



VBF VIETNAM BUSINESS FORUM

Annual Consultative Group Meeting 2012

Vietnam Business Forum Consortium



Hanoi, December 3^d, 2012

Disclaimer

The Vietnam Business Forum (VBF) is a structured and ongoing policy dialogue between the Vietnamese Government and the local and the foreign business community for a favorable business environment that attracts private sector investment and stimulates sustainable economic growth in Vietnam.

This publication was created for the Annual Vietnam Business Forum on December 3, 2012.

The conclusions and judgments contained in this publication, as well as presentations made by businesses' representatives at the Forum, should not be attributed to, and do not necessarily represent the views of, the VBF Consortium Board, or the VBF Secretariat, or its co-chairing institutions including Vietnam's Ministry of Planning and Investment, the World Bank group, and IFC - a member of the World Bank group. These parties do not guarantee the accuracy of the data in this publication and the aforesaid presentations, and accept no responsibility for any consequences of their use.

This publication is distributed subject to the condition that it shall not, by way of trade or otherwise, be lent, re-sold, hired out, or otherwise circulated on a commercial basis.

BACKGROUND

The Vietnam Business Forum ("VBF") is a structured and ongoing policy dialogue between the Vietnamese Government and the business community to develop of a favorable business environment that attracts foreign investment and stimulates domestic sustainable economic growth.

In February 2012, International Finance Cooperation ("IFC"), a member of the World Bank Group, officially transferred the coordination function of the Forum's secretariat to a consortium of 14 foreign and local chambers of commerce and business associations ("VBF Consortium") so that the private sector can play a bigger role in the Forum's sustainable development. The VBF Consortium is managed by a VBF Management Board, which is led by two co-chairmen representing the foreign and local business community. For the 2012 cycle, the two co-chairmen are EuroCham's Immediate Past Chairman Mr. Alain Cany and VCCI's Chairman Mr. Vu Tien Loc.

To take over the IFC's VBF secretariat role, the VBF Consortium established a new secretariat to coordinate day-to-day activities of the Forum. The operation mechanism of the Forum, structure and activities of the working groups as well as their dialogues with related government counterparts still maintains the way they work.

The VBF Consortium has welcomed its 15th member - the Swiss Business Association in July 2012. 15 members of Vietnam Business Forum Consortium are:

1. American Chamber of Commerce in Vietnam (AmCham Vietnam)
2. European Chamber of Commerce in Vietnam (EuroCham Vietnam)
3. Vietnam Chamber of Commerce and Industry (VCCI)
4. Australian Chamber of Commerce in Vietnam (AusCham Vietnam)
5. British Business Group in Vietnam (BBGV)
6. Canadian Chamber of Commerce in Vietnam (CanCham Vietnam)
7. Hanoi Young Business Association (HYBA)
8. Hong Kong Business Association Vietnam (HKBAV)
9. Japanese Business Association in Vietnam (JBAV)
10. Japanese Business Association in HCMC (JBAH)
11. Korea Chamber of Business in Vietnam (KorCham Vietnam)
12. Vietnam Leather and Footwear Association (LEFASO)
13. Nordic Chamber of Commerce in Hochiminh City (NordCham Hochiminh City)
14. Singapore Business Group (SBG)
15. Swiss Business Association (SBA)



VIETNAM BUSINESS FORUM

PROGRESS & RENOVATION

Working progress

After the transition, the seven working groups in the fields of banking, capital markets, investment and trade, infrastructure, tourism, education and mining have been structurally strengthened to continue actively participating in the consultation process of the Government's important regulations and policies. Great progress has already been made on a number of fronts with government counterparts since the working mechanism was innovated. Besides, the formation of a new VBF working group, specializing in the automotive sector, is in progress.

New VBF Identity

As part of the Forum's renovation, the VBF Consortium decided to move forward with the development of a new VBF identity. The VBF Consortium's identity design was created for Vietnam Business Forum by Landor Associates, one of the world's leading strategic brand consulting and design firms.

The design (applied to this letterhead, and in Figure 1, below) exhibits the spirit of building a boundless platform for dialogue between the Vietnamese Government and the business community to create infinite possibilities and opportunities.



Figure 1 - VBF Logo

Upgraded VBF Website

The VBF website at the domain www.vbf.org.vn has been upgraded with an intention to facilitate heightened awareness of the Forum's role and activities, improve its on-line profile and support the organization's general objectives through high-impact communications and content development and potentially an online discussion forum for VBF members.



Figure 2 - VBF Homepage

VIETNAM BUSINESS FORUM

Upgraded and new features of the Website include:

- Mobile device friendly: the new VBF website has been updated and optimized for smart phones and tablets to provide a better and friendlier experience for its visitors and members on the move during business travels.
- The newly developed platform will provide the VBF and its members with a flexible and powerful system to grow and provide additional services in the future.
- New documentation center: files and documents are categorized according to VBF working groups. Each working group has a private directory to share documents between their respective members.
- Private forum: a private forum section for each working group will provide their respective members with a tool to communicate and share ideas, questions and information amongst each other. Automated notifications will warn members about new replies to their forum posts.
- Event: the new event system provides the ability to display all relevant information such as event information, date, time and location via a Google map. Online registration will also be enabled to provide an easy way for visitors to register for events.
- VBF member online registration: visitors can now apply to become VBF members directly via the website.



Hanoi, December 3, 2012

TABLE OF CONTENTS

AGENDA

Section I: REVIEW OF INVESTMENT CLIMATE

- 1.1. Perceptions by Foreign & Local Business Associations/Chambers

Section II: BANKING & CAPITAL MARKETS

2.1. Banking

- 2.1.1. Report of Banking Working Group
- 2.1.2. Proposal of the main talking points of the Banking working group for the meeting with the State Bank of Vietnam on November 29, 2012

2.2. Capital Markets

- 2.2.1. Report of Capital Markets Working Group
- 2.2.2. Summary of the meeting with the State Securities Commission on capital market issues on November 13, 2012

Section III: INVESTMENT & TRADE

- 3.1. Report of Investment & Trade Working Group

3.2. Investment Law

- 3.2.1. Comments and recommendations on Investment Law
- 3.2.2. Summary of the meeting with the Ministry of Planning & Investment on Investment Law on September 26, 2012

3.3. Enterprise Law

- 3.3.1. Comments and recommendations on Enterprise Law
- 3.3.2. Summary of the meeting with the Ministry of Planning & Investment on Enterprise Law on September 26, 2012

3.4. Labor

- 3.4.1. Comments and recommendations on labor issues
- 3.4.2. Summary of the meeting with Ministry of Labor, Invalids and Social Affairs and Vietnam General Confederation of Labor on labor issues on November 2, 2012

3.5. Tax

- 3.5.1. Report of Tax Sub – group
- 3.5.2. Summary of the meeting with Ministry of Finance and General Department of Taxation on tax issues on November 15, 2012

3.6. Land

- 3.6.1. Report of Land & Property Sub-group
- 3.6.2. Comments and recommendations on draft revised Land Law

Section IV: INFRASTRUCTURE

4.1. Report of Infrastructure Working Group

4.2. Telecom

- 4.2.1. Comments and Recommendations to Draft Decree on Information Technology Services
- 4.2.2. Summary of the meeting with Ministry of Information and Telecommunication on Draft Decree on Information Technology Services on August 17, 2012

4.3. Port & Shipping

- 4.3.1. Report of the Port & Shipping Sub-group

Section V: OTHER WORKING GROUP REPORT

5.1. Education

Report of the Education Working Group

5.2. Automotive

Report of the Automotive Working Group

5.3. Tourism

- 5.3.1. Report of the Tourism Working Group
- 5.3.2. Summary of the meeting with Vietnam National Administration for Tourism on tourism issues on September 18, 2012

5.4. Mining

Report of the Mining Working Group

Section VI: APPENDIX

- 6.1. Midterm VBF 2012 Report to Consultative Group Meeting – June 2012
- 6.2. Summary of Midterm VBF – May 2012
- 6.3. “Doing Business 2013” Scorecard of Vietnam



**RESTORING ECONOMIC DYNAMISM
The Urgent Reform Agenda**

Time: 7:30 - 13:30/Monday, December 3, 2012

Venue: Sheraton, 11 Xuan Dieu, Hanoi

TENTATIVE AGENDA

7:30 – 8:00	Registration
8:00 – 8:25	Introduction Opening Remarks <ul style="list-style-type: none">▪ H. E. Mr. Bui Quang Vinh, MPI Minister▪ Ms. Keiko Sato, WB Portfolio and Operations Manager▪ Mr. Simon Andrews, IFC Regional Manager▪ Mr. Alain Cany, VBF Consortium Co-chairman Remarks by Government Leader H.E. Mr. Vu Van Ninh, Deputy Prime Minister
Session 1:	Review of Investment Climate
8:25 – 9:10	<ul style="list-style-type: none">▪ Investment Climate Perception presented by Local & Foreign Associations<ol style="list-style-type: none">1. VCCI – <i>Mr. Vu Tien Loc, Chairman</i>2. EuroCham – <i>Mr. Preben Hjortlund, Chairman</i>3. AmCham – <i>Mr. Christopher Twomey, Chairman</i>4. KorCham – <i>Mr. Kim Jung In, Chairman</i>5. HYBA – <i>Mr. Dang Duc Dung, Vice Chairman</i>▪ Business Sentiment from 2012 PCI Survey – <i>Mr. Edmund Malesky, VCCI/USAID</i>▪ Investment Environment Report – <i>Mr. Susumu Sato, JETRO Hanoi</i>
9:10 – 9:20	<ul style="list-style-type: none">▪ Brief on Vietnam's economy in 2012 and development plan for 2013 – <i>Ministry of Planning and Investment</i>
Session 2:	Topics to be discussed with Government
9:20 – 10:05	1. Banking and Capital Markets

	<ul style="list-style-type: none"> - Banking Working Group <ul style="list-style-type: none"> + Resolving the NPL Problem – <i>Mr. Louis Taylor, Head of the Group/ Mr. Brett Krause, Representative/ Mr. Sumit Dutta, Representative</i> + Progress on Banking Regulatory Reform – <i>Mr. Tareq Muhmood, Representative</i> <p><i>Response from Government</i></p> <ul style="list-style-type: none"> - Capital Market Working Group – <i>Mr. Terence F. Mahony, Representative</i> <p><i>Response from Government</i></p>
10:05 – 10:20	Coffee Break
10:20 – 11:05	<p>2. Investment & Trade</p> <ul style="list-style-type: none"> - Investment & Trade Working Group – <i>Mr. Fred Burke & Mr. Tran Anh Duc, Co-heads of the Group</i> - Tax Sub-group – <i>Ms. Vu Thu Huong, Representative</i> - Land Sub-group – <i>Mr. David Lim, Head of the Sub-group</i> <p><i>Response from Government</i></p>
11:05 – 11:30	<p>3. Infrastructure</p> <ul style="list-style-type: none"> - Infrastructure/Port Working Group – <i>Mr. Tony Foster, Head of the Group</i> <p><i>Response from Government</i></p>
Session 3:	Reports from Other Working Groups
11:30 – 12:00	<ul style="list-style-type: none"> - Automotive Working Group – <i>Mr. Gaurav Gupta, Head of the Group</i> <p><i>Response from Government</i></p> <ul style="list-style-type: none"> - Tourism Working Group – <i>Mr. Ken Atkinson, Head of the Group</i> <p><i>Response from Government</i></p>
12:00 – 12:10	<p>Closing Remarks</p> <ul style="list-style-type: none"> ▪ H. E. Mr. Bui Quang Vinh, MPI Minister ▪ Mr. Vu Tien Loc, Co-chairman, VBF Consortium
12:10 – 13:30	Lunch

Section I

REVIEW OF INVESTMENT CLIMATE



EUROCHAM STATEMENT
Annual Vietnam Business Forum 2012
Hanoi, December 3, 2012

Presented by
Mr. Preben Hjørtlund
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 ongoing constructive dialogue with the private sector through the Vietnam Business Forum.

I. Overview

From the results of the 9th quarterly Business Climate Index survey, conducted in October 2012, can be seen that business confidence and outlook among European businesses in Vietnam continues to drop. The level has reached a record low with only 45 points. Members that participated in the survey expressed increasing concern about their current business situation and outlook as well as the impact of increased taxes, fines and official scrutiny. We understand that the Government in 2012 has had to deal with important issues, such as continued attention in order to prevent double digit inflation figures. Nevertheless, we encourage the Government to take note of the recommendations we have laid down in this position paper. They can serve as a guideline for what is important for companies (as well as consumers/citizens) and what obstacles they encounter. In particular, there are three main reoccurring themes of EuroCham's position paper: pricing, the role of the State Sector, and IPR issues.

The Government continues to display an ambivalent attitude towards free market pricing, and in various sectors (such as energy) price changes now require approval. This type of price control is clearly worrying for investors who expect to be able to set prices themselves within the normal boundaries created by cost and competition. This creates uncertainty for investors.

It is estimated that 40% of the economy is in the hands of the State Sector, which in itself is not a problem. However, in those areas, state companies generally receive favourable treatment – through loans, access to land, limited profit targets etc – and are inefficient. This is hampering growth of the economy. It is in our view important that the Government starts equitisation as soon as possible, to obtain a more competitive market in which the market mechanism can do its work.

Vietnam is currently competing internationally based on low labour cost. The Government has expressed the desire and need to move away from a labour intensive economy into technology and value added areas. But unless there is real, implemented protection of intellectual property rights, investors are unlikely to bring their technology to Vietnam, and Vietnam will remain in the low labour cost trap.

This is worrying for both European businesses and Vietnam because if these issues are not addressed, then foreign investors simply will not invest. The following sections will give a more detailed overview of the main issues in each industry sector and provide suggestions for how to address them.

II. World Trade Organisation (WTO) commitments & Licensing

In the past, Vietnam has greatly benefited from foreign direct investment (FDI), following its WTO accession and the resulting liberalisation in some service sectors. However, FDI is declining and with other countries in the region competing for foreign direct investment, it is in our view important that the Government continues the implementation of its WTO commitments.¹ Some issues, mainly related to investment licensing, are in our view important to address to attract more foreign direct investment. The implementation of a “one-stop shop” approval for investment licensing and a transparent procedure for obtaining a business license with the information being publicly available is in our opinion paramount. It would also help if the licensing requirements were simplified and the requirement to amend investment certificates for changes that are common in the course of business were abolished. Lately there have been many discussions between companies and Government authorities on tax incentives related to expansion. In our view tax incentives should uniformly apply to both the establishment of a new investment project as well as the expansion of an existing investment project. In this regard it is important that the list of areas where investments are entitled to incentives is clearly laid out in one document and that the tax incentives are clearly stated in investment certificates as a guarantee to investors. Finally, we believe it is necessary to allow licensing authorities to stipulate a longer period for capital contribution in those cases where construction of the project is reasonably expected to take longer than 3 years.

III. Banking and finance

Since last year, significant progress has been made on several aspects of Vietnam’s macro-economic management. The stability of the currency has been impressive and the reduction in inflation has been more rapid than anticipated, and has occurred while interest rates have fallen. The trade balance has improved markedly, and has allowed an appreciable increase in foreign currency reserves. The Government’s appropriate policy focus on stability has yielded these good results, although the corollary has been a slowdown in overall GDP growth. It has also understandably led to a very challenging micro-economic environment, with many companies and individuals facing difficulties in meeting their obligations and sustaining their income levels. At the same time it is important not to lose sight of efficiency and clarity and the way the market and the regulations should work so as to reduce the “cost of delivery” of banking products and services to businesses and consumers. With regard to consumer banking it is important that clear guiding principles are drafted and major impediments for the consumer banking and consumer finance industries are removed. Finally, there are some short term stability measures that should be implemented, such as how to apply more fairly and effectively some of the measures introduced last year under Resolution 11 and this year under Directive 1 to achieve price and currency stability. Many of the Government aims are closer to being fulfilled, which means that many of the temporary administrative restrictions can be removed, particularly as the banking sector is restructured. Significant progress has been made in identifying a way forward to an improved and strengthened Vietnamese banking system. Implementation of the government proposed structural reform is now key.

¹ See for more information World Investment Report 2012, United Nations Conference on Trade and development (UNCTAD).

IV. Taxation

We support the principles of the Government's Roadmap for Strategic Tax Reform for the period 2011-2020. One of the primary stated objectives under this Roadmap is a general reduction in the corporate income tax rate. We believe that a tax reduction would make Vietnam more competitive. The Government should take changes in neighbouring countries into consideration when deciding the reduction of the corporate income tax. We support the stated objective of a uniform basic tax rate for incomes of similar types of operation or activities to ensure equity in tax obligations between individuals and legal entities. The advertisement and promotion cap should be addressed by the Government through a roadmap towards the full removal of the advertisement and promotion caps in the corporate income tax law by 2014, or earlier, and commit to this. Furthermore, health care expenses, voluntary health insurance premiums and pension contributions for employees should in our opinion be deductible if these are provided in the labour contract and fiscal policy. To attract FDI it is important to revive corporate income tax incentives for investment expansion and to provide a clearer definition of investment expansion under the current regime. The issue of clarity and transparency also applies to taxation. It is important that tax laws and regulations, on all levels, are comprehensive, self-contained, clear, transparent, and not substantially supplemented by rulings which do not have the same authority.

V. Transfer pricing

Since the approval of the Taxation Roadmap for 2011-2020 last year there has been an increase in tax audits. Earlier this year, the Ministry of Finance approved the National Action Plan to administer a transfer pricing policy of foreign direct investment companies for 2012-2015. We believe that the tax authorities will increase their efforts to demonstrate that Vietnam has a transparent tax system that adheres to international norms. Transfer pricing is currently covered under general tax audit procedures, but may lack the necessary depth required to identify aggressive transfer pricing tax schemes. Therefore, separate and distinct audit procedures and penalties may be more effective. The process for transfer pricing audits is in our view not clear or not clear enough. It is necessary to improve the effectiveness of the process and procedures for transfer pricing audits and provide clear guidance regarding implementation procedures for the advance pricing agreement programme. This lack of clarity causes uncertainty; and time and money is spent where it could have been avoided. In our view implementation procedures should be carefully tested for practicality and viability before the law becomes effective. Furthermore, issues related to intra-group services and intercompany loans should be addressed, and safe harbour guidance should be provided for lower risk transactions and/or less complex entities and intercompany loans. Guidance should be given on considerations that taxpayers should undertake to determine the arm's length nature of receiving or providing intra-group services. We believe it is important to allow simplified documentation for small and medium-sized enterprises. Specific guidance on the treatment of intangibles for transfer pricing purposes should be provided in order to avoid discrepancies with corporate income tax treatment.

VI. Public-Private Partnerships

According to the Ministry of Planning and Investment, Vietnam needs about 150-160 billion USD worth of infrastructure investment in the next 10 years to achieve the level of growth targeted by the Government. The state budget can only cover about 60% of this needed investment. Decision 71/2010/QĐ-TTg on issuing the regulations on pilot implementation of Public-Private Partnership investment attracted the attention of the private sector but, as a comprehensive Public-Private Partnership regulation, it is generally recognised as falling short of investor expectations. Without going into detail on issues found within the drafting

of Decision 71, the gap between investor expectations and Decision 71 consists of the project pipeline, state contribution, viability gap funding and institutional structure. Decision 71 did not provide a specific, predetermined pipeline of attractive, bankable projects. As a consequence, the level of Government support, the state contribution, as well as what items constitute state contribution remains unclear. Although there was a general recognition that Public-Private Partnership should be managed by a single window, meaning a one-stop shop, Decision 71 did not clearly establish a single Public-Private Partnership unit with authority to implement projects on behalf of the Government. Instead, projects were to be implemented through the cooperation of an authorised state body, meaning the ministry owning the project, an inter-ministerial task force, the Ministry of Planning and Industry and the Ministry of Finance. With such a committee approach to identifying the project pipeline, each project would require significant political consensus building between the above ministries during implementation. This process takes time and should be shortened.

VII. Human Resources and training

Training and development of the work force remains an important issue that needs to be addressed. In June 2012 the new Labour Code was approved and next year the Employment Law is foreseen to be adopted. The Labour Code should in our opinion be amended to extend the standard duration of probation period from thirty to sixty working days for all kinds of jobs, regardless of training and qualification. There should also be flexibility for certain management and highly qualified jobs, provided it is freely agreed between employer and employee. We believe that the stipulations with regard to the maximum overtime do not fully meet the requirements of the industry and more flexibility should be allowed. Regarding Decree 46, the requirement of apprenticeship contracts should be abolished as there are too many negative implications. Clarifications are needed with regard to training programmes which can be submitted instead of an apprenticeship contract. The same applies to the requirement to submit vocational-based training certificates and diplomas, the process of legalisation, notarisation and certification; and the requirements for positions that fall under the eleven sectors of the WTO. It would also be a good idea if an official receipt or conditional work permits allowing a certain category of foreign employees to commence work immediately could be issued.

VIII. Intellectual Property Rights

In the middle of the last decade, the legal system was upgraded to meet the requirements of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), which is the IPR component of the WTO accession. Although better laws with improved enforcement mechanisms are now in place, these mechanisms need to be further strengthened, and public awareness of IPR issues needs to be raised. Infringement of IPR continues to result in loss of jobs and tax revenues for the Vietnamese government. At present, the protection and enforcement of IPR falls short of what is necessary to attract more value-added high-tech manufacturing to Vietnam. We believe it is important that the Government places further emphasis on developing adequate enforcement teams capable of fighting counterfeits and infringing goods in a timely, broad-scale and effective manner. Additionally, Vietnam should focus on building expertise in its judiciary and administrative agencies to handle the ever-increasing complexity of cases, such as patent infringement cases and unfair competition cases. In terms of general public and corporate awareness of IPR, we believe that it is important to implement further programs to raise awareness and explain to the Vietnamese population as well as foreign companies that it is in everybody's interest to respect IPR. Consequently, this would lead to a decrease in production, trade and purchase of products that infringe the intellectual property rights of Vietnamese and foreign intellectual property rights holders'. More importantly respect for IPR will help protect the Vietnamese population from often dangerous counterfeits. Furthermore,

various Vietnamese companies failed to secure their own intellectual property rights in Vietnam and abroad, which has led to Vietnamese products and brands being registered by foreign companies. This lack of protection of IPR has had a detrimental effect on Vietnamese businesses, its economy and population.

IX. Summary

In conclusion, EuroCham continues to stress the need for economic and financial reforms. If Vietnam wants to follow an internationally competitive and sustainable economic growth model, it needs to attract more and better-quality foreign investment. Therefore, the Vietnamese Government should focus its efforts in 2013 on solving the following three general issues: pricing, the role of the State Sector, and IPR issues. If this is not done, it creates uncertainty for investors and FDI will remain limited as compared to its potential.

Additionally, as demonstrated above, a number of more specific issues remain in the individual sectors. These should be dealt with between the relevant ministries and companies. Whilst action is required, we warn against implementing new laws, decrees and procedures without careful discussion, consideration and impact assessments. If regulation affecting industry does not take into account industry perspectives, the risk of the regulation not addressing the root of the problem or indeed creating non intended perverse effects is bigger. Consequently, new legislative proposals should take into account industry knowledge and be followed up by systematic and consistent implementation.

We make our various suggestions within this position paper on behalf 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; if there is a level playing field; if corruption and the resulting inefficiencies are banished; if Government bureaucracy and oversight are reasonable. We sincerely hope our suggestions will assist the Government reaching such a situation and EuroCham will continue to assist where possible in striving towards this goal.

Let me close by saying that at EuroCham we will continue to work hard to promote Vietnam as a trade and investment destination for both European and Vietnamese enterprises, and 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!



AMCHAM STATEMENT
Annual Vietnam Business Forum 2012
Hanoi, December 3, 2012

Presented by
Mr. Christopher Twomey
Chairman

I am pleased to speak about AmCham's perception of the business environment in Vietnam. AmCham members thank the Ministry of Planning and Investment, supported by the World Bank and the International Finance Corporation, as well as our partners in the new Vietnam Business Forum Consortium and Secretariat, for their role in bringing together business and government leaders to discuss how to improve business conditions in order to promote economic and social development in Vietnam.

Trade and Investment Environment

Trade and its related foreign investment brings jobs and income, tax revenues, exports and foreign exchange and technology transfer, and contributes to Vietnam's strategic drive for economic and social development to industrialize, modernize and globalize. It is especially important that FDI representatives be included in the Vietnam Business Forum since FDI factories represented 42% of Vietnam's gross industrial production and 59% of Vietnam's exports in 2011, which increased to 62.6% of Vietnam's exports in the first ten months of 2012. Positive action on the recommendations of current FDI representatives will create an environment that attracts additional FDI.

AmCham cooperation with and support of Vietnam's government and business has led to a substantial increase in bilateral trade over the last ten years: from only \$1.5 billion in 2001 when the BTA went into effect (December 2001); to \$9.7 billion in 2006 when Vietnam achieved WTO Accession and Permanent Normal Trade Relations with the U.S. (December 2006); to more than \$22 billion in 2011. Based on trade data for the first nine months of 2012, we expect that Vietnam-U.S. bilateral trade will be \$24.5 billion this year, and will reach nearly \$50 billion by 2020, if present trends continue. However, U.S. imports of apparel from Vietnam have been slowing in recent years, because of rapidly increasing labour costs, competition from neighboring countries, and weak demand in the U.S. because of the continuing financial and economic crisis since 2008.

Several U.S.-based MNCs, with FMCG (fast-moving consumer goods) companies are in the FDI lead in Vietnam, having invested from \$200 to \$500 million each in Vietnam, which is often their fastest growing market globally. This is reported regularly in the newspapers. For example, the Coca-Cola CEO recently visited Vietnam and announced another \$300 million investment in Vietnam. Many have heard that leading U.S. franchises have entered or may be planning to enter Vietnam's market, for example, KFC, Burger King, McDonald's, 7-Eleven, Starbucks, etc. So clearly the investment outlook for these companies, focused on Vietnam's demographics, growing per capita GDP, and consumption trends is promising.

Moreover, U.S. and other countries' FDI in higher value-added "modern manufacturing" for export to global markets continues to increase, led by the Intel investment of \$1 billion in an assembly and test facility in Saigon Hi-Tech Park, and also FDI by General Electric (GE), and Jabil from the U.S., Korea's Samsung Electronics Co., and Japan's Nidec, etc. Based on this FDI, Vietnam has increased high-tech exports amid a global slowdown that has damped demand for goods from other Asian nations. Shipments of mobile phones and other electronics from Vietnam surged 91 percent in the first 10 months of the year to \$16 billion. And Vietnam's shipments of electrical machinery to the U.S. climbed 58 percent in the first eight months of the year, while China's sales to the U.S. in the category rose 11 percent, Malaysia's grew 4 percent, Thailand's slid 5 percent and Indonesia's fell 16 percent in the period. So, again, the investment outlook in Vietnam for these "modern manufacturing" companies is promising.

However, we remain very concerned that Vietnam may not succeed in a smooth transition from U.S.-related FDI by "partner factories" that produce lower value-added consumer goods, to U.S. FDI in "modern manufacturing" that produce higher value-added products for export to global markets. The "partner factories" account for much of Vietnam's exports of apparel, footwear, and furniture, and employ millions of Vietnamese workers. Vietnam may lose this FDI and become caught in the "middle income trap" if unable to overcome many challenges.

Challenges facing Vietnam

In recent years, Vietnam has faced challenges regarding macroeconomic stability. Unacceptably high levels of inflation, tension in the foreign exchange market, high nominal interest rates, declining foreign exchange reserves, downgrades by credit rating institutions and negative comments from global financial institutions highlighted the need for policymakers to change course. In February 2011, the Prime Minister announced that the Government would focus on stability rather than growth. AmCham and many others strongly supported the Government's endeavor.

Today, our view is unchanged. Over the years, Vietnam's success in attracting foreign investment was largely been built on the expectation of economic and political stability.

We did not come today to point fingers and place blame for the causes of Vietnam's current economic woes. We do, however, endorse the call for urgent reforms and we expect the Government to take decisive action to create a more attractive business climate.

It is no secret that Vietnam's fragile financial system is one of the country's biggest economic problems. Much of today's VBF is focused on the troubling rate of non-performing loans in the local banking system. The Prime Minister recently said, "Resolving bad debt is an urgent task which needs to be done swiftly and resolutely, but with a reasonable roadmap and tight procedures." We agree that this issue needs to be dealt with without delay, because this problem doesn't just affect the banking system, it affects all of us.

Many AmCham members are finding it more difficult to conduct business here than in past years. Government efforts to "manage" business activity have caused numerous investors to rethink their business and expansion plans in Vietnam. Decisions on which items can be imported, how products can be priced, who can work in Vietnam, which programming can be broadcast on television, who can provide health care, and much more have contributed

to a perception that investors are not welcome in Vietnam and need to consider doing business someplace else.

Given the current state of the economy, Vietnam should make every effort to entice foreign investment and resources. Instead, actions such as ending the successful visa waiver pilot project and raising visa fees will deter free-spending foreign visitors that create jobs and wealth here.

We also note with concern the recent amendments to the Law on Lawyers, and particularly the proposal by a few local law firms to stop the Vietnamese lawyers who work for foreign firms from drafting commercial contracts and business charters governed by Vietnamese law. The people in this room recognize that international law firms here have been incredibly beneficial to Vietnam's development over the years. They have donated their time and expertise in advising the government on many laws, decrees, and other issues of importance, such as administrative reform, trade agreements, and more. Furthermore, the foreign lawyers have trained many of the talented local lawyers now working in Vietnam, a substantial benefit to the development of the country. Companies and individuals that engage law firms enjoy having choice in the marketplace, and, some local law firms compete quite well, offering good service and value. Restricting foreign participation in Vietnam's economy will not help create a stable, high-growth, modern economy that increases opportunities and creates wealth for the 90 million people living here.

Vietnam gains better access to capital sources, modern technology, and management experience through investment and trade activities with major economies.

There are, of course, many areas of the business climate that require improvements in order to elevate Vietnam's competitiveness. Given the brief time we have today, I will focus on a few subjects of particular concern to AmCham members.

Corruption and Good Governance

Corruption is a widespread phenomenon in Vietnam that undermines good governance, erodes the rule of law, hampers economic growth and efforts for poverty reduction, and distorts competitive conditions in business transactions. The Party and Government launched good governance and anti-corruption efforts in 2004, but too little progress has been made in the past eight years.

In a recent survey of AmCham members, over 80 percent of respondents listed corruption as one of their top two concerns in Vietnam. Existing control systems are inadequate to prevent corrupt officials from misappropriating funds intended for public use, especially in infrastructure projects. As the Prime Minister said himself, "If everything is made transparent, then there are no reasons why the economy cannot be healthy?" Instead of improvement, our members feel that corruption is getting worse in every factor of doing business here.

AmCham encourages the Government to take additional steps towards international best practices on accounting standards and tax collection. Active Government support and endorsement of anti-corruption measures at all levels of society, government and business is required. We look forward to specific actions to help tackle growing corruption concerns that remain one of the biggest challenges to progress in Vietnam.

Human Infrastructure

The Government must take further action to improve and upgrade the skills of its workforce. The challenge of modernizing the education system directly affects the options and prospects of future generations. AmCham is committed to assisting Vietnam in providing a better education for its children. The enhancement of skills, as well as improved access to training, is necessary to achieve higher productivity and higher incomes. The Asian Development Bank and other donors have pledged nearly \$500 million for education projects in Vietnam. We urge the Government to ensure these projects are effective at producing “work-ready” graduates, and not simply for funding failing and failed institutions.

Recently, VCCI and several key exporting industry associations in the lower value-added consumer product manufacturing-for-export sector (VITAS, LEFASO, HAWA, VASEP, VCOSA, etc.) recommended to the Government that the Private Sector Minimum Wage Adjustment be increased by 15 percent per year for the next three years. This recommendation was based on predictions that around 100,000 Vietnamese enterprises will cease operations in 2011-2012, and that taxes, lack of capital, and rapidly escalating labor costs, together with weak international markets, are driving more and more Vietnamese companies into hardship. We share with VCCI and the key export industry associations the hope that the Government will recognize that the private sector, like the state sector, cannot afford 25-35 percent annual wage increases.

AmCham recommends that the Government create a meaningful “Tripartite Partnership” and “National Wage Council” with the Government representatives (including not only MOLISA, but also MPI, MOIT, and MOF), the Employers’ Representatives (VCCI, leading Foreign Business Associations and the Vietnamese Industry Sector Associations), and the Employees’ Representatives (VGCL and other industry sector unions), and that these entities engage in joint cooperative research and fact-based discussions regarding industrial relations, wages, and other labor issues. An institutionalized process should yield better outcomes than the past four years of frustrating pro-forma consultations.

Our shared goal is to maintain harmonious, stable employer-employee relations for the protection of legitimate rights and interests of both sides while at the same time ensuring an environment that keeps Vietnam a competitive destination for manufacturing many of the goods that have driven the economy forward and raised the standard-of-living for millions of Vietnamese citizens.

Productive Decision Making

AmCham members are frustrated by persistent delays in decision-making on key projects and policies. Examples include delays in implementing regulations on important Laws and Decrees, delays in moving forward key infrastructure projects, delays in streamlining administrative procedures, and much more.

The political environment has produced a level of anxiety that discourages decision-making and therefore action. When causing economic loss to the state can land you in jail, *not* taking action is often seen as the safest course. We are not excusing wrongdoing and we respect the laws here. We do, however, need the Government to actively reinsert confidence into the system so that deals can get done, so that balance sheets can be cleaned up, and so that normal business activity can resume.

Conclusion

Countries need good economic policies, good legal and regulatory infrastructure, transparent and efficient government agencies, and good public infrastructure to continue

to attract investment, promote trade, and spur economic and social development. Vietnam, however, is struggling to live up to its full potential, hindered by lack of focus, lack of leadership commitment, and slow progress on a list of perennial barriers to investment.

Concern exists that Vietnam may fail to make the transition to a middle-income, “modern-manufacturing” and services-based economy. The country needs urgent reforms now to generate tangible progress on the issues continually raised at these forums, as well as other concerns that are detracting from Vietnam's image as an attractive destination for foreign investment.

We want businesses to invest and expand operations in Vietnam, not move them to China, Indonesia, Bangladesh or Myanmar. Vietnam must become more competitive to attract investors and foreign capital.

We want Vietnam to succeed and AmCham remains committed to working with our partners in the Government to improve the business and investment climate here. Our comments and recommendations should be viewed as opportunities to strengthen the business and economic climate in Vietnam.

Xin chân thành cảm ơn. Thank you very much.



KORCHAM STATEMENT
Annual Vietnam Business Forum 2012
Hanoi, December 3, 2012

Presented by
Mr. Kim Jung In
Chairman

I must show unbounded gratitude to the Ministry of Planning and Investment and all the authorities participated here today for giving this opportunity with privator sector through the Vietnam Business Forum. I plan to provide brief analysis on the current economic prospect of Vietnam in 2012 and suggest some improvements for sustainable expansion of investments by Korean enterprises. Please refer to these details and help us to achieve more constructive developments in Vietnam.

I. Economic Status of Vietnam in 2012

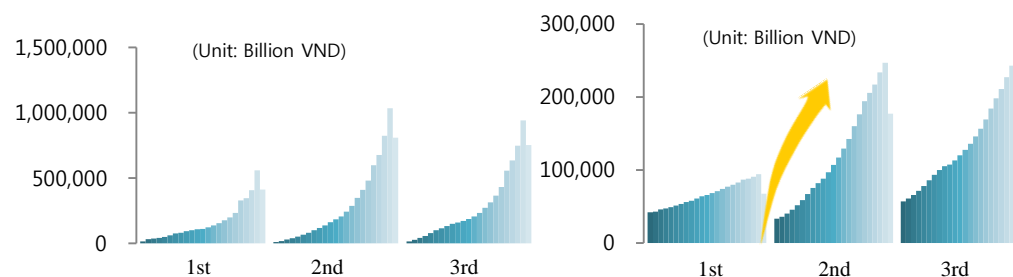
Annual GDP of Vietnam continuously increased ever since the introduction of Doi Moi policy in 1986. Nominal GDP of Vietnam is ranked as 58th in the world at 135.4 billion dollars, which is 1/10 of Korea (nominal GDP of 1.165 trillion dollars). Also, GDP per capita of Vietnam is 1,498 dollars (as of 2012).

