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

With special focus on Employment & Labor area

28 June, 2016
Frederick Burke
Thuy Hang Nguyen
Speakers
Speakers

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 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.

© 2016 Baker & McKenzie (Vietnam) Ltd.
Agenda
Agenda

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

Chapters:
- Key principles

Annexes to each chapter:
- Modifications to the key principles by one or more TPP parties

Party-specific annexes:
- Measures non-conforming to the key principles

Side letters
- Clarification of bilateral matters between 2 TPP parties that do not affect the rights and obligations of other TPP parties
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
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

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 Quotas
Rules of origin (ex-textile and apparel)

Product specific rules of origin

- Typically either (a) change of tariff heading; or (b) regional value content
- Different methods of calculating regional value content
- Accumulation allowed
- Accessories, spare parts, tools and instructional and other information materials
- Transit and transhipment rules

Origin Procedures

- Self-certification by exporter or producer / Other arrangements
- Origin verification procedures which could include inquiries with importer and / or exporter
- Record-keeping requirements (no less than 5 years)
- Liabilities for importers and exporters for incorrect origin declarations
- No penalties for voluntary self-correction of invalid claims
Other disciplines on trade in goods

- Customs administration & trade facilitation
- Trade remedies
- Sanitary & phytosanitary measures
- Technical barriers to trade
Investment

<table>
<thead>
<tr>
<th>Coverage</th>
<th>Key principles</th>
<th>Non-conforming measures</th>
<th>Investor-State Disputes</th>
</tr>
</thead>
</table>
| • “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 | • 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 | • “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 | • Investors’ right to pursue neutral, international arbitration  
• Dispute proceedings principles |
## Trade in services (ex-financial services)

### Coverage
- “Covered investment”
- “Cross-Border Trade in Services”
- “Service Supplier of a Party”
- Excluded services
- Denial of benefits:
  - Circumventions of existing prohibitions
  - Shell companies

### Key principles
- 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)

### Service-specific Annexes
- Professional services Annex
- Express Delivery Services Annex:
  - 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

### Annexes on non-conforming measures
- “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

- Competition policy
- Government procurement
- SOEs and designated monopolies
- Intellectual property
- Labor
- Environment
Transparency & coherence

- Regulatory coherence
- Transparency & anti-corruption
- Administrative & institutional provisions
- Dispute settlement
### TPP v. MFN – Sectors where TPP is better than WTO (Vietnam)

<table>
<thead>
<tr>
<th>Service sectors</th>
<th>WTO</th>
<th>TPP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-facilities based telecom services</td>
<td>65% -70% ownership allowed</td>
<td>100% TPP ownership allowed 5 years after TPP effective date</td>
</tr>
</tbody>
</table>
| Distribution services            | ENT required for the establishment of retail outlets beyond the first one. **ENT criteria**: number of existing service suppliers in the geographic area, stability of market and geographic scale, etc. | • No ENT for the establishment of outlets for retail services with area <500m² in areas planned for **commercial activities**, and on which the **construction** of infrastructure has been **finished**.  
• 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
- Prohibit employer interference with labor unions
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

- Extend employees’ right to organize strikes
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:

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

⇒ 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
For additional information, please contact:

**Frederick Burke**  
Baker & McKenzie (Vietnam) Ltd.  
12/F Saigon Tower  
29 Le Duan Blvd.  
District 1, Ho Chi Minh City  
Socialist Republic of Vietnam  
T + 84 8 3520 2628  
F + 84 8 3 829 5618  
Frederick.Burke@bakermckenzie.com

**Thuy Hang Nguyen**  
Baker & McKenzie (Vietnam) Ltd.  
12/F Saigon Tower  
29 Le Duan Blvd.  
District 1, Ho Chi Minh City  
Socialist Republic of Vietnam  
Tel: +84 8 3520 2641  
Fax: +84 8 829 5618  
thuyhang.nguyen@bakermckenzie.com
Baker & McKenzie Global TPP Website

You can also refer to our Global TPP Website at:
http://tpp.bakermckenzie.com/
Thank you!