

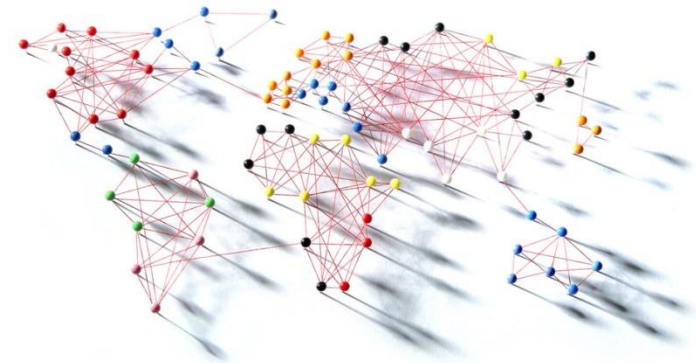
Trans-Pacific Partnership Agreement – Impact on Vietnam’s legal reform

With special focus on Employment & Labor area

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Frederick Burke

Thuy Hang Nguyen



Speakers

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Frederick Burke
Speaker – Ho Chi Minh City

Frederick Burke has over 20 years of experience practicing in the area of corporate law. He served as the Practice Group Leader of the Firm's Global WTO & International Trade Practice Group from 2006 to 2007, and has been ranked by *Chambers Global* as a leading lawyer in both Corporate Mergers & Acquisitions and International Trade for three successive years. Mr. Burke was also recommended in more categories than any other lawyer in Vietnam by *PLC Which Lawyer?* in 2008. He is currently a member of the Prime Minister's Advisory Council on Administrative Reform in Vietnam.

Mr. Burke is highly regarded for his work on foreign investment projects in Vietnam and China for key players in the property development, trade, IT/C, and project finance areas. He provides practical advice in the related issues of securities, finance, tax, labor, regulatory compliance and dispute resolution. Mr. Burke also has extensive experience in working closely with Vietnamese legislators and law drafters on the many new laws and decrees that have been introduced to integrate Vietnam into the global economy.



Thuy Hang Nguyen
Speaker- Ho Chi Minh City

Thuy Hang Nguyen is a partner based in the Ho Chi Minh office and leads the Firm's employment and labor practice in Vietnam. She is also involved in M&A, compliance, corporate and commercial practice areas. Regarding the employment and labor practice, Ms. Nguyen focuses on various employment and labor matters, involving both contentious and non-contentious issues. She particularly places emphasis on labor regulations compliance, employment aspects of major corporate restructurings and transactions, employment issues in relation to senior executive and managers, global migration and executive mobility, restrictive covenants and trade secrets, and labor dispute resolution.

Agenda



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- I. Overview of TPP
- II. TPP Labor Commitments
 - 1. Labor-related regulations in TPP
 - 2. Commitments under Labor Chapter
 - 3. Vietnam's Undertakings under US-VN Plan
 - 4. Timeline for labor law reform
 - 5. Temporary Entry for Business Persons
- III. Recommendations

I. Overview of TPP

Background to the TPP

- Comprehensive trade agreement between 12 Pacific Rim countries
- About 40% of Global GDP, 1/3 Global Trade, population of 800 million people
- 7 years of negotiations
- Open architecture, other countries can join at a later stage



Source: <https://ustr.gov/tpp/#what-is-tpp>



Prospects and Timing

- **The TPP was signed by the 12 member States on February 4th, 2016 in New Zealand**
- But ... Each country must ratify
- Must be ratified by at least 6 countries / (minimum of 85% of the GDP of the 12 members)
- Remember delays in prior agreements (BTA, WTO examples).
- **Political headwinds strong in the US, particularly.**
 - Lame Duck Period?
 - Impact of Brexit on TPP, EU-V Free Trade Agreement?