The size of economy in Vietnam is expected to continue increasing in the future due to economic opening. The Vietnamese government is advocating active opening of economy. After joining as a member of WTO in 2007, Vietnam is expected to gradually expand its FTA with other nations including Korea and EU.

Figures below are graphs on annual GDP of each industry between 1990 and 2012. ←Figure 1→ represents nominal GDP and←Figure 2→ represents real GDP based on prices in 1994[GDP accumulated for 9 months for 2012]. For the past 20 years, both nominal GDP and real GDP steadily increased in Vietnam. When only nominal GDP is taken into consideration, one may miscomprehend that similar growth was shown by all industries. However, secondary and tertiary industries accomplished rapid growth in comparison to primary industry. Looking at ←Figure 2→, growth of primary industry is extremely poor compared with growth of secondary and tertiary industries.

←Figure 1→ Annual Nominal GDP of Each Industry

←Figure 2→ Annual Real GDP of Each Industry (as of 1994)

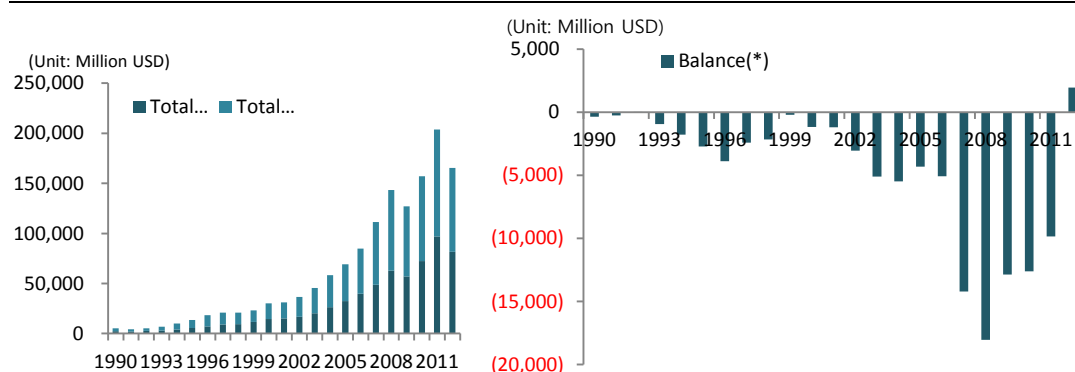


Source: General Statistics Office of Vietnam

High import growth and chronic current account deficit

As of 2008, exports take up 69% of total GDP (152% for total trade). Change in size of import and export is an important factor in examining the economy of Vietnam. Currently with increase in GDP, size of import and export is also continuously increasing. While import and export in 2011 were increased by about 900% compared to 10 years ago in 2001, chronic current account deficit is being continued because of higher import growth than export growth. Deficit set a record of 18 billion dollars during the financial crisis in 2008. Although the size of deficit has been relieving after the crisis, demand is recently decreasing with global economic recession. This results in reduction of exports by Vietnam, and deficit in current account is expected to continue for some time.

←Figure 3→Annual Import and Export Status of Vietnam ←Figure 4→ Annual Current Account of Vietnam



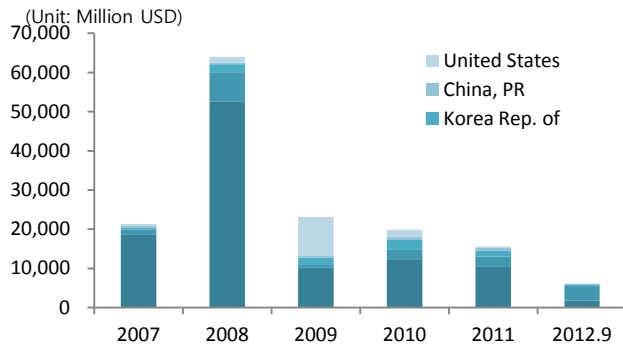
Source: General Statistics Office of Vietnam

In terms of export items, clothes, cell phones and auxiliary devices account for greatest part of export. Electronic appliances, petroleum and fiber account for greatest part of import. Quantity of export for rice and coffee, the representative export products of Vietnam, is respectively 2.87 billion dollars and 2.855 billion dollars (as of September 2012). The ratio of rice and coffee in overall export of Vietnam is not very large (about 3% each). Petroleum, steel and plastic materials used as raw materials in secondary industry account for a significant portion of import, showing a conversion the industrial structure from primary industry to a more higher value added industry.

Steep reduction in influence of foreign direct investment (FDI)

Reduction in foreign direct investment (FDI) has been clearly shown in the past 5 years. After investment of 64 billion dollars in 2008, the trend of reduction has continued. There was no recovery after the global financial crisis. Future prospect of Vietnam is not so bright due to recent global economic recession and decrease in investment on emerging markets.

(Figure 5→Size of Annual Foreign Direct Investment



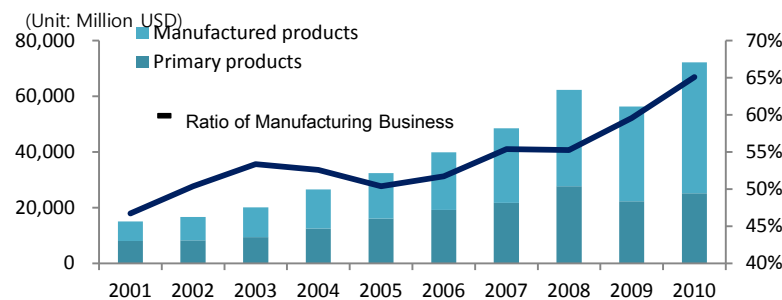
Source: General Statistics Office of Vietnam

II. Investment Points of Vietnam in 2012

Increasing added value of export products

As mentioned in the economic status of Vietnam, industrial structure is being quickly reorganized from primary industry to secondary industry. Cell phones, auxiliary devices, electronic appliances, computers and machineries were ranked on top of coffee and rice, traditional export products of Vietnam. This suggests that Vietnam is advancing into a high value added industry instead of simply exporting primary industry products. Future investments should consider secondary and tertiary industries as targets. Also, Ernst & Young selected Vietnam as top 3 nations with possibility of fastest growth in the Rapid-Growth Markets Forecast in Oct. 2012. One of the reasons for such prediction was reorganization into high value added industry, which is not seen in surrounding Southeast Asian countries.

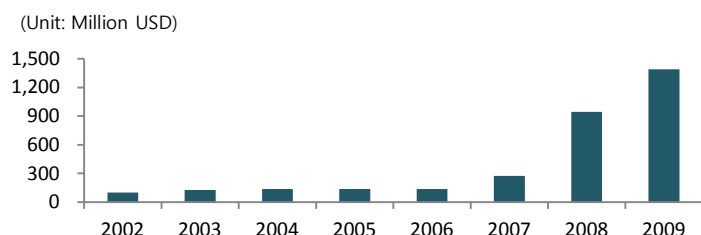
←Figure 6→Annual Export Status and Ratio of Manufacturing Business in Total Export



Source: General Statistics Office of Vietnam

Especially, increase in telecommunication products stands out. This was probably caused by construction of first Samsung Electronics manufacturing plant in 2009 and Nokia manufacturing plant in 2011. Telecommunication products are expected to continue increasing in the future with establishment of the second Samsung Electronics manufacturing plant in October 2012.

←Figure 7→Annual Exportation of Telecommunication Products (Excluding TV)



Source: Oxford Economics

Vietnam has population structure of typical developing countries. Working age population (15-64 years old) exceeded 70% of total population in 2011. For the past 10 years, population and ratio of working age population have continuously increased. Such trend is expected to continue for some time due to high fertility. This means that the size of domestic market is increasing in Vietnam, securing possibility of providing sufficient labor force upon investment in Vietnam.

GDP per capital of Vietnam in 2012 is 1,498 dollars, which is somewhat distanced from 3,000 dollars generally considered as the turning point of competitiveness in domestic market. However, Vietnam is consistently growing with expansion of domestic market. GDP per capita of Ho Chi Minh City as the largest economic region has already exceeded 3,000 dollars.

III. Economic Prospect

As shown in the analysis, recession in 2012 is a visible fact and seems to continue for a while. Future investment in Vietnam should be carried out as long-term plans according to the flow of reorganization in industrial structure. Competitiveness of investment in labor-intensive industries is not as desirable as in the past, and possibility of successful investment will be increased for secondary industry.

In particular, opportunities for real economy investment must be found in points such as resource development, high added value industry, use of broad internet infrastructure and high quality human resources, and expansion of domestic market. Especially, Vietnam is exporting secondary industry products focused on electronic products such as cell phones of Samsung from Korea, showing full-scale production of high value added products. New industrial opportunities must be created for the internet and Wi-Fi, which are relatively more advanced than other industries. Increasing youth population and education level should desirably increase the size of domestic market and provide supply of high quality human resources.

IV. Suggestions for Making a Better Investment Climate

1. Necessity for strong restructure of government enterprises

Vietnam is in the swamp of bad debt. Continued economic recession and crisis in Europe are influencing the debt. The State Bank of Vietnam announced in June 2012 that the ratio of bad debt in total loan increased by 4% to 10% from 6% at the end of last year. Bad debt was lower than 3% in 2008 but increased by more than 3 times in 3 years. Total size of bad debt in bank note was found to be 280 trillion Dong or 11% of total GDP. In particular, serious problem is the increase of the overdue debts by government enterprises. They possess debt

of about 145 trillion Dong (Vietnamese Dong), and about 20~30% of this debt cannot be paid back. Vietnam has high level of dependence on government-owned companies. Government enterprises are responsible for about 40% of total economic production. During last year, government enterprises were evaluated to take a role in reducing inflation down to 8%. Rate of increase in loans was 10.9% last year, much lower than average rate of 35% during 2006~2010. However, there are remaining concerns on continued financial crisis in Europe. Weakening of European economy has a direct influence on exportation of Vietnam, which can naturally deepen the problem of bad debt.

The number of public enterprises in Vietnam is currently decreasing, but the size is increasing. This is because capital and resource are concentrated on public enterprises, despite continued promotion of privatization by the Vietnamese government. According to the data by the Ministry of Finance in Vietnam, public enterprises in Vietnam are using about 70% of the land to execute over 70% of ODA funds and 60% of bank note loans. However, despite such concentration of resources in public enterprises, their efficiency seems to be much lower than foreign investment companies and private enterprises. In particular, economic restructuring through privatization of public enterprises is urgent because of recent economic recession in Vietnam, but reformation of public enterprises with greater size is not an easy task. As mentioned earlier, the core of reformation in public enterprises of Vietnam lies in introduction of competition system based on reduction in the number of enterprises and fair distribution of finances and resources. The Vietnamese government must get rid of monopolistic status from public enterprises to improve competitiveness of private enterprises in leading the future economy of Vietnam. In addition, accurate asset assessment must be allowed based on disclosure of transparency, efficiency and financial status that accords with the international standards in public enterprises of Vietnam. Such reform would make it more desirable to attract more foreign investors in Vietnam. In order for Vietnam to take an initiative role as a member of WTO and global economy, we propose a strong restructure of government enterprises on the government level.

2. Application of external audit system for general enterprises for transparency and reliability in accounting information of Vietnamese enterprises

Article 37 of Independent Accounting Audit Law no. 67/2011/QH12 dated on March 29, 2012 does not include general enterprises in independent accounting audit groups. When Korean financial institutes located in Vietnam wish to verify financial soundness of Vietnamese enterprise for transaction or assistance, reliability of financial data on the enterprise is quite low because external audit system is not applied to general enterprises except for government enterprises, financial firms, foreign investment corporations and listed enterprises. That is, soundness has not been verified by a third party.

Therefore, in order to reduce social cost of checking financial soundness of partner enterprises, external audit system by Vietnamese accounting firms must be applied to all Vietnamese enterprises with certain size for improved accounting transparency and reliability of Vietnamese enterprises.

3. Segmentation and reinforced description of HS tariff schedule issued by Tax Department/ Ministry of Finance in Vietnam

Currently in Vietnam, HS item classification is not segmented and described well, particularly in the field of chemical products. Since accurate HS classification on transaction items is difficult, Korean companies have great fear of additional collection afterwards. If description on each item is inaccurate, unintended error may occur in classification of items, and this causes an additional collection later on during tax

investigation.

In the Enforcement Circular no. 157/2011/TT-BTC of the Ministry of Finance on November 14, 2011, description on items in table of preferred import tax rate and table of export tax rate is based on the 2012 List of Import and Export Products issued as an attachment to the Enforcement Decree No. 156/2011/TT-BTC on November 14, 2011. It executes the protocol of fulfilling 2012 ASEAN Harmonized Tariff Nomenclature (AHTN) based on 2012 item classification (HS) standard system by World Customs Organization (WCO).

Also, classification of import and export products must follow the principles of item classification regulated in Chapter 2 List 1 Article 5 of the Enforcement Decree no. 49/2010/TT-BTC by the Ministry of Finance dated as April 12, 2010. In addition, each case must be based on the matters regulated in Article 6 of the Enforcement Decree no. 49/2010/TT-BTC dated as April 12, 2010.

We encourage the Vietnamese government to further segment the table of tax rate and reinforce descriptions by utilizing the above mentioned regulations.

4. Adoption of customer supply system¹ for improved cost competitiveness and export competitiveness of manufacturers

Since there is no clear distinction between customer supplied sales among manufacturers and general distribution, despite the fact that sales of materials by X (producer of finished products) to Y (producer of parts) is based on the purchase contract between X and Y on materials related to parts instead of sales for profit, current government officials of Vietnam are considering this in connection with general distribution sales. Customer supply system is a system necessary for clear management of materials between X and Y in operation of manufacturing companies. This system can secure price competitiveness in finished products produced by X after supply of materials to Y at a competitive price.

In the laws of Vietnam, 'distribution business' refers to business or franchise business that trades products in wholesale or retail. Also, according to Circular 04/2007/TT-BTM, foreign investment companies can also sell corporate products through wholesale, retail or agent in Vietnam. However, while distribution business can sell products manufactured by the company through wholesale, retail or agent as long as it has an investment certificate, distribution business can only sell products that are not manufactured by the company after acquiring an additional approval for distribution business. Thus in Vietnam, supply of production materials (customer supply) by finished product assembly company to parts manufacturer based on purchase delivery contract can only be done after acquiring an approval for distribution business. Therefore, a system must be prepared to issue approval on paid supply of materials by finished product manufacturer to parts manufacturer based on purchase delivery contract instead of government permit. In addition, the Vietnamese government must clearly distinguish between general distribution and inter-corporate transaction for production. Since it can help increase exportation by manufacturers based on security of cost competitiveness, vitalize manufacturing companies in the nation, and increase stability in employment, we encourage the Vietnamese government to pay closer attention to enforcement of the customer supply system.

¹Customer supply: Supply of materials required for manufacture by the finished product assembly company to the manufacturer of parts used in finished products

5. Discordance of Vietnamese construction laws and regulations

Current construction laws are divided by sections into separate laws (Land Law, Housing Law, Real estate business Law, Investment Law and etc.). Several laws must be applied simultaneously in conducting a project. However, it is extremely difficult for foreigners to understand such laws (higher and lower laws system). Furthermore, interpretation of laws differs depending on each authority, ability of lawyers, and public officer in charge. A systematic device must be prepared to prevent such discordance in interpretation of the laws and unify closely related laws.

To prevent differing interpretation of laws by authorities related to construction investment projects, and to give the foreign investors a consistent guideline, a systematic device is required. We encourage the Vietnamese government to integrate all closely related laws as a single law for easier access by investors.

6. Alleviation of labor certification conditions for foreign laborers

Due to employment conditions for foreign laborers in Vietnam (graduate of a 4-year university, professional license, 5 or more years of career experience and etc.), there are many laborers experiencing difficulties from failure to obtain labor certificate. In the labor market there are discrepancies in occupations and type of profession between Korea and Vietnam. There are laborers who contribute to their companies and local communities without high educational background and professional license.

Based on the WTO Commitment that Vietnam promised to fulfill after joining WTO in 2007, labor certification must follow general laws of Vietnam. Long-term residence approval can be obtained in the two cases below except for (i) service providers, Vietnamese corporations or branches that can acquire 90-day residence approval and (ii) service providers who can acquire residence approval for shorter period among 90 days and labor contract period. That is, among internal predecessors of a foreign company, administrators, managers and experts who worked at least one year for the same foreign company can obtain residence approval for 3 years upon initial issuance. Administrators and managers are defined as individuals who perform major management duties of a corporation established by the foreign company in Vietnam, receive general guidance and supervision by stakeholders, and have rights related to personnel management of employees. Experts refer to individuals working for the organization with high quality experience and knowledge in organization's service, research ledger, technology and management. Experts explicitly include those without professional license. The commitment also regulates that employees of a foreign company wishing to establish a branch in Vietnam, who are not administrators, managers nor experts but cannot be replaced by laborers in Vietnam, can obtain residence approval for shorter period among 3 years and labor contract period.

On the contrary, according to the Decree No. 34/2008/ND-CP related to labor certification, a foreigner who wishes to obtain labor certificate in Vietnam must satisfy Article 3 of the Decree. This article requires the foreigner to be an administrator, manager or expert. This seems to be similar to the definition by WTO, but data required for application of certificate include professional license, high class qualification certificate, and nationally certified career certificate showing at least 5 years of work in related managerial occupations. Also since long-term residence approval presumes labor certification, there is a problem of adding labor certification as an additional condition when compared with conditions on the WTO Commitment to acquire long-term residence approval.

Conditions for labor certification of Korean laborers should be alleviated based on abolition or relief of educational background limit with consideration on the intent of WTO

Commitment, difference in labor markets between the two nations, and diverse labor technologies and knowledge.

7. Preparation of measures against illegal strikes

There are many cases in which laborers go on strikes without taking appropriate legal procedures. In some cases, they perform illegal strikes without negotiation with the labor unions. Sometimes, strikers block other laborers from attending work or threaten those who do not participate in the strike. However, corporations are receiving serious damages from such cases because the authorities show extremely late response to reports on illegal strikes.

According to the current labor law of Vietnam, employers and laborers must organize a Labor Reconciliation Committee composed of representatives from each party before strike is determined to primarily try to settle any disputes. If such primary effort comes to failure, parties of the dispute have the right to settle the matter by making the chief of corresponding commissariat file arbitration through Labor Arbitration Committee. If secondary settlement of dispute by the commissariat fails, a party may request a court to settle the dispute or laborers can legally proceed with strike procedure. Labor law (Section IV, Chapter XIV) regulates that the parties of labor dispute must proceed or settle strike based on legal procedure. It is necessary to strictly punish laborers performing illegal strikes without legal procedures based on relevant laws.

The Vietnamese government must make police stations and the Ministry of Labour – Invalids and Social Affairs to promote active arbitration and settlement of illegal strikes, as well as preparing for a window through which corporations can report illegal strikes. Also, laborers must receive preventive education to abide with procedures of Labor Law.

8. Demand for notification of increase in minimum wage

The Vietnamese government is expected to promote stepwise increase in minimum wage in 2013. However, the fact that increase of the minimum wage is irrelevant to laborers already earning higher income than the existing minimum wage, discordance is being created by laborers demanding increase in their wages.

Since the plan proposed by the Vietnamese government to increase wage is only applicable to minimum wage, we strongly urge the Vietnamese government to actively promote and give a separate announcement that individual enterprises are not responsible for changes in wages rather than minimum wage for laborers who is earning more than a minimum wage.

9. Maintenance of existing incentive upon expansion of investment size

According to Article 32 of the current investment law in Vietnam, investors who perform investment in priority investment areas and regions as regulated in Article 27 and Article 28 of the same law can receive investment incentive based on the same law and other relevant laws. Since investment incentive is applied to new investment projects, size expansion, improvement in management ability and efficiency, technological innovation, quality improvement, and environmental protection projects, new investment projects can also receive existing incentive benefits. Nevertheless, there are cases in which existing investors end up establishing new companies because they cannot receive existing tax incentives in their new investments when expanding their size of investment. Existing investment incentives must be guaranteed as regulated in the investment law in case of new investment projects and expansions.

10. Acceleration of administrative procedures

Overall speed of administrative procedures in Vietnam is extremely slow, and work processing deadlines regulated in the current laws are not being promptly carried out. Investors are experiencing great difficulties. Quick processing of administrative procedures not only offers better services to foreign investors but also to citizens of Vietnam, as well as improving the degree of satisfaction on administrative services. The Vietnamese government should prepare a system to accelerate administrative procedures.



HYBA STATEMENT

Annual Vietnam Business Forum 2012

Hanoi December 3, 2012

*Prepared by
Hanoi Young Business Association*

The Hanoi Young Business Association ("HYBA") was an active member throughout the formulation and growth of the Vietnam Business Forum ("VBF"). We are honored to be one of the local business community representatives to present initiatives in relation to the economy, businesses and employment for the Government's and sponsors' consideration.

In this forum, we will express some of our concerns regarding the macro-economy, supporting industrial development, city planning and culture promotion.

1. Business confidence

Faced with an economic recession, many economic and monetary policies, plus other rescue packages have been announced. However, they have not been successful in helping businesses recover. One question to small- and medium-sized enterprises (SMEs) is what has actually caused these difficulties and how can they be overcome?

The most common answer is **confidence**. Businesses need a belief that can only be achieved by transparent and consistent policies. Transparent and consistent policies can navigate and provide stability to SMEs.

2. The need for strong policy breakthroughs to the supporting industry

This issue was mentioned in the Mid-term Forum this year and in previous Forums. However, a specific and effective regulation for the supporting industry has not been forthcoming.

After Decision 12/2011/QĐ-TTg and many other guiding documents such as Decision 1483, Circular 96, Decision 2992, Decision 4290 and Official Letter 9734, the Prime Minister recently issued Decision 1556/QĐ-TTg dated 17/10/2012 approving the scheme to support the development of medium and small enterprises engaged in the supporting industry. The viewpoint on the long-term development of the supporting industry in these documents, however, is still very limited. The ambition to develop a country with a population of around 100 million by 2020 into an industrialized country was not practical if there are just 2,000 enterprises engaged in the supporting industry.

The business community expects a truly practical policy, similar to the Enterprise Law when it came into force in 1999, rather than implementing policies which are not practical.

During the last two years, the number of enterprises which received incentives for businesses in the supporting industry since the Decision 12 and guiding policies has not

been summarized but only statistics of the number of bankrupted or suspended SMEs and the increasing amount of bad debts are available.

Many countries such as Japan, or smaller economies such as Taiwan, rely on SMEs, especially those in supporting industry. However, in Vietnam, the leading role is taken by state-owned enterprises ("SOEs"). SOEs have not been able to develop core products for local and export markets. The stimulation of the supporting industry has shown no progress in the past years. SOEs with monopoly positions in areas such as telecoms, air transport and oil/gas, if coming across any opportunities to develop supporting industry, often assign the jobs to in-house companies and institutes, or set up new state-owned subsidiaries to take them on, resulting in a patchy picture of supporting industry and failure to enlist the dynamics and innovation of the otherwise cash-strapped, underemployed private sector.

Policies to facilitate the supporting industry remain opaque as even the very definition of the supporting industry is unspecific. Consequently, it is difficult for policies to deliver incentives or support the right objects.

The most serious issues for SMEs engaged in supporting industry are:

The lack of new technology and manufacturing processes such as a quality management system, ISO9001 or ISO14001 means products do not meet market needs and enterprises that cannot compete will go bankrupt.

Businesses that capture some markets, have good manufacturing processes and have been doing businesses with many multinational corporations (MNCs) are eligible for the supporting package No. 2 of the Decision 1556. However, due to high interest rates, the high depreciation of machinery and poor infrastructure for the supporting industry, those businesses still cannot withstand their positions despite their high incomes.

We urge the Government to consider practical solutions to stimulate the supporting industry such as direct financial support, especially to enterprises which have invested in manufacturing and are burdened by commercial debts with high interest rates. They need help to expand plants and technology, heighten scientific knowledge, train highly skilled labor, and participate in international cooperation, technology transfers and support to promote products through exhibition and commercial conferences. Immediate practical action is needed since many solutions in Decision 1556 have not been implemented.

If Vietnam does not offer policies for the supporting industry, MNCs will come and go with no technology transfers, no value added and Vietnam will struggle to pursue its ambition to develop scientific and technological enterprises as emphasized in Resolution 6.

3. High inventory

Manufacturing enterprises with high inventory levels are in serious trouble. Many inventories have declined in price, doubling enterprises' difficulties. The declined asset due to its lowered price may ruin the function of securing debts of pledged asset. This means enterprises which used their assets to secure their debts but later cannot secure may be judged having fraudulent action. Besides, debts are increasing because of monthly interest payments for inventories, while firms have little income to service the debts.

To make matters worse, some businesses have no or low inventory levels. Though inventory is low but the debt collecting is high as credit to other businesses has not been claimed. Credits that are difficult to claim back are even more serious than high inventory because both high inventory and bad debts can happen.

The amount of bad debts among enterprises or those that owes to enterprises by the State are extremely difficult to summarize. Legal problems and procedures make loans grow bigger and there is hardly a way for settlement. The honest business enterprises fall into hard situation which is not protected since debt is hardly collected through the court.

4. Banks' bad debts - pressing issues

Commercial banks are established and supervised with criteria that are different from those of the international market. This has decreased the trust of depositors. The highly publicized real estate bubble is just the tip of the iceberg, but the deposit race between banks has caused asset bubble and freezes the system. Banks that have cross-shareholdings with "backyard" businesses in many important industries have weakened the risk management system.

SMEs' manufacturing is reliant on bank loans. Business owners, their clients, and their employees, therefore, are affected by weak banks. The business community recommends the State Bank of Vietnam categorizes, delineates and helps fix commercial banks one more time to prevent a domino effect and filter the capital sources for businesses' development. This can create jobs, technology advancement, and help recover local and foreign market shares.

5. Other issues

Big cities like Hanoi and Ho Chi Minh City have struggled to develop efficient transport networks, leading to noise and air pollution, along with excessive travel times. Businesses' indirect costs are rising due to swelling transportation fees, which do not make any real contribution to improving urban planning and traffic infrastructure upgrade. Meanwhile, recent steel overpasses and public parking lot projects fail to attract the private sector involvement and to demonstrate transparency, leaving solutions to urban traffic a big unanswered question.

We appreciate the State and Party's science and technology policy changes. The Ministry of Science and Technology and immediate subordinate bodies have shown interest in the application of technology and PPP in this sector. However, the provider for human capital, the Ministry of Education and Training, needs to renovate policies further to increase the numbers of technicians for the new development strategies.



USAID
FROM THE AMERICAN PEOPLE

VNCI
VIETNAM
COMPETITIVENESS
INITIATIVE

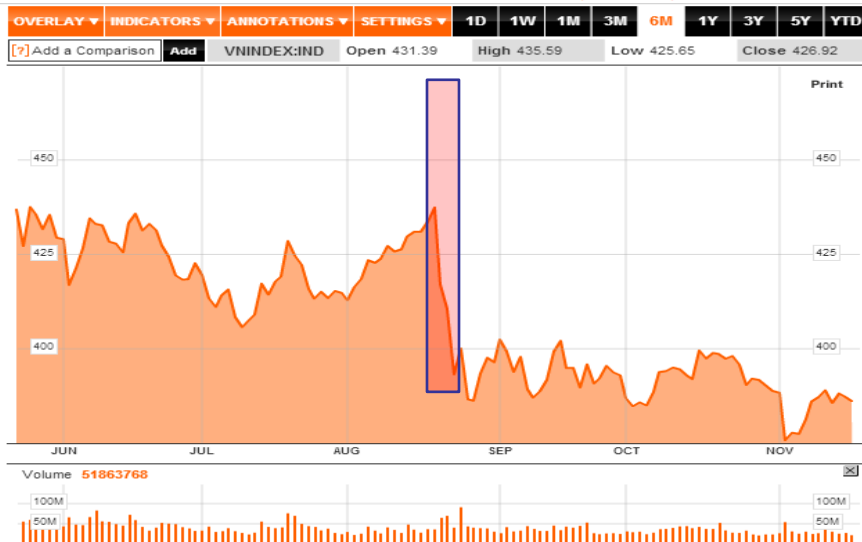


Policy Risk and Investor Behavior: A Natural Experiment from the Summer of 2012 in Vietnam

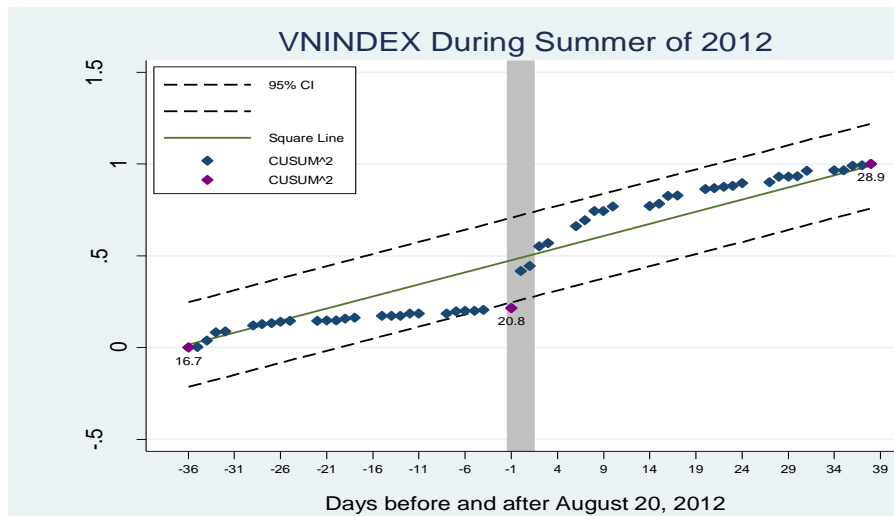
Prof. Edmund Malesky

Ho Chi Minh Stock Market 2012 (Bloomberg)

Interactive Chart for Vietnam Ho Chi Minh Stock Index / VN-Index (VNINDEX)

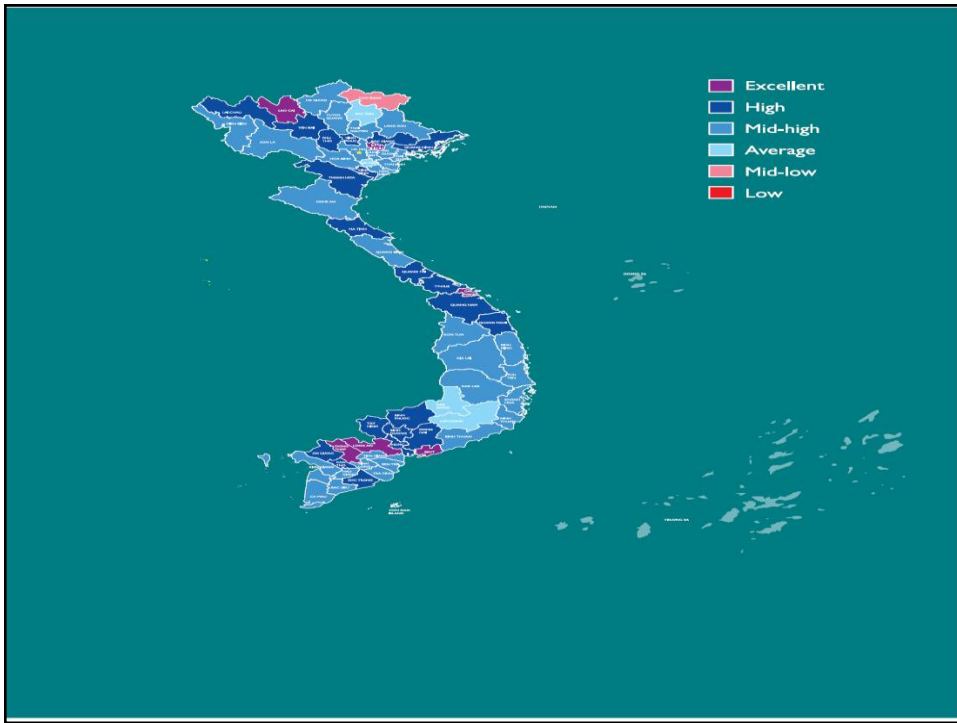


Change-Point Analysis (July and August 2012)



Pci THE VIETNAM PROVINCIAL COMPETITIVENESS INDEX





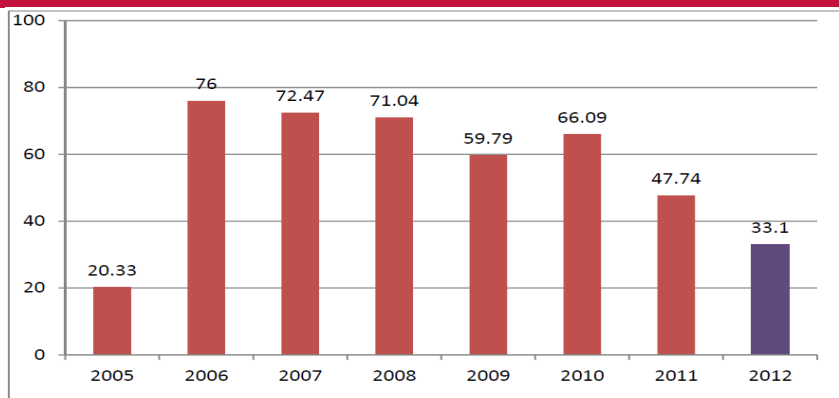
The PCI

- Annual business survey used to gauge Vietnamese business environment.
- 2012 data contains 8177 private, domestic operations and 1,540 foreign firms (87% are 100 percent foreign owned).
- Sample is stratified by age, legal form, and broad industrial sector.
 - Domestic sample covers all 63 provinces and is provincially representative (i.e. small provinces are over-sampled)
 - Foreign sample is only completed in 13 provinces with large investor populations (nationally representative survey).

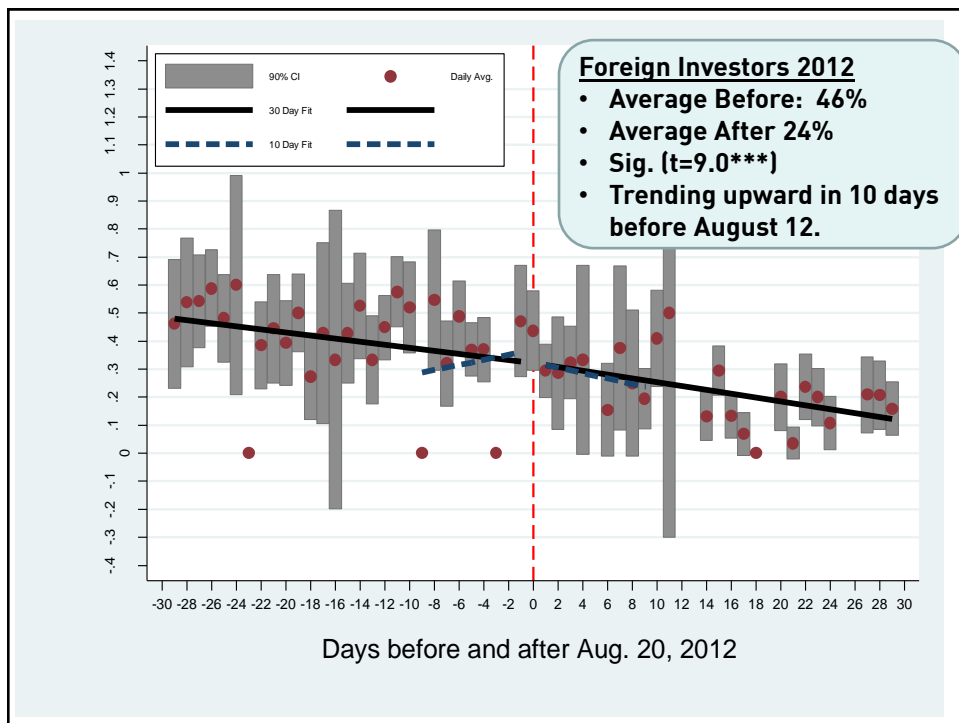
Key Components of Survey Methodology

- Mail-out survey in order to protect confidentiality of investors
- Response rate is about 30%, varying slightly across provinces.
- Release Dates: Domestic: June 17; Foreign: July 14th
 - Released in batches with randomly sampled locations.
 - War room of college students randomly-assigned calls firms to remind them to complete survey and offer assistance on technical questions.
- **2012 INCLUDED A MODULE ON POLITICAL RISK!!**

A Shock to Investor Confidence: The PCI Business Thermometer



Graphics are drawn from the annual question (A10/A13): "What are your plans for this business over the next two years?" Each bar reports the share of respondents who answered that they intended to expand their operations in a given year.



