can raise them with authorities for solutions.

Investment and Trade Working Group – Mr. Tran Anh Duc, Co-head

- Slow equitization: While more than 800 companies were corporatized during 2004-2005, about 10 businesses went public last year. Strong Government action is needed to accelerate equitization.

- Lack of corporate governance: Many SOEs have converted to single member limited liability companies or shareholding companies with the State holding controlling shares. Nevertheless, a specialized monitoring mechanism is needed for converted companies for division of power between the State's ownership and business administration roles.

- Information security and transparency monitoring: Given that many SOEs are not operating productively, there is a need for a more effective monitoring mechanism for SOEs. The Government could consider inviting the public to get involved in monitoring SOEs, including requirements for specific disclosure applicable to SOEs and companies, or converted businesses.

- Full-scale restructuring: The business community welcomes Government efforts to restructure Vinashin's debts and business operation. It appears the Government has achieved initial progress in reorganizing business operations, by redirecting SOEs and companies to focus on their core business lines.

- Fair treatment: SOEs have benefited from numerous advantages in terms of access to funding, credit or better places of business compared to the private sector. We suggest the Government addresses this situation and applies fair treatment between different economic stakeholders pertaining to investment and trade projects.

- Resources allocation: For an infrastructure project initially reserved for a State developer, if a private or foreign investor wants to participate, will the State-owned business transfer the project to the private or foreign investor?

5) Automotive

Automotive Working Group – Mr. Gaurav Gupta, Head

- Despite healthy competition, the automotive sector has not grown as expected by investors and the Government. The total industry in 2013 has 100,000 units compared to its capacity of half a million units. The growth and development of the automotive industry in Vietnam has been constrained by multiple issues. In response, the working group has made recommendations that the Government should consider with steps to accelerate the sector's growth. The key points are:

- The Government should recognize and safeguard the interests of the complete knock down (CKD) industry during transition to AFTA in 2018. This can be made by implementing measures to retain the CKD industry's cost competitiveness, such as incentives linked to CKD production.

- On the strategic car and project, there's growing concern it will be impossible for other models to exist in the market. The requirement being considered is to have 40% local Vietnam content in the absence of an established parts industry and the limited size will bring new challenges. The strategic car approach will hurt competitiveness and limit the market to only a few models. We request the Government reconsider the strategic car and project details.

- Regarding the two-wheeler section, the first concern is Decision No.356 that mentions limiting the number of motorbikes to 36 million units only by 2020. It is requested the Government share more information with the Automotive Working Group to allow investors to strategize. The second concern is the special consumption tax of 20% on selected categories of motorcycles and it is requested this tax is reconsidered. It is also recommended that the dates of decision announcements and effective dates be streamlined, especially related to taxes because it impacts on purchases and industry performance.

Response by the Ministry of Labour, Invalids and Social Affairs – Mrs. Pham Thi Hai Truyen, Minister

- Prerequisites for foreign workers to enter Vietnam: Non-national experts need to meet two criteria - have a tertiary education and a minimum five years work experience. If an

individual has been verified by his/her domicile country as an expert, the two criteria will be waived. So the preconditions reflect the Labour Code's intent to create an opportunity for any companies investing in Vietnam to access skilled workers not available in Vietnam.

- Work permit for technical workers: The Ministry of Labour, Invalids and Social Affairs (MoLISA) is putting together an implementing circular to Decree 102/2013/ND-CP, guiding the revised Labour Code that came into effect from May 1, 2013. The circular will clearly define criteria to be met to obtain a work permit for skilled workers having three years or more work experience and a training period in of at least one year.

- Work permit approval time line: The implementing circular will duly provide adjustments to the permit granting time line to provide easier access to a work permit, targeting a timeframe of 10 days for a new permit and three days for reissuance.

Response by the State Bank of Vietnam – Mr. Le Minh Hung, Vice Governor

- In relation to investors' concerns about the draft decree replacing Decree 160 that guides the Foreign exchange Ordinance: Previously, the Foreign exchange Ordinance specified that the provision of guidance to the Ordinance was under Prime Ministerial jurisdiction. But the revised Foreign exchange Ordinance passed by the National Assembly Standing Committee in March 2013 passed the power to the SBV. In the draft circular on foreign exchange transactions taking place within Vietnam, regulations on payment of salary to non-national workers remains the same without any changes. The draft circular was expected to come out in December 2013.

Response by the Ministry of Industry and Trade – Mr. Tran Quoc Khanh, Vice Minister

- The Government sees the automotive industry as of great importance in industrializing and modernizing the country. The Government has requested the MoIT draft a master plan for automotive industry development, with specific policies to provide stability and promote the development of the local automotive industry to meet local demand and become part of the regional and global production chain when free trade agreements Vietnam is a signatory to come into effect.