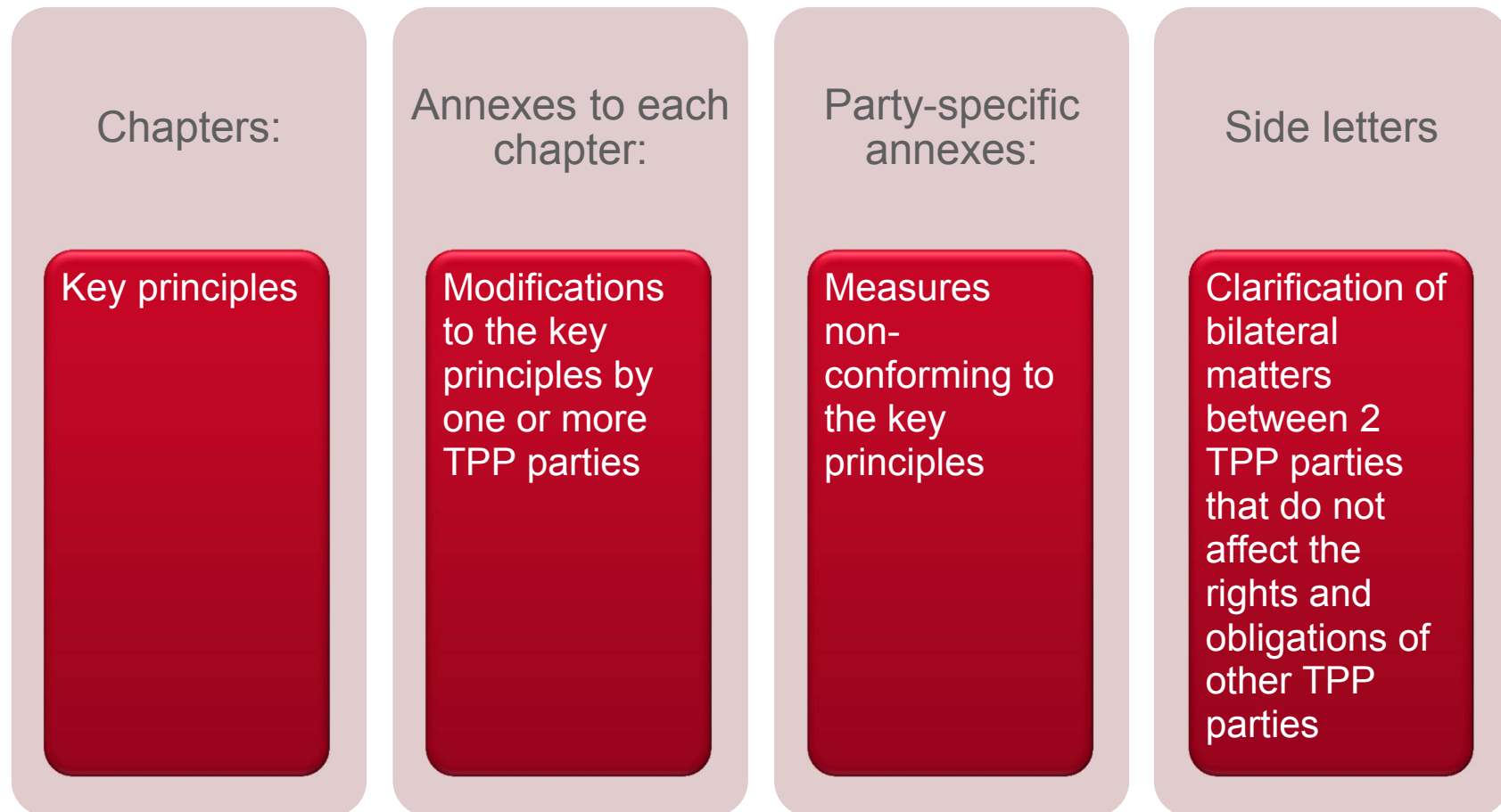
What is the TPP? A New Kind of FTA

- Ambitious, “21st-century” FTA creating a new trade block
- Largest multilateral FTA, providing comprehensive market access
- Goal is to set a new standard for global trade while taking up next-generation, cross-cutting issues (e.g., e-commerce, competition, SOEs, IPR, labor and environment)