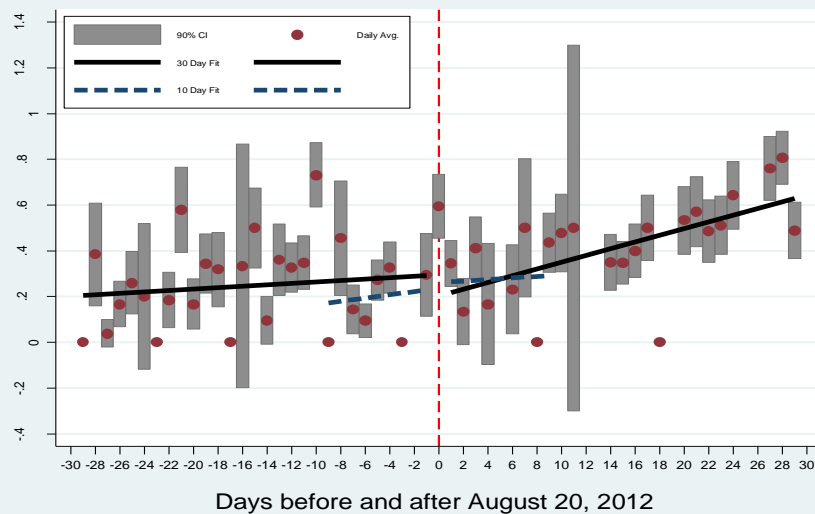
What Are the Main Types of Risk You Face? (Check All That Apply)

- Macroeconomic risk (changes in price stability and growth that affect business prospects).
- Expropriation risk (the loss of business premises, property, or equipment to host government).
- Contract risk (breach of contract by business partners, such as suppliers or customers).
- Regulatory risk (changes in regulatory or tax policies that reduce profitability).
- Labor risk (strikes, outbreaks of illness, or other events that lead to work stoppage).
- Corruption (demands for informal charges, kickbacks, or other illicit decisions that reduce profitability).
- Political instability (changes in regime or outbreaks of violence that impact operations).

Change in Type of Risk Faced

<u>Risk Type</u>	<u>Before</u>	<u>After</u>	<u>Difference</u>	<u>SE</u>	<u>T-Stat</u>	<u>P-Value</u>
A. Macroeconomic	27.80%	47.70%	19.90%	2.45%	8.12	0.000
B. Expropriation	7.89%	7.26%	-0.64%	1.36%	-0.47	0.640
C. Contract	19.60%	24.37%	4.77%	2.13%	2.24	0.026
D. Regulatory Changes	17.40%	24.36%	6.96%	2.09%	3.33	0.001
E. Labor Relations	14.30%	16.95%	2.65%	1.87%	1.42	0.157
F. Corruption	14.20%	7.16%	-7.04%	1.55%	-4.54	0.000
G. Political Instability	2.92%	2.10%	-0.82%	0.80%	-1.02	0.306

Macroeconomic risk



Embedded Survey Experiment 1

Form A

5. We would like to understand how investors currently respond to policy uncertainties in Vietnam?
Suppose the government suddenly increased domestic input requirements in your industry, which would limit your ability to purchase intermediate goods from overseas and will reduce your annual revenue by about 10%.

Form B

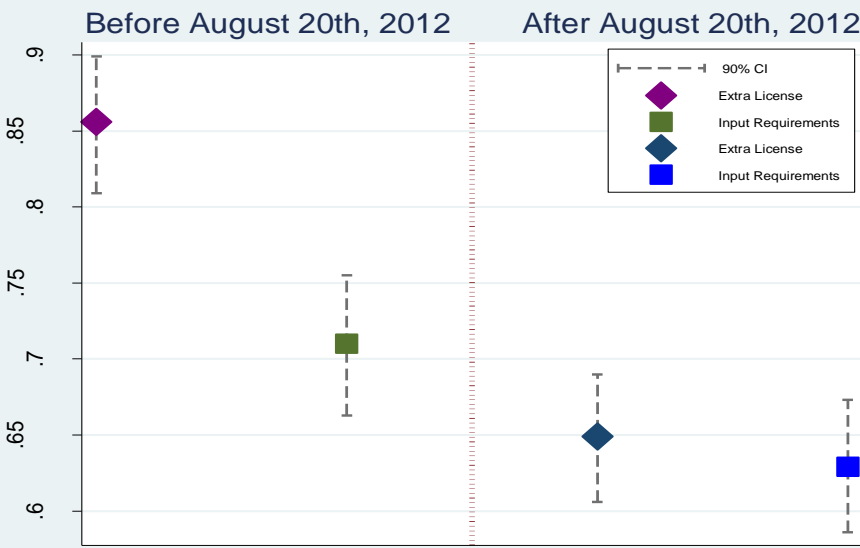
5. We would like to understand how investors currently respond to policy uncertainties in Vietnam?
Suppose the government suddenly instituted a new license requirement in your industry. The license would only cost a marginal fee, but it must be renewed annually, requiring a visit to a provincial official and a thirty day wait to be issued.

How would this change affect your business?

- ☐ Would have strong negative effect?
- ☐ Would have a negative effect?
- ☐ Would have no effect?
- ☐ Would have a positive effect?
- ☐ Would have a strong positive effect?

Relative Risk

(Input Requirements v. New Regulation)



Embedded List Experiment 3

9. If your firm competed for business with a government official, please look at the following list of common activities firms engage in to make their goods or services more attractive to government clients.

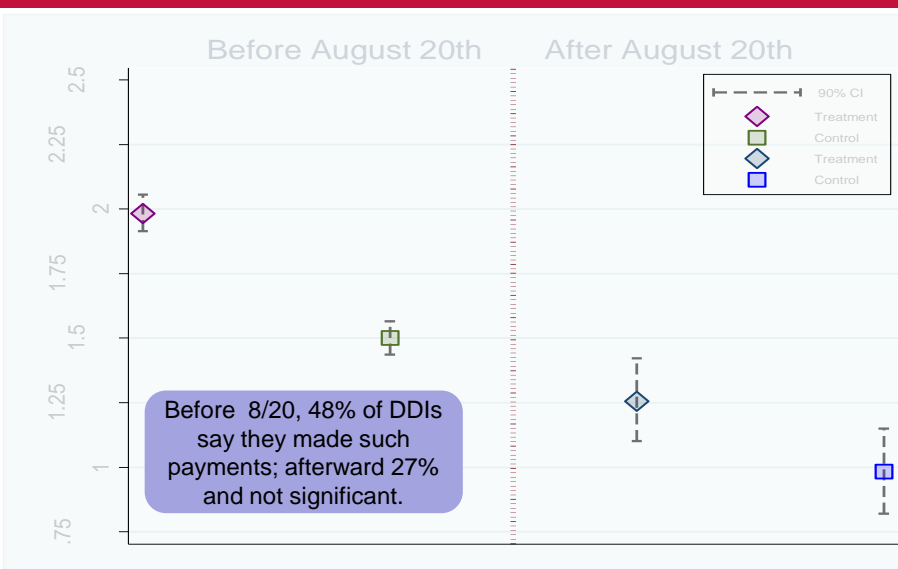
- Dropped off pamphlets or fliers at government offices advertising your goods or services.
- Opened your business or a branch of your business near government offices in order to be nearer to the decision-makers.
- Appealed to a friend or relative in the office to steer government business toward your enterprise.
- Paid a "commission" to a government official to ensure that your business won the contract, he would receive a small percentage
- Attended government functions or meetings in order to meet officials and make them aware of your goods or services

Form B Only

Please do not answer about any one of these activities specifically, we are only interested in the TOTAL NUMBER you may have utilized to win government business. How many of the listed above activities did you engage in when competing for government contracts?

Number of activities ☐ 0 ☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5

Results of List Experiment 3 ("Commission" on Government Procurement)



One Explanation: Item Non-Response Jumps Dramatically after August 20th

Item Non-Response in Survey Experiments (Before and After August 20th)

<u>Experimental Question</u>	<u>Form</u>	<u>Before</u>	<u>After</u>
Bribes for Relationships (J7)	Control	31.96%	58.03%
	Treatment	37.81%	59.21%
Bribes for Procurement (D14)	Control	2.11%	3.41%
	Treatment	4.17%	10.07%
Bribes at Registration (C6, FDI)	Control	21.64%	18.64%
	Treatment	20.05%	11.40%
Bribes at Registration (C6, Dom.)	Control	18.43%	25.45%
	Treatment	17.10%	26.06%

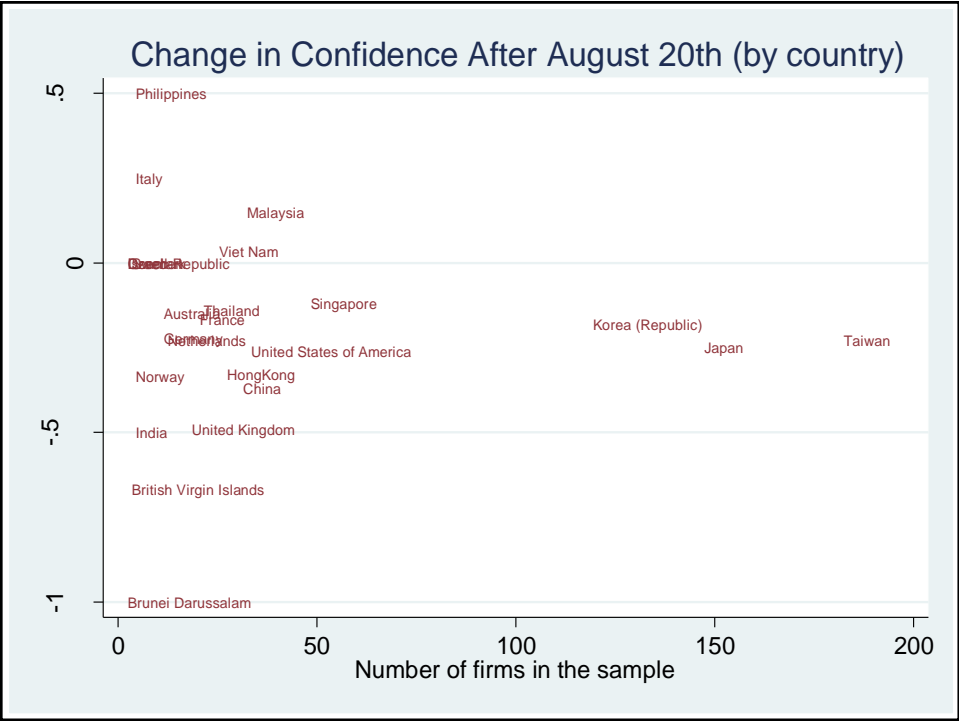


USAID
FROM THE AMERICAN PEOPLE

VNCI
VIETNAM
COMPETITIVENESS
INITIATIVE



WHAT TYPES OF INVESTORS WERE AFFECTED?



Size Matters (% Willing to Expand)			
Size	Before	After	Differece
Small (<10 Employees)	38.16%	33.80%	-4.36%
Medum (10-500)	44.92%	26.02%	-18.90%
Large (>50 Employees)	48.15%	27.16%	-20.99%

Key Take-Aways for Vietnam

- The crisis of the summer of 2012 sent a strong signal to investors that Vietnam is struggling.
- Within 20 days, investor confidence was halved.
- Most investors believe the crisis is macroeconomic, and are not worried about expropriation or political instability.
- Medium to large firms and manufacturing operations were hit hardest.
- Firms relying on internal mitigation strategies
- In addition to general fear, the crisis affected firms' willingness to answer sensitive survey questions.



USAID
FROM THE AMERICAN PEOPLE

VNCI
VIETNAM
COMPETITIVENESS
INITIATIVE



THANK YOU!

The author is the lead author of the PCI, this research note represents entirely his own views and not the views of the project, US-AID or VCCI.

INVESTMENT ENVIRONMENT REPORT BY JAPANESE INVESTORS

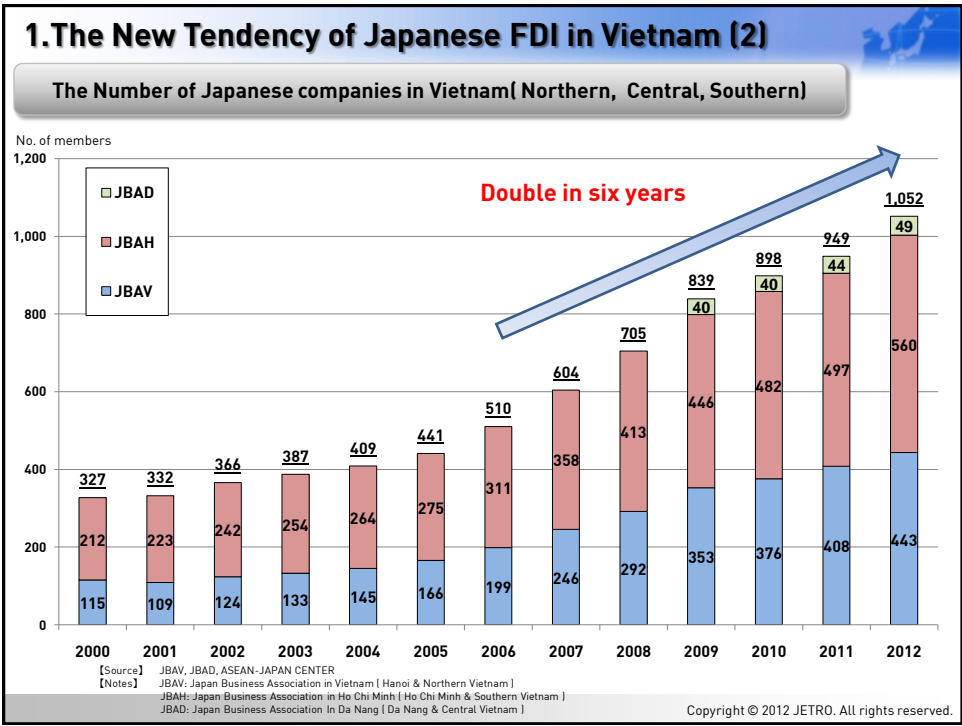
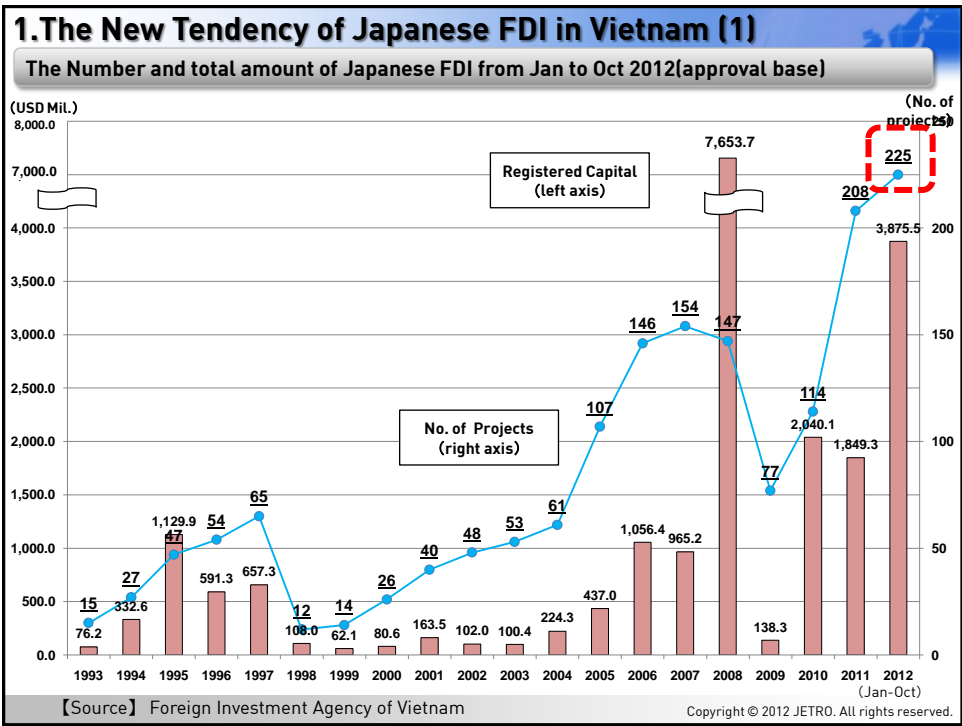
**JETRO Hanoi
Vietnam Business Forum
Hanoi, 3 Dec 2012**

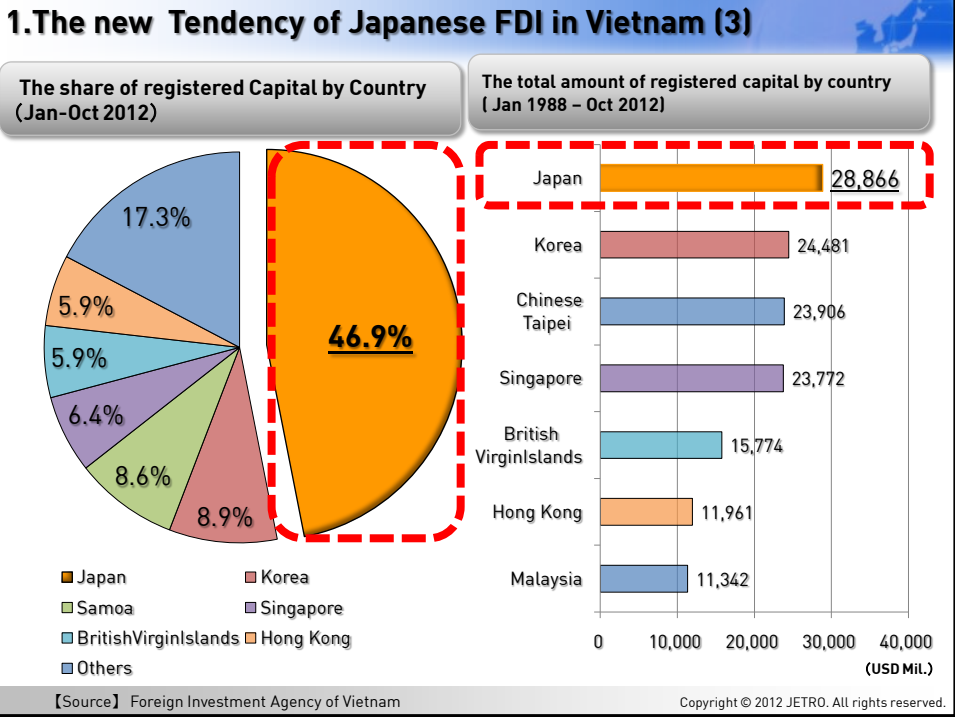
Copyright © 2012 JETRO. All rights reserved.

CONTENTS

- 1. The New Tendency of Japanese Foreign Direct Investment (FDI) in Vietnam**
- 2. The Result of JETRO Annual Surveys (Original)**
 - 2-1 Investment-related Cost Survey**
 - 2-2 Japanese-Affiliated Firms Survey in Asia -Facing Difficulties-**
- 3. JETRO's Comments**

Copyright © 2012 JETRO. All rights reserved.





1.The New Tendency of Japanese FDI into Vietnam (4)

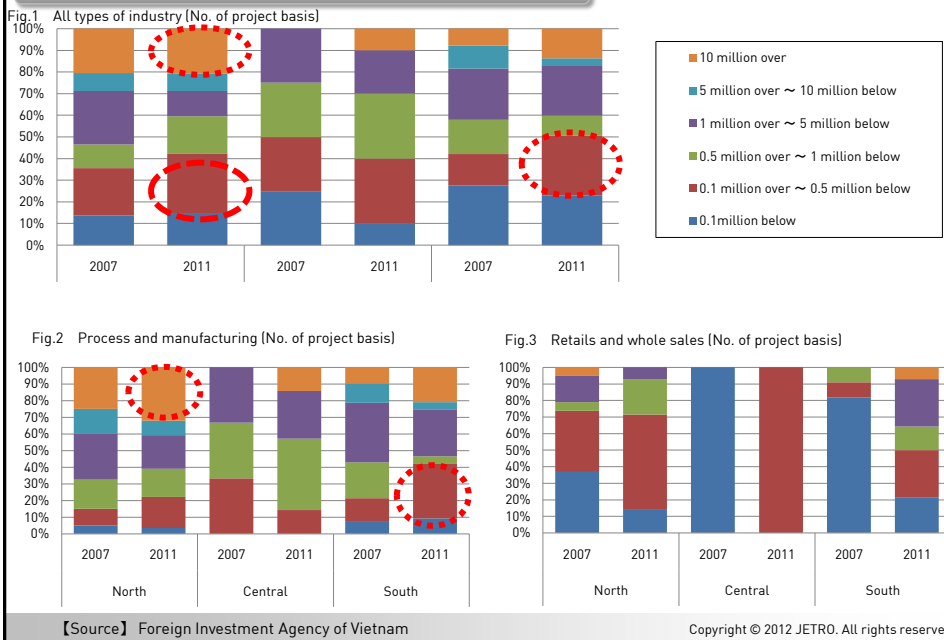
Top 10 projects (Jan – Oct, 2012)
(Approval base)

No	License issued Date	Project name	Investment capital (USD)	Activity	Industry	Province/ City
1	01/03/2012	Becamex Tokyu Co.,Ltd (Tokyu Binh Duong Urban area project)	1,200,000,000	Real estate trading including trade complex, accommodation and entertainment service	Real estate trading	Binh Duong
2	01/02/2012	Bridgestone VN Tire Production Co.,Ltd	574,800,000	Produce and export 100% rubber tyres	Processing and manufacturing industry	Hai Phong
3	05/04/2012	Global Production LIXIL Viet Nam Co.,Ltd	441,000,000	Produce window frames, windows, doors, aluminum accompanied components	Processing and manufacturing industry	Dong Nai
4	05/04/2012	Nipro Pharma Vietnam Industry Co.,Ltd	250,000,000	Produce high quality medicine to export all over the world	Processing and manufacturing industry	Hai Phong
5	17/02/2012	Vietnam Kyoei Steel Co.,Ltd	184,400,000	Construct high-quality steel stamping factory	Processing and manufacturing industry	Ninh Binh
6	14/02/2012	Oshima Shipbuilding Vietnam Co.,Ltd (Shipbuilding factory)	180,000,000	Build and export vessels and ship of all kinds	Transport, warehouse	Khanh Hoa
7	25/05/2012	AEON Viet Nam Co.,Ltd (Binh Duong Branch)	95,000,000	Build supermarket, shopping malls, carry out import - export rights	Wholesales, retails and repairs	Binh Duong
8	04/05/2012	Tamron Optical (Viet Nam)	67,000,000	Produce lens	Processing and manufacturing industry	Ha Noi
9	30/07/2012	Takazono Viet Nam Co.,Ltd	62,760,000	Produce, assembly, process medical facilities, machines	Processing and manufacturing industry	Long An
10	02/07/2012	Manuchar Phu My Co.,Ltd	55,000,000	Produce mold and products made from plastic used for industry and civil	Processing and manufacturing industry	Ba Ria – Vung Tau

【Source】 Foreign Investment Agency of Vietnam Copyright © 2012 JETRO. All rights reserved.

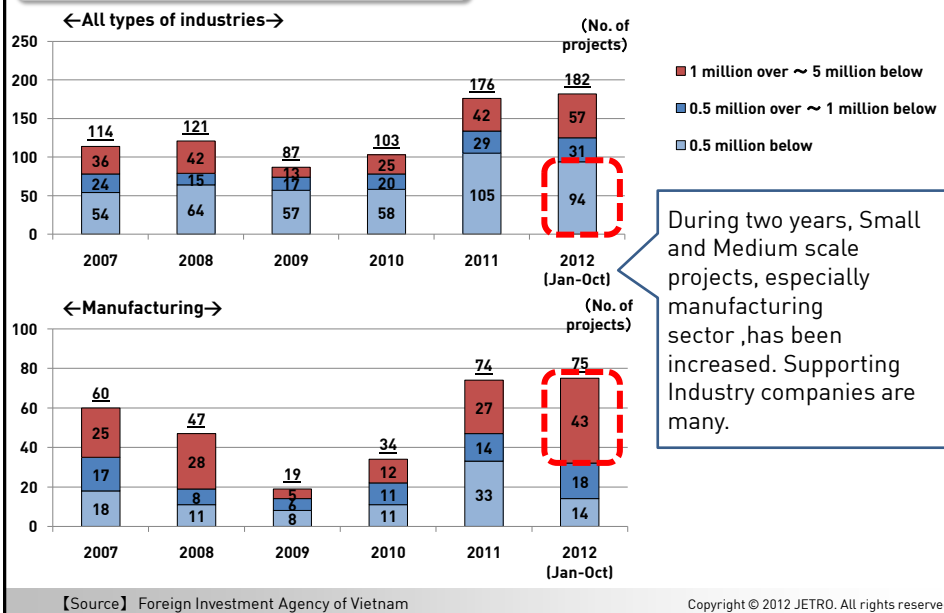
1. The new tendency of Japanese FDI in Vietnam (5)

By Regional and By Size of Capital (Approval base)



1. The New Tendency of Japanese FDI in Vietnam (6)

The Scale of FDI Amount (Approval base)



2.The Result of JETRO ANNUAL SURVEYS(Original)

1. Investment-Related Cost Survey:

- The 22nd survey
- Conducted from December 2011 to January 2012
- 29 major cities and regions in Asia
- Major costs: Wage, Land Price (Industrial estate rent, Office rent, Housing rent for foreigners), Telecommunication, Electricity, Water, Gas, Transportation, Taxation

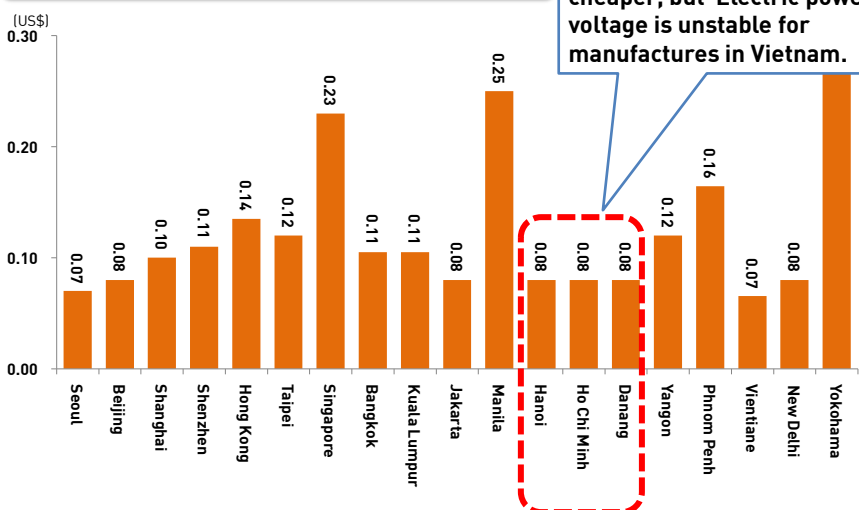
2.Japanese-Affiliated Firms Survey in Asia:

- The 24th survey, Oct, 2011
- Conducted from 1st August to 15th September 2011
- 3,904 responses from Japanese-Affiliated companies in 17 countries/regions in Asia and Oceania
- Major industries: Motor vehicles and motorcycles, Petroleum and Plastic products, General Machinery, Iron & Steel, Banks, Sales Companies, Communication, etc.

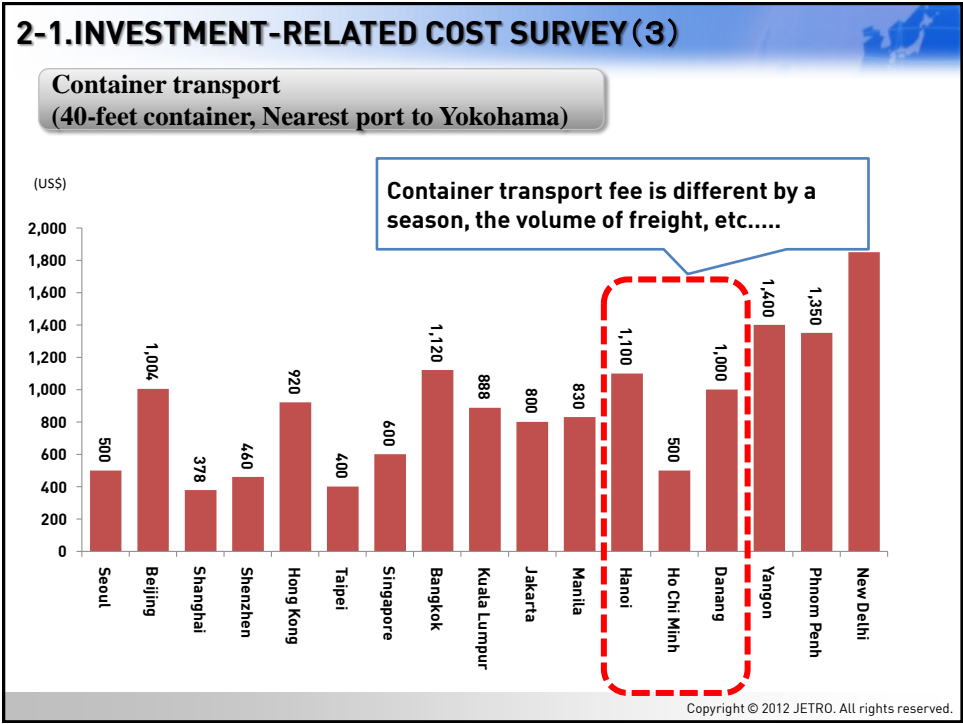
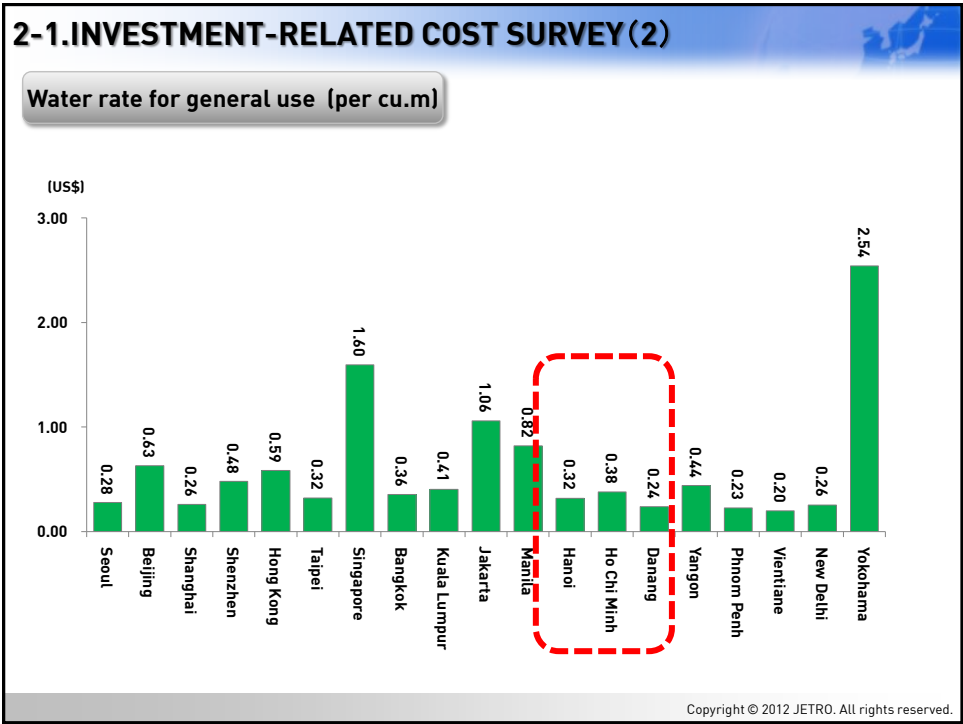
Copyright © 2012 JETRO. All rights reserved.

2-1.INVESTMENT-RELATED COST SURVEY(1)

Electricity rate for general use (per kWh)

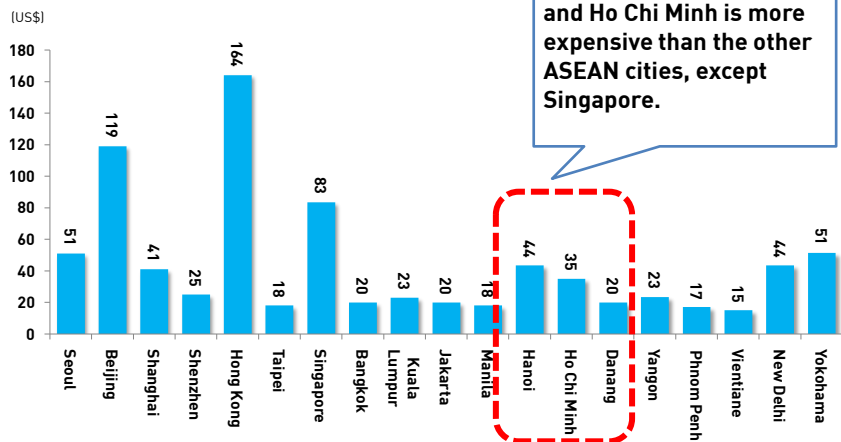


Copyright © 2012 JETRO. All rights reserved.



2-1.INVESTMENT-RELATED COST SURVEY (4)

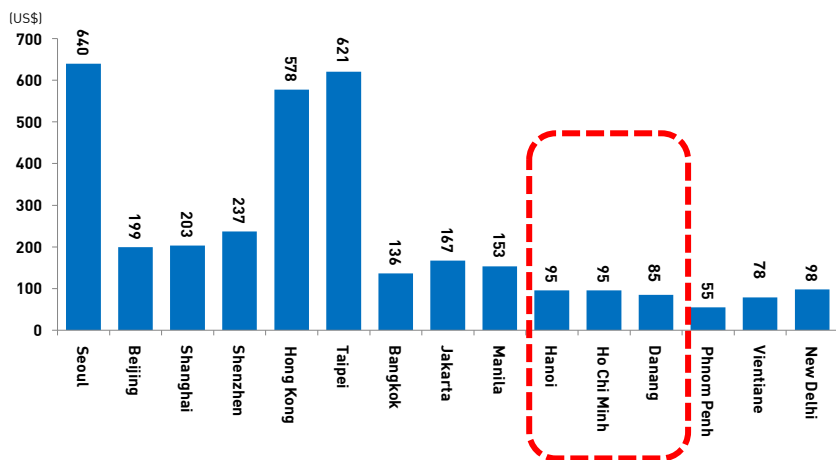
Office rent (monthly, per sq.m)



Copyright © 2012 JETRO. All rights reserved.

2-1.INVESTMENT-RELATED COST SURVEY (5)

Legal minimum wage (monthly)



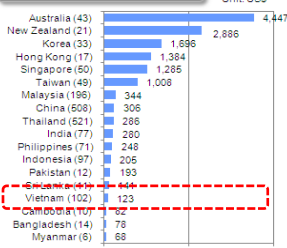
Copyright © 2012 JETRO. All rights reserved.