- Two-wheeler issue: The Government has provided supportive policies to develop the two-wheeler vehicle industry. But some large cities face concerns about two-wheelers to urban living; there have been ongoing debate on the need to restrict this type of transportation mode. This is an inevitable trend and decision-making rests with People's Councils of major cities. It is suggested two-wheeler manufactures are aware of this development trend and make adjustments accordingly to their development strategies.

6) Land & Property

Land Sub-Group – Mr. David Lim, Head

- The Land Sub-Group encourages the Government to proceed with SOE equitization and divestment from non-core businesses. A clear divestment policy must be accompanied by consistent implementation and SOEs should be required to report periodically on progress and be held accountable for any failure.

- Regarding the pilot program permitting foreigners residing in Vietnam to purchase residential property, limited success has been achieved with just 130 buyers. The draft Housing Law offers hope that resident foreigners could purchase more than one real estate property with a provision permitting the leasing out of such property. This policy is encouraging, but a decision must be made swiftly as the pilot program ends this year. Allowing the pilot program to lapse will send out a negative signal about Vietnam's real estate market and the country in general.

- The draft Housing Law also contains a change in ownership terms for apartment units from unlimited and long term use to fixed limited terms. This means apartment unit owners would be required to surrender apartment units at the end of the use term to be demolished and apartment owners resettled by the State. Apartment owners should not be deprived of their land use rights and the implications of such a drastic measure will have a very negative impact on the housing market. The Land Sub-Group requests this provision be rejected.

- Another pressing issue is common area and facilities in development projects, which can be owned by apartment owners. However, there are no such provisions for landed property development projects, which has resulted in developers selling property units, but still being owners of common area and facilities used by the landed property owners. It is unclear what happens to these facilities one the developer's investment certificate expires. The Land Sub-Group requests that guidelines be issued to clearly permit landed property owners to own common areas and facilities.

Customs Working Group – Mr. Jonathan Moreno, Head

- On behalf of the newly formed Customs Working Group I would like to highlight progress in its area of work and the most striking example of progress is the General Department of Customs having prioritized dialogue with the business community by agreeing to establish this working group. It is important this good start is built on for continued responsive engagement.

- A brief summary of issues that are a key focus of the Customs Working Group include integration between customs, ministries, foreign customs offices and the World Customs Organization; enhanced transparency to address informal "facilitation payments"; greater professionalism from brokers; greater technical and cultural capacities for firms to be ethical partners; preventing delays; greater transparency in establishing HS codes; broadening businesses' ability to seek customs values through advance rulings and strengthening the appeals process. Two giant General Department of Customs projects, E customs and National Single Window, have the capacity to address many of the concerns noted in the white paper. The Customs Working Group strongly appeals to the General Department of Customs to strengthen its partnership with the business community to assess these major projects step-by-step through implementation.

Response by the Ministry of Construction – Mr. Nguyen Manh Ha, head of Housing Administration

- The revised 2005 Housing Law and 2006 Real Property Trading Law will be submitted by the Government to the National Assembly for approval within 2014.

- Eligible scope of real property trading in Vietnam for foreign investors: The drafting team has amended Article 10 of the 2006 Real Property Trading Law to widen the scope

of involvement in real estate trading by foreign investors by allowing them to lease real property for sublease and buy real estate for retrofit, sales and leases.

- Broader coverage and loosened requirements for foreign entities and individuals to buy houses in Vietnam: The provisions of Resolution 19 will expire by the end of this year. Broader coverage and easier requirements for foreign entities and individuals to buy houses in Vietnam have been integrated in the new draft Housing Law.
- Apartment ownership length: The sub-group recommended against setting a specific 70-year period of ownership for residential buildings. The drafting team has made modifications to allow time limits and indefinite ownership that gives developers, businesses and buyers the choice of scheme that best fits specific conditions and financial capacity.

- Shared ownership in residential buildings: This issue will be jointly discussed with the Ministry of Natural Resources and Environment for appropriate action.

Response by the General Department of Customs

- Improvements to e-customs: E-customs is a strategic development by Vietnam customs as before 2012, this system faced multiple gaps and challenges in relation to transparency and the roadmap. From 2013, e-customs was adopted nationwide, with more than 92% of transaction volumes going through the system. There is also increased automation in receiving information and handling clearance, with further improvements made to the electronic tax payment system in cooperation with commercial banks' e-payment system. A digital signature system was introduced in November 2013 to enhance cargo owners' accountability and ensure legitimate transactions. The General Department of Customs is moving to prepare for upgrades and formal introduction of an automated electronic clearance system, (VNAC) expected to come into operation in April 2014.

- The revised Customs Law will come into effect from 2015, with the uniform adoption of the electronic customs system and the new VNAC system to rely on the new regulatory framework of the General Department of Customs and relevant revised implementing documents.