Reduce constraints affecting the choice of how and where to form supply chains

TPP structure



Coverage of the TPP

Preamble

- 1. Initial provisions and general definitions
- 2. National treatment and market access for goods
- 3. Rules of origin and origin procedures
- 4. Textiles and apparel chapter
- 5. Customs administration and trade facilitation
- 6. Trade remedies
- 7. Sanitary and phytosanitary measures
- 8. Technical barriers to trade
- 9. Investment
- 10. Cross-border trade in services
- 11. Financial services
- 12. Temporary entry for business persons
- 13. Telecommunications
- 14. Electronic commerce

Goods

Services

- 15. Government procurement
- 16. Competition policy
- 17. State-owned enterprises and designated monopolies
- 18. Intellectual property
- 19. Labor
- 20. Environment
- 21. Cooperation and capacity building
- 22. Competitiveness and business facilitation
- 23. Development
- 24. Small and medium-sized enterprises
- 25. Regulatory coherence
- 26. Transparency and anti-corruption
- 27. Administrative and institutional provisions
- 28. Dispute settlement
- 29. Exceptions
- 30. Final provisions

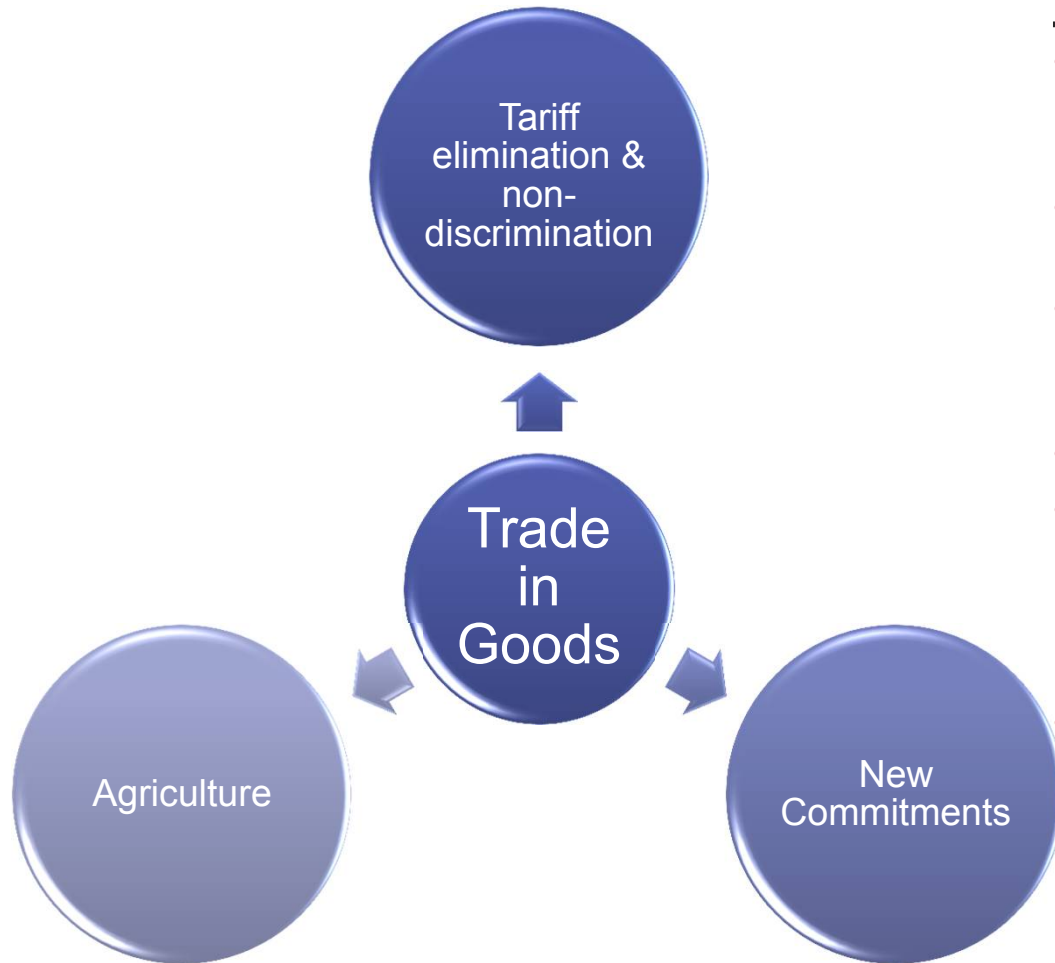
Business Environment

Development

Transparency

Annexes
Side letters

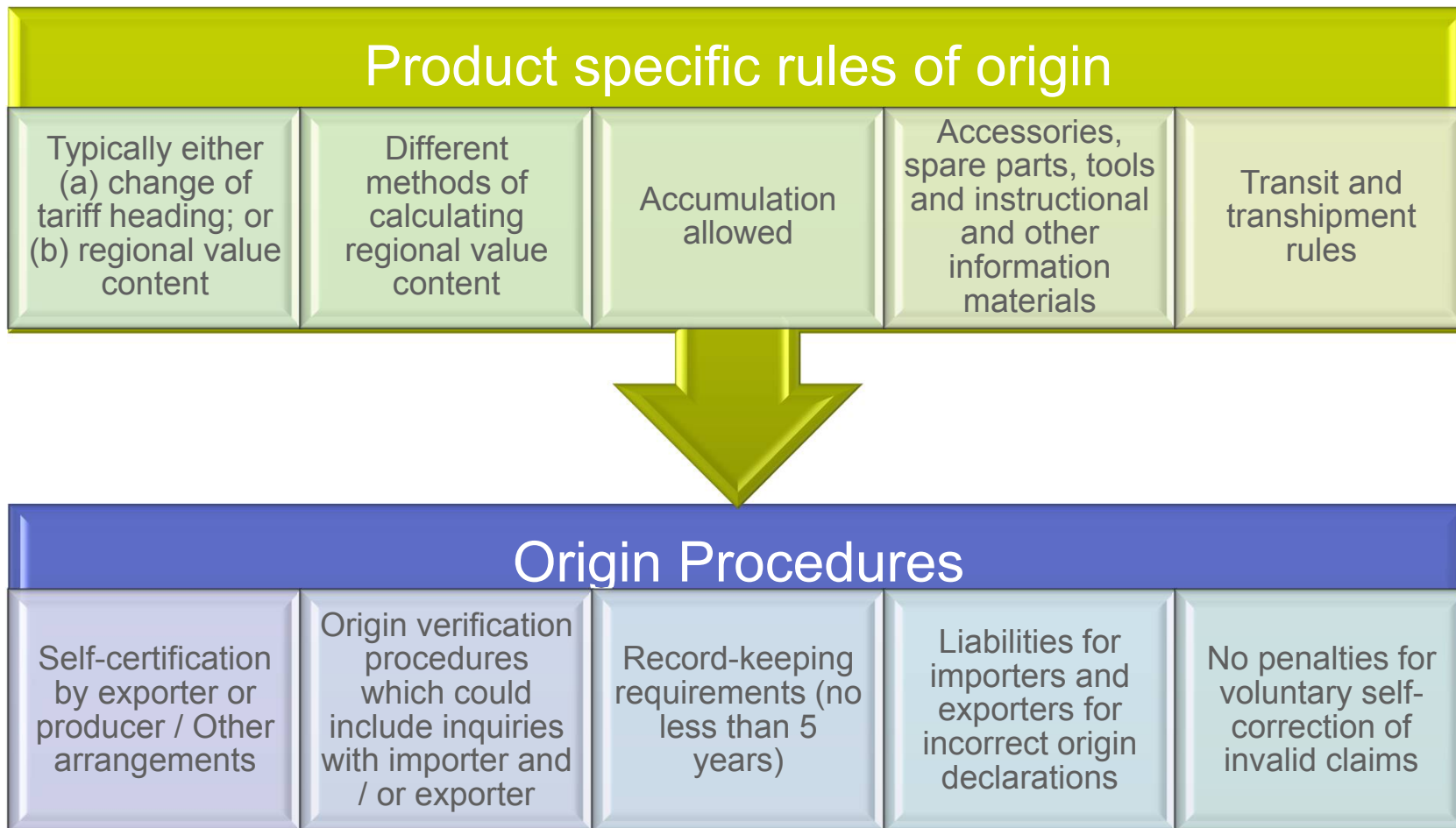
Trade in goods



New commitments

- Limitation on waiver of customs duties based on fulfilment of performance requirements
- Duty free re-importation of goods after repair or alteration in another Party
- Duty free entry of commercial samples and advertising materials imported from another Party
- Duty free temporary imports
- Disciplines on import / export restrictions
 - commercial cryptographic goods