2-2. Japanese-Affiliated Firms Survey in Asia -Facing Difficulties- (1)

Monthly wage(Base salary)

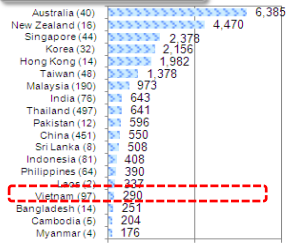
Workers, Manufacturing

Unit: US\$



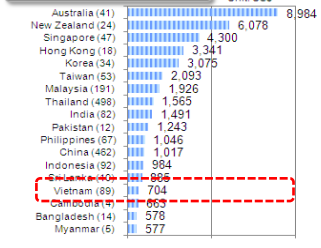
Engineers, Manufacturing

Unit: US\$



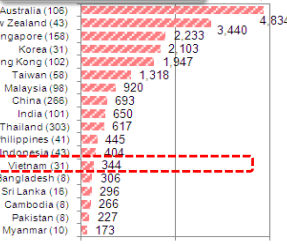
Managers, Manufacturing

Unit: US\$



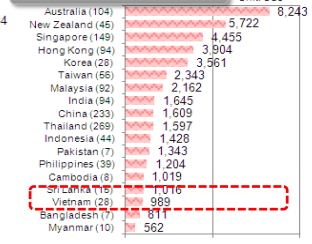
Staff, Non-Manufacturing

Unit: US\$



Managers, Non-Manufacturing

Unit: US\$

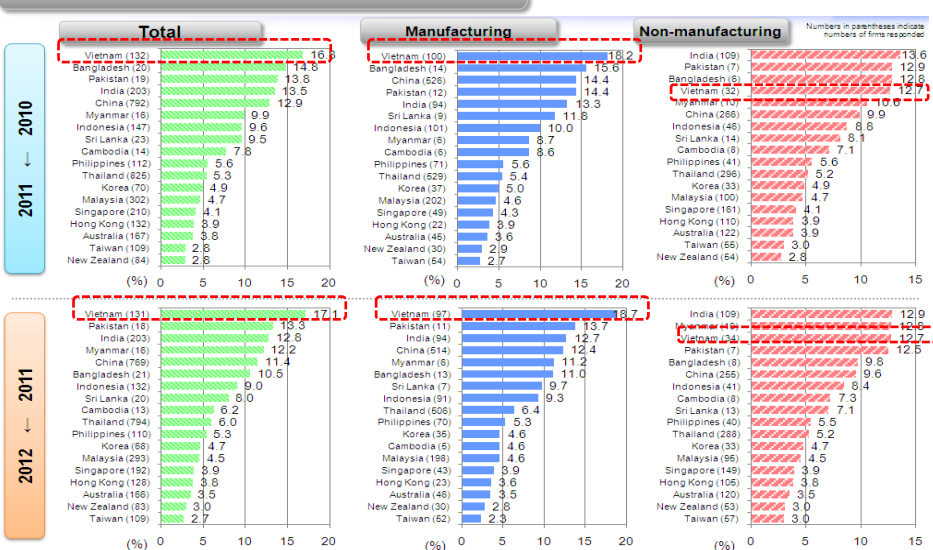


But.....,
Japanese Labor intensive
companies are looking for
the other potential
countries like
Cambodia, Bangladesh,
Myanmar.

Copyright © 2012 JETRO. All rights reserved.

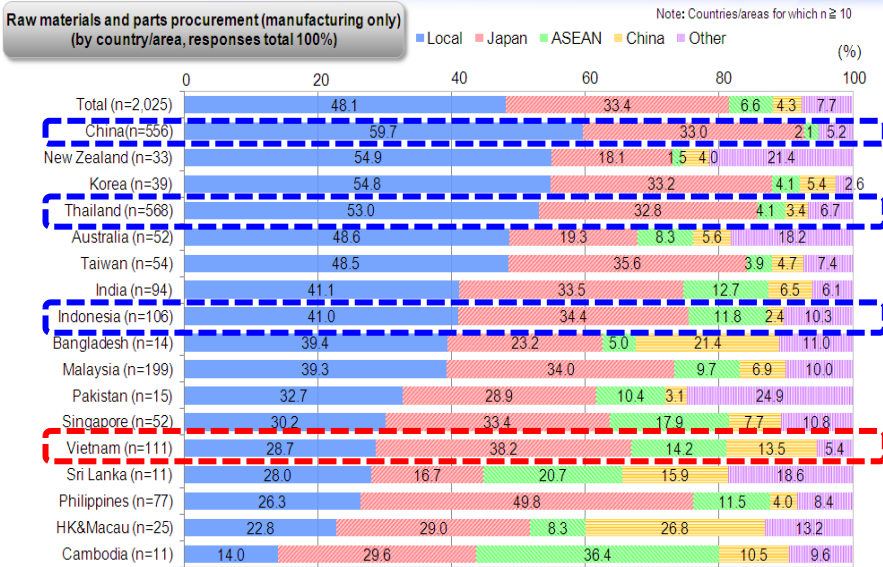
2-2. Japanese-Affiliated Firms Survey in Asia -Facing Difficulties- (2)

Wage increase over the previous years



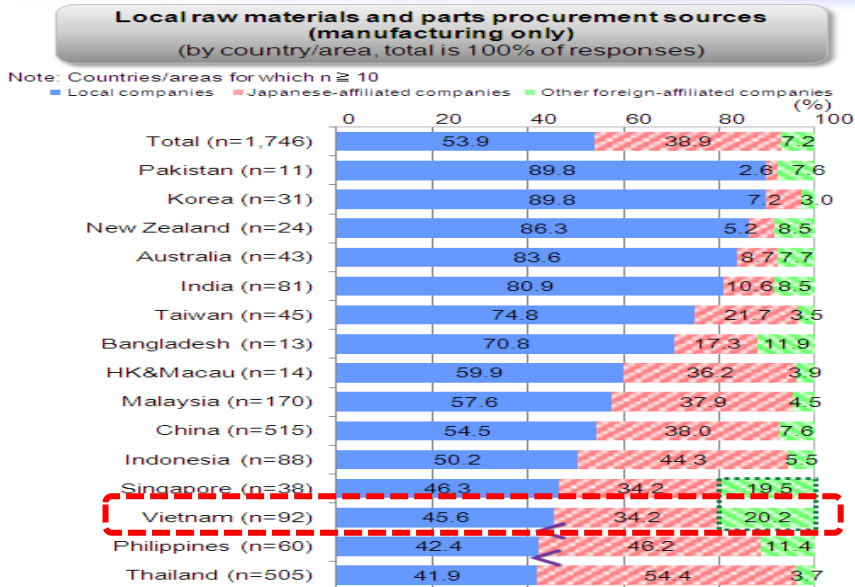
Copyright © 2012 JETRO. All rights reserved.

2-2. Japanese-Affiliated Firms Survey in Asia -Facing Difficulties- (3)-a



Copyright © 2012 JETRO. All rights reserved.

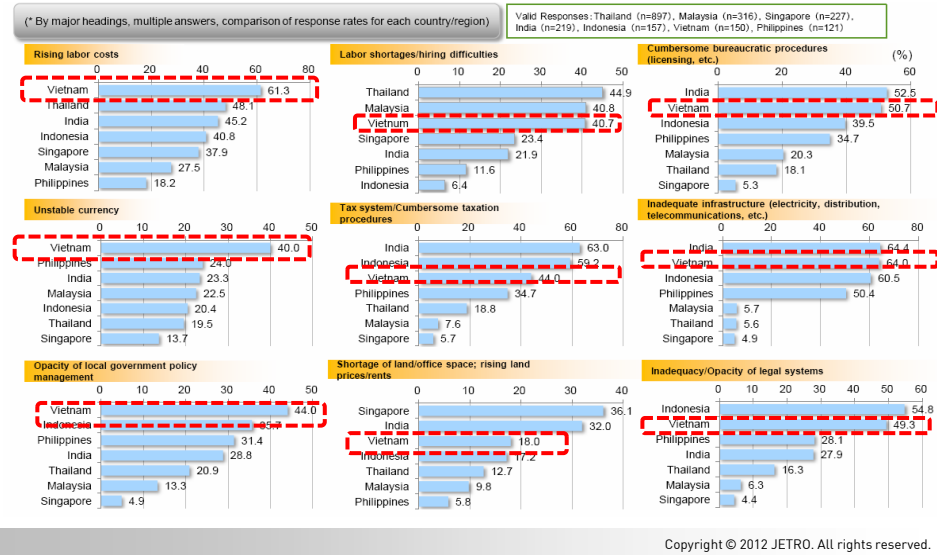
2-2. Japanese-Affiliated Firms Survey in Asia -Facing Difficulties- (3)-b



Copyright © 2012 JETRO. All rights reserved.

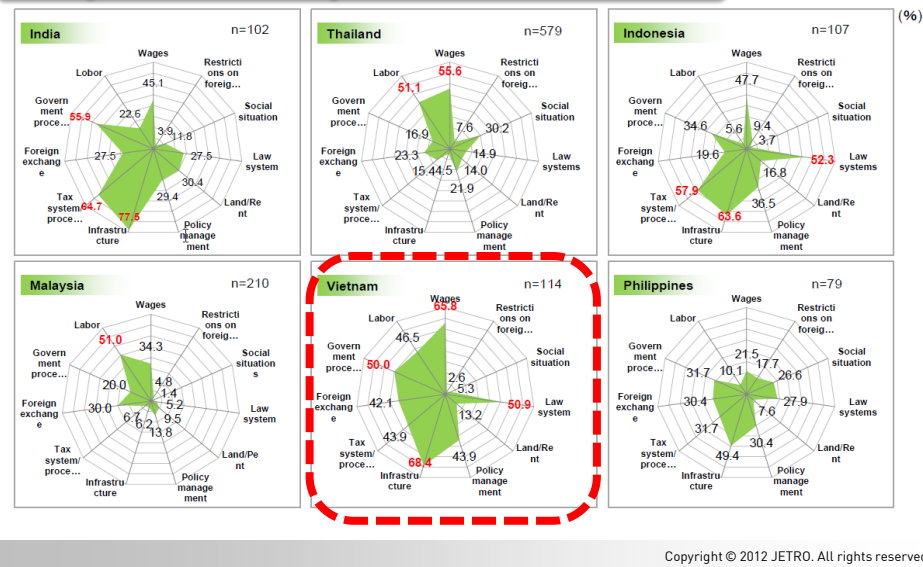
2-2. Japanese-Affiliated Firms Survey in Asia -Facing Difficulties- (4)-a

Challenges in the investment environments (by country as assessed by Japanese-affiliated firms)



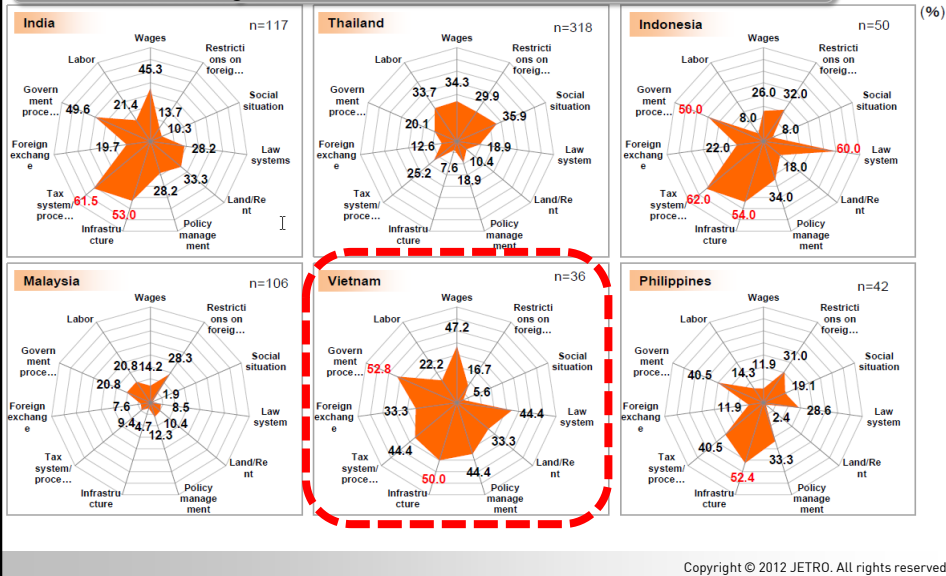
2-2. Japanese-Affiliated Firms Survey in Asia -Facing Difficulties- (4)-b

Challenges in the investment environments (by country and region): Manufacturing sector



2-2. Japanese-Affiliated Firms Survey in Asia -Facing Difficulties- 4-(c)

Challenges in the investment environments (by country and region): None Manufacturing sector



3.JETRO's COMMENTS

1.Business Environment

- The number of projects of Japanese FDI in Vietnam has reached the highest ever level in the past two years.
- The total amount of Japanese FDI is No.1 in comparison with the other countries.
- The Vietnam investment environment, especially water rate, electricity rate, labor cost and the other fee, is still attractive for Japanese investors.
- Japanese Labor intensive companies are looking for the other potential countries like Cambodia, Bangladesh, Myanmar due to raising labor cost .

2. Facing Difficulties

- Labor:
 - + Raising labor cost. Japanese companies, especially manufacturers, are highly concerned about new Minimum wage from 2013.
- Supporting Industries:
 - + The procurement rate of 28.7% is the third lowest in ASEAN countries
- Infrastructure:
 - + Electricity, Transportation, Telecommunication, etc.
- Opacity (Unclear, Uncertain) legal and government procedure system:
 - + e.g. Law on Environment protection, Law on saving energy, Custom Clearance Procedure

Copyright © 2012 JETRO. All rights reserved.

THANK YOU!

JETRO HANOI
2F, 63 Ly Thai To, Hanoi
Tel: 04.3825.0630;
Fax: 04.3825.0552
Email: vha@jetro.go.jp
Website: www.jetro.go.jp

Copyright © 2012 JETRO. All rights reserved.



The Nordic Business Association in Ho Chi Minh City

12A Floor, Bitexco Building, 19-25 Nguyen Hue Boulevard, District 1, Ho Chi Minh City, Vietnam

Tel: (84-8) 38215 423 Fax: (84-8) 38215 424 E-mail: contact@nordcham.com

HCMC 30th November 2012

INVESTORS FEEDBACK

Government leaders, business representatives, ladies and gentlemen, The Nordic Chamber of Commerce – NordCham, appreciate 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 a few specific areas where Nordic investors focus on.

RENEWABLE ENERGY WIND, SOLAR WATER

The potential for wind energy in Vietnam is high, and Nordic countries are no stranger to this industry – being the world leaders in wind power development. Given that only a small portion of Vietnam's potential has been tapped, Nordic businesses are keen to invest and transfer their expertise to grow this sector. 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 power project development, engender greater transparency in governmental decisions on energy issues, provide greater incentives for wind 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 from the utility.

The prospective for solar energy water supply in Vietnam is extraordinary, especially in the south and Nordic companies are experienced in this industry – being some of the world leaders in solar water development. Given that only a few systems are operating today in Vietnam's, Nordic companies are keen to invest and transfer their expertise with Vietnamese users and to grow this sector to assist rural development, woman in development, sustainable safe water and poverty reduction. 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 solar water development, engender greater transparency in governmental decisions on solar energy issues, provide greater incentives for solar industry investment and project development, enhance infrastructure, enable access to cheaper financing options to users as well as provide governmental guarantees on the purchase of solar technology from the state own utilities in a transparent manner.

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 water supply powered by renewable energy.

LABOR, 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 engineer. 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 too 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 logistic cost as a result of port congestion and lack of handling capacity in the major Vietnamese ports. In order for Vietnam to remain competitive compared with its neighboring countries it is important to improve the cargo handling capacity and cost.

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. It is important that the users being mostly foreign shipping companies, do 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.

We are pleased to see that new and efficient ports have now been opened in the Ba Ria - Vung Tau Province. However the construction of road access is far behind schedule and cannot meet the current need. This is now preventing the utilization of the real potential of these port. We recommend that high priority is given to complete these road constructions, so that both time and cost can be reduced to a normal competitive level.

We would also recommend that the relocation of main ports out of HCMC center is accelerated to transfer the cargo flow to more transport accessible and cost efficient deep sea ports in Baria Vung Tau province.

ISSUING OF INVESTMENT LICENSES AND PRODUCT REGISTRATION

In the main provinces in Southern Vietnam the issuance of new investment license is been processed quite quickly and there has been a good improvement. However in many of the provinces it is still very time consuming as they do not seem to always be updated on new regulations/laws.

There is a clear need for improvements in the provincial and local administration, enabling them to all reach the same efficiency as the main provinces.

Furthermore some of our members who have invested in new factories in Vietnam, thus transferring the technology and know-how from Nordic countries for production of goods for the Vietnamese market such as fish-food and fertilizer, are encountering complicated procedures for the registration of the goods they produce after the investment license for the production has been obtained.

We believe it should be possible to coordinate such licenses and permissions so that when a company is given the license to invest in production, it should also be able sell the products without further delays in product registration.

From Nordcham's perspective, our members are confident about their investment in Vietnam which are 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.

Thank you.

Sigmund Strømme

Chairman Nordcham Ho Chi Minh City

Section II

BANKING & CAPITAL MARKETS

Banking

BANKING ISSUES

*Presented by
Banking Working Group*

Introduction

Since the mid-year VBF significant progress has been made on several aspects of macro-economic management. The stability of the currency has been impressive. The reduction in inflation has been more rapid than anticipated, and has occurred while interest rates have also fallen. The trade balance has improved markedly, and has allowed an appreciable increase in foreign currency reserves. The Government's appropriate policy focus on stability has yielded these good results, although the corollary has been a slowdown in overall GDP growth. It has also understandably led to a very challenging micro economic environment, with many companies and individuals facing difficulty in meeting their obligations and sustaining their income levels.

For the Banking Sector, this has been reflected in rising levels of non-performing loans (NPL). Recent input from various official sources has highlighted the issues arising from this situation, including the consequences of: cross shareholdings among banks; undue influence of major shareholders; banks lending to related parties; and an over-reliance on real estate collateral for loans. While underlying confidence in individual banks is low, confidence justifiably remains in the State Bank of Vietnam's (SBV) ability to provide adequate liquidity to the market. Recent events involving a large local bank demonstrated the ability and willingness of the SBV to provide liquidity support as necessary to maintain the stability of the banking market.

In addition to identifying the underlying issues in the banking system, the Government published Decision 254/QĐ-TTg (Decision 254) on 1 March 2012 relating to Restructuring the Banking System, a plan on how it intends to address the issues. This plan is strategically strong, but its success depends on implementation, which has so far been slower than hoped, and less comprehensive. Significant decisions to enable the plan to be implemented remain to be taken, including: how to address the NPLs on banks' balance sheets; the permitted level of involvement by foreign banks; and how to introduce the higher standards of governance, capital and risk management for which the plan calls. The long term growth of the economy depends on thorough implementation of the Bank Restructuring Plan. We support its strategy, and would welcome the opportunity to help implement it along lines described at the most recent VBF.

While many of the issues we have previously highlighted have not yet been addressed, this is understandable. The urgent need to bring stability to the macro economy and the banking system has consumed the SBV's resources in recent months, so progress on our longer term agenda has been relatively limited.

A consequence of the difficult macro-economic conditions over the last eighteen months has been the introduction of a variety of temporary administrative measures on the banking system. Directive 01/CT-NHNN of 13 February 2012 promised that there would be 92 new regulations and decisions from the SBV this year, and the flow of documents released has so far lived up to that promise. While the drive, industry and intention of the authorities is not in any doubt, we are concerned at the speed of introduction and the nature of some of the new regulations. These include: deposit and lending rate caps; credit growth caps; and restrictions on foreign currency lending, among others. The SBV has assured us that many

of these measures are temporary, and that a return to an agenda of market-based structural reform of the banking industry will come as soon as possible. We emphasise the need to return to such an agenda at the earliest time, enabling the banking system to help the economy develop most efficiently. We also encourage the removal of the temporary administrative measures introduced over recent months as soon as practical.

It is a pleasure to report that our working relationship with the SBV has developed strongly this year. This has largely resulted from the SBV's initiative to provide us with draft regulations before they are published in order to allow our feedback to be considered. A very constructive dialogue has been held, particularly with the SBV's Monetary Policy, FX and Inspection and Supervision Agency. We have given written and verbal input to many drafts, including:

- Draft Circular on forward rates
- Comments on provisions of Ordinance on FX management
- Draft Circular on derivatives replacing Circular 62
- Draft Circular 9 on use of non cash payment for loan disbursement
- Draft Circular replacing Decision 1325 on discounting of negotiable instruments and valuable papers
- Draft Circular replacing Circular 13 on prudential ratios
- Draft Circular replacing Decision 1452 on FX transactions in local FX market
- Draft Circular replacing Decision 493 on loan classification and provisioning

We look forward to continuing this close dialogue with SBV at the drafting stage of new regulations.

As in the past we base our paper on a "four pillar" structure, as these remain valid:

1. **Roadmap:** a forward looking roadmap for the banking industry, harnessing market forces rather than administrative restrictions to continue the drive for growth;
2. **Market efficiency:** efficiency and clarity in the way the market and the regulations should work so as to reduce the "cost of delivery" of banking products and services to businesses and consumers;
3. **Consumer banking:** clear guiding principles and removal of major impediments for the consumer banking and consumer finance industries;
4. **Short term stability measures:** how to apply more fairly and effectively some of the measures introduced last year under Resolution 11 and this year under Circular 1 to achieve price and currency stability.

The issues and recommendations set out below represent an overall statement of our commitment to help develop the Banking System in Vietnam to a level that will support the full growth potential of the economy. We support the Government's Bank Restructuring Plan, and where measures have been set out in that Plan, we have not duplicated them here. We commit to working closely with the SBV to achieve a restructured banking system, and are fully supportive of the SBV in this aim.

ROADMAP (PILLAR 1)

Circular 40 on bank licencing

Circular 40/2011/TT-NHNN (Circular 40) of 15 December 2011 deals primarily with the issuance of licenses. Previously, licences permitted banks to undertake: (i) activities

specifically listed on their licence; and (ii) activities which were permitted through being included in generally applicable SBV regulations. Circular 40 removes the automatic right to undertake the second group of activities, instead requiring specific mention of each activity on a bank's licence. While our members have already applied to amend their licences in accordance with the Circular, delays in these applications could cause disruption to clients and/or a breach of banks' legal obligations under commitments already made to clients. This problem would be solved if the SBV allowed banks either: (i) to continue offering business activities that are permitted by SBV regulations without the need to revise licences; or (ii) to continue to offer these activities as in the past until a formal response to their new licence application is received.

It would also be helpful if the SBV's licensing requirement related only to broad business activities, and not to each product under same activity. For example, if a bank's licence permits FX activity, it should be allowed to offer all FX products that the SBV has stipulated in relevant regulations, instead of requiring a separate licensing application for each FX product, such as FX forwards or cross currency swaps.

Foreign shareholdings in local banks

At present, foreign banks are not permitted to own more than 20% of a local bank, and total foreign ownership of a local bank cannot exceed 30%. The Government's Bank Restructuring Plan (Decision 254) envisions foreign bank participation in consolidating and integrating Vietnam's banking system, including allowing increased shareholdings by foreign banks in local banks that are subject to restructuring. We request the SBV to provide more clarity on the scope and timing of any increases in permitted levels of foreign bank and overall foreign shareholdings in local banks. We believe that any increase in foreign ownership limits should apply across all local banks. A crucial element of the Government's plan involves the introduction in local banks of higher standards of governance, capital and risk management, and we believe increased foreign shareholdings would significantly accelerate this very desirable process. At current ownership levels of 15 or 20%, foreign banks only have modest influence over the management of their local investee banks, even where they have Board representation.

Enforcement of regulations

There have been many public reports recently of banks not complying with various regulations. For example, it is said that banks either breach deposit rate caps or use alternative means of giving value to customers in a way that effectively increases the interest rate on deposits beyond the cap level. We respectfully request the SBV consistently to emphasise banks' duty to comply with regulations, and to impose sanctions for a failure to do so. Unless all banks adopt the same strong compliance culture, it creates an uneven market. If compliance with regulation is demonstrably more advantageous to banks than non-compliance, then they will comply.

Single Borrower Limits

Article 128 of the Law on Credit Institutions sets out single borrower limits for banks. Most foreign banks have relatively small balance sheets in their Vietnamese branches and subsidiaries, even though their parent banks have the capability to finance significantly larger transactions than Article 128 will allow onshore. Vietnam has a significant need for foreign investment over the coming years. To facilitate this, in our view offshore guarantees or Standby Letters of Credit (SBLC) from the head office or other offshore financial institutions should be allowed to offset the credit exposure to a single borrower where that exposure exceeds the single borrower limit in Vietnam. A parent guarantee and/or SBLC

has been extensively used to transfer risk between banks in many countries, allowing prudent lending above the single borrower limit set by central banks. The guarantee and/or SBLC would be issued in respect of an exposure of the group entity to a third party, e.g. the off-shore parent bank guarantees its Vietnamese branch or subsidiary against a specific exposure of the Vietnamese branch or subsidiary to a third party borrower for amounts exceeding the single borrower limit. This solution should enable corporate customers and large infrastructure projects in Vietnam to access their required large funding for business expansion. This solution will greatly help the efficient financing of large businesses and projects whilst simultaneously ensuring prudential credit exposure by banks. Governor Binh, when he was still Deputy Governor, gave an indication that the SBV would adopt this recommendation, and we await a final response.

Recommendations

We would like to make the following recommendations:

1. allow banks to continue to offer business activities that are permitted by SBV regulations without the need to revise licences
2. oblige banks to amend their licenses only in case SBV regulations are amended
3. encourage introduction of improved governance and risk management standards
4. increase the permitted foreign shareholding in local banks
5. clarify scope and timing of further increases in permitted foreign shareholding in local banks
7. consistent enforcement of regulations
8. permit banks to exceed single borrower limits where a third party bank guarantee or letter of credit covers the excess

MARKET EFFICIENCY (PILLAR 2)

Previously raised issues

We still hope for further progress on some of the points we have previously raised. These remain important issues to be addressed to modernize the Vietnamese banking system and ensure it can properly support economic growth. We hope the SBV can focus on these points again soon. These points include: introduction of a comprehensive FX Forward market; establishment of credit bureaux and rating agencies; and introduction of a netting and offset framework.

FX regulations and policy

Decree 160/2006/ND-CP (Decree 160), issued in December 2006, lays out the framework for dealings between participants in various FX products. However, the key implementing circulars have still not been issued, and guidance is needed for participants in conducting their FX activities in line with this law. In particular, better guidance is needed for participants about FX control on FDI and FII, as well as on current transactions and capital transactions. The lack of such guidance has slowed down the development and the depth of the FX market.

We are very encouraged by the SBV's effectiveness in stabilizing the FX market, which has been fostered by the FX rate management regime introduced in 2011. However, there remains very limited ability to hedge currency exposures, and without a functioning FX forward market, periods of strong demand for FX will demonstrate the structural instability of the VND FX market.

We understand that the Government and SBV are working on a new Ordinance on FX Control. It is important to issue this Ordinance urgently, including clear implementing circulars. Doing so will allow participants to operate their FX activities uniformly and responsibly, reinforcing an orderly and transparent market. This would also have the effect of improving confidence in the VND and increasing liquidity in the FX market.

We also believe that a liquid and market-driven FX derivative market should be created. Such a move would not only reduce overall systemic risk for key sectors through an effective and efficient hedging framework, but it would also help inward investment to Vietnam and enhance trade flows. Foreign investment is more uncertain than it needs to be because currency risk cannot be adequately hedged.

Development of the Capital Markets

The development of a liquid and systematically managed government bond (and bill) yield curve is important for supporting efficient funding markets and bank balance sheet management, as well as ensuring Government access to the longer term funding necessary for infrastructure investment. Further, having a robust government debt issuance process is important for the healthy development of new capital market instruments, greater corporate bond issuance and broader investment options for institutions and individuals.

Restrictions, such as the inclusion of corporate bonds in the credit growth cap, and limitations on bond coupon rates, have meant that the corporate bond market has again been inactive this year. Unless the capital markets are developed, the economy will have an over-reliance on banks for longer dated financing, which will increase the systemic mismatch between short term deposits and long term loans. Efficient bond markets, driven by long term investors such as life insurance companies and pension funds, should free-up banks to continue prudently financing businesses and individuals while maintaining appropriate balance sheet turnover.

We believe the Government bond market needs to have transparency as to the issuance calendar, and the amounts and maturities to be issued. In order to allow longer maturity bonds to be issued, a long-term investor base should be encouraged, including private pension funds. In this regard, the proposed establishment of open ended mutual funds could be a very positive development. It should also be a priority to encourage development of a broader capital market for non-government issuers.

Withholding tax on offshore borrowings

Vietnam's long term economic growth and infrastructure development will require substantial long-term debt capital to be raised from offshore capital markets. We welcome the recent reduction in withholding tax on interest paid to offshore lenders from 10% to 5%. However, it is the case that this withholding tax is not imposed on interest payable to foreign banks from a few jurisdictions where bilateral tax treaties exclude it. Banks from these jurisdictions can be more competitive than those from jurisdictions subject to the withholding tax. We continue to recommend that the government abolish the withholding tax on all interest paid to foreign lenders, or at least to continue to negotiate taxation agreements with additional jurisdictions. This will allow more cost-effective financing of large, strategic projects using foreign capital, yet it should not open up foreign borrowing inappropriately for purposes that could adequately be met by domestic borrowing.

Regulatory Reporting

While we have seen a reduction in the number of reporting criteria from around 200,000 to around 132,000 in the new Circular 21/2012/TT-NHNN (Circular 21), the increase in ad-hoc reports requested by regulators in 2012 remains a challenge for banks to meet accurately and in a timely way. Whilst timely and accurate reporting of critical data is a prerequisite of effective regulation, the current system has many duplications. The same information has to be included in several different reports, and the same reports have to go to several different recipients (SBV branches in Hanoi and Ho Chi Minh City and SBV Head Office, MoF, Deposit Insurance Company, etc). In our view the SBV should set up a centralised data centre for bank information where SBV branches or other authorities can access the information centrally. We also believe a working group should be created to review and overhaul bank reporting requirements to ensure that reporting is appropriate and robust, and that duplication of reports is eliminated.

Recommendations

We would like to make the following recommendations:

1. complete the issuance of implementing Circulars related to Decree 160
2. develop an FX derivative market
3. increase transparency of government bond issuance
4. consolidate multiple government bond issues into fewer, larger, more liquid issues
5. encourage establishment of pension funds as long term domestic investors
6. abolish all withholding tax on foreign interest payments
7. rationalise and centralise regulatory reporting to avoid duplication
8. minimise requirements for ad hoc regulatory reports

CONSUMER BANKING (PILLAR 3)

Wealth management products

Globally, wealth management products are a core offering for banks to their retail clients. This has proved advantageous for consumers given that regulators and banks provide significant oversight and expertise to ensure that products are appropriately provided to customers by proper assessment of their risk appetite and investment purpose. Currently, no regulation exists on investment products, and each bank must seek individual product approval from the SBV. This is a poor use of time for banks, the SBV and for customers, and lacks transparency and consistency. A uniform set of rules that ensures the appropriateness of investment products for retail investors will allow banks to encourage savings by individuals, and to mobilize funds more effectively by channelling them into important investment projects. Following positive feedback from the SBV on this subject last year, we continue to encourage the introduction of a new, principle based regulation that allows commercial banks to offer investment products to their customers, provides protection to investors in the sales process, and requires transparency in the pricing, returns and risks of such products.

Consumer Finance Distribution

The availability of consumer finance would be boosted if the consumer finance companies were formally authorized to expand their networks through the establishment of “service introduction points” (SIPs). The efficiency of this model was well tested in 2010-2011 when the VSB of Vietnam approved the SIPs opening on a pilot basis with SBV Official letter No. 2336/NHNN-TTGSNH dated 30 March 2010. Since April 2011, consumer finance companies have not been allowed to open new SIPs, while the existing network of SIPs is

not challenged at this point, which means that the expansion of the distribution network is in practice frozen.

Recommendations

We would like to restate the following recommendations:

1. introduce a new, principle based regulation on investment products
2. allow consumer finance companies to open service introduction points

SHORT TERM STABILITY MEASURES (PILLAR 4)

Achieving credit growth targets

In 2012, the Government has again set a credit growth target. Currently banks are limited to lending no more than 15% of their capital to a single borrower. To help achieve the Government's overall credit growth target, the single borrower limit could be amended to apply only to medium and long term loans, in line with corporate investment licenses. The single borrower limit would not constrain the provision by a bank of working capital to companies, which would ensure a consistent supply of working capital financing for corporate customers, and alleviate some of the restriction many companies face in accessing adequate financing.

Circular 14/2012/TT-NHNN (Circular 14) of 4 May 2012, introduced a cap on lending rates charged by banks for several sectors. We understand the SBV's intention to reduce the cost of credit for hard-pressed sectors of the economy. However, we are concerned that this administrative measure has led to banks lending less to these sectors than before, since they will be less able to obtain an adequate return relative to the risk taken. The Government's Bank Restructuring Plan properly states the need for banks to introduce better risk management processes, including a requirement to price loans for the risk they represent. Circular 14 makes this pricing impossible, and while it is positive that the SBV recognises the temporary nature of this measure, we hope it can be removed as soon as possible.

Foreign currency loans

Circular No. 03/2012/TT-NHNN (Circular 3) of 8 March 2012 only allows banks to lend FX to importers who have sufficient FX income to repay the loan. Decision 857/QĐ-NHNN, which is effective until 31 December 2012, allows banks to lend FX to exporters for domestic uses, but they are required to sell that FX amount to the lenders. We recommend that the SBV allows enterprises that generate FX revenue to borrow short term and long term FX loans for general purposes. For companies that do not have FX revenue, the current law is not having the intended effect of encouraging a switch to VND borrowings, but rather is pushing the financing off shore, away from SBV supervision and to the detriment of the local banking sector.

Loan disbursement

Circular No.09/2012/TT-NHNN (Circular 9) of 13 September 2012 requires banks to ensure that the use of borrowed funds is in line with the stated purpose of the original borrowing. In pursuit of this, Circular 9 prohibits banks from disbursing loans directly to borrowers. While we support the SBV in seeking to reduce cash settlements and discourage borrowing for consumption rather than investment, the practical implementation of Circular 9 is proving difficult for foreign banks, whose core banking and accounting systems automatically disburse loan drawdowns to customers' accounts before onward remittance

to beneficiaries, of which there is a record to ensure appropriate use of funds in compliance with Circular 9's intention. We have proposed several alternative ways of achieving the aims of the SBV which do not involve expensive and complex reworking of global core banking systems. Therefore, we respectfully request that in regard to loan disbursement, the SBV gives positive feedback on our proposals.

Recommendations

We would like to make the following recommendations:

1. apply the single borrower limit only to medium and long term loans, not to working capital facilities
2. remove lending rate cap in Circular 14 as soon as possible
3. allow export companies to borrow foreign currency for their working capital requirements
4. allow corporates to borrow foreign currency to meet timely payment obligations to avoid any default in a commercial obligation
5. allow compliance with the purpose of Circular 9, rather than being prescriptive on the method of compliance

Conclusion

Many of the issues and views mentioned are born out of the recent need to re-establish control over the macro economy and credit growth. These aims are closer to being fulfilled as each month passes, and this should mean that many of the temporary administrative restrictions can be removed, particularly as the banking sector is restructured, with weaker players' issues being addressed. There has been significant progress in identifying a way forward to an improved and strengthened Vietnamese banking system. Implementation of the structural reform proposed by the Government is now key. We remain committed to helping the Government and the SBV to implement its plans.