7) Education
Education Working Group – Mr. Khalid Muhmood, Co-Head

- The first issue on the table is autonomy, with the Government encouraged to have a clear framework and guidelines for non-State universities to operate. The requirement for non-State universities to get Government approval for various issues causes gridlock. So, the Education Working Group urges the Ministry of Education and Training (MoET) to provide more autonomy to the non-State sector to allow universities to be the champions of the future. Government action to stop some universities from establishing links with weak overseas universities is understandable, but in practice there are also sound linkages between quality Vietnamese and overseas universities.

- The second issue relates to Decree 73 issued in November 2012. As yet, there is no clear circular on that decree and that has caused gridlock, confusion and delays. The decree has actually made life more complicated in a number of areas. For example, setting up a new branch involves the same process as setting up an initial organization. This discourages reinvestment on the back of growth. The Education Working Group also sincerely hopes work permit issues are addressed as the huge majority of teachers

in Vietnam are qualified, but some do not necessarily have the requested years of experience. Regarding vocational training, the higher engineering education model is working well as an alliance between the engineering sector and Government.

Response by the Ministry of Education and Training – Mr. Bui Van Ga, Vice Minister

- Autonomy for higher education institutions: The Higher Education Law came into effect on January 1, 2013 and recognizes autonomy as a built-in property of universities. The MoET is drafting implementing documents to provide as much autonomy as possible for colleges. Schemes to hand autonomy to colleges for recruitment and issuance of credentials to graduated students will also be drafted. Colleges care about autonomy in tuition collection and nonpublic colleges, including those with foreign investment, have had autonomy in defining tuition levels, as a tuition cap for public colleges is set by Decree 49.

- Education quality and applicability of higher education to business needs: The partnership between colleges and businesses is vital to improve human resources development and creation of job opportunities. The MoET provided support to formalize relationships between higher education institutions and businesses through the introduction of specific mechanisms to twin education and human resources for businesses. Within colleges, the MoET has created mechanisms to deliver quality courses, also with higher tuition, to upgrade the quality for specific majors and student groups.

- Decree 73: Education and training is a conditional and incentivized area of investment. The MoET is working to develop implementing circulars for a number of Decree 73 provisions. These circulars will provide specific guidance on how to transform or register startup colleges and expand foreign-invested educational institutions without infringing investors' interests under the 2005 Investment Law and Enterprise Law.

  The working group has recommended simpler regulations on education foreign investment. The MoET's stance is to provide the best opportunities for good investors and quality higher education institutions to engage in partnerships.

- Technical training and vocational education: The MoET has entered into agreements on vocational training cooperation and working to support students' and businesses' needs. The MoET has released a circular on linkages between meister high schools, vocational colleges and universities, and insisted academic institutions guarantee education quality within this interconnected system. The MoET is now working with MoLISA and other ministries and line agencies to develop a national qualification framework.

8) Governance and Transparency

Governance and Transparency Working Group – Mrs. Dao Nguyen, Head

- It is recommended to use OECD five principles of corporate governance our paper has highlighted what the other ASEAN countries are doing well and we urge the Government to give equal priority to these issues as well as anti-corruption. Turning to anti-corruption issues, VBF members have identified four sectors as being the most affected by corruption namely customs, taxation, licensing and land administration.

- On customs, the government should continue to simplify customs process, liaise with businesses on how the e-customs system can be best implemented, incentivize individual customs offices to complete procedures by international best practice, create

a customs watchdog for importers and exporters, create a fully transparent list of all customs fees and ensure all fee payments are made electronically and importers/exporters receive an e-receipt for payment.

- Some taxation recommendations for the Government, amongst others, include the streamlining of existing tax regulations and processes for improved transparency, make information about all relevant tax rates available online, ensure all tax payments are made electronically, formulate a clear mechanism to punish tax officials who have intentionally imposed incorrect decisions and introduce a fully computerized system for taxpayers to assess their tax liability online.

- On licensing, the consolidation of licensing regulations to improve the application process is recommended as well as abolishing the need for existing licensees to go through a full application process when a license expires and ensuring all communication between officials and applicants is made in writing and recorded in a computerized database.

- On land administration, it is suggested transparency provisions already embedded in the existing legal framework be improved, a computerized national land registry record land owners and permitted uses be established, land procedures and processes face greater transparency, individual officials' accountability be increased and all fees and charges payable by applicants be listed with all applicants to receive a receipt.

Response by the Ministry of Planning and Investment – Mr. Nguyen Van Trung, Vice Minister

- Licensing: The best option is to minimize face-to-face interactions between applicants and the licensing agency through computerization. A national licensing database has reduced licensing problems. The Investment Law combines business registration and investment certification procedures, but in practice there are issues with this combination of workflows as they do not share much commonality in terms of legitimacy. The ministry is working to minimize such overlaps.
- The Investment, Enterprise and several other related laws overlap. The ministry is working to consolidate the regulatory and operating procedures, and accelerate computerization.