 - no requirement to appoint distributor as condition of importing goods
- Prohibitions on import of used goods shall not apply to remanufactured goods
 - Disciplines on import and export licensing, and administrative fees and formalities
 - Elimination of export duties, taxes, or charges unless reserved
 - Disciplines on Tariff Rate Quotas¹²

Rules of origin (ex-textile and apparel)



Other disciplines on trade in goods

Customs
administration &
trade facilitation

Trade remedies

Sanitary &
phytosanitary
measures

Technical
barriers to trade

Investment

Coverage	Key principles	Non-conforming measures	Investor-State Disputes
<ul style="list-style-type: none">• “Investment”• “Covered investment”• “Investor of a Party”• Denial of benefits• If inconsistency, the other Chapters shall prevail.• Exclude measures covered by the Financial Services chapter	<ul style="list-style-type: none">• National treatment• MFN• “Minimum standard of treatment”• Disciplines on government expropriation• Free and without delay transfer of funds related to an investment, with exceptions• No “performance requirements”• Senior managers appointment	<ul style="list-style-type: none">• “Negative-list basis”• Annex I: current non-conforming measures to be maintained on “standstill” and “ratchet” bases• Annex 2: non-conforming measures to be maintained or to be adopted in the future	<ul style="list-style-type: none">• Investors’ right to pursue neutral, international arbitration• Dispute proceedings principles

Trade in services (ex-financial services)

Coverage	Key principles	Service-specific Annexes	Annexes on non-conforming measures