**DRAFT AGENDA ITEMS
THE BANKING WORKING GROUP MEETING WITH
THE STATE BANK OF VIETNAM**

1. Circular 40/2011/TT-NHNN dated 15/12/2011 on the issuance of license and organization, operation of commercial banks and foreign bank branches ("Circular 40")

The Banking Working Group ("the BWG") acknowledges the new requirements in the Law on Credit Institutions and Circular 40. However, the BWG faces difficulties in the licensing procedure due to unclear guidance on licensing steps and some administrative delays in license applications. Therefore the BWG requests the State Bank of Vietnam ("SBV") to consider the extension of effective date of Cir 40 so as to allow credit institutions ("CIs"), and foreign bank branches ("FBBs") to continue providing operations and services, which have not been stated in the Operating License and granted Sub-licenses but which were regulated by legal documents as stipulated in Article 37 of Circular 03/2007/TT-NHNN (replaced by Circular 40) to ensure the continuity of business. Moreover, we recommend SBV to only set licensing requirement for new 'business activity' but not for every single new products under same activity. And CIs should only need to register with SBV for such new products. For example, if the CI has FX and derivative activities in their license, they should be allowed to conduct all FX and derivatives products that the SBV has stipulated in relevant regulations instead of applying for every single product under these activities such as Cross Currency Swap ("CCS").

BWG has also sent a separate letter to SBV on this subject and would appreciate SBV's positive feedback.

2. Foreign shareholdings in local banks

Decision 254/QĐ-TTg of the Government on approving the Scheme of "Restructuring the Credit Institution System in the 2011-2015 Period" ("Decision 254") encourages foreign banks to participate in M&A and integration with local banks. The decision also mentioned the consideration of allowing increased shareholdings of foreign banks in local banks which are under the restructuring plan. We understand that draft decree replacing decree 69/2007/ND-CP dated 20/4/2007 submitted to Government for approval keeps 30% cap unchanged with the limited exception for the case of M&E in weak banks. We request that any increase in foreign ownership of local banks should apply across all institutions. We believe that an increase in foreign shareholdings will help foreign bank shareholders to implement the risk management and governance reforms set out in Decision 254, which will otherwise take longer to achieve.

3. Circular 09/2012/TT-NHNN dated 10/4/2012 on using payment means for loan disbursement

The BWG supports the SBV's intentions in promoting the use of non cash payments and ensuring loans are used for their stated purpose. However, the BWG suggests the SBV

should consider allowing Financial Institutions to use their own controlling mechanisms where these also satisfy the SBV's requirements. There are two main reasons:

- (i) If the disbursement does not go through the customer's own account, they will not be able to claim input VAT in accordance with circular 06/2012/TT-BTC dated 11/1/2012 of MOF; and
- (ii) Further, a major issue with Circular 09 is linked to the Core Banking/Accounting systems of foreign banks, which automatically cause disbursement through debiting internal loan accounts and crediting the customer's current account, before the loan is subsequently transferred to the beneficiaries. Changing core banking systems is a very costly and difficult exercise.

We believe that if foreign banks are required to change their core banking systems to comply strictly with Circular 09, there will be no greater compliance with the purpose of Circular 09, which we believe is well served by the proposal made by the BWG. In fact, it will increase lending costs. Therefore, we fully agree that overdraft facilities should strictly comply with the drafting of Circular 09, but respectfully request that in regard to loan disbursement, the SBV to give positive feedback on our proposal.

4. Draft circular replacing Circular 13/2010/TT-NHNN ("Circular 13") on Prudential ratios

We would like to thank SBV for the recent meeting with Safety Policy Department on BWG's comments on this draft and recommend SBV the followings:

- **On the CAR calculation:**
 - Capital includes the Net of placements by foreign bank's head office and branches in Vietnamese branch and its placements in head office and those branches. This confuses capital and loans.
 - Grandfathering of credit agreements signed before the effective date (to exclude those contracts in CAR calculation).
- **Single Borrower Limit (SBL)**
 - Credit extension towards cash collateralized facilities, guaranteed facilities, and other -approved facilities should not be subject to the Single Borrower Limit. We recommend SBV to keep the excluded cases as Circular 13 as the credit risk of this credit is either eliminated or mitigated, depending on whether they are cash-collateralized or payment is guaranteed by a third party bank.
 - Further, we continue to recommend that offshore guarantees or Standby Letters of Credit ("SBLC") from the head office or other offshore financial institutions be allowed to offset the credit exposure to a single borrower should a single borrower (or related group company borrowers) reach and need to exceed the single lending limits in Vietnam. A parent guarantee and/or SBLC has been extensively used to transfer risk between banks in many countries, allowing prudent lending above the single lending limit set by central banks. The guarantee and/or SBLC would be issued in respect of an exposure of the group entity to a third party, e.g. the off-shore parent bank guarantees its Vietnam branch or subsidiary against a specific exposure of the Vietnam branch or subsidiary to a third party borrower for amounts exceeding the single lending limit. This solution should enable corporate customers and large infrastructure projects in Vietnam to access their required large funding for business expansion. This solution will greatly help the efficient financing of large businesses and projects whilst simultaneously ensuring prudential credit exposure by banks.

Governor Binh, when he was still Deputy Governor, gave an indication that the SBV would adopt this recommendation, and we await a final response.

- **Liquidity requirement**

- 'Immediately Disposable Assets' should include balance of Nostro accounts at other banks, and lending or placements to other banks at maturity.

- **Solvency ratio**

- We recommend that SBV should not require this ratio for other convertible CCYs because these CCYs only account for small portion of the BS. Moreover, there is no FCY liquid asset (bonds and other valuable papers) in Vietnam. We have previously raised this but SBV has not taken into account in the latest draft.
- Banks can't comply with 100% for each CCY due to liquidity gap. Within 30 days, cash outflow always bigger than cash inflow because deposit tenor is always shorter than loan tenor given market situation.
- Cash inflow should consider the inflow from committed facilities provided by parent bank and cash outflow should remove the unconditional cancellable committed facilities to customers.

- **Loan to Deposit Ratio ("LDR") 80% for Banks and 85% for Finance companies**

- Recommend SBV to include capital in the source of fund. This ratio should be at 100% first with gradual reduction in line with overall market liquidity situation.

- **For Consumer Finance Companies**

We suggest more relevant safety ratios should be applied to Consumer Finance companies due to the different nature of the consumer finance industry. Consumer finance does not mobilize individual deposits from the general public, and has limited funding mobilization options so there will be a minimal positive impact on the whole banking system if all the safety ratios are applied in the same manner as required to banking system.

5. Draft circular replacing Decision 62/2006/QĐ-NHNN dated 29/12/2006

According to Decision 62 of the SBV and the draft replacing this decision, there is a cap set at 30% of a bank's capital on the total outstanding notional swap amount with clients. This limitation is unduly restrictive and has essentially shut down the derivative market in Vietnam.

Also there is no netting guideline in this draft. If trading partners within Vietnam were able to offset their positions or obligations with each other, it would help to improve market efficiency dramatically. Transaction costs would be reduced, as would credit and liquidity risks, and ultimately systemic risk. Additionally, given that netting results in more favorable capital treatment for credit risks, netting arrangements are crucial for Vietnamese-domiciled banks as it may help to improve their credit ratings when they participate in the international markets in order to hedge their positions.

Recommendation: We recommend the SBV to review the cap setting for the notional swap amount and allow netting in the new circular replacing circular 62. In the VBF and its position paper, we also recommend the government to work with industry and external experts to develop regulation on close out netting and set-off in line with international best practice. The BWG is pleased to cooperate with SBV in a more detailed working session on these subjects.

6. Circular 07 on NOP

Circular 07 on NOP does not take into account the NOP which is created from derivatives transactions, particularly CCS transaction which is a commonly used hedging instrument by clients. The inclusion of NOP created from derivatives transaction into the NOP calculation is of international practices as it correctly reflects the actual NOP of the bank for risk management. This will also help SBV to have a correct NOP number for effective management actions. We understand that there is currently lack of accounting guideline for derivative transactions which drive the reporting of NOP. We would like SBV to coordinate with the MOF to issue necessary accounting guideline and amend the Cir 07 to officially capture NOP created from derivatives.

7. Circular 03 on FCY lending and Decision 857/QD-NHNN on FCY short term loans

Circular 03 only allows CIs and FBBs to lend FCY to importers who have sufficient FCY income. Decision 857/QD-NHNN, which is effective until 31/12/2012, allows CIs and FBBs to lend FCY to exporters for domestic uses, but they are required to sell that FCY amount to the lenders. We recommend SBV to allow enterprises that generate FCY revenue to borrow short term and long term FCY loans for other legitimate purposes. For companies that do not have FCY revenue, the current law is not having the intended effect of encouraging a switch to VND borrowings, but rather is pushing the financing off shore, away from SBV supervision and to the detriment of the local banking sector.

8. Circular No. 21/2012/TT-NHNN regulation on operation of lending, borrowing; term purchase and sale of valuable papers with term among foreign CIs and FBBs

According to this Circular 21, from 01/09/2012, the consumer finance companies shall not conduct deposit activities (excluding payment account) at other CIs, FBBs. We are only allowed to borrow from other CIs with the term of less than 1 year. This change incurs some concerns (i) Deposit activities: Finance companies often deposit unused funds in banks, which is a safe, efficient, flexible profitability solution for us. However Circular 21 contradicts with other prevailing SBV circular requesting finance companies to keep 15% of its total liabilities in liquid form (cash). Hence we believe that SBV will continue encourage this investment (ii) Loan term: In addition to capital, loans from other CIs are necessary for the business of consumer finance companies since we are not allowed to mobilize capital from individuals. The consumer loans are normally granted to customers during the term 6-36 months or longer for Mortgages. The restriction of Circular 21 on the loan term as between CIs and FBBs for less than 1 year will generate maturity risk and will create a long term systematic risk. We expect SBV continues to allow the consumer finance companies to carry out the term deposit activities in other CIs as well as to remove the regulation on restriction of loan term from other CIs.

9. Foreign Account Tax Compliance Act (FATCA)

FATCA was introduced by US government in an effort to improve compliance of US tax payers on worldwide income and to combat tax evasion by US persons holding investment in offshore accounts. It has worldwide application to all institutions with a US banking license.

FATCA will take effect on 1 July 2013 and requires FIs globally to: register with the US Inland Revenue Service (IRS); update their client on-boarding and account opening process to ensure all US persons are identified and verified; report annually to the IRS the personal and account information of confirmed US customers; and apply a withholding tax on certain US customer types. Failure by a foreign FI to comply with FATCA will result in a 30% withholding tax penalty being levied by US IRS on their US earnings annually.

The BWG is seeking legal advice on the conflict within the laws and regulations in Vietnam. Article 14.3 of the recently promulgated Law on Credit Institutions requires only the consent of the customer for disclosing information to other organizations and individuals while Decision 45/2007/QĐ-NHNN states that information disclosures on customers' deposits and assets are secret information of the State and requires the approval from the SBV. We request SBV to provide the guidance whether the CIs are permitted to provide their customers' information to the US Tax authority with customers' consent.

10. Follow up of issues in previous meeting minutes that have no progress

- **Network and distribution:** The BWG requests clarification on when the new regulations on network of commercial banks will be passed. The SBV has stopped licensing for new branch network pending the new circular.
- **Interest rate subsidy reimbursement**
For over two years, banks have been due a reimbursement of an interest subsidy as part of the subsidy program that ended in 2009. We have complied with all data requests in relation to the reimbursements and the amounts due are clear. We understand that the State Audit has performed an audit review on compliance to this program and confirmed the figures already. It has been two years now and the unpaid accruals begin to pose a problem for banks' internal accounting policy and audited financial statements. We understand that 14 banks have been settled the payment. We request the SBV to continue to make the necessary payments as soon as possible for the remaining banks.
- **Wealth Management Products**
The BWG requests a more active process to develop guidelines of wealth management products. While the SBV granted licenses to a number of banks to offer structured deposits as investment products, these products have not been able to be developed because they are being treated as needing to comply with the deposit cap requirements, rather than as investment products.

Capital Markets

REPORT OF CAPITAL MARKET WORKING GROUP

*Presented by
Mr. Terence F. Mahony
Capital Market Working Group*

SUMMARY

- Capital Market History
- Economic Overview
- Working Results with MOF/SSC
- Suggestions 5 Areas: SOEs, Foreign Ownership, Capital Markets, Debt Market, Governance
- Conclusion

CAPITAL MARKET HISTORY

The highly attractive macro story of Vietnam (population, median age, literacy etc) have been a magnet for Emerging Markets funds seeking the new “Asian Dragon”.

Past

1990s Several funds were raised despite there being no stock market. The investments ended up in property or private equity and with the advent of the Asian crisis in 1997 were liquidated mostly at barely break even if not losses.

Successful implementation

2000s The second phase began with the opening of the HCM Stock Exchange in July of 2000 with just 2 listings. Subsequently more listings were added and the first equitisation occurred. This led to the boom in 2007 with the VN Index reaching a peak of 1170. Thereafter due to poor macroeconomic policies, the market plunged to a low of 234 in February 2009 and since then after a strong rally in late 2009 it has traded in a range of 420 to 520 into mid 2011 and then plunged to 330 late in the year.

Current stagnation

2012 Earlier in the year it rallied to 490 to correct to 385. Not only does this volatility reflect a lack of investor confidence and institutional support but the current level remains the lowest from the previous highs in any Asian market except for Japan. Apart from Taiwan and Thailand (which were driven by excessive speculative bubbles) all Asian markets have surpassed their previous highs.

ECONOMIC OVERVIEW

Unfavorable Economic Environment

After a decade of impressive GDP growth in excess of 7 % pa, Vietnam hit the wall as unbridled credit growth (25-30%) led to high inflation and a weakening currency. The Government's focus was totally myopic focusing solely on growth to the detriment of fundamental economic principles and the safeguarding of the basic institutions that are the backbone of an economy and society. But unlike as in the Asian crisis of 1997 most countries accepted the pain of financial mismanagement and had the courage to swallow the bitter pill of reform viz. Korea, Thailand and Indonesia to name a few.

The collapse of Vinashin and the weak administration and financial management of most SOEs, concurrent with rising bad debts in the banking sector have damaged the image of Vietnam in the eyes of international investors. The credit rating of the country has deteriorated which made capital raising virtually impossible. The bad debts in the banking system are emerging as a big threat to the whole economy.

WORKING RESULTS WITH MOF/SSC

However, the Group would like to recognize the cooperation of MOF/SSC in addressing various matters relating to the capital market during the last few years; especially in 2012 when many suggestions from the Group were taken and addressed by the MOF/SSC.

Basically the MOF/SSC built up a comprehensive legal framework outlining the activities of the stock market. They presented to the Government the “Development Strategy of Stock Market to 2020”. This covered many important legal documents such as the Guidance Decree of the revised Law of Securities; new circulars on information disclosure and corporate governance; launched new indices VN30; allowed margin trading, market orders and extended trading hours. The MOF recently issued a circular on open-ended funds and a paper to introduce regulations on real estate funds, pension funds and ETFs.

Regarding the bond market, after taking comments from the Group’s members, the MOF required the SSC, State Treasuries and other government bodies to publish a calendar for issuing Government bonds and T-Bills at the beginning of each year which would help bond investors to establish investment schedules. The MOF constructed a legal framework to allow the merging of multiple small government bonds into one large bond to increase the size and liquidity of the market. T-Bills are already centralized at the Ha Noi stock exchange.

SUGGESTIONS - KEY AREAS

- SOE reform and Equitisation
- Foreign Ownership
- Stock Market issues (Trading bands-liquidity, opening an account, consolidation of brokers)
- Debt Market
- Improved corporate governance and transparency

SOE Reform and Equitisation

This is the most critical area for the successful development of the Capital Markets. Privatisation of State Owned Enterprises is not only the key to capital markets but also to enhancing the efficiency of the economy. There has been a great deal of noise and talk but little achieved since a good start in 2007. At the VBF 18 months ago Dominic Scriven the usual Head of the Capital Market Working Group, and for whom I am standing in today, stated that to speed up the process “a new roadmap with clear criteria and a detailed timetable” needs to be established. Why has nothing specific been published since then?

Equitisation is the backbone of sound economic policy and one only has to see what has been achieved in other Emerging Markets. The 2 principle industries that get privatized initially are Telecom and Banking. (2 banks have already been privatized and unsuccessfully due to mispricing). The key to a successful offering is VALUATION and the only way to achieve this is to hire independent advisers (reputed investment bankers) who can price and place out the issue in line with global industry standards and publish a prospectus that satisfies global investors’ requirements. There is always the fear of selling State assets too

cheaply and getting blamed but these are the risks involved in the process and ironically the most successful privatisations have been those where the stake holder has left a bit of money on the table to attract investors. Overpricing issues usually leads to failure and furthermore a substantial % should be sold to create a liquid after market, not single digit %s. Also managements should be encouraged to meet foreign investors.

Let's take BIDV as an example. The focus should be to sell off at least 30 to 40% with several foreign cornerstone investors, the issue being underwritten by leading global investment bankers. Not just 3 to 5%.

Equitisation should become the lynchpin of the Capital Market Group with the Government identifying 2 to 3 candidates to be privatised within the next 9 to 12 months. The process can no longer be a discussion point it must become an action point.

Furthermore SOEs should focus on their core lines of business and expertise and not diversify into unrelated sectors, which will only distract them from operating effectively and runs the risk of causing egregious losses. Proper discipline and consistency in planning are prerequisites to run, develop and privatize the SOEs successfully.

Foreign Ownership

In Emerging Markets foreign investors are a key element in fostering the growth of a stock market as they contribute much of the necessary capital for economic development. However it is appreciated that certain entities of such national importance need to remain in control by local interests most notably government owned companies. A way around this would be to create a class of share with no voting rights exclusively for foreigners, as in Thailand, but they get the economic benefits such as dividends. This would enable companies to attract much needed foreign capital. The bank foreign ownership limit should be raised to 49%, this would be a more realistic number.

Stock Market issues (Trading Bands-Liquidity, Account Opening, consolidation of brokers)

- *Trading Bands-Liquidity:* Despite extending the trading hours liquidity still continues to be an issue due to the % trading bands which restrict the natural movement of prices. Admittedly these % are there to protect investors from sharp falls but they encumber the natural workings of the market. A suggestion would be to impose a 30 minutes halt in the trading of a security when a move up or down of more than 10% occurs. Such a pause should bring stability.
- *Account Opening:* The current system is cumbersome and does not attract foreigners as it takes almost 6 months to open an account whereas in most other jurisdictions it only takes a week. The requirement to obtain judicial status and a non criminal record from the country of origin of the account holder proves to be time consuming and costly. This should be replaced by the simple requirement of a notarized valid passport. This would attract many more foreign investors and most importantly capital into the stock market.
- *Consolidation of Brokers*
The Group and MOF/SSC have discussed and agreed that, currently there are too many securities firms (105 companies) for the Vietnam stock market of which the top 10 companies hold more than 50% of market share. The remaining companies are small and cannot operate profitably. Many securities firms are almost inactive with incurred losses destroying shareholders' equity and putting at risk bona fide investors who open securities account at these firms. The losses incurred by securities firms are mainly due

to proprietary trading, excessive borrowings and incautious margin lending while the risk management is weak. Thus, the Group suggests:

MOF/SSC need to accelerate the restructuring process of securities firms in order to reduce the number of firms, focusing on improving quality and financial capacity which should result in a healthier market. SSC needs to supervise and enforce compliance of the regulation that requires segregation of the investor's asset and firm's asset by securities firm.

MOF/SSC should regularly check the financial capacity, corporate governance and risk management of securities firms in order to ensure safety of the overall stock market and investors' interests.

Debt Market

The country's bond market is still very small and liquidity is low. There should be a focus on developing:

- *The Government Bond Market:* A proper functioning bond market with defined maturities (3, 6 and 12 months, 3, 5 and 10 years). There should be a clear calendar for the auctions. There should be a few designated government authorized dealers dealing amongst themselves and not on an Exchange; this would encourage a more orderly and liquid market. To attract foreign investors the 10bps transaction tax MUST be abolished. It is senseless and generates no revenues; on the contrary foreign investors would bring much needed funds to the government.
- *The Corporate Bond Market:* There should be a focus to develop a corporate bond market, with fixed coupon issues, zero coupon issues and convertible issues. Such vehicles would suit local insurance companies and foreign fixed income funds.

Going forward the Group suggests the MOF/SSC focus on the establishment of a credit rating so that risk levels can be better defined.

Improved Corporate Governance and Transparency

Though the current legal framework basically regulates public disclosure and corporate governance areas, in practice, many companies do not adhere strictly to these regulations causing concerns for investors. The Group suggests the SSC increase supervision, investigation and make strict penalties for violations in order to enhance law enforcement and promote a greater awareness for market participants.

An economic calendar should be published on a timely basis to be made available to investors with collective macro indicators from various formal sources such as GSO, SBV, MPI and MOF/SSC.

The research reports by securities firms need to disclose fully, truthfully and objectively any potential conflict of interests. For example, the securities firm or the author of the report himself may own shares or have related party benefits with the subject company of the report. Such information must be disclosed openly and transparently.

Conclusion

Vietnam continues to have a great macro story, 90 million population, median age 27 and 93% literacy rate great ingredients for future growth. We have to look at what went wrong. There was too much focus on economic growth and unbridled credit growth (30% at the

peak), which inevitably led to high inflation and currency depreciation. Similar characteristics that led to the Asian crisis of 1997 which was resolved in 2 years with the most vulnerable countries taking their pain through bankruptcies and cleaning up bad debt. This is not being addressed in Vietnam. Yes inflation has been brought down from 23% to 9% and the currency has stabilized but there continues to be a reluctance to address the real issues of the banking system and reforming the State Owned Enterprises (SOEs). Until these issues are addressed it will be difficult to achieve sound sustainable economic growth.

Regarding Vietnam I don't want to be an apologist but rather a realist and remain a long term supporter. The underlying will to succeed is widespread throughout the population, but is hampered by the corrosive prevalence of corruption, which has not been contained and is not even pragmatic as in other Asian countries. Until effective sanctions are put into place, policy will continue to drift. A wake up call is needed. Don't get me wrong I am still a big believer in Vietnam.

In conclusion it is often darkest before dawn and as in the Chinese language script, the word for chaos also means opportunity. Change is inevitable hopefully for the better.

Vietnam has a challenge, TO DELIVER.

MEETING SUMMARY ON CAPITAL MARKET

- *Time:* 09:30 – 11:30, Tuesday, 13/11/2012
- *Venue:* State Securities Committee, 164 Tran Quang Khai, Hanoi
- *Participants:* See Appendix

I. BOND MARKET

Mr. Dominic Scriven – CEO, Dragon Capital

- *Positive changes have been seen as the market evolves:* Members of the bond market have now been able to enter the T-bill market.
- *Credit rating agency:* Vietinbank just completed an international bond issue with a coupon rate of 8% per year. However, given the lack of official credit rating agencies providing sufficient information, many voices have been heard saying this rate is too high.
- *Various tax policies need to be synchronized.* And that is not only with the bond market, but tax policies applicable to all forms of financial investment, both on and off the exchange, should be paid attention to.

Mr. Tran Le Minh – Deputy CEO, VietFund Management

- *Tax concerns:* Through discussions with members of the Asset Management Companies Club, there have been two applications for establishment of open-ended funds to invest in bonds. However, existing tax policies do not encourage investment through bond funds, so direct investment is more favorable. This is a critical point of consideration when it comes to attracting investment in bond funds. The State Securities Commission (SSC) is welcome to take note of this issue and take quick action to remedy it.

Mr. Michel Tosto – Director, VietCapital Securities

- The company has done a lot of marketing for bonds in Japan during the past 18 months. However, the firm has gained no success. The main issues were liquidity, no credit agency to estimate all risk and high taxation. So, investors may decide to invest in other destinations such as Indonesia and Malaysia that offer relatively good deals. Despite having lower rates than Vietnam, they are less risky. Vietnam should consider all the mentioned factors in order to attract foreign investment.

Mr. Hiramoto Hiroshi – General Manager, Japan Securities

- A new open-ended fund is being prepared for Japanese investors, in essence a bonus fund. However, this is not attractive due to the tax applied to institutional investors, which is now 25% on the coupon and almost impossible to distribute to foreign institutional investors. But investment from institutional investors is expected for the bonus fund. If it is limited to only individual investors, the expansion or growth of the fund will be difficult.

Response by Mr. Nguyen Son – Director, Market Development Department, SSC

- *Credit rating agency for corporate bond*: The Ministry of Finance (MOF) issued Decision No.957/2012/QD-BTC, dated April 19, 2012 regarding the formation of a drafting and editing team for the draft Decree on development of credit rating entities. The drafters are now finalizing the draft, while also putting together a proposal for formulation of credit rating agencies in Vietnam. This will be the foundation for the incorporation of credit rating agencies to provide credit rating support for companies in Vietnam in the issuance of corporate bonds and preferred stock. Also other institutions in Vietnam, especially major groups and companies in their IPO attempts in Vietnam and abroad, have been using globally respected credit rating services such as Standard&Poor's and Moody's.
- *The 10% tax rate on bond investment earnings*: The MOF Circular No.60/2012/TT-BTC, April 12, 2012 on withholding tax, cuts the prevailing tax rate from 10% to 5%.
- *REPO transaction taxation for bonds (far leg)*: The SSC has talked with the MOF on understanding the nature of bond sales and repurchase agreements. From there, tax rates applicable to far leg transactions will be determined, with a description of how the interest rates are calculated in REPO deals. The final answer to this question will soon be given in the upcoming Circular on stock market taxation.
- The MOF is currently the lead agency revising the Corporate Income Tax Law, Personal Income Tax Law and Value Added Tax Law. All issues under the jurisdiction of the National Assembly have been reported by the SSC to the drafting boards of the three laws. Starting from the top legislative tier, MOF follow-on Decrees and Circulars will be steered to provide guidelines and adjustments for tax exemption or breaks.
- *Liquidity of the bond and T-bill markets*: Decree No.01/2011/ND-CP on Government bonds was released, supported by a series of implementing documents, to provide a platform for the development of a standard interest yield curve. This will make it easier for investors as they look for reference information and creation of liquidity. It is worth noting that a Circular has allowed Treasury Bills to be tendered both at the State Bank's Operation Center and the OMO market, while also being listed for trading on the Hanoi Stock Exchange (HNX). This allows for a wider range of trading activities, from short-term T-bills to longer-term bonds on the HNX.

In addition, the SSC has been working with the HNX on a Circular to replace Decision No.46/2008/QD-BTC providing regulatory schemes for Government bond trading, to remove all obstacles that have existed in the last four years and create a more open environment. The Circular will include implementing rules on bond repurchase agreements, bridging primary and secondary market investors, plus forming a group of founding members for the bond market. The SSC is considering Bond Market Association recommendations for reporting to the MOF to accommodate the support of fee mechanisms for these bond market founding members.

II. CAPITAL MARKET

Mr. Dominic Scriven – CEO, Dragon Capital

- *Opening accounts for foreign investors:* A number of issues relating to the account opening process should be addressed.
- *Recommendations for improved liquidity,* including shortening the settlement gap, widening the 5% band, allowing short selling, allowing overseas securities firms to enter into agreements with local entities to engage in specific trading and liquidity-related activities.
- *Foreign shareholding:* Is it possible to develop a concept of non-voting preferred share to assist companies that have run out of room for foreign equity, but still need more capital? Two contradictory “for and against” mindsets now exist within the group.
- Updated plans to develop new instruments and restructuring plans for various stakeholders, specifically asset management companies and securities firms, is needed.

Mr. Michel Tosto – Director, VietCapital Securities

- *Opening accounts for foreign individual investors:* A major issue is to get a criminal record. Depending on which country the investors come from, it can be difficult to obtain such record, especially as the record must cover the entire life of the investor, which can be complicated if he/she has lived in several countries, a reality for many investors. Our experience is that many investors have decided not to invest in Vietnam because of this complicated requirement. Even the US does not have this requirement.
- *Quality of companies available for foreign investors in Vietnam:* Vietnam-dedicated funds like VinaCapital and Dragon are a dying breed. New investors in Vietnam will increasingly be regional and thematic funds that allocate a portion of the fund’s money to Vietnam. These investors will only invest in high-quality companies. However, the reality is there are few of those in Vietnam that aren’t fully foreign-owned (such as VNM, FPT and DHG). Three solutions are proposed:
 - Applying non-voting-right stocks that worked well in Thailand
 - Pushing good SOEs to list
 - Offering incentives, such as tax breaks, to entice Vietnam’s private companies to list.
- *The removal of the trading band* may help increase liquidity on fully foreign-owned stock. One of the major issues for doing transactions outside the band with associated approval is that there is no pricing visibility. The reason for the band’s application is well recognized. But the removal of bands for block transactions, for example, should be considered to attract foreign investment in the Vietnamese stock market.
- *Two major steps needed to boost the market:* The most important point is having strong local institutions that means pension, open-ended and ETF funds. In many countries, open-ended funds are by far the most important vehicle to channel private capital to good Vietnamese companies. Second, the key issue is to help Vietnam be reclassified as an Emerging Market by MSCI, rather than a Frontier Market. To reach that goal, the following measures should be taken:
 - Ease pre-funding requirements

- Improve settlement time (T+1 would be ideal)
- Have a foreign board or NVDR that basically offers foreigner investors more access to Vietnam's best companies.

Mr. Nguyen Khac Hai – Deputy Director, SSI Asset Management

- *Local funds with the participation of foreign investors:* Any funds with a less than 50% foreign holding are considered local. The challenge is that foreign investors are subject to a 25% tax rate on received dividends, which keeps most foreign investors at bay from these funds.

According to existing rules, a fund with a more than 50% foreign shareholding is deemed a foreign investment fund. As such, investors engaging in the fund are subject to room limitations. If the fund is treated as a foreign investment fund, it is eligible for tax incentives, such as the application of a 0% tax rate on stock transactions. Nevertheless, existing taxation rules remain unclear on whether, regarding funds with a more than 50% foreign shareholding, foreign investors are legally considered foreign individuals, subject to taxation schemes for foreign investors. Current regulations are often interpreted in ways that imply investors as local in terms of taxation. That means both a room restriction and lack of tax incentives apply here. There should be more consistency in defining room and taxation schemes.

Mr. Hiramoto Hiroshi – General Manager, Japan Securities Inc.

- There are two key limitations that hinder investors coming to Vietnam - quality and quantity.
- *Foreign ownership in security companies:* The current regulations allow foreigners to invest less than or equal to 49% or 100% in a securities company. Foreign investors need a more flexible limitation, for example 70% or 80%.
- The most effective method to improve liquidity is to shorten time for net settlement toward application of net settlement at transaction time (T+0). It takes time, needs more complicated system, risk management but should be the final target.

Response by Mr. Nguyen Son – Director, Market Development Department, SSC

- *Opening an account:* The draft Circular replacing Decision No. 121/2008/QĐ-BTC has provided answers to two questions, (i) the removal of requirements on the judicial status and (ii) allowing delayed consular formalization for legal entities to complete procedures to obtain trading codes in Vietnam. The draft Circular has been submitted to the MOF for release within 2012.

The timeline for issuance of trading codes has been reviewed for trimming down from 10 to seven days.

- *Trading band:* The MOF has accepted, in principle, to permit the SSC to calibrate the trading band based on market developments, viewing this as a technical tool to regulate the market. The SSC is planning to expand trading bands for the HNX to 10% and Ho Chi Minh Stock Exchange to 7%. Unfortunately, as the plans were about to be rolled out,

unfavorable signs emerged in the market, including the ACB and Sacombank cases. It has, therefore, been decided it is an unfavorable time to widen the bands, given the perceived selling risks that could destabilize the market. Once the market stabilizes, apart from such strategies as afternoon trading and shortening the settlement cycle from T+3 day afternoon to T+3 day morning, trading band expansion will be reconsidered.

- *Recommendation for removal of the trading band* to be replaced by a circuit breaker: The system in Vietnam is not designed for adoption of such a tool. Instead, it is built around the trading band, applicable to individual stock symbols. In this way, the entire market index system will stay within the prescribed threshold, ruling out the need for a temporary trading freeze. Of course, this strategy will be considered for possible introduction in the IT bidding plan for stock market investment in the foreseeable future and implementation further down the road.

Circular No. 74/2011/TT-BTC providing guidelines for stock trading has addressed temporary the cessation of trading to allow the market to re-stabilize.

- *Petition about the current trading band being too tight*, making it difficult for transactions of stock with no more available room for foreign investors, such as the Vinamilk case or State divestment to allow strategic partners more room for block purchases, who will have to accept buying at lower prices or with volumes outside the band. To solve this problem, Circular No. 43/2010/TT-BTC and Circular No. 74/2011/TT-BTC have come up with an alternative where the SSC Chairman will review and approve ownership transfers on the VSD system. This will be a cautious process and should rely on the resolution of the shareholders' general meeting of the organization with block trading to avoid takeovers and maintain control if public offerings are required.
- *T+0, T+1*: Technology improvements and facilitation to shorten the settlement cycle from the T+3 day afternoon to before 9am, T+3 day have been provided. In this way, on the morning of the T+3 day, the stock will be ready for trading.
- *Shortening the settlement cycle to T+2*: The SSC is working with the Vietnam Securities Depository (VSD) to review technological and legal considerations that allow closing the settling gap to T+2.
- The T+day concept by nature refers to stock trading where investors may sell the stock prior to completion of the offset settlement cycle. To make it possible for stock to be sold on the morning of the T+2 day, or before the stock is even credited in the buyer's account, related legal preparations should be made, as well as other issues pertaining to the stock borrowing and borrow granting systems, to address the risk of missing stock when the tool is in effect. The SSC will also consider the development of an offset settlement system with CCP center partners to ensure smooth operation and create a platform for the upcoming derivative market.
- *Foreign shareholding*: The 2nd draft Decision replacing Decision No. 55/2009/QĐ-TTg on the proportion of foreign equity in the Vietnam stock market has been submitted to the MOF for consultation with relevant ministries and line agencies prior to the Prime Minister's endorsement. This legislative instrument will answer three questions. These are (i) the foreign shareholding in public joint stock companies, (ii) FDI companies converting to joint stock companies and (iii) meeting WTO commitments that remain

unclear under the implementing Decree 58 of the Securities Law and revised Securities Law.

According to this document, the foreign shareholding still remains at 49% with specific exceptions.

- *Increasing foreign investors' room in local banks to 49%:* The State Bank is now drafting a Decree to replace Decree No. 69/2007/ND-CP on the engagement of foreign parties in credit institutions with a more open perspective on foreign shareholding. The final decision on this issue, however, rests with the Government.
- *WTO commitments on stock and securities service providers:* The implementing Decree 58 of the Securities Law has been clear on this. However, two issues are opaque, (i) the ownership form of wholly foreign-owned entities and (ii) whether a foreign securities firm may open a branch in Vietnam and what the branch may do. The group has requested explanations as to why foreign investors may only own 49% or less equity in local securities firms, or 100% providing the company is a limited liability firm and not a joint stock company with three to four foreign shareholders owning 100% of the company's equity. These rules are set to maintain governance and monitoring of the owners when the company is incorporated. This is similar to the banking sector, where foreign shareholding in a local bank must not exceed 30%. Any expected shareholding above 30% should adopt the only available option of a wholly foreign-owned bank and in the form of a limited liability enterprise.
- *The Thailand model allows foreign investors to own non-voting shares* to promote the attraction of foreign capital: Vietnam's Enterprise Law provides for various other types of preferred shares. If inclusion of non-voting shares is possible, the instrument will be considered to help companies raise funds without losing control once foreign equity exceeds the current required threshold.
- *Other market support instruments:* Apart from ones specified in Decree 58, the SSC also has a reporting mechanism to the Prime Minister for piloting other instruments such as global depository receipts or global debt certificates (GDM), to assist the Government bond market's liquidity.
- *Listed companies:* Despite the large number of listed companies, quality remains low. For a few companies with good performances, corporate governance and transparency standards like Vinamilk and Phu My Fertilizer, there is no more room available. Decree 58 has tried to improve the listing quality and stock exchange standards to upgrade the quality of listed commodities. The MOF has also released a number of guidelines associated with corporate governance and disclosure to assist increased transparency among listed companies.