Response by the Ministry of Finance – Mrs. Vu Thi Mai, Vice Minister

- Regulatory arrangements: The MoF is working to reform the legislative system to achieve more transparency and simplification for businesses. During 2008-2013, the ministry submitted input for enactment of 13 laws and 146 decrees and decisions. With respect to administrative procedure reform in implementing the Government's Resolution 30, the ministry simplified 500 procedures and shred 517 out of 840 procedures. With regards to taxation, 265,000 out of 450,000 active and tax-registered businesses have adopted electronic declaration. A customs clearance automated monitoring and inspection system has also been introduced to support businesses, while the MoF has also set up hotlines and an internal control function to curb corruption. An anti-corruption Steering Committee has also been formed to fight corruption within the finance sector as well as the tax the customs subsectors.

Response by the Ministry of Natural Resources and Environment – Mr. Chu Pham Ngoc Hien, Vice Minister

- The revised Land Law was passed by the National Assembly in 2013 and will come into effect from July 1, 2014. One of its key provisions focuses on transparency in land administration. Specifically, clarification has been given to zoning, land use planning, compulsory acquisition and land clearance compensation. The public's role is more clearly defined in the revised law.

CLOSING

Deputy Prime Minister H.E. Hoang Trung Hai

- Vietnam's economy achieved saw impressive progress in 2013, while the business sector showed positive signs as returning and startup companies started to grow. However, sustainability of macroeconomic conditions, interventions to push up demand in the economy and increase businesses' access to finance are needed. Administrative procedure reforms will continue. Future steps include:

- Banking and capital markets: Continued implementation of NPL resolution, especially loan security management and debt restructuring, with development of the VAMC and the commercial bank system brought into line with best practice.

- Public investment restructuring: Mid-term investment plans will continue, as public investment efficiency is improved, spreading investment and curbing wastage in line with Directive 1792, with scrutiny of investments made from the Government budget, Government bonds, SOEs and ODA funding. The Government will make every effort to involve the private sector in the investment process. The Government has tasked the MPI and relevant ministries to prepare a list of projects and areas of interest in each sector where private sector investment can be called upon, with bigger lists of projects for PPP and private sector involvement.

- Monopolistic company reform: This process has been delayed due to the global economic crisis and setbacks to the local economy. The reform pathway of the electricity sector in Vietnam has been spelled out in the Electricity Law of Vietnam and is currently underway. The Government will further renew power tariffs to accurately reflect cost prices of power production and provision. Going forward, a competitive wholesale electricity market will be further implemented to make sure that electricity distributors can benefit from a competitive environment.

- The Prime Minister has endorsed the SOE reform plan, to bring the number of SOEs from 1,200 down to 600 by 2015 and 300 by 2020. This is an ongoing process and has lagged behind due to the economic downturn.

- Consolidation of the market economy system: Further steps will be taken to consolidate the market economy system and create a level playing field for businesses to access resources and investment opportunities.

- Human resources development: The MoLISA Minister will advise relevant functions to start working with the cities of Hanoi and Ho Chi Minh to help the Departments of Labour and local Governments better understand Decree 102 to address deficiencies in implementation.

- Public administration reform: Despite specific progress, further concentrated efforts are needed in public administration reform in all domains, including resolving insolvency, access to finance, land management and natural resources to better support the business community and public as well as stamp out corruption.

Ministry of Planning and Investment – Mr. Bui Quang Vinh, Minister

- The Forum has created a strong push Vietnam's policy making process and improvements to its investment and business environment. Over the last three years, despite the world economic recession, FDI companies continue to enter Vietnam. All discussions today will be reported at the Vietnam Development Partnership Forum.

World Bank – Mrs. Victoria Kwakwa, Country Director for Vietnam

- It is clear from our conversations this morning that there are still considerable challenges and addressing them is crucial to return Vietnam back to rapid and sustained growth. There are also opportunities for Vietnam to enhance economic integration with upcoming trade negotiations such as the TPP, EU FTA and other bilateral trade agreements. However, Vietnam must also put its own house in order with domestic changes to enhance economic competitiveness to achieve maximum benefits. Further to this, the SOE sector continues to benefit from resources, but inefficiencies remain and represent missed opportunities to really create a dynamic domestic private sector that will drive economic growth. The SOE reform message has come out loud and strong today and we recognize privatization is complex. But, several things can be done to start the process for a more efficient State sector in Vietnam. We have discussed SOE transparency, good corporate governance and SOEs moving out of non-core business areas.

- The Government's investment in the VBF over a long period is also very important and acknowledged. We recognize the VBF is the high point of the conversation between the private sector and the Government, but other work continues. We look forward to continuing our constructive conversations and to the Working Groups getting back to business and continuing fruitful dialogues for further progress.