<ul style="list-style-type: none">• “Covered investment”• “Cross-Border Trade in Services”• “Service Supplier of a Party”• Excluded services• Denial of benefits:<ul style="list-style-type: none">• Circumventions of existing prohibitions• Shell companies	<ul style="list-style-type: none">• National treatment• Most-favored nation treatment• Market access• Local presence• Domestic regulations• Transparency• Recognition of service suppliers’ credentials – bilateral• Free and without delay payments and transfers, subject to exceptions (e.g., capital controls, prudential measures)	<ul style="list-style-type: none">• Professional services Annex• Express Delivery Services Annex:<ul style="list-style-type: none">• Minimum level of market openness to be provided on TPP signing date.• Discipline local postal monopoly• Independent regulator• No cross subsidization• No compulsory universal service as a licensing condition• Disciplines on fees and charges	<ul style="list-style-type: none">• “Negative-list basis”• Annex I: Non conforming measures to be maintained, subject to “standstill” and “ratchet” principles• Annex II : Non conforming measures to be maintained or to be adopted in the futures

E-commerce

Free cross-border flow of data

- “covered person”
- legitimate public policy objectives

No requirement on localization of computing facilities

No customs duties on electronic transmission

No discriminatory treatment favouring national producers of digital product producers / suppliers

- Subsidies, grants, broadcast

Prohibit forced source code sharing requirements

- Critical infrastructure

Recognition of e-signature and e-authentication

Promotion of paperless trading between businesses and the government: e-forms, e-submissions