Response by Mr. Pham Hong Son – Director, Securities Business Management Department, SSC

- *Short selling:* The SSC's standpoint is not to allow short selling and stock lending at this point, given the current market downturn. To guarantee market equity, the SSC has ramped up audit and inspections to prevent such negative behaviors. Evidence shows that short stock selling has mostly occurred among individuals.

- *Foreign securities companies outsourcing services:* In the market, both Vietnamese and foreign securities firms are operating on the same level. There is no way a foreign firm can offer a service that a local counterpart cannot. Moreover, the current Securities Law has clearly listed what a securities firm can do, which does not include using outsourcing services.
- *Restructuring:* Nine securities companies have been put under special scrutiny, three of which have been suspended for six months, pending license withdrawal if no improvements are made, and two others have lost their depository licenses. In summary, the financial landscape of securities companies is getting darker. Under these circumstances, the restructuring plan for securities firms in particular, and the stock market as a whole, will try to map out more explicit strategies. The most drastic move will be if, within four months a securities firm fails to lift itself from the special watch pool, it will be terminated from further trading.
- *Financing scheme:* The MOF will release regulations mandating securities firms to set aside funds to ensure its indemnity liabilities to customers.

In the long run, the SSC will also consider establishing investor protection funds in case securities firms incur big losses or go bankrupt.

Response by Mr. Nguyen Thanh Long – Director, Fund Management Department, SSC

- *New instruments:* Circular 183, providing guidelines on open-ended funds, is the framework legislation. Based on this, fund-related instruments will be built. The SSC is now in the process of developing instruments and licensing open-ended fund instruments. In addition, the Accounting Standards Department has drafted preliminary detailed regulations to ensure compliance with the prevailing accounting standards and practices to support this process.
- *Pension fund:* A legal framework for voluntary and supplementary pension funds is in the works, in cooperation with related ministries like the Ministry of Labor, Invalids and Social Affairs, given the social security nature of this instrument.

Mr. Michel Tosto – Director, VietCapital Securities

- When controversies like those at ACB or Sacombank occur, the market panics. Investors' immediate reaction is to automatically sell everything at the floor because they want to get out. As psychology plays a big role in investors' decisions, if there was no trading band, the selling price would be thoroughly considered and we could see the market fall less than floor. Therefore, it is recommended to allow higher trading band or allow block transactions to be done outside the band.
- Securities companies face tougher rules and regulations to protect small investors. An alternative to tougher regulations on brokers would be having Vietnamese investors' accounts set up in a similar way to those for foreigners. For example, foreign clients' cash account is with BIDV in the investor's own name and the securities company cannot access that cash. Moreover, the shares held and being custodied by the broker are segregated and cannot be used by the broker, for example for collateral. Therefore, there is no risk to foreign investors if securities companies go bankrupt. The only problem is that investors have to find new brokers. If we are able to apply the mechanism to Vietnamese investors it will make a lot of sense in reducing risks to

Vietnamese investors, while not having to have a “fund” to cover the risk of brokers going bankrupt.

Conclusion by Mr. Nguyen Doan Hung – Vice Chairman, SSC

- *Credit rating agency*: A decision to assemble a drafting team for the Decree pertaining to the organization, incorporation and operation of credit rating agencies has been released. This is a positive sign in the crafting of a sound legal framework.
- *Taxation*: Through numerous discussions with the MOF, a general consensus has been finally reached. With the three tax laws being revised and their implementing documents, we hope that improvements are imminent. Not least the fact that this is happening when a legal framework for open-ended funds and other types of funds is now available.
- *The account opening process* will continue to be further simplified through the upcoming removal of requirements for judicial records and shortening the issuance process of opening accounts for trading codes.
- *Market liquidity*: As a 'circuit breaker' system is not in place, there is no way to control the market in the event of a crisis. The trading band, therefore, remains the tool of choice for now. The SSC has been working on the possibility of widening the trading band in the near future, when the market recovers. Once a circuit breaker system emerges, the trading band's removal will be considered.
- *T+0, T+1*: These require thorough preparation from the VSD and cautious steps as to when they should be introduced.
- *Outsourcing services*: The SSC recognizes that it is a common global trend to outsource back office services. The SSC will research this. An enabling regulatory system, however, is needed.
- *Foreign shareholding*: A number of good shares have now run out of the 49% room and many investors have suggested allowing non-voting shares, while others recommend transactions among foreign investors outside the market bands, i.e. trading at volumes higher than the existing bands. The government has commissioned relevant ministries and line agencies to work on the possibility of removing the 49% cap in non-sensitive and non-critical sectors.
- *Development of financial institutions, ETF funds, pension funds and real estate funds*: Implementing Circulars have also been completed and waiting to be enacted. The SSC has received some applications for establishment of open-ended funds and bond investments, while other types of business are emerging which could be effective channels to draw foreign investment. Along that line, issues relating to taxation, local mutual funds and offshore mutual funds will be clarified and controlled in terms of groups and tax rates.
- *System safety and restructuring securities firms*: As many as 105 securities firms are being restructured. A special concern is the financial security of securities firms. Circular 226 on the financial security of securities companies in effect from April 1, 2012 requires that H1 financial statements must be audited. The reporting deadline is August 15 and the SSC has completed reviewing all financial security considerations to be

audited and H1 financial statements. The companies will be classified in groups of having less than 120%, 150% and 180% of disposable funds. Companies classified in the less than 120% mark group will be put under special watch for four months and will be suspended if no improvements are made.

- A draft Circular replacing Circular 27 on the organization, incorporation and operation of securities firms is being developed. It will provide more stringent provisions on customers' asset management and segregation of customers' funds. With the current single-tier depository system, control and prevention of abuse of customers' stock will be better ensured, as well as isolation of customers' funds.

Appendix: List of Participants

<i>Sgt.</i>	<i>Name</i>	<i>Title</i>	<i>Org.</i>
<i>State Securities Commission of Vietnam (SSC)/Ministry of Finance</i>			
1	Mr. Nguyen Doan Hung	Vice Chairman	SSC
2	Mrs. Bui Thanh Nga	Deputy Director	Legal Dept., SSC
3	Mr. Nguyen Thanh Long	Director	Fund Management Dept., SSC
4	Mr. Nguyen Son	Director	Market Development Dept., SSC
5	Mr. Vu Chi Dung	Deputy Director	International Relations Dept., SSC
6	Mr. Pham Hong Son	Director	Securities Business Management Dept., SSC
7	Mr. Nguyen Tien Dung	Deputy Chief of Office	SSC
8	Mr. Nguyen Vu Quang Trung	Deputy General Director	Hanoi Stock Exchange
9	Mr. Pham Thi Thu Quyen		Hanoi Stock Exchange
10	Mr. Le Minh Khiem	Specialist	Tax Policy Dept., MOF
11	Mr. Pham Minh Hang	Specialist	Department of Accounting and Auditing, MOF
12	Mr. Le Thi Hoa	Specialist	Department of Accounting and Auditing, MOF
<i>Capital Market Working Group - Vietnam Business Forum</i>			
1	Mr. Dominic Scriven	OBE, CEO	Dragon Capital
2	Mr. Le Anh Tuan	Associate Director	Dragon Capital
3	Mr. Hoang Manh Thang		Dragon Capital
4	Mr. Nguyen Khac Hai	DCEO	SSI Asset Management
5	Ms. Ha Nguyen	Market Development	HSBC Securities Services
6	Mr. Michel Tosto	Director	Viet Capital Securities
7	Mr. Hiramoto Hiroshi	General Director	Japan Securities Inc.
8	Ms. Nguyen Thi Thu Hien	Foreign Investors Marketing Executive	Japan Securities Inc.
9	Ms. Duong Thi Thu Thuy	Chief Ref. of the Japan Asia Holdings Hanoi Ref. Office	Japan Securities Inc.
11	Mr. Tran Le Minh	Deputy CEO	Vinafund
12	Ms. Nguyen Thu Ha	Securities Country Manager	Citi Vietnam
13	Ms. Phung Thi Thu Ha		VBF Secretariat

Section III

Investment & Trade

REPORT FROM TRADE & INVESTMENT WORKING GROUP

*Presented by
Mr. Fred Burke
Head of Trade & Investment Working Group*

Honored Deputy Prime Minister, Co-Chairs, Speakers and Guests,

On behalf of the Trade & Investment Working Group, formerly known as the Manufacturing and Distribution Working Group, I would like to express our thanks for your continued involvement and participation in the Vietnam Business Forum.

We agree with the view that has been expressed many times, that in this period of acute economic challenges, this kind of open, constructive dialogue is more important than ever. Just as important as the dialogue, is showing results from the efforts of everyone in this room. In this regard, I am pleased to have some good news to report, though it seems that new challenges emerge every day, and some perennial issues remain unsolved.

Recent Working Group Activities and Progress

Our Working Group had two particularly constructive meetings with the MPI and CIEM and a large number of stakeholders regarding the Enterprise Law and the Investment Law on September 23.

These meetings built on the constructive input developed through Project 16. Although the amendments to these two important laws are still some way off, new implementing rules could address the many smaller, technical issues that have a disproportionately large impact on enterprises in their day to day operations.

Since then, we have seen progress on the issues we have raised in these and other areas. For example:

1. The so called "Automatic Import Licensing" scheme has been abolished. This removes one of the obstacles importers of certain types of products faced at customs.
2. More good news was welcomed with the issuance of the Law on Tax Administration, which preserved the 275 day period for duty free treatment of imports used in export products. Due to some cases of abuse and fraud, it had been proposed to reduce this period to 90 days or less, but that would have hurt the competitiveness of enterprises; not only the traditional export processors in the garment, footwear and furniture industries, but importantly the new electronic exporters that are beginning to gain traction in Vietnam.
3. Japanese citizens are now permitted to use various types of civil documents in Vietnam without going through the long and expensive process of notarization, legalization and consularization. Japan is the 22nd country to enjoy this treatment and we hope that it will expand to some of Vietnam's other major trading partners. The issue of legalization costs has been a perennial VBF topic and we are very happy to see some progress on it.

We have prepared a rough "Progress Matrix" that tracks the issues raised in our previous submissions and the progress that has been made against them. Some are very challenging, broad issues, such as implementing general administrative procedures reform, so it is hard

to define precisely the degree of progress. Other issues are specific (such as eliminating the "Automatic Import Licensing" Requirement). For each issue, we have a ranking of its progress (0 = no progress, 1 = some progress, and 3 = full resolved), which is multiplied by the issue's significance or priority to get a score. Going forward, we hope to track the VBF's progress better to help the members of the Vietnam Business Forum assess their future participation.

Regulatory Impact of New Rules Generally

T&I Group members favour policies that enhance competitiveness and encourage growth. Particularly in the challenging economic environment today, enterprises need professional support from the government's administrative services. Among other things, they need to get permits and approvals to do their business in a timely and legal manner. Delays are killing enterprises who have debt to repay but can not implement their projects on time due to slow administrative procedures.

Legislators and administrative officials need to think more carefully about the new jobs they assign their officials to ensure they have proper staffing, sufficient budget and training to impellent the jobs assigned to them. To often, a new procedure is introduced in the name of public health and safety that ends up as just another "toll booth" for an agency that has no other source of funds. For example, the recent rule that only allows the registered owner of a vehicle to drive that vehicle seems so completely out of touch with reality that one has to wonder how it could have been adopted.¹

Since we met at the May VBF, many companies have gone under, and many workers are unemployed. It is encouraging that some high profile, large scale electronics exporters such as Intel and Samsung have established successful factories in the industrial zones. But enterprises and property developers outside the zones still face a daily life or death struggle to find the support they need from local and national level government.

Today there seems to be a much broader awareness of these challenges, so the question becomes - what can we do, specifically? From the feedback of the T&I WG members, here are a few of the main comments and suggestions.

Comments and Suggestions in respect to Specific Issues

1. Labor Market

In May we expressed our concern with the new Labor Code in terms of the higher costs and greater burdens it put on manufacturers and services providers. Having to get work permits every two years vs. every three may not sound like a problem, until you have tried to do it.

Looking forward to Vietnam's possible accession to the Trans Pacific Partnership ("TPP"), Vietnam has effectively raised the bar for itself; the new Labor Code has already made it harder for Vietnam because the principle of the TPP is that each member must implement and respect its own labor laws, in addition to some international standards. Now that Vietnam has established standards that are in many cases *higher than international standards*, such as its overtime limits, six month maternity leave, etc. it has set itself a the difficult challenge of complying with a law that for many struggling businesses is largely aspirational. Mitigating this impact in the implementing decrees, and avoiding further deterioration of Vietnam's competitive labor market in the proposed "Employment Law" is vital to the livelihoods of millions in the years ahead. Our stakeholders look forward to

¹ We understand that this rule has recently been suspended.

continuing active dialogue during the process of working out the implementing decrees for the new Code.

2. E-Customs

The manufacturing sector still suffers from antiquated formalities, risk of delays and disruption, inconsistent interpretations of HS Code classifications, ever-changing import regulations, slow appeal processes, and demands for informal payments. Even in many of the industrial zones, the level of professionalism of customs needs obvious improvements.

One major and practical improvement that could be rolled out immediately would be E-customs. A real E-Customs system has been tried on a pilot basis at the Intel plant in the Ho Chi Minh City High Tech Park and by all accounts it seems to have been successful in expediting customs processing.

Expanding this system to other enterprises and indeed entire zones would be a reasonable first step in universalizing a modern, efficient and transparent E-Customs system. We see no reason to wait until 2015, as the Department of Customs suggests, to take such an obvious step in the right direction.

3. Health Care Services

Improvements in the health sector have languished and complaints about market access impediments are widespread. Better health care is not just a precondition to retaining international standard professionals, it is the legitimate aspiration of the Vietnamese people. Among the issues that T&I WG members wish to raise are the following.

According to foreign hospital and clinic operators, the licensing criteria applied to them are far more onerous than those applied to local clinics. In most cases it seems that the discrimination is informal (*de facto*, not *de jure*, e.g., (1) where a construction completion certificate was required for foreign invested clinic to operate in a building that a locally owned clinic had been operating in for several years without it; (2) delays in Ministry of Health process of practicing certificates for doctors, both Vietnamese and foreign, seem to take longer for foreign clinics than for the local ones and the requirements for speciality license enforced more strictly, etc.).

According to these members, the MOH has not licensed any new clinics for over a year, while investor's capital is wasted on newly built, international standard facilities. Meanwhile, even though the MOH says it is too busy to process new doctor or clinic applications, spot inspections constantly interrupt operations for the parts of the operations that have already been licensed. Work permits can take many months when the police or other authorities do not perform their role, and it is unreasonable to waste trained professionals' time waiting month after month on the company payroll for these administrative formalities.

These delays are worse than a tax - at least a tax produces revenue for the State to use to subsidize the system.

Other issues raised by Health Care Services Members include:

3.1. Virtual Import & Distribution Monopoly for Medical Equipment

Members report that Decree 24 effectively deprives them of the direct capital equipment import rights they are supposed to enjoy under their Investment Certificates. Because it is impossible for them to each obtain a Manufacturer's Certificate for each equipment

purchase they are forced to go through a "Distribution Service Supplier". The mark up charged by these distributors is often totally disproportionate to the value of any service provided. Some members reported that basic medical equipment such as an X-Ray machine, every US\$600,000 in equipment requires US\$1,000,000 in costs. The increase is not due to customs duties, which are low, it is the distributor's mark up. Why should patients in Vietnam have to bear the cost for this kind of expense?

3.2. Medical Translators

Members object to the requirement for a Vietnamese medical doctor who also has a degree in English to attend each foreign doctor on a 1:1 ratio. There are not many Vietnamese doctors with English degrees, so this is an effective bottleneck on the number of service providers who can treat patients in Vietnam, and another waste of resources. Most foreign patients want a doctor who speaks their language and do not need a Vietnamese translator. Even where Vietnamese doctor/translators are needed, they should be shared on a pooling system in each establishment, rather than paired wastefully on a 1:1 ratio with foreign doctors.

3.3. Selling drugs to hospital outpatients

Foreign invested hospitals are not permitted to establish their own pharmacy to sell drugs to their outpatients nor can they joint venture or associate with other entities to establish a pharmacy to sell drugs to their outpatients, except where the Government permits for pilot implementation² (which never happened). There have been no guidelines to obtain such pilot permission from the Government. Whilst provision of drugs to outpatients is an integral part of medical services of hospitals, this regulation takes away the legitimate rights and interests of foreign invested hospitals in selling drugs to their outpatients, limiting profitability and incentives for foreign investment in healthcare, which is meant to be an encouraged investment.

3.4. Profit margin for hospital pharmacy in selling drugs

The drug retailing prices in hospital pharmacies are restricted at the "maximum retailing surplus" from 2% to 20% based on the input price value³, regardless of services or facilities provided in the pharmacies, investment costs, etc. whilst such costs in foreign invested hospitals are higher than for State run hospitals. If profits cannot be made to reflect investment, this will act as a disincentive to investment and improvements in the Vietnamese healthcare system.

3.5. Hospital Regulations

Foreign invested hospitals are required to comply with the Hospital Regulations issued by the Ministry of Health in 1997⁴. However, these Regulations were designed mainly for public State-owned hospitals and contain many provisions which are completely inappropriate for foreign invested hospitals that follow international healthcare standards and/or are out-of-dated.

² Circular No. 15/2011/TT-BYT of the Ministry of Health dated 19 April 2011 regulating the organisation and operation of drug retailing establishments in hospitals

³ Circular No. 15/2011/TT-BYT of the Ministry of Health dated 19 April 2011 regulating the organisation and operation of drug retailing establishments in hospitals

⁴ Decision No. 1895

Not only the Hospital Regulations but also other healthcare regulations have focused almost exclusively on public hospitals and are often inappropriate to apply to foreign invested hospitals.

3.6. Lack of industry-specific regulations/laws to govern staff discipline

Healthcare is a very specialized area and requires special regulations for certain issues. For example, there is no law governing corrective actions and disciplinary actions against medical staff or giving foreign invested hospitals the right to impose such actions (i.e. reduction, suspension or revocation of Privileges, reduction of staff category or limitation of staff prerogatives or suspension or revocation of medical staff membership, etc.), other than disciplinary measures under the Labour Code, which may not be sufficient or appropriate to deal with violations of medical issues. Given that patient safety is often involved, specific regulations need to be implemented on this issue.

3.7. Practice certificate for foreign doctors

Since the Law on Medical Examination and Treatment, in order to obtain a practice license, foreign doctors must have a fluent Vietnamese language certificate or an interpreter who has a language competence certificate granted by an authorised medicine university after passing required tests. No test or language certificate has yet been granted in Ho Chi Minh City and as such foreign doctors cannot obtain a licence. This is a major disincentive to foreign investment in an encouraged sector. The Department of Health in HCMC has suspended some foreign Vietnamese speaking doctors for not having this certificate even though none could because the language certificate test is still not organized.

3.8. Practice certificate for visiting foreign doctors

The current law requires that every doctor performing medical examination and treatment must have a practice certificate (except for charitable work), regardless of the number of days of practice. This means that all visiting foreign doctors who come to Vietnam for a very short period for medical consultation and treatment (even one day) must have a practice certificate, whilst it will take more than 3 months to obtain such practice certificate (if one can be obtained at all). This is an obstacle to inviting highly skilled foreign doctors to update and transfer advanced medical knowledge/skills to doctors in Vietnam.

One consistent suggestion from the stakeholders was to move regulatory authority from the local Departments of Health up to the Ministry of Health to ensure a more uniform and professional regulatory environment.

May we suggest that before the next VBF, a special working group meeting between the health care sector representatives and the MOH and the MPI be convened to air these issues and discuss them directly? Complaints in the press too easily turn into empty discussions about protecting the public health, which is actually everyone's common objective. It is time to sit down and work on a consensus about how to achieve that goal.

4. The Steel Industry

Foreign investors trying to develop Vietnam's steel production industry have the following concerns and suggestions.

4.1. Lack of Industrial Policy on Steel

Investors and potential investors cite a lack of industrial development policy and say that this has caused disequilibrium between supply capacity and market demand. It has also discouraged the application and introduction of state-of-the-art technologies. The "cheaper-the-better" criteria prevails today, without regard to quality or safety.

It may very well be that Vietnam will ultimately chose a policy that recognizes there is a global surplus of steel products and therefore it should not add more production capacity domestically when it can import more cost-effectively from abroad. Alternatively Vietnam may want to chose the route of Japan, Korea and China and formulate an industrial plan that encourages a dynamic and sustainable domestic steel industry.

However, that policy discussion remains unresolved and in the absence of a coherent strategy, much less a practical plan, the industry is in a chaotic state.

Depressed product prices from cheap domestic and imported product threaten the sustainability of the industry. Small private local producers can not support the capital intensive infrastructure and facilities needed to build a sustainable industry producing quality products. The development histories of steel business in Japan and Korea show that government should have a supportive industrial policy to build a globally competitive integrated steel industry at least at the primary stage of its development.

In Vietnam today, there is no integrated domestic steel producer. Imported product floods in at seemingly below market prices but no anti-dumping measures have been taken.

4.2. Specific Requests

Comments and suggestions based on current operational difficulties of steel producers:

- Customs duty levied on imported steel billets (semi-finished steel products) should to be eliminated to encourage local production. Significantly insufficient power supply and steel making capabilities make it impossible to produce sufficient steel billets in Vietnam. Customs duty on imported steel billets sacrifices competitiveness of the steel rolling mills and therefore discourages the emergence of strong local producers.
- Inflow of cheap products from the north at what seem to be dumping prices has caused financial difficulties among domestic steel producers. Investigation into dumping practices and control of them needs to be a priority to nurture a healthy domestic industry without sacrificing a competitive marketplace.
- Vietnam's Construction Law and its implementing rules need to be modified particularly for road construction. Currently roads are constructed without utilization of steel bars or wire rods, resulting in significantly shorter lifespan of roads and requiring frequent repairs of damaged surfaces. Any initial saving by omitting steel bars or wires is outweighed by the increased maintenance and repair costs over the lifetime of the roads. Easily damaged and uneven road surfaces create serious dangers in driving.
- Standardized specifications for steel products needs to be established and enforced. Currently in the market place you can find a wide range of steel products that are below any recognized international standard but nevertheless traded and used routinely. This is only possible at the cost of safety of buildings and housing. Such unqualified products lead to a poor reputation for Vietnamese steel product exports in South East Asia.
- In order to increase domestic steel making capacity, Vietnam needs to establish customs clearance standards and procedures for imported steel scrap. The current practices in custom houses causes confusion and difficulties. Among other things, steel scraps which are major raw materials in steel making are sometimes classified as disposed wastes.

Again, a focused sub-working group on the Steel Sector comprising producers, importers, consumers, raw material suppliers and of course government may help to reach a unified policy direction for the industry. T&I members would be keen to support such a meeting in due course.

5. Outstanding Enterprise Law and Investment Law Issues

In respect to the Enterprise Law and The Investment Law, detailed summaries of the Roundtable Discussions we enjoyed with the MPI and CIEM in Ho Chi Minh City on September 26 are included in the VBF materials. Though the two laws are not scheduled for amendment until late 2013, we already see consensus emerging on a number of important issues. Some of the top issues in this category are :

1. Realigning the registration and approval procedures for foreign and local enterprises to reduce discrimination and enhance overall efficiency. One of the idea is to do away with the distinction of using only Investment Certificates for Foreign Invested Enterprises and give everyone a unified form of Business Registration Certificate;
2. Definition of "Foreign Invested Enterprise"(for purposes of market access restrictions) and "Direct" vs. "Indirect" foreign investor;
3. SME Access to Capital and the rules governing private placements, especially to foreign strategic and portfolio investors.
4. New procedures are required to deal with the common situations that require suspension and cessation of investment projects;
5. Investment incentives regime needs to be updated in light of the international situation for industries such as high value added electronics and alternative energy projects, human resources and training projects, among others.;
6. Move from a "positive list" system (red light unless there is a green light) to a "negative list system (all green light unless there is a red light) as contemplated in the Investment Law of 2005 (all sectors open except for those that are prohibited, restricted or conditional under specific provisions of law).
7. WTO Commitments should be seen "as a floor, not a ceiling".
8. There was even some talk of eliminating the "Investment Law" altogether, echoing a discussion that surrounded its inception in 2005, assuming that the relevant enabling portions could be subsumed into the Enterprise Law and other relevant laws.
9. And there were a number of pragmatic suggestions for updating implementing rules to reflect experience over the past seven years, including (1) the need to clarify and harmonize requirements for amending Business Registration Certificates, especially in terms of naming new members/shareholders, (2) modernization of rules on company seals to reflect business realities and modern e-commerce; (3) further liberalizations in terms of allowing companies to design and print their own Value Added Tax receipts; (4) a suggestion that the law allow for more than one "legal representative" for a company to handle affairs especially in times of crisis; (5) concepts such as "fiduciary duties" of directors and officers should be enforced more strictly.

10. There are more materials on these discussions and channels for stakeholders to air their views on the VCCI's www.vibonline.com.vn website and at the Foreign Investment Agency's website.

6. Legal Services

Recently, proposed amendments to the Law on Lawyers gave rise to concern among foreign and international law firms, the Vietnamese lawyers who work for them, and international business chambers and companies. These concerns arose out of the contention from some local law firms that Vietnamese lawyers working for international law firms should not be allowed to engage in the activity of drafting commercial contracts and business charters. This contention was based on the argument that under the United Nation's Statistical Division's nomenclature for international trade in services that is used for reference in Vietnam's Services Schedule to its World Trade Organization accession documents (the "CPC Code"), "*legal document services*" are lumped together with "*notarization*" and certain other quasi governmental acts. Since drafting contracts is core to the transactional practices of the major international law firms, the concern was quite serious and damage to the trade and investment environment was feared if the universe of legal service providers for large investment projects and trade deals were suddenly to be reduced.

Fortunately, though a hurried process of communications with the relevant authorities, especially the Ministry of Justice, the wording in the Law on Lawyers was modified somewhat, and the floor debate, broadcast on national television, made it clear that the deputies considered the activity of "*legal consultation services*" that Vietnamese lawyers can provide even when working at international law firms includes drafting various types of agreements. This is subject to the important and well recognized condition that it is the lawyers who are qualified to advise on Vietnam law who can formally provide these legal document services.

The implementing decree for the Law on Lawyers will no doubt provide further guidance, but in the meantime, to eliminate any lingering uncertainty on this particular issue (which is not good for the investment and trade environment) it would be helpful if the Ministry of Justice could kindly confirm our understanding, namely, that taking in to account Article 28 and 70 of the amended Law on Lawyers, Vietnamese qualified lawyers who work in international law firms can still draft commercial contracts and business charters as part of their general consultation activities.

7. Concern about Proposal for Prior Approval for Food Advertisements

The recently adopted Law on Advertising will come into effect on January 1, 2013. Among other things, we understand that this law enables the establishment of an Advertising Appraisal Council and an Advertising Professional Association. The advertising community is already well on the way to adopting an industry codes of practice (to be approved by the relevant authority) to help protect consumers from misleading advertising, in a manner consistent with the Law on Advertising, the existing Law on Consumer Protection, etc.. Taken together, these developments constitute a big step in the direction of responsible professional self regulation that is welcome.

However, notwithstanding these developments, the Ministry of Health has proposed new rules that would effectively amount to prior MOH approval of all advertisements related to food and beverages, medicines and cosmetics, etc. Rather than formulating detailed guidelines for such advertisements and placing the responsibility on the producers under their government approved code of practice, the MOH's proposal would regress to a system where every advertisement needs to go through another "toll gate". This would have little

practical benefit for consumers, but would add costs to the supply chain that they would eventually have to bear.

We hope that once these proposals are discussed with stakeholders and other regulators, an approach that is both safe and efficient will be agreed upon.

8. International Integration

In times of economic hardship there is a temptation to resort to protectionism, to erect tariff and non-tariff barriers to international competitors who would like to enter the market. Every day we hear open cries for protectionism all over the world, including here in Vietnam. But for the most part, these cries come from special interest groups who stand to benefit at the expense of the broader society and economy.

We urge the leadership to resist these short-sighted, self-interested pressures and continue to pursue global economic integration through day to day domestic policies as well as aggressive pursuit of broader international treaty arrangements. Mainly, the Trans-Pacific Partnership (TPP) and an EU FTA, both of which promise to reduce tariff and non-tariff barriers for goods and services broadly across a huge area of the global economy.

One thing we've learned in the past few years is that international agreements alone, without clear domestic resolve to reform and advance, are not sufficient to produce the kinds of economic and social opportunity Vietnam needs today. Among other things, the social and economic costs of State owned enterprises have become too obvious; procurement practices for major projects are inefficient prone to abuse. Many of the non-strategic assets of the large SOE groups should be spun off and privatized, but too many are still managed by the old rules.

Moreover, the reforms required by the TPP are ones that Vietnam should want anyway – reform of State Owned Enterprises, transparency in government procurement and more competitive supply chain support services. Therefore, we urge the Government to continue to pursue the TPP and EU FTA talks aggressively.

* * *

Thank you for giving us the opportunity to share our concerns and suggestions. We look forward to hearing your response and to continuing our constructive dialogue on the Enterprise Law and its implementing rules in anticipation of its planned 2013 overhaul.

* * *

Investment Law

REVIEW OF LEGAL DOCUMENTS - THE INVESTMENT LAW 2005

Prepared by
Baker & McKenzie

4 review criterion:

1. Transparent
2. Consistent

3. Reasonable
4. Feasible

No.	Issues	Articles in Law/Sub-law document governing the issues	Criterion that have not been met	Analysis of the issues (based on the criterion, and state clearly the difficulties arising for the enterprises due to these provisions etc.)
1	The definition of “foreign investor” is not complete and in some cases not consistent with other legal normative documents	Article 3, Article 29 of the Investment Law 2005 Decision 55/2009/QĐ-TTg dated 15/4/2009	Transparent	<p>Article 3 provides that: “Foreign investor is a foreign organization [or] individual that injects capital for the purpose of conducting investment activities in Vietnam”.</p> <p>The above definition indicates that “foreign investor” only includes offshore organisations/individuals that inject capital the purpose of conducting investment activities in Vietnam. As such, foreign invested enterprises (established in Vietnam) does not seem to qualify for this definition to be considered “foreign investors”.</p> <p>However, Decision 55 provides, for the purpose of determining the shareholding of a foreign investor operating in Vietnam's securities market, that foreign investors include also the foreign invested enterprises established in Vietnam in which the shareholding of the foreign party is over 49%.</p> <p>In conclusion, the definitions of “foreign investor” under the Investment Law and Decision No. 55 are not consistent. The definition under Decision 55 is not applicable to all investment activities in general (but only to securities trading activities in Vietnam's securities market). Therefore, when an investor using its subsidiary (established in Vietnam) to further invest in a sector which is restricted for foreign investors (e.g.: under WTO commitments) in Vietnam, it is unable to decide whether it (the subsidiary established in Vietnam) must be subject to those restrictions.</p>

No.	Issues	Articles in Law/Sub-law document governing the issues	Criterion that have not been met	Analysis of the issues (based on the criterion, and state clearly the difficulties arising for the enterprises due to these provisions etc.)
2	Unclear regulations on investment incentive entitlements	<p>Article 32-39, Section 2, Chapter V, Investment Law 2005</p> <p>Article 22-29, Section I, Chapter IV, Decree 108/2006/ND-CP</p>	Transparent	<p>Under the provisions of the law, investors having investment projects conducted in preferential investment fields and geographical areas (including new investment projects and investments in expanding the scope of investment, improving productivity and business capacity, renovating technology, improving product quality and reducing environmental pollution) might be entitled to the following incentives:</p> <ul style="list-style-type: none"> (i) tax incentives (EIT, import duties, etc.); (ii) incentives as to loss carry forward; (iii) incentives as to fixed asset depreciation; and (iv) incentives as to uses of land (land use tax, land use charges, land rent and water surface rent). <p>Article 38 of the Investment Law states clearly that for foreign-invested projects, the State investment administration authorities shall specify the preferential treatment in the Investment Certificates.</p> <p>However, we realize that in practice, these regulations are not satisfied as to transparency/completeness, because they fail to clearly provide about the formalities for the investors to obtain these incentives.</p> <p>It is common that incentives as to loss carry forward or fixed asset depreciation are not provided in the investment certificates. The question is that shall the investors be automatically entitled to investment incentives which are not specified in the investment certificates? Do they need to obtain further approvals from other authorities (e.g. Ministry of Finance, Department of Finance) to be entitled to these incentives?</p>

No.	Issues	Articles in Law/Sub-law document governing the issues	Criterion that have not been met	Analysis of the issues (based on the criterion, and state clearly the difficulties arising for the enterprises due to these provisions etc.)
3	Discriminatory regulations regarding term of operation of foreign invested projects and domestic ones	Article 52, Investment Law 2005	Reasonable	<p>Article 53 states that: “The term of operation of a project with foreign investment capital must correspond with the project operation requirements and must not exceed 50 years; in necessary circumstances, the Government may decide on a longer term for a project though [it] must not exceed 70 years.”</p> <p>The above regulation is not reasonable, because it discriminates between the foreign invested projects and the domestic ones. The term of operation of foreign invested projects is restricted while that of domestic projects is not. It is obvious that the restriction on the term of operation of foreign invested project is not necessary and creates an unnecessary discrimination between the foreign invested projects and the domestic ones.</p>
4	The definitions of “Direct investment” and “Indirect investment” are not clear, making it difficult to distinguish these two forms of investment, affecting investment formalities and other related formalities.	<p>Article 3, Investment Law 2005</p> <p>Article 13, Decree 160/2006/ND-CP providing detailed regulations on the implementation of the Foreign Exchange Ordinance</p>	Reasonable	<p>Article 3 provides that: “Direct Investment refers to a form of investment whereby an investor injects investment capital and participates in the management of the investment activities”, and “Indirect Investment refers to a form of investment made through a purchase of shares, share certificates, bonds [or] other valuable papers, [or] through a securities investment fund, [or] through other intermediary financial institutions, without the direct involvement of the investor in the management of the investment activities.”</p> <p>The above provisions are not satisfied in terms of reasonableness. In many cases, the investors make investments under the forms of buying shares of an enterprise, and the acquired shares (or the shares accrued after several purchases) add up to 100% or a certain ratio which enables the investors to participate in the management of that enterprise. On the other hand, Article 50.1 of the Investment Law provides that a foreign investor that makes an investment in Vietnam for the first time must have an investment project. A number of government authorities refer to this regulations and provide further guidance that investors making investments in Vietnam for the first</p>

No.	Issues	Articles in Law/Sub-law document governing the issues	Criterion that have not been met	Analysis of the issues (based on the criterion, and state clearly the difficulties arising for the enterprises due to these provisions etc.)
				time must have Investment Certificates. Such regulation means that every foreign investor making investments in Vietnam (including indirect investments) for the first time must have an investment project and obtain an investment certificate, making indirect investment formalities becoming direct investment formalities.
5	The provision that investment certificates are concurrently the certificates of business registration creates procedural difficulties for enterprises that wish to transfer only the projects but not the enterprises	Article 50, Investment Law 2005 Article 66, Decree 108/2006/ND-CP	Transparent	In practice, the transfer of investment projects shall result in the amendments to investment certificates. For investment projects attached to the establishment of the enterprises (foreign invested enterprises must always be attached to specific projects), it will result in the formalities to amend business registrations, as such the transfer of an investment project shall lead to the transfer of one part of or the entire enterprise. At this stage, the formalities to transfer the project might lead to the termination of the operation of the transferred economic organization, accordingly, the transfer of a project must comply with the conditions on and formalities applicable to enterprise merger and acquisition.

No.	Issues	Articles in Law/Sub-law document governing the issues	Criterion that have not been met	Analysis of the issues (based on the criterion, and state clearly the difficulties arising for the enterprises due to these provisions etc.)
6	Absence of clear provisions on investment mechanism and formalities applicable to investors from countries and territories which are not WTO members	No regulations	Transparent	The absence of detailed regulations on this matter makes the Investment Law intransparent, because investors from these countries have no basis to determine their rights and obligations, especially the statutory investment restrictions, when making investments in Vietnam (while this is very important because before investing in any market, every investor wishes to have a general view of the investment environment of that country, thereby to decide its business strategy).
7	Absence of clear regulations on the investment mechanism and formalities for investors wishing to invest in sectors/sub-sectors that are "unbound" or not included in Vietnam's WTO commitments	No regulations	Transparent	<p>The fact is that many local authorities have refused to issue a permit to the investors, explaining that "unbound" or not included in the WTO commitments means that Vietnam has no obligation or is not required to open the market.</p> <p>Under WTO regulations, the implication of "unbound" or not included in the accession commitments, and market access and the level of market access shall depend on domestic regulations of Vietnam</p> <p>Recommendation: We recommend that there should be detailed regulations clarifying the policies and formalities applicable to investors wishing to invest in the sectors/sub-sectors which are "unbound" or not listed in WTO commitments.</p>
8	The provision that investors	Investment Law Decree	Transparent	<p>According to the provisions of Article 13.2 of Decree 102:</p> <p><i>2. Foreign investors shall make capital contributions to limited liability companies</i></p>

No.	Issues	Articles in Law/Sub-law document governing the issues	Criterion that have not been met	Analysis of the issues (based on the criterion, and state clearly the difficulties arising for the enterprises due to these provisions etc.)
	must obtain investment certificates if they wish to make capital contributions to or acquire shares of Vietnamese enterprises operating in goods trading and/or activities directly relating to goods trading, <u>even 1%</u>	102/2010/ND-CP Decree 23/2007/ND-CP Official Dispatch No. 4646/BKH-DTNN Official Dispatch No. 10725/BCT-KH		<p><i>or receive capital contribution portion transferred from members or owners of those companies according to the regulations on capital contribution or capital transfer and conduct member change registration under the provisions of the Enterprise Law and the relevant laws.</i></p> <p><i>The registration of change in membership of companies already having an Investment Certificate shall be conducted at competent authorities in charge of investment management.</i></p> <p><i>The registration of change in membership in other cases shall be conducted at business registration authorities.</i></p> <p>It seems that Vietnamese enterprises selling shares to foreign investors are only required to conduct the formalities to amend their business registration.</p> <p>However, Official Dispatch No. 10725/BCT-KH dated 27 October 2009 of the Ministry of Industry and Trade provides that: <i>Foreign investors wishing to make capital contributions to or purchase shares of Vietnamese enterprises already having business registration certificates to operate in goods trading activities and/or activities directly relating to goods trading are considered foreign investors making investments for the first time, accordingly, they are required to conduct the formalities to obtain an Investment Certificate, which is concurrently the Business License to operate in goods trading activities and/or activities directly relating to goods trading, and must be approved in writing by the Ministry of Industry and Trade.</i></p> <p>As such, there seems to be a conflict among these provisions, specifically as to whether the investors must obtain an investment certificate or they only need to conduct the formalities to amend their business registration certificates.</p>

PROPOSALS TO INVESTMENT LAW

*Prepared by
VCCI*

Unlike with other Laws, the review results show no specific proposals on revisions or deletions of the provisions of this Law but prove that it is necessary to redraft this law on a more systematic manner. There are actually two different points of views on specific proposals. The majority agreed that this Law on Investment should not be kept as it now contains too many overlaps with other Laws and is becoming unnecessary; also this Law is only necessary at early days of the opening of the economy when a red carpet was required to call for foreign investment at any cost and when the legal framework for enterprises and businesses is not yet adequate; and now as that mission of the Law on investments has been accomplished it seems to be no longer necessary particularly when all the investment incentives and preferences can be set out in specialized laws such as the Land law and laws on duties and taxes... The rest argued that the Law on investments should not be removed completely, specifically only parts of it should be removed (i.e. provisions on procedures for investment registration) and the rest should be substantially revised. The second group comes up with the following proposals:

1. Proposed additions:

- To add provisions on capital contributions and purchases of shares by foreign entities and individuals respectively to and in Vietnamese enterprises shall be provided in the following manner:
 - These provisions shall replace all existing regulations on capital contributions and share purchases by foreign entities and individuals to and in Vietnamese enterprises, including capital contributions and share purchases in the securities market. These provisions should be consistent with those in the Law on enterprises.
 - The term of “foreign investors” should be clarified whereby enterprises set up in Vietnam and involving foreign ownership are regarded as Vietnamese enterprises Vietnam under the Law on investments.
 - Specialized laws might detail (if necessary) these provisions in their text bodies by way of imitating the percentage of ownership with regard to the conditional business activities.
- To add provisions on investments by investors from a country which is not yet a WTO member.

2. Proposed revisions:

- To revise provisions on suspension and stretching the investment progress;
- To revise provisions on the termination of investment projects;
- To revise provisions on the changes to and adjustments of investment projects;
- To revise provisions on transfers of investment projects;
- To revise provisions on the list of sectors where investment is prohibited and conditional;
- To revise provisions on investment incentives;

- To revise provisions on the term of operation of a foreign invested project by not discrimination between domestic and foreign projects;
- To revise provisions on the distribution right of foreign-invested enterprises;
- To revise provisions on the right to set up trade unions.

3. Proposed revocations:

- To delete provisions on evaluation and registration of investment projects;
- To delete the requirement that the first time foreign investor in Vietnam must have an investment project;
- To delete current provisions distinguishing between various forms of investment even between direct and indirect investments;
- To delete provisions on incentives which are no longer appropriate such as those on loss transfer;
- To delete provisions on tender (Article 54).

COMMENTS ON INVESTMENT LAW

Prepared by
PBC PARTNERS

No.	Matters	Relevant legal instruments	Short-comings
1.	Requirement of opening VND capital accounts by foreign investors when acquiring shares/equities in a 100% Vietnamese owned company	<ul style="list-style-type: none"> - Law No. 59/2005/QH11 on Investment (“Law on Investment”) - Decree No. 160/2005/ND-CP guiding the implementation of the Ordinance on foreign currency (“Decree 160”) - Decision No. 88/2009/QĐ-TTg enacting Regulations on capital contribution, acquisition of shares by foreign investors in Vietnamese enterprises (“Decision 88”) - Circular No. 03/2004/TT-NHNN guiding the management of foreign currency regarding capital contribution, acquisition of shares by foreign 	<ul style="list-style-type: none"> - According to Circular 03, all foreign investor must have a VND capital account for capital contribution or share acquisition in Vietnamese companies. - In practice, the relevant authorities have different opinions about this regulation. For example: <ul style="list-style-type: none"> ▪ A foreign investor acquires 99% of shares in a 100% Vietnamese owned company in a province. The department of planning and investment (DPI) in this province does <i>not</i> require this foreign investor to open a VND capital account because the purpose of investment is to <i>manage the company</i>. ▪ Another foreign investor contributes capital in a 100% Vietnamese owned company in another province with the percentage of 70%. The DPI requires this foreign investor to open a VND capital account and then submit a certificate thereof issued by a commercial bank. <p>Because the laws are not clear, and because of the different approaches taken by different local authorities, some banks refuse to open a VND capital account because the foreign investor <i>contributes capital for management of the</i> 100% Vietnamese owned company. Other banks require an investment certificate (“IC”) recording such foreign investment before opening this account; meanwhile, the IC cannot be issued until a certificate of opening a VND capital account is submitted to the DPI.</p>

No.	Matters	Relevant legal instruments	Short-comings
		investors in Vietnamese enterprises (“Circular 03”)	<p>Proposals:</p> <ul style="list-style-type: none"> - The Law on Investment should clarify the term of “management of investment activities”. For example, if the ratio of charter capital held by a foreign investor is at a certain percentage, he is deemed to invest for management. - A guideline should be issued for the open of VND capital accounts so that there is consistency of interpretation and application.
2.	Converting loan to capital of foreign investors in a 100% Vietnamese owned company	<ul style="list-style-type: none"> - Article 21 of the Law on Investment - Decree 134/2005/ND-CP guiding foreign loans and repayment thereof (“Decree 134”) 	<p>Investments via convertible loan arrangements are common in many countries but it is not straightforward in Vietnam. Therefore, authorities may have different opinions.</p> <p>2.1. Form of investment:</p> <ul style="list-style-type: none"> - While the conversion of loan to capital is not expressly stated in Article 21 of the Law on Investment, it may be allowed as a form of FDI as “other direct investment forms”. - If this is the case, foreign investors may apply for such investment. However, issuance of IC is at the discretion of the licensing authorities. For example: <ul style="list-style-type: none"> ▪ Where a foreign investor has granted a loan to a foreign owned enterprise (“FOE”), then it may apply for conversion of loan to capital in this FOE quite easily; ▪ However, where a foreign investor has granted a loan to a 100% Vietnamese owned company, conversion of loan to capital may be refused. It is because

No.	Matters	Relevant legal instruments	Short-comings
			<p>such type investment is not clearly provided by the laws according to a DPI in a province.</p> <p>2.2. <u>Scheme for conversion of loan to capital:</u></p> <ul style="list-style-type: none"> - According to Decree 134, foreign loans are controlled by the State Bank of Vietnam (“SBV”). Meanwhile, foreign investment is controlled by the DPIs. Therefore, it requires cooperation between the SBV and the DPIs in assisting foreign investors with conversion of loan to capital. - However, there is lack of such cooperation in practice. For example: <ul style="list-style-type: none"> ▪ DPI of one province states that foreign loans are under the SBV’s control; hence, foreign investors must apply for termination of foreign loan at the SBV first and then apply for conversion of loan at the DPI. ▪ In another case, according to one staff of the SBV, foreign investors must apply for an IC issued by the DPI first and then submit the IC recording foreign investment to the SBV for termination of foreign loan. <p>Proposals:</p> <ul style="list-style-type: none"> - Form of investment: <ul style="list-style-type: none"> ▪ Conversion of loan to capital should be considered a form of investment in investment laws. ▪ Moreover, there should be specific guidelines for the procedures for such conversion and required documents to be submitted by foreign investors and 100% Vietnamese owned companies.

No.	Matters	Relevant legal instruments	Short-comings
		<ul style="list-style-type: none"> - Scheme for conversion of loan to capital: 	<p>Guidelines should also be issued to clarify the procedures. Logically speaking, if a foreign investor intends to convert a foreign loan, there must be a foreign loan at the time of conversion, i.e. such loan has not been terminated. Therefore, it will be more reasonable if foreign investors (i) apply for conversion of loan to capital at the DPI; and then (ii) register termination of foreign loan at the SBV.</p>
3.	Foreign investment by foreign investors from non-WTO members	<ul style="list-style-type: none"> - Article 5 of the Law on Investment – laws governing foreign investment - Article 29 of the Law on Investment – Investment fields subject to conditions 	<ul style="list-style-type: none"> - According to Article 29 of the Law on Investment, investment fields as provided in WTO Commitments are investment fields subject to conditions. Therefore, foreign investors shall satisfy conditions in WTO Commitments before conducting their investment in Vietnam. - However, for foreign investors from non-WTO members, it is impossible to verify conditions of investment, rights and obligations because both WTO Commitments and the Law on Investment do not provide for these matters. - Therefore, licensing authorities normally issue IC for such foreign investors on case-by-case basis after consulting the upper authorities such as the Ministry of Planning and Investment (MPI), the Ministry of Industry and Trade (MOIT), etc. Consulting relevant authorities usually takes time, but the final result may be a refusal. Moreover, opinions of the upper authorities on the same matter may be different from each other. <p>For example:</p> <ul style="list-style-type: none"> ▪ According to the MPI, a BVI's investor may enjoy WTO treatment when investing in distribution services if its owner is from a WTO member country; ▪ However, according to the MOIT, a BVI investor cannot be granted the

No.	Matters	Relevant legal instruments	Short-comings
			distribution license because it is a non-WTO member country.
		<p>Proposals:</p> <ul style="list-style-type: none"> - This matter is common in WTO member countries. Some of them have the procedures for investment by foreign investors from non-WTO members. <ul style="list-style-type: none"> ▪ For example, in Canada, under the Investment Canada Act, foreign investments by foreign investors from non-WTO members are deemed reviewable – meaning that they are subject to approval by the federal government – if the threshold is \$5 million or more for direct acquisitions. <p>Foreign investments can be approved only if the Minister of Industry is satisfied that the transaction is likely to be of “net benefit” to Canada. Factors that are considered in the net benefit “test” are: (i) the effect of the investment on economic activity in Canada; (ii) the degree of participation by Canadians in the business in question; (iii) the effect of the investment on productivity, efficiency, technological development, product innovation and product variety in Canada; (iv) the effect of the investment on competition; (v) the compatibility of the investment with national industrial, economic and cultural policies; and (vi) the contribution to Canada’s ability to compete globally.</p> <p>In order to make the decision, the minister consults with provincial governments, other federal departments, and the Competition Bureau. Also, the minister examines in detail the foreign investor’s future plans for the Canadian business. The foreign investor may offer legally binding undertakings (e.g., job creation, R&D activities or new investments) to demonstrate “net benefit” to Canada.¹</p> - In Vietnam, there should be a guideline for investment by foreign investors from non-WTO members such as conditions of treatment, procedures for apply for IC, competent authorities to deal with the application dossiers, etc. 	

¹ <http://www.parl.gc.ca/Default.aspx?Language=E>

No.	Matters	Relevant legal instruments	Short-comings
4.	The post licensing procedures	Chapter V, Item 1, Article 46, 47, 48, 49 of the Law on Investment	<p>Normally, for establishment and operation of a company, foreign investors will apply for IC, lease office, recruit employees, etc. In some countries, many tasks such as pitting – out the premises, recruiting employees, etc. (post-licensing procedures) are performed after issuance of IC. However, there is often an overlap in Vietnam and this causes confusion.</p> <p>For example:</p> <ul style="list-style-type: none"> - According to Chapter V, Item 1, Article 46, 47, 48, 49 of the Law on Investment and guidelines of some DPLs, when applying for IC, foreign investors are required to submit documents regarding location of investment projects such as notarized lease agreements, building ownership and land use right certificates, land use right certificates, business registration certificate of the lessor, etc. <p>In practice, some notary publics refuse to notarize lease agreements because foreign investors have not obtained a license to invest in Vietnam yet. Therefore, foreign investors must submit to DPLs memorandums of understanding (“MOU”) signed between foreign investors and lessors instead. However, normally, the foreign investors must pay the rental from the date of signing MOU. It will cause financial hardship if the application dossier is rejected. Moreover, DPLs in some provinces may refuse a MOU; consequently, foreign investors cannot obtain IC.</p> <ul style="list-style-type: none"> - In addition, for some industries such as HR business, vocational education, etc. foreign investors must (i) apply for IC at the DPLs, and (ii) register operation at the professional competent authorities. However, at the first stage, some DPLs require documents of the second stage such as statement of facilities, curriculum, list of teachers, etc. <p>It may take time and money for foreign investors to submit these documents; hence, it may cause delay in the procedures for issuance of IC. In case the</p>

No.	Matters	Relevant legal instruments	Short-comings
			<p>application dossier is rejected by the DPI, this will cause financial hardship to the foreign investors. Moreover, it appears that before issuance of IC, foreign investors cannot recruit employees, sign agreements on equipment installment, etc.; these partners may hesitate in cooperating with foreign investors because at this moment, it is unclear about the feasibility of issuance of IC to foreign investors.</p>
		<p>Proposals: Conditions of establishment (issuance of IC) and conditions of operation should be clearly distinguished in the investment laws. In order to facilitate the foreign investors, documents for the post-licensing procedures such as location, operation registration, etc. should not be required by the DPIs for issuance of IC.</p>	
5.	Term of investment projects	<ul style="list-style-type: none"> - Article 52 of the Law on Investment - Article 13.1 of the Law on Investment 	<ul style="list-style-type: none"> - According to Article 52 of the Law on Investment, term of an investment project with foreign capital is subject to requirements of the project and does not exceed 50 years. In the appropriate case, the Government may allow a longer term but not exceeding 70 years. <p>Article 13.1 of the Law on Investment, the investment term is under discretion of the foreign investors.</p> <ul style="list-style-type: none"> - However, in practice, investment term is usually at the discretion of the DPIs. For example: <ul style="list-style-type: none"> ▪ For investment in manufacturing, the investment term of 50 years may be approved by the DPIs; ▪ For investment in services, such as distribution, the investment term is usually 10 years only.
		<p>Proposals: Restrictions on investment terms caused by the DPIs should be revoked. Instead, they must approve the</p>	

No.	Matters	Relevant legal instruments	Short-comings
		investment terms proposed by foreign investors if such terms comply with the Law on Investment.	
6.	Requirement of minimum capital injected by foreign investors	The Law on Investment	<ul style="list-style-type: none"> - The Law on Investment does not provide for the minimum amount of capital to be injected in normal investment fields. - In practice, requirement of minimum capital is usually applied by the DPIs. For example: <ul style="list-style-type: none"> ▪ For investment in distribution services, the minimum amount of capital at the discretion of the DPIs is usually US\$100,000, depending on types of products to be distributed. ▪ However, for investment in manufacturing, the minimum amount of capital must be more than US\$100,000.
		Proposal: The requirement of minimum amount of capital for different industries decided by DPIs should be revoked.	

No.	Matters	Relevant legal instruments	Short-comings
7.	Companies operating under both BRC and IC	<ul style="list-style-type: none"> - The Law on Investment - Decree 102/2010/ND-CP guiding the law on enterprises (“Decree 102”) 	<ul style="list-style-type: none"> - According to Article 13 of Decree 102, in case foreign investors contribute capital, acquire shares from shareholders/members in limited liability companies/joint stock companies: <ul style="list-style-type: none"> ▪ If the companies have been issued with the IC, registration of change in shareholders/members is at the authority managing investment. ▪ In other cases, such registration is at the authority managing business registration. <p>These articles imply that if the company operates under BRC, such registration is at the authority managing business registration; or if the company operates under IC, such registration is at the authority managing investment.</p> - In practices, this regulation applied in different ways by different DPIs. For example: <ul style="list-style-type: none"> ▪ A foreign investor intends to contribute capital in a 100% Vietnamese owned company with the percentage of 70%. It is required by the DPI in this province that the company will (i) amend the BRC at the authority managing business registration and (ii) apply for the IC at the authority managing investment; as a result, this company operates under both BRC and IC. ▪ However, for another case in another province, a foreign investor acquires 99% of shares in a 100% Vietnamese owned company; the DPI of this province recovers the BRC and then issues an IC for the company.

No.	Matters	Relevant legal instruments	Short-comings
		<p>Proposals:</p> <ul style="list-style-type: none">- The licensing authorities should standardize the procedures for foreign investment in 100% Vietnamese owned companies. In this case, recovery of BRC and issuance of IC will be more reasonable. If a company operates under both BRC and IC, the company may apply for amending both BRC and IC in case of any changes in business activities. The procedures may take much time.- Besides, there should be a guideline for relevant matters such as a certain percentage of foreign capital at which the BRC will be replaced with the IC, the competent authorities to deal with the application dossier, etc.	

SUMMARY OF ROUNDTABLE DISCUSSION ON INVESTMENT LAW

- *Time:* 08:30 ~ 11:30, Wednesday, 26/09/2012
- *Venue:* Vietnam Chamber of Commerce and Industry, HCMC Branch, No. 171 Vo Thi Sau Street, Ward 7, District 3, HCMC

I. AGENDA

- Schedule and orientation for amendments and supplements to the Investment Law – Representative of Legal Department, Ministry of Planning and Investment (MPI)
- Recommendations on amendments and supplements to the Investment Law – Vietnam Business Forum
- Responses by the MPI

II. SCHEDULE AND ORIENTATION FOR AMENDMENTS AND SUPPLEMENTS TO INVESTMENT LAW

Mr. Quach Ngoc Tuan - Deputy Director of Legal Department, Ministry of Planning and Investment

- Foundation

The National Assembly (NA) issued Resolution No. 23/2012/QH13 on the law and ordinance-making program, and added the Investment Law into the agenda of the XIII National Assembly.

The Prime Minister also issued Decision No. 1229/QĐ-TTg dated September 7, 2012 assigning authority to compiling the program for laws and ordinances, entrusted to the Government by the NA under Resolution No. 23/2012/QH13. The MPI was assigned to compile amendments to the Investment Law.

- As part of the preparations, the MPI is reviewing and thoroughly assessing the law implementation process by examining and learning from investment laws in other nations with similar conditions to Vietnam and those that have achieved a higher development level than Vietnam to explore possible solutions.
- Some big issues need to be addressed to align investment procedures with other procedures and improve the transparency of investment procedures to assist investors and the State without the need for any further guidelines.
 - + Investment procedures: (i) The principle of equality between foreign and local investors will be applied as a first priority. Some regulations, however, shall still be separated according to local and foreign investment conditions, while still guaranteeing the equality principle. (ii) Investment procedures will be different from business registration procedures, i.e. the investment and business registration certificates shall be passed through two independent procedures.
 - + State governance: The further amendment of mechanisms to monitor and supervise investment projects, and issue investment certificates to ensure the investment certificate licensing system is consistent nationwide.

III. SUMMARY OF RECOMMENDATIONS ON THE AMENDED INVESTMENT LAW

Mr. Dau Anh Tuan - Director of Legal Department, Vietnam Chamber of Commerce and Industry (VCCI)

- The results of the Investment Law review conducted by the VCCI in 2011 are based on four criteria:
 - + Transparency
 - + Consistency
 - + Viability
 - + Rationality.
- According to our results, there are two main bodies of thought:
 - + The Investment Law should not continue due to it overlapping with other laws
 - + The Investment Law should be preserved and amended with some fundamental changes

VCCI's recommendations are based on the second opinion, due to its practicality and feasibility.

- The VCCI recommends the removal of the investment registration and evaluation procedure as an independent process because it has been included in required procedures in land, construction and environment.
- The separation of the investment procedure from the business registration procedure is a positive signal, though there is still the need to review the investment registration procedure to ensure its practicality. Assuming legal requirements on land, construction and environment are properly met, will it be necessary to maintain the requirement of monitoring the investment procedure? State governance of the procedures should be conducted, but this should not result in additional costs and time for investors.
- The term "foreign investor": The term should be clarified whereby enterprises set up in Vietnam with foreign ownership are regarded as foreign investors? If this is the case, what proportion of foreign ownership is appropriate?

The requirement of investment project to the first time foreign investor in Vietnam should be abolished since this is not sensible.

- Investment forms: The classification of direct and indirect investment needs to be removed as it does not reflect the nature of business and investment activities, which possibly results in misconceptions about investment. For instance, so called indirect investments where the investor purchases 95% of a corporate's shares, equivalent to his/her ownership of the whole business, cannot be termed indirect. Also, local businesses can be hurt by foreign companies holding minimal, as little as 1%, joint capital.
- Scope of application: Company establishment and business operations are now being confused. The scope of application of the amended Investment Law, therefore, should include not just the current approach but also capital contributions, the purchase of

shares in Vietnamese companies, business cooperation, monitoring the implementation of investment projects, investment and business incentives, and in line with Law on Land, Construction, and Environment.

- Temporary cessation and extension of investment projects' implementation: For new investments, there is a need to clearly recognize the order, procedure and conditions for temporary cessation and deceleration, and distinguish between objective and subjective cases since the Investment Law and other guiding documents have no clear regulations on these issues. In other words, these processes are not transparent in practice.
- Termination of investment projects: The termination of investment projects should not be associated with the termination of a business's operations. The existing termination procedure is inadequate and unclear. This issue should be prioritized for amendment in the revised Investment Law.
- Assignment of projects: The fact that regulations equate the procedure of assigning projects with the concession of shares, contributed capital and M&As is inaccurate. This should be more specifically distinguished.
- Investment incentives: Some existing incentives are declared directly on the investment certificate, while others such as carrying forward losses are not clearly communicated if businesses can conduct them themselves or need permission. Since a clear procedure is not available, different practices in different provinces occur and cause confusion for businesses. Clarification should be given to how to enjoy incentives or to apply for incentives, with minimal administrative work.
- Clarify how the cases of investments in non-WTO committed sectors, or investors from non-WTO territories are addressed.

Mr. Fred Burke – Managing Partner, Baker & McKenzie

- The international economic environment is very weak and will remain so for the next few years as the US, EU and Japanese markets offer few export growth opportunities. So, bold steps need to be taken to improve Vietnam's investment environment.
- Many Vietnamese companies are struggling, especially in the real estate, export, commodities and service areas. Many need foreign capital injections, but are prevented by some disfunctionalities in the law. So in addition to streamlining procedures and making them more transparent, a big question should be asked, "Do we need an Investment Law at all?" If the answer is yes, could it be narrowed to just those projects that are sensitive and involve national State interests?

Mr. Hadrien Wolff – Representative of EuroCham

- Difficulties in licensing: The procedure for investment certificates is still too complicated and long. The process should be improved.

For improvements in terms of timing and transparency, EuroCham's suggestion is to maintain the one-stop shop approach that will give foreign investors a one-door norm for licensing and post-licensing.

- Changes to the investment certificate: Investment certificates should not be amended when changing general director, the address of the company, head offices, branches or other minor points. EuroCham suggests only the main features of a project, which are in the scope of chartered registered, should result in investment certificate amendments.
- Clarification of investment incentives: The list of areas which are entitled to incentives is provided in two different laws, specifically in Decree 108 guiding the Investment Law and Decree 124 guiding the CIT Law.

As a result, there are overlaps leading to opaque and conflicting interpretations among the laws. Local authorities using different references have caused uncertainties for investors. EuroCham suggests that the list of areas where investments are entitled to incentives be stated in one combined document, preferably in investment regulations to give investors true clarity.

Mr. Benjamin Yap – Lawyer, PBC Partner

- The acquisition of shares by foreign investors in 100% Vietnamese-owned companies: This is in relation to Circular 03 on guiding the management of foreign currency regarding capital contributions and acquisition of shares by foreign investors in Vietnamese enterprises.

According to Circular 03, all foreign investors must have a VND capital account for capital contributions or share acquisitions in 100% Vietnamese-owned companies. This has been implemented inconsistently.

For example, in one case the authority does not require a foreign investor to open a VND capital account because the purpose of investment is to manage a company. While in another case the Department of Planning and Investment requires this foreign investor to open a VND capital account and then submit a certificate thereof issued by a commercial bank.

Because of this inconsistent application and different approaches taken by different local authorities, some banks refuse to open VND capital accounts because a foreign investor contributes capital for management of the 100% Vietnamese-owned company. Other banks require an investment certificate, recording such foreign investment, before opening this account.

The Investment Law should clarify the term “management of investment activities” and a guideline should be issued for the opening of VND capital accounts.

- Convertible loan arrangement: This only relates to 100% Vietnamese-owned companies. Investments via convertible loan arrangements are common in many countries, but it is not straightforward in Vietnam. A reason for this is the inconsistency in understanding the law by authorities. The finger can also be pointed at a lack of communication between government departments in Vietnam.
- Foreign investments by foreign investors from non-WTO members: Again there are inconsistencies and this issue is common in WTO member countries.
- Overlaps between post-licensing procedures: These areas include human resources and education where investors must apply for three licenses: investment certificate,

registration for operation and practicing license. For example, when applying for an investment certificate, foreign investors are required to submit documents regarding location of investment projects such as notarized lease agreements. In order to facilitate foreign investors, documents for the post-licensing procedures such as location and operation registration should not be required by the DPIs for issuance of investment certificates.

Another consequence of this confusion is the many required applications for licenses and foreign investors must submit memorandums of understanding ("MOU") signed between foreign investors and land lessors to DPIs instead of at the licensing stage. However, normally foreign investors must pay rent from the date of signing the MOU. This causes financial hardships if the application dossier is rejected. Moreover, DPIs in some provinces may refuse a MOU, meaning foreign investors cannot obtain an investment certificate.

- Term of investment projects: According to the Investment Law, the operational duration of a foreign investment project shall be compatible with the requirements on operation of the project and shall not exceed 50 years. However, in practice the investment term is usually at the discretion of the DPIs without reasonable explanations.

Ms. Hoang Nguyen Ha Quyen – Lawyer, LCT Lawyers

- The investment certificate should be renamed to investment registration certificate because at the time of investment registration, projects have yet to be deployed. The name change could help remove some problems and initial red tape to help investors deploy projects after being awarded the certificate.
- Foreign investors with less than 49% shareholding in a company: Whether a company with less than 49% shareholding by foreign investors is treated as a Vietnamese or foreign company in its direct investments or BCC. The regulations on these issues remain unclear.
- The actual licensing process in provinces still asks for documented opinions from related departments which costs huge amounts of time despite the one-stop shop process. One mechanism should be applied to heal this hiccup is the duration of up to 15 days for responses by agencies being consulted otherwise their acceptance is automatically affirmative.
- The Investment Law should not re-stipulate issues corrected by other laws because it cannot be as specific as other laws, for example the law on CIT or environment. This repetition often inflames conflicts and makes them difficult to settle.

Mr. Hoang Van Son - Head of VNC Law Office

- To avoid discrimination between foreign and local investors and amongst different types of investments, these Laws on Investment and Enterprise should be amended towards 'Combine all procedures so foreign and domestic investors are subject to the same procedure of business registration'. Afterwards, businesses themselves can decide the scale and location of their projects. They can also run a number of projects simultaneously. This combination will not distinguish different types of businesses in the business process, suitable to the nationality principle of enterprises applied by many countries.

- Nationality of enterprises: Obstacles arise when investors want to purchase houses for their office. The notarizing office cannot approve this if the foreign-invested company's house purchase for the head office has not been worked out. From the viewpoint of guaranteeing the fixed assets of enterprises, those with fixed assets such as a house can use it to bring about benefits to their workers, social insurance, partners and creditors in cases of dissolution or bankruptcy.
- Business sectors: Regulations for business sectors with foreign companies are still limited and this prompts them to bypass regulations by setting up other businesses and using Vietnamese employees to operate in areas where foreign companies are not allowed to. The amended Investment Law, therefore, should consider the expansion of business sectors to foreign enterprises.

IV. RESPONSES BY MINISTRY OF PLANNING & INVESTMENT AND DISCUSSION

Mr. Do Nhat Hoang - Director of Foreign Investment Agency, MPI

- In 2007, to prepare for the compilation of Circulars guiding the implementation of the Investment Law and facilitate investments, the MPI reviewed and collected more than 100 investment area issues and categorized them into groups, including a group in relation to the Investment Law, a group that needs guiding Decrees and a group with overlapping issues across different laws. The draft summarizing the review was sent to VCCI to publish on VIB Online at that time.
- The compilation process of the amended Investment Law should agree with specific laws, between State governance and a flexible investment environment, and between laws and implementation. Ideas contributed by the business community are appreciated. To solve fundamental issues, a thorough review of the whole legal system in connection with investment is needed. Law No. 38 dated 2008 to amend a number of related laws, for example, addressed some problems.

Mr. Fred Burke – Managing Partner, Baker & McKenzie

- Is it correct that the National Assembly will look at a draft of the amendment to the Investment Law in the fourth session in November, 2012 and the Law will be voted on after?
- There are many issues that need to be resolved. There are some hardships, but some simple issues can be addressed at levels of Decrees or Circulars and do not need to wait for the Investment Law to be revised.

Response by Mr. Do Nhat Hoang - Director of Foreign Investment Agency, MPI

- The Investment Law amendment process is in the program of amending laws for 2013. The coming National Assembly session in November, 2012 shall not discuss this.
- In the short run, Decree 108 will be amended and complemented. The draft has been submitted to the Government for approval.

Mr. Tran Huu Huynh - General Secretary of Vietnam International Arbitration Center

- Improving communication between State management authorities and the business community is recommended to enhance transparency during the process of formulating the law. On the official website of the Foreign Investment Agency or concerned bodies, a channel for business feedback should be available. This will improve democracy and transparency within the process.

Mr. Quach Ngoc Tuan - Deputy Director of Legal Department, MPI

- In parallel with amendments to the Investment Law, the MPI is also amending guiding Decrees and Circulars. In particular, issues regarding business, investment certificate retrieving are being amended in the Draft Decree amending Decree 108. Meanwhile, in terms of business registration, the MPI is amending a number of contents of Decree 43/2010/ND-CP on business registration that has addressed some short-term worries.

Enterprise Law

REVIEW OF LEGAL DOCUMENTS - ENTERPRISE LAW

*Prepared by
Baker & McKenzie*

4 Review criteria:

1. Transparency
2. Consistency

3. Reasonableness
4. Feasibility

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
1	Applying other specialized laws instead of the Enterprise Law in particular cases	Article 3.2 of the 2005 Enterprise Law Article 3.3 of Decree No. 102/2010/ND-CP	Transparency Feasibility	<p>The general provision of "in particular cases relating to the establishment, managerial organization, and operation of enterprises governed by another law, the provisions of that law will apply" will lead to the fact that it is unclearly defined as to whether the Enterprise Law or a specialized law will govern. This may possibly cause conflicts and arguments about which law will apply in practical situations. It is difficult for enterprises to search and study in practice cases where it is necessary to study the possibility of applying a specialized law instead of the Enterprise Law.</p> <p>Article 3.3 of Decree No. 102 only lists 11 specialized laws to be enacted, as well as the laws that were adopted by the National Assembly after 15 November 2010 (effective date of Decree No. 102). Would other laws enacted before 15 November 2010, such as the Law on Real Estate Business, Pharmaceutical Law, Investment Law, etc., be applied? Why not? After 15 November 2010, which specialized laws will be enacted? The provisions of laws as currently set forth lack a systematic nature, resulting in difficulties in application and lowering their feasibility.</p> <p>Typically, business registration authorities apply the Investment Law</p>

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
				instead of the Enterprise Law and Decree No. 43/2010/ND-CP in registering businesses for foreign invested enterprises.
		<p>Recommendations: It is necessary to amend Article 3.2 of the Enterprise Law and Article 3.3 of Decree No. 102 in a way that the Enterprise Law and implementing provisions of Decree No. 102 may consistently apply in relation to the establishment, dissolution and managerial organization of all enterprises. Specialized laws should only provide for further conditions for particular activities without any provisions contrary to the provisions of the Enterprise Law.</p> <p>Article 3.3 of Decree No. 102 also needs to be reviewed. It is not advisable, when drafting a law, to list certain conditions and then give a general statement, which includes all laws enacted after 15 November 2010. As such, the Government would have to periodically enact decrees to enlist all laws prevailing over the Enterprise Law. It is impossible to set forth general provisions as provided in Article 3.3, as it will cause difficulties in application.</p>		
2	The interpretation of terms should be added, and the terms referred in the Enterprise Law and in all other legal documents should be construed and used consistently.	Article 4 of the Enterprise Law	Reasonableness Consistency	<p>Article 4 provides that terms and expressions of types of enterprises which are interpreted in the Enterprise Law and reiterated in all relevant documents, if not separately defined in such documents, must be consistent with the interpretation as provided in the Enterprise Law.</p> <p>Adding interpretations to a number of relevant and necessary definitions is required in order to ensure the reasonableness, consistency, codification and completeness of the relevant legislation system and to make documents more concise, brief, consistent and understandable. Such terms should be construed and used consistently in other specialized documents as they are defined in the Enterprise Law unless otherwise there are separate definitions for the same concepts in such documents.</p>

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
		Recommendations: To make additions to the following terms and expressions of the Enterprise Law; to add the provision of "if there is no specific definition of terms in other legal documents, the definitions referred in such legal documents will be construed as provided in the Enterprise Law"; foreign invested enterprise, related person.		
3	Discrimination amongst enterprises of same form currently operating in the country due to their differences in sources of investment capital: domestic or offshore, state or private	Article 5.1 of the 2005 Enterprise Law Scattered in the Enterprise Law and guiding documents: - Article 60.4(d) of the 2005 Enterprise Law - Article 11.3, 11.4 and Article 12.4 of Decree No. 102/2010/ND-CP	Feasibility Consistency	Article 5.1 defines that: "...assures the equality of enterprises before the law, regardless of the form of ownership and economic sector ..." - Article 60.4(dd) of the 2005 Enterprise Law providing for the procedures for increasing/reducing the charter capital: "...for a company in which the foreign owned capital portion represents more than 50%, [its] financial statements must be confirmed by an independent auditor". This provision does not ensure the consistency and reasonableness where the procedures are required only for a company in which the foreign owned capital portion represents more than 50%. - Article 11.4 of Decree No. 102/2010/ND-CP: "an enterprise already established in Vietnam having the foreign owned capital portion represents more than 49% of the charter capital will be applied with the investment and business conditions as same as those applicable to foreign investors..." - Article 12.3 and 12.4 of Decree No. 102/2010/ND-CP; - Decree No. 23/2007/ND-CP and guiding documents; - Decrees of the Government on minimum wage; - The Land Law and its guiding documents; and - Other provisions in which there exists discrimination between foreign invested enterprises and non foreign invested enterprises.