Cooperation: SMEs, personal information protection, online consumer protection, cybersecurity threats

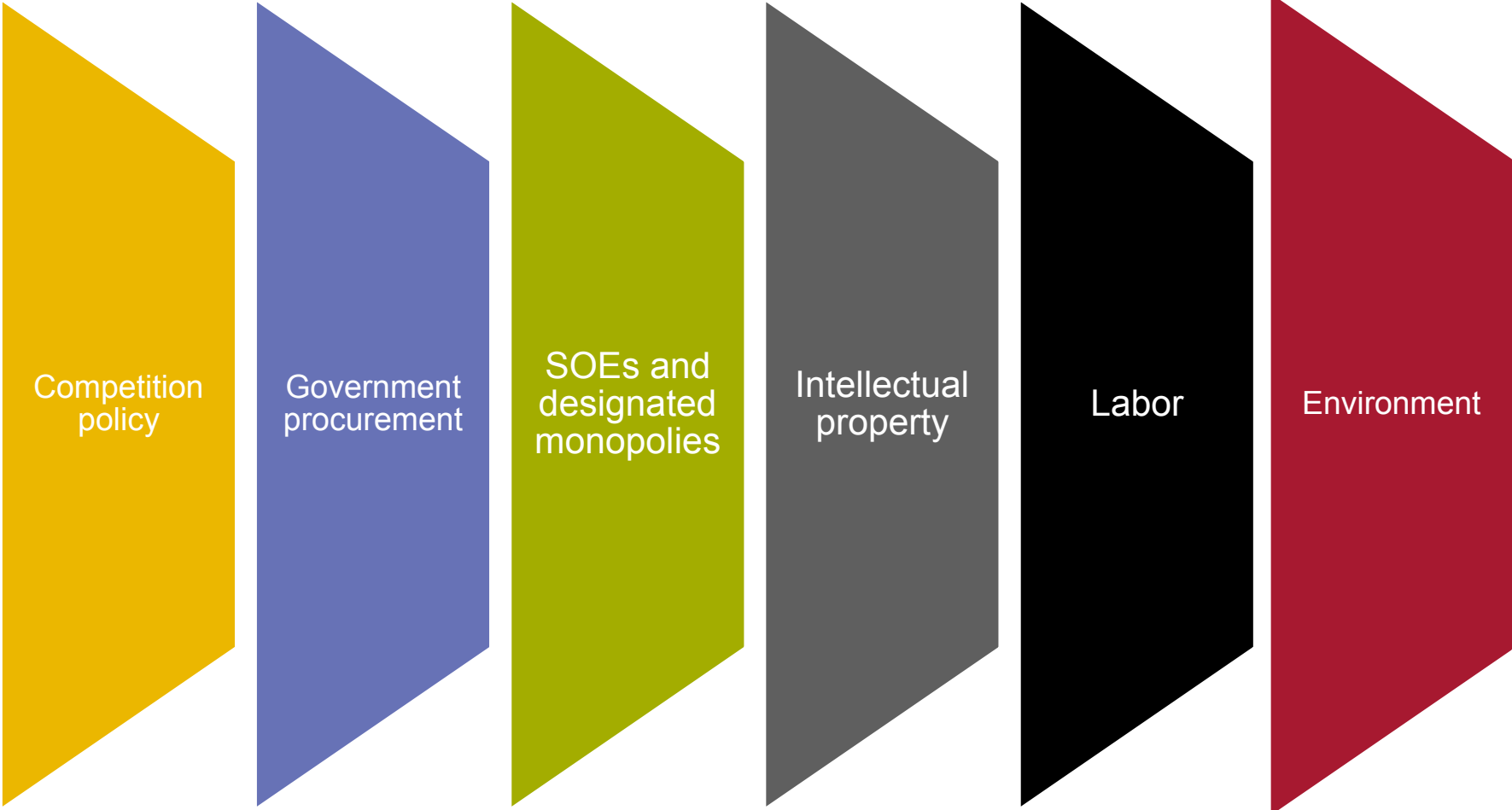
Requirements on domestic laws

- Electronic transactions
- Consumer protection related to fraudulent and deceptive commercial activities online
- Protection of personal information of the users of e-commerce
- Measures regarding unsolicited commercial electronic information

Exceptions

- Government procurement,
- Information held or processed on behalf of government
- Provisions, exceptions and non-conforming measures under chapters 9, 10, and 11

Business environment



Transparency & coherence

Regulatory coherence

Transparency & anti-corruption

Administrative & institutional provisions

Dispute settlement

TPP v. MFN – Sectors where TPP is better than WTO (Vietnam)

Service sectors	WTO	TPP
Non-facilities based telecom services	65% -70% ownership allowed	100% TPP ownership allowed 5 years after TPP effective date
Distribution services	<p>ENT required for the establishment of retail outlets beyond the first one.</p> <p>ENT criteria: number of existing service suppliers in the geographic area, stability of market and geographic scale, etc.</p>	<ul style="list-style-type: none"> No ENT for the establishment of outlets for retail services with area <500m² in areas planned for <u>commercial activities</u>, and on which the <u>construction</u> of infrastructure has been <u>finished</u>. ENT removed 5 years after TPP effective date



Benefits for Vietnam

- Boost for trade, investment, growth and job creation
- Facilitate market access and stimulate foreign investment in Vietnam
- Improve export opportunities and diversify Vietnam's export basket towards manufacturing exports
- Encourage industrial restructuring and domestic manufacturing
- Accelerate domestic legal reform, especially in labor and employment area

II. TPP – Labor Commitments



TPP's labor-related regulations

- Chapter 19 of TPP Agreement (Labor Chapter)
 - Requires all parties to adopt and maintain in their laws and practices the fundamental labor rights as stated in the 1998 ILO Declaration on Fundamental Principles and Rights at Work
- US-VN Plan for Enhancement of Trade and Labor Relations:
 - Requires Vietnam to enact legal reforms before the entry into force of the TPP between Vietnam and the US
 - Enable the US to review the implementation of legal reforms and withhold or suspend tariff reductions under TPP for Vietnam
- Chapter 12 of TPP Agreement (Temporary Entry for Business Persons)

Commitments under Labor Chapter

- Adopt and maintain the 1998 ILO Declaration on Fundamental Principles and Rights at Work:
 - Freedom of association and the effective recognition of the right to collective bargaining;
 - Elimination of all forms of forced or compulsory labor;
 - Effective abolition of child labor and, for the purposes of this Agreement, a prohibition on the worst forms of child labor; and
 - Elimination of discrimination in respect of employment and occupation.



Commitments under Labor Chapter (Cont.)

- Adopt and enforce laws on acceptable conditions of work with respect to:
 - minimum wages,
 - hours of work, and
 - occupational safety and health
- Implement laws on labor rights and conditions of work in export processing zones and foreign trade zones
- Discourage the importation of goods produced by forced or compulsory labor

Impacts of commitments under Labor

Chapter

- Set the regulatory framework for improved labor conditions
- Strengthen protections for workers and raise labor standards
- Create fairer and more level playing field for businesses and workers
- Enhance visa processing procedures and transparency
- Facilitate activities across the region of business persons

Vietnam's Undertakings under US-VN Plan

- Freedom of association:
 - Create a “labor” union system independent from and existing in parallel with the VGCL
 - Allow grassroots labor union to be registered through a competent authority (intended DOLISAs)
 - Enable labor unions to administer their affairs with autonomy
 - Allow grassroots labor unions to choose, form or join organizations of workers across enterprises or at higher levels
 - Limit function of upper-level labor union

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Vietnam's Undertakings under US-VN Plan

- Collective Bargaining:
 - Negotiation between labor collective and the employer to set forth working conditions better than statutorily required in the form of a CLA.
 - Vietnam commits to ensure “effective recognition and protection of the right to bargaining collectively”

Vietnam's Undertakings under US-VN Plan

- Scope of strikes:
 - Allow rights-based strikes
 - Require 50% plus 1 of Executive Committee to approve strikes
 - Allow strikes for workers of different enterprises
 - Permit strikes in the exploration and exploitation of oil and gas and the supply and production of gas
 - Reduce scope of strike suspension

Vietnam's Undertakings under US-VN Plan

- Forced labor:
 - Prohibit forced labor, including “debt bondage”
 - Apply criminal sanctions for the use of forced labor
 - Prohibit forced labor during treatment in drug rehabilitation centers
 - Require drug abuser’s entry to be voluntary or based on court’s decision

- ⇒ *Strict regulations and sanctions on forced labor will be issued*

Vietnam's Undertakings under US-VN Plan

- Discrimination:
 - Issue guidance on non-discrimination
 - Clarify the prohibition on discrimination based on color, race and national extraction
 - Prohibit discrimination in "all aspects of employment"
 - Remove list of jobs which women are not allowed to engage in
 - ⇒ *Guidance and regulations on discrimination will be issued*
 - ⇒ *Unknown as to how the government will define "all aspects of employment"*



Temporary Entry for Business Persons

- TPP parties commit to:
 - Provide information on applications for temporary entry;
 - Ensure reasonable application fees;
 - Make decisions on applications and inform applicants in a timely manner; and
 - Publicize information on requirements for temporary entry.

Temporary Entry for Business Persons

– Vietnam's commitments:

Category	Length of Stay
Intra-corporate transferees	Three years, extendable
Service sales persons	Limited to six months
Persons responsible for setting up a commercial presence	Limited to one year
Contractual service suppliers	Contract duration or six months, whichever is shorter, extendable
Other personnel	Term of concerned employment contract or 3 years, whichever is shorter

⇒ *Possible change in term of work permit*



Timeline for Labor Law Reform

- April 2016: 1st Vietnam Industrial Relations Forum with tripartite joint statement reaffirming Vietnam's commitment to 1998 ILO Declaration
- October, 2016: MOLISA to submit draft revised Labor Code and Union Law.
- October, 2017, or by April, 2018 at the latest: Revised laws take effect and be implemented
- VGCL is also drafting a Master plan for operational reform with the National Congress of VGCL revising its Charter in 2018
- Large scale technical cooperation project to assist the Government, unions and employers in preparing labor law and industrial relations reform being designed
- Double the number of labor inspectors in near future

Action Plan for Legal Reform – Employers' perspective

1. Revised Labor Code and Union Law Consultation (2017-18)

Suggestion:

- Analyze 2012 Labor Code, Union Law, TPP labor chapter and consistency plan;
- Assess possible changes in law and impact on the business;
- Coordinate with VCCI / Chambers to provide inputs and consultation

Action Plan for Legal Reform – Employers perspective (Cont.)

2. Preparation for Changes (2018)

Suggestion:

- Assess impacts of legal reforms;
- Seek supports/services from employer organizations and maintain good communication with them;
- Set up strategies in light of new laws

3. Implementation of Labor Code Changes (+TPP 2018 onwards)

Suggestion:

- Seek advice from employer organizations and professional firms regarding implementation of new laws;
- Implement strategies/changes to comply with new laws and mitigate adverse impacts.



Recommendations for businesses

- Review business strategies, incl. supply chain, in view of TPP
- Avoid forced labor and suppliers who use forced labor
- Be updated with regulations issued to implement TPP commitments
- Give strong input to the Government during legal reform
- Ensure compliance with new regulations
- Prepare well for labor inspection activities
- Respect collective bargaining and independence of unions
- Avoid violation of labor rights.

Q & A

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Baker & McKenzie Global TPP Website

You can also refer to our Global TPP Website at:

<http://tpp.bakermckenzie.com/>

Thank you!