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
		Recommendations: - To annul the provisions causing a distinction in the domestic implementation procedures among enterprises with or without foreign investment, foreign investment capital accounting for less than 51% or 51% or more of the charter capital of an enterprise. To eliminate the distinction among Vietnamese enterprises, joint venture enterprises, 100% domestically invested enterprises, foreign-invested enterprises, etc., so that there remains only one term of Vietnamese enterprises organized and existing in compliance with the laws of Vietnam". - To annul paragraphs referred in Article 60.4(dd) of the 2005 Enterprise Law; Article 11.3, 11.4 and Article 12.4 of Decree No. 102/2010/ND-CP and provide for consistent procedures for all enterprises duly organized and existing in Vietnam without differentiating sources and levels of capital.		
4	Form of representing the satisfaction of conditional business lines	Article 7.2 of the 2005 Enterprise Law Article 9.3 of Decree No. 102 Articles 16.4, 17.5, 18.5, 19.5 of the Enterprise Law	Transparency Reasonableness	Article 7.2 of the 2005 Enterprise Law provides for forms of representing the satisfaction of requirements for conducting conditional business lines. Article 9.3 of Decree No. 102 requires the registration or supplemental registration of the business subject to a practice certificate. Articles 16.4, 17.5, 18.5 and 19.5 of the Enterprise Law concerning the requirements for submitting a practice certificate when registering the business. In practice, it is very difficult to ensure transparency when the list of the forms of representing the satisfaction of requirements for conducting conditional business lines ultimately ends with the phrase "otherwise provided". This allows other forms of requirements, which have not been provided in law, to arise. The registration of the business or supplemental registration of business

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
				lines is required to be taken into consideration separately from the satisfaction of conditions for conducting business. Only after the registration or (supplemental registration) of business, can an enterprise have the legal capacity to employ personnel who have practice certificates as required. In addition, even after the registration of business, if the enterprise fails to satisfy the requirements of the business license and the practice certificate, such enterprise is not allowed to operate.
		<p>Recommendations: To review forms of requirements (if any) which have not been incorporated into this article in order to supplement and complete the article, and to delete "or otherwise required" to ensure transparency.</p> <p>To annul Article 9.3 of Decree No. 102, or amend it as follows: "for an enterprise conducting the business line for which the law requires a practice certificate, <i>the enterprise may only operate after satisfying the following requirements of practice certificate: ...</i>"</p>		
5	Giving particular names of enterprises in foreign language	Article 33.1 of the 2005 Enterprise Law.	Reasonableness	Name of a foreign invested enterprise usually contains the name of the foreign investor. Article 33.1 of the 2005 Enterprise Law should clearly provide that a foreign invested enterprise is allowed to use its own name, or either the name of its group or its trademark, both of which do not have to be translated into Vietnamese. This is a common practice.
		<p>Recommendations:</p> <p>To amend the regulation on naming an enterprise, to allow the naming of an enterprise in a foreign name coinciding with (or bearing a part of) the name of the foreign investor, company group, or trademark that the foreign investment is entitled to use.</p>		

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
6	Particular regulations on registration of business of a foreign invested enterprise	Article 20 of the Enterprise Law	Consistency, Reasonableness	<p>The 2005 Investment Law and Enterprise Law set forth overlapping provisions in registration of business. Is it advisable that every enterprise, irrespective of capital sources, can register its business in accordance with the 2005 Enterprise Law to establish an enterprise, and can be granted the business registration certificate in a consistent way and afterwards, the Investment Law can set forth the provisions for issuing the investment certificate, if necessary? In practice, there are two types of certificates: the business registration certificate is only for enterprises without foreign capital, and the investment certificate is mainly for enterprises with foreign capital (even though a domestic enterprise may obtain a investment certificate in some cases). This practice is quite complex and inconsistent, and fails to achieve the objective of a consistent legislation system for all enterprises in all economic sectors when the State issued the 2005 Enterprise Law and Investment Law.</p>
		<p>Recommendations: To annul Article 20 of the Enterprise Law, to review and amend the Enterprise Law and the Investment Law to consistently apply the provisions for issuing the business registration certificate to all enterprises, and the investment certificate to projects that enterprises have.</p>		
7	Contents of the business registration certificate (BRC)	Article 25.2 of the Enterprise Law Article 38, Decree No 43/2010/ND-CP	Reasonableness	Article 25.2 requires that a BRC 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 Enterprise Law also does not clearly provide for the time at which the appointment of the representative at law becomes effective, when the representative at law is appointed or when the personal information is updated in the BRC.

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
		Recommendations: To amend Article 25.2 so that the BRC only lists the person who holds the position of the enterprise's representative at law (for example, Director, General Director, Chairperson of the Board of Members, Chairperson of the Board of Management, etc.) without declaring personal information of a specific person. After an enterprise is established and a specific person is appointed or elected to the said position and becomes the representative at law of the enterprise, the enterprise is only required to submit a notice containing information about such person to the business registration authority.		
8	Provisions concerning the rights of a member	Article 41 of the Enterprise Law	Consistency	Article 41.1(b),(d), (dd) provides that: a member of a limited liability company having two or more members is entitled to have a number of votes corresponding to [his/her/its] capital contribution portion, to receive a distribution of profit corresponding to [his/her/its] capital contribution portion after the company has paid taxes fully and fulfilled other financial obligations, to receive a distribution of the value of the company's remaining assets corresponding to [his/her/its] capital contribution portion when the company is dissolved or bankrupt under the provisions of law.
		Recommendations: It is advisable to amend Article 41 of the Enterprise Law from "capital contribution portion" to "portion of actually contributed capital, unless otherwise provided by the company charter", to be consistent with Article 18 of Decree No. 102.		
9	Provisions concerning rights and duties of the Board of Members	Article 47 of the Enterprise Law Article 58 of the Enterprise Law	Consistency	Article 47.2(e) only provides for the BOM to decide on the salaries, bonuses [and] other benefits applicable to the Chairperson of the Board of Members, Director and other managerial personnel while Article 58 provides that the enterprise may pay salaries, bonuses [and] other benefits to other members of the Board of Members.
		Recommendations: Article 47.2(e) should grant the Board of Members the right to decide on salaries, bonuses [and] other benefits to the members of the BOM.		

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
10	The appointment of an authorized representative	Article 48.1	Feasibility	Article 48.1 provides that the appointment of an authorized representative must be given a notice thereof to the business registration authority within a period of seven working days. In practice, the local business registration certificate does not implement this procedure (i.e., not receiving the notice of appointment). Furthermore, this is a matter of internal management of the enterprise, so it is not necessary to notify or to register at the business registration certificate.
		Recommendations: To annul the requirement of this notice.		
11	Conditions and Formalities for Convening a Meeting of the Board of Members	Article 51 of the Enterprise Law Resolution 71 approving the WTO accession Article 53 of the Enterprise Law	Reasonableness Feasibility	Article 51 provides for the quorum of members (according to the portion of charter capital) attending the meeting. In practice, many enterprises operate on the consensus of members. In case of a joint venture contract, members agree to adopt the resolution only with the presence of all parties involved and their votes thereupon. As such, Article 51 facilitates the members to decide on the conditions for convening a meeting of the Board of Members. Article 53 discusses the minutes of a meeting of the BOM. It provides that the minutes of a meeting of the Board of Members must be completed and passed immediately prior to the end of the meeting and it must have the full names and signatures of the members attending the meeting. This is unfeasible where a meeting is held through modern communication means such as telephone, teleconference (in the event that the enterprise charter provides for this formality of convening a meeting).
		Recommendations: Article 51 should provide as follows: “1. <i>Unless otherwise provided by the Charter, ...</i> 2. <i>Unless otherwise provided by the Charter, ...</i> 3. <i>Unless otherwise provided by the Charter,...</i> ” Article 51.4 should delete “Member[s] [and] authorized representative[s] of member[s] must attend and vote		

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
		<p>at meetings of the Board of Members" since this is unfeasible. 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 the issues in the meeting agenda.</p> <p>Article 53.2 should be amended as follows "a minutes of a meeting of the Board of Members must be completed and passed immediately prior to the end of the meeting <i>or within another period in accordance with the enterprise charter.</i>"</p>		
12	Decision of the Board of Members	Article 52 of the Enterprise Law Resolution 71 approving the WTO accession	Consistency Reasonableness	<p>Resolution 71 provides that the quorum of members attending a meeting and the voting proportion represents 51% of the charter capital while Article 52 of the Enterprise has different provisions for the same.</p> <p>Recommendations: Articles 51 and 52 of the Enterprise Law and Resolution 71 should provide consistent regulations on the quorum of members attending a meeting and the voting proportion. Furthermore, Decree No. 102 provides a definition of an enterprise having foreign capital portion of up to 49% or more than 49%. Perhaps, the portion of 49% or 51% is related to the passing of a resolution of the Board of Members. If Article 52 of the Enterprise Law is applied as currently, for example, with the portions of 65%, 75%, etc., for a resolution of the Board of Members, what is the significance of dividing the members of the enterprise having foreign capital portion of 49% or 51%?</p>
13	Contracts [and] Transactions That Must Be Approved By the Board of Members	Article 59	Reasonableness	<p>Article 59.1 provides that the draft contract must be posted at the head office and branch of an enterprise. In practice, this cannot be carried out since a contract usually contains trade secrets, and provides confidentiality requirements. This provision is unreasonable and is not adhered to in international practices.</p> <p>Article 59.1 also provides that the member involved in a transaction is</p>

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
				not entitled to cast a vote. Some enterprises have members who hold major charter capital, say 80% or 88%, etc. Hence, they are not entitled to cast a vote on members' transactions with the parent company. This is unreasonable in said circumstances.
		Recommendations: Article 59.1 should delete the requirement of posting the draft contract at the head office [and/or] branch. It is advisable to include a provision allowing members owning at least 51% of the charter capital to cast a vote on their transactions.		
14	Reduction of charter capital of a limited liability company having two or more members	Article 60 of the Enterprise Law	Transparency	Article 60.3(b) of the Enterprise Law provides that: pursuant to a resolution of its Board of Members, a company may reduce its charter capital by way of buying back the capital contribution portions in accordance with the provisions of Article 44 of the Enterprise Law. Meanwhile, Article 44 only provides for the transfer of capital (other than reduction of capital).
		Recommendations: It is recommended to amend as follows: pursuant to a resolution of its Board of Members, a company may reduce its charter capital by way of buying back the capital contribution portions in accordance with the provisions of Article 43 of the Enterprise Law. It is recommended to add guidelines for reduction by way of buying back the capital contribution portions, for example, financial sources to buy back the capital contribution portions.		
15	Provisions on Director or General Director of One Member Limited Liability	Article 70 of the Enterprise Law	Reasonableness	Article 70.3(b) of the Enterprise Law provides that the Director or General Director should not be a related person of a member of the Board of Members, or of the company President or the person having the authority to directly appoint the authorized representative or the company President.

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
	Company	Recommendations: It is recommended to delete this provision for private 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.		
16	Right to nominate persons to the Board of Management and Control Committee	Article 79.2 of the Enterprise Law	Reasonableness	<p>Article 79.2 provides that <i>“A shareholder or group of shareholders that owns more than 10% of the total number of common shares for a period of at least six consecutive months, or another smaller proportion as stipulated in the company charter, has the following rights: a) nominate persons to the Board of Management and Control Committee; ...”</i></p> <p>This is unreasonable due to the fact that when shareholders contribute a large amount of capital to the company (10% or more or another proportion), they must be entitled to immediately nominate persons to the Board of Management or Control Committee in order to represent their lawful rights and interests.</p>
		Recommendations: It is recommended to eliminate the period of 6 months in the above provision. As a result, Article 79.2 will be amended as follows: <i>“a shareholder or group of shareholders that owns more than 10% of the total number of common shares or another smaller proportion as stipulated in the company charter, has the following right: a) nominate persons to the Board of Management and Control Committee; ...”</i>		
17	Registration of increase/reduction of the charter capital of a joint stock company	Article 80 of the Enterprise Law Article 84.4 of the Enterprise Law	Reasonableness	<p><i>“A common shareholder must not withdraw from the company in any form whatsoever the capital that [he/she/it] contributed in the form of common shares, except in the circumstance where the company or another person acquires [his/her/its] shares”.</i></p> <p><i>“In the event that the founding shareholders do not subscribe for all of the number of shares authorized to be offered for sale, the remaining</i></p>

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
		<p>Article 23.9 of Decree No. 102</p> <p>Articles 90, 91, 92 of the Enterprise Law</p>		<p><i>number of shares must be offered for sale and all must be sold within a period of three years from the date on which the company is granted the business registration certificate".</i> Article 23.9 provides that a joint stock company must reduce its charter capital if the number of shares that the company is entitled to issue is not fully sold after 3 years. The Enterprise Law should be amended to include this provision to be clear.</p> <p>However, the Enterprise Law and Decree No. 102 do not have provisions concerning cases of registering the reduction of the charter capital of a joint stock company in the event that the company buys back shares at the request of a shareholder or at the decision of the company. How long will an enterprise be entitled to retain the shares that the company is entitled to issue? Is it required to reduce capital?</p> <p>Article 6.5 of Decree No. 102 provides that a general meeting of shareholders has the right to decide on increase of capital. This is the number of capital that the enterprise is entitled to issue. Article 24 of Decree No. 102 sets forth provisions concerning the offer of shares for sale. However, the Enterprise Law and Decree No. 102 have not set forth provisions concerning the period for which an enterprise must fully sell the number of shares that it is entitled to issue before re-registering new charter capital. When is an enterprise required to register an increase of charter capital at the business registration authority? In increases of the capital that the enterprise is entitled to issue, is a shareholder, after subscribing for shares, required to make payment within 90 days after the date of subscription?</p>

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
		Recommendations: The Enterprise Law should be amended to resolve the said issues in terms of procedures for increase/reduction of charter capital of a joint stock company.		
18	Timeline for contributing capital by shareholders	Article 80.1 of the Enterprise Law	Reasonableness Consistency	<p>Article 80.1 provides that <i>"pay fully for the number of shares that [he/she/it] has committed to buy within a period of ninety days from the date on which the company is issued with a business registration certificate"</i></p> <p>This way of setting forth provisions is inappropriate in the circumstances where common shareholders buy shares offered by founding shareholders. For example, after 3 years from the date of establishment, the restrictions applicable to the common shares of the founding shareholders will all be removed, the shareholders have the right to freely transfer their common shares without registering the amendment of the Investment Certificate. Hence, the capital contribution cannot be concluded as "90 days" from the date of issuance of the BRC.</p> <p>As said above, the Enterprise Law has not provided for the period for which a shareholder must make payment in the event the enterprise increases the capital that it is entitled to issue.</p>
		Recommendations: It is recommended to amend to "founding shareholder" in Article 80.1 to be more appropriate. It is recommended to add the provision concerning the period for which a shareholder must make payment in the event the enterprise increases the capital that it is entitled to issue.		
19	Transfer of shares of founding shareholders	Article 84.5 of the Enterprise Law Article 41.2 of	Consistency Reasonableness	<p>Article 84.5 provides the restrictions applicable to the transfer of shares of a founding shareholder within 3 years after registering the enterprise. Article 41.2 of Decree No. 43 sets forth provisions for the order and procedures for registering the change of a founding shareholder in this</p>

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
		Decree No. 43/2010/ND-CP		<p>circumstance.</p> <p>However, in practice, where there is any change to the BRC or the investment certificate (including any amendment to a founding shareholder or the number of shares held by him/her after the period of 3 years from the date the company is granted the BRC or investment certificate), the enterprise must submit the application for amendment of the BRC or investment certificate to the business registration authority. Since Decree 43 has only Article 41.2 providing for the change of a founding shareholder within 3 years after registering the enterprise, this Article is similarly applied by many business registration authorities, and accordingly, the minutes of a meeting and resolution of a general meeting of shareholders are also required to be submitted. This procedure leads to the fact that any change to a founding shareholder (capital transfer, etc.) at any time (even after 3 years under restrictions) must be approved by the general meeting of shareholders. This is very unreasonable.</p> <p>Recommendations: Article 84 of the Enterprise Law must set forth additional provisions specifying that all transfer of shares of a founding shareholder after the limited period of 3 years will not be subject to the application for amending the BRC or Investment Certificate. As such, the application will be clear and consistent.</p> <p>Or if the amendment of the BRC is mandatory, Decree 43 is required to set forth a separate provision specifying a simpler procedure for the amendment of the BRC in this case. Accordingly, the application is sufficient when including only the company's notification accompanied by the resolution of the Board of Management.</p>

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
20	Shareholder register	Article 86 of the Enterprise Law	Consistency Feasibility Reasonableness	<p>In accordance with Article 86 of the Enterprise Law, the shareholder register will record information about the company's shareholders.</p> <p>However, due to the fact that the procedure for registering the amendment of the business registration is time-consuming, sometimes there is a difference between the information about shareholders contained in the shareholder register and the information contained in the business registration certificate. In such case, which document will prevail?</p>
		<p>Recommendations:</p> <p>It is necessary to clearly provide that information about shareholders is only required to be included in the shareholder register and that the responsibility of managing shareholders' information is assigned to the company. Accordingly, the efficiency of the state management will be better if it is possible to avoid disputes which may arise in relation to the difference between the information about the shareholders contained in the shareholder register and the information contained in the business registration certificate.</p>		
21	Keeping shareholder register	Article 86.3 of the Enterprise Law	Feasibility Reasonableness	<p>Article 86.3 provides that "3. The shareholder register may be kept at the head office of the company or at the Securities Registration, Custody, Clearing and Settlement Center."</p> <p>Various public companies which have not been listed are engaging securities companies to provide the service of managing their shareholder register. The Enterprise Law should recognize this fact to ensure that transactions related to the shareholder register (including transfer of shares), that are conducted by such securities companies, are lawful.</p>

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
		Recommendations: Amend this provision as follows: "3. The shareholder register may be kept at the head office of the company, <u>or at an organization authorized by the company to manage the shareholder register</u> , or at the Securities Registration, Custody, Clearing and Settlement Center."		
22	A shareholder that owns 5% or more of the total number of shares must be registered with the competent business registration authority	Article 86.4 of the Enterprise Law	Reasonableness Feasibility	Article 86.4 provides that " <i>A shareholder that owns 5% or more of the total number of shares must be registered with the competent business registration authority within a period of seven working days from the day on which the above ownership percentage is obtained</i> ".
		Recommendations: It is recommended to annul this provision, or only provide that an enterprise must notify the business registration authority instead of registering, and must give detailed provisions regarding the act of notifying.		
23	Publishing the notice of an offer to sell shares	Article 87.2(a) of the Enterprise Law	Reasonableness Feasibility	If the offer to sell shares to all existing shareholders is an internal affair of the enterprise, why is it required to be published? In addition, with the number of existing joint stock companies, this publication of notice is almost impossible in practice.
		Recommendations: It is recommended to annul this provision.		

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
24	Becoming a shareholder after fully paying for and being recorded onto the shareholder register	Article 87.3 of the Enterprise Law	Consistency Reasonableness Transparency	<p>Article 87.3 of the Enterprise Law provides that “<i>A share is deemed to have been sold when [it is] fully paid for and the information about [its] buyer as stipulated in Article 86(2) of this Law are stated correctly and fully in the shareholder register; from that time onwards the share buyer becomes a shareholder of the company</i>”.</p> <p>Furthermore, how can the case be resolved where the buyer has fully paid for the bought shares, but for whatever reason, the company has not updated this in the shareholder register? In such case, interests of the buyer will not be protected.</p>
				<p>Recommendations: It is recommended to amend this provision as follows: “<i>A share is deemed to have been sold when [it is] fully paid for. Afterwards, the information about [its] buyer as stipulated in Article 86(2) of this Law is stated correctly and fully in the shareholder register; from that time onwards the share buyer becomes a shareholder of the company</i>”.</p>
25	Provision concerning private placement of shares	Article 87.6 of the Enterprise Law	Reasonableness, Transparency, Consistency	<p>Article 87.6 provides that the Government will provide guidance for the private placement of shares.</p>
				<p>Recommendations: It is recommended that Article 87.6 should add the last sentence clearly providing that the private placement of shares is not conducted on the basis of the existing ownership proportions of the shareholders.</p>

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
26	Convening a Meeting of the General Meeting of Shareholders	Article 97 of the Enterprise Law	Transparency	<p>Article 97 provides that, “<i>The General Meeting of Shareholders may meet annually or extraordinarily, at least once a year. The meeting venue for the General Meeting of Shareholders must be within the territory of Vietnam</i>”</p> <p>The authority of the General Meeting of Shareholders is to pass major affairs in the operation of a company. However, Decrees guiding the Law always require that in any changes of the enterprise leading to a change of the contents of business registration, the contents of the charter (for example, head office, representative at law, etc.) and the minutes of the General Meeting of Shareholders must be submitted to the business registration authority. This leads to difficulties in the operation of an enterprise. Regularly, the General Meeting of Shareholders meets only once a year 4 months after the fiscal year. In addition, there has been no provision concerning the procedures and conditions enabling the business registration authority to extend the period of an annual meeting of the General Meeting of Shareholders of a joint stock company so far. Concurrently, there has been no provision concerning the responsibility of the Board of Management of a joint stock company to request the business registration authority to extend the period of a meeting of the General Meeting of Shareholders of a joint stock company.</p>
		Recommendations: It is recommended to amend provisions in guiding Decrees to be more appropriate.		

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
27	List of Shareholders Having the Right to Attend a Meeting	Article 98.1 of the Enterprise Law	Reasonableness Transparency	<p>Article 98.1 of the Enterprise Law provides that “<i>The list of shareholders having the right to attend a meeting of the General Meeting of Shareholders is compiled based on the shareholder register of the company. The list of shareholders having the right to attend a meeting of the General Meeting of Shareholders is made upon a decision to convene [the General Meeting of Shareholders] and [it] must be completed <u>no later than thirty days prior to the date of commencement of the meeting of the General Meeting of Shareholders</u> if the company Charter does not stipulate another period that is shorter.</i>”</p> <p>With respect to a public joint stock company, a securities trading transaction occurs on a daily basis, hence, this provision will not ensure the interest of securities buyers after the time of closing the list by the company.</p> <p>Recommendations: It is recommended to amend this Article as follows: “<i>The list of shareholders having the right to attend a meeting of the General Meeting of Shareholders is compiled based on the shareholder register of the company. The list of shareholders having the right to attend a meeting of the General Meeting of Shareholders is made upon a decision to convene [the General Meeting of Shareholders] and [it] must be completed no later than thirty days prior to the date of commencement of the meeting of the General Meeting of Shareholders if the company Charter does not stipulate another period that is shorter. <u>In the event there is a change of shareholders after such period of time, a share transferee after the time at which the company compiles the list of shareholders must submit to the company documents evidencing his/her completion of the transfer in order for the company to update the list, then the share transferee will have the right to attend a meeting of the General Meeting of Shareholders.</u></i>”</p>

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
28	Invitation to a Meeting of the General Meeting of Shareholders	Article 100.2 of the Enterprise Law	Transparency	<p><i>“A meeting invitation notice must be accompanied with a form for appointing an authorized representative to attend the meeting, the meeting agenda, voting ballot, documents for discussion which serve as bases for adopting decisions, and a draft resolution for each matter included in the meeting agenda.</i></p> <p><i>If the company has an website, the meeting invitation notice and attached materials must be published on that website at the same time that the notice is sent to the shareholders.”</i></p> <p>With this provision, can we understand that if an enterprise has a website, it only needs to send a meeting invitation notice to the shareholders without relevant documents? If an enterprise having a website does not publish the meeting invitation notice, does such meeting violate the procedures?</p>
		<p>Recommendations:</p> <p>It is advisable to amend expressions to be appropriate in order to ensure shareholders' rights and interests. Paragraph 2 of Article 100.2 may be amended as follows: <i>If the company has an website, the meeting invitation notice and attached materials <u>may</u> be published on that website at the same time that the notice is sent to the shareholders.”</i></p>		
29	Proportion to adopt a Resolution by a General Meeting of Shareholders	Article 104.3 of the Enterprise Law	Consistency	<p>Article 104.3 of the Enterprise Law provides for the proportions to adopt a resolution by a General Meeting of Shareholders, particularly 65% and 75%.</p> <p>According to Resolution No. 71/2006/QH11 of the National Assembly, the proportion of 51% to adopt a resolution by a General Meeting of Shareholders is only applicable to foreign invested enterprises having operations in the field of services in accordance with the WTO Commitments of Vietnam. However, the proportion of simple majority</p>

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
				(above 50%) has been applied for a long time to all companies.
		Recommendations: To amend this proportion in accordance with Resolution No. 71 and international practice.		
30	Election of the Board of Management (BOM) and the Control Committee (CC) when its term of office ends	Article 109 and 121 of the Enterprise Law	Sufficiency	<p>- Under Article 109 of the Enterprise Law, "the term of office of the Board of Management is five years" and "the Board of Management that has [its] term of office just ended shall continue to operate until a new Board of Management is elected and takes over the work."</p> <p>- Under Article 121 of the Enterprise Law, "the term of office of the Control Committee does not exceed five years" and "In the event that at the end of the term of office, a Control Committee for the new term of office has not been elected, the Control Committee with [its] term of office just ended continues to exercise its authority and perform its duties until a new Control Committee is elected and takes over the duties".</p> <p>However, the Law does not stipulate how long from the time at which the term of office of the BOM or CC ends, the BOM must convene a General Meeting of Shareholders (GMS) to elect a new BOM or CC. Although Article 79.3(b) provides that a shareholder or group of shareholders that owns more than 10% of the total number of shares has the right to request the convening of a meeting of the General Meeting of Shareholders if "the term of office of the Board of Management has exceeded six months [and] a new Board of Management has not been elected to replace it", but the Law does not stipulate whether this applies</p>

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
				to the CC or what will happen if the shareholders do not exercise this right.
		Recommendations: Article 109 and Article 121 should add one more clause providing that the BOM must convene a GMS to elect a new BOM or CC within a period of 6 months (or 60 days) from the time at which the term of office of the former BOM or CC ends.		
31	Relieve and/or Discharge Duty of a Member of the BOM	Article 115 of the Enterprise Law	Reasonableness	Article 115.2 provides that a member of the Board of Management may be relieved from duty at any time under a resolution of the General Meeting of Shareholders. As such, a member elected by minority shareholders may always be relieved or discharged from duty at any time by shareholder(s) holding 65% or 75% of the charter capital, accordingly the protection of minority shareholders by way of ballot accumulating is not ensured.
		Recommendations: Should Article 115.2 add one more clause limiting the power of discharging members of the BOM from duty by majority shareholders? For example, laws of some states in the U.S. provides that a member of the BOM is not discharged from duty if he/she receives the votes against this dismissal (dissenting votes) that are sufficient to elect him/her to the BOM (by means of ballot accumulating).		
32	Responsibilities of members of the Board of Management, Director or General Director and other	Article 119 of the Enterprise Law Article 126 of the Enterprise Law Article 25 of	Transparency	Article 25.1(a) Decree No. 102/2010/ND-CP provides that: “ <i>A member of the Board of Management, Director (General Director) <u>fails to properly exercise assigned rights and duties; fails to perform, fails to perform fully [and/or] timely a decision of the Board of Management; exercises assigned rights and duties contrary to the provisions of law, company charter or resolution of the General Meeting of Shareholders</u></i> ”. The Enterprise Law and Decree 102 do not clearly define what is “failure

No.	Issues	Provisions in law/sub-law document governing the issues	Criteria not met	Analyzing the issues (based on the criteria and specifying difficulties that enterprises face due to these provisions, etc.)
	managerial personnel	Decree No. 102/2010/ND-CP		<p>to properly perform", "failure to perform fully and timely " or "contrary to regulations", from which, a manager who violates even a very minor error may be prosecuted.</p> <p>In addition, the Enterprise Law and Decree 102 do not provide for the responsibilities of a member of the Control Committee.</p>
		Recommendations: It is recommended to clarify the scope of responsibilities of managerial personnel, and to supply members to the Control Committee.		
33	Annual financial statement	Article 129.3 of the Enterprise Law	Reasonableness.	<p>Article 129.3 of the Enterprise Law provides that: <i>"All organizations [and] individuals have the right to review or make a copy of the annual financial statements of a joint stock company at the competent business registration authority"</i>.</p> <p>In practice, this is not applied at the business registration authorities. In addition, financial statements of companies (except for public companies) is the confidential information of such companies.</p>
		Recommendations: It is recommended to amend in the way of applying to public joint stock companies only.		
34.	Establishment of a branches and/or representative office	Article 108.2(k) of the 2005 Enterprise Law	Reasonableness	Under Article 108.2(k) of the 2005 Enterprise Law, the Board of Management has the right to decide on the establishment of a subsidiary, branch [or] representative office. However, Article 22 provides that the company charter must contain information about its address and branches. The establishment (or closing) of

				branches or representative offices, hence, will require the amendment of the charter. Under Article 96.2(d), only the General Meeting of Shareholders may amend the charter. Therefore, the decision under the (sole) authority of the Board of Management, in practice, is required to have the consent of 75% votes thereon in a meeting of shareholders.
		Recommendations: To amend Article 22.1 in the way of stating the company name (excluding the company address) in the charter.		
35.	Authority of the representative at law	Article 25 of the 2005 Enterprise Law	Transparency	In practice, the authority of the representative at law is usually restricted or limited in the company charter (for example, those contracts valued at US\$5,000 must be approved by the Board of Management). However, this restriction is not expressed in the Business Registration Certificate, hence, contractors do not recognize such restriction.
		Recommendations: to include the specific authority of the representative at law (restriction, limitation) to the Business Registration Certificate.		
36.	Meeting agenda of a General Meeting of Shareholders	Article 100 of the 2005 Enterprise Law Article 99.2 of the 2005 Enterprise Law	Reasonableness	Under Article 100, the meeting agenda of the General Meeting of Shareholders (and other documents) must be sent to shareholders no later than seven working days prior to the date of commencement [of the meeting]. Under Article 99.2, a shareholder (or group of shareholders) has the right to propose matter[s] to be included in the meeting agenda of the General Meeting of Shareholders. The proposal must be made in writing and forwarded to the company no later than three working days prior to the date of commencement [of the meeting]. However, there is no way for the remaining shareholders to know supplemented/proposed matters and to decide not to attend the meeting based on the meeting agenda that has been sent.
		Recommendations: To amend Article 100 so long as (1) the meeting invitation notice must be sent no later than 10 days prior to the date of commencement [of the meeting]; (2) matters in the meeting agenda must be proposed no later than 7 days prior to the date of commencement [of the meeting]; and (3) the final meeting agenda must be sent no later than 5 days prior to the date of commencement [of the meeting].		

PROPOSALS TO ENTERPRISES LAW

*Prepared by
VCCI*

1. Proposed additions:

- To add a new separate Chapter or Section on Public Companies as part of the provisions on joint stock companies, specifying the manner in which businesses are administered; structure and operation and protection of minor shareholders;
- To add provisions on procedures and formalities to convene GSM by a group of shareholders who fail to receive support from the Company; to increase the ratio of common shareholders as set out in Article 79.2 of the Law on enterprises to a reasonable percentage to avoid the fact that there are too many shareholders asking to convene a meeting; to clarify the scope of responsibilities of managers and rights to appeal of shareholders, groups of shareholders of CB; to add provisions on procedures and formalities to convene GSM at the request of BOD, CB without the presence of BOM Chairman, or Head of CB. The selection of members of BOM and CB at the expiry date of the term of office: in case of a discrepancy among the shareholders of a Company which results in the failure to hold GSMs and affect the operations of the company, there should be a mechanism to divide, split or dissolve the company within a certain period of time;
- To consider supplementing a new type of shares called “golden shares” as in the case of some countries in the world. This type of shares is encouraged to be held by the State because the holder of the golden shares does not hold physical shares but has big power in all decisions relating to enterprises which are not for their own benefits and only based on the State policy. The State as a shareholder holds golden shares instead of administrative decisions and orders to interfere the company. However, a legal basis for this type of shares should only be created for certain business activities where the State controls or dominance is necessary for example banking business;
- To supplement several provisions on sales and purchases of companies as the 2005 Law on enterprises only provides for the sales and purchases of private enterprises but no other types of enterprises; to insert provisions to prohibit members of BOD, General Director and other managers from using company’s assets to secure the loans of shareholders to buy shares in that company or to lend the company’s assets to shareholders to buy shares in their company; to provide for the management and use of seals in enterprises; to provide for the transformation of private enterprises into shareholding companies; transformation of branches into companies;
- To add and clarify several provisions for example what “for the benefit of one’s own, one’s agency, unit”; to provide detailed guidelines on the term “being involved in the management and administration”, whereby it is necessary to quantify the percentage of the charter capital of which the holder is regarded as “being involved in the management and administration of the enterprises”; what the nominal value of shares means; which words are regarded as violating the traditions, history, culture and fine moralities; to provide guidelines as how to evaluate the assets used for capital contribution such as reputation/prestige and IPR, talent; to specify whether a person who owns a capital proportion as a gift or donation can automatically become a member of a limited liability company or a limited liability company with 2 or more members; and how to deal with the remaining shares offered for sale but not exhausted and when a person is named in the

registry of shareholders;

- To make consistent provisions for law enforcement by State agencies to ensure the equality, reorganize registration agency for business establishment as an independent and vertically- organized agency under some Ministry which, however, shall act independently in respect of professional aspects with independent personnel;

2. Proposed revisions:

- To revise the provisions of Law on enterprises and implementing documents and specify the relationship between the Law and other specialized laws by way of making clear that the establishment, organization and management of operations of enterprises in all economic sectors shall have to comply with the Law on enterprises as a priority. In special cases if the operations of an enterprise relate to other laws, such other laws shall be applied;

- To set up a mechanism for registration and management of enterprises by having one single agency under a Ministry which acts as a single point for this purpose and there should be a sub- law document governing the State management with regard to the registration of enterprises; to delete the provisions on line-based business registration in Vietnam and give freedom to people to register their business activities provided that such activities are not prohibited by laws;

- To revise the provisions on dismissal of members of BOD in the way to protect minor shareholders, have clear criteria and reasons for dismissal in order to avoid arbitrary dismissal. To completely deal with this, it is necessary to reconsider the mechanism for accumulative votes as set out in the Law;

- To revise the provisions on contributed capital and charter capital whereby charter capital is construed as the capital contributed or committed to contribute by members and shareholders within 90 days from the granted date of Business Registration Certificate; the distinguish between contributed capital proportion and actually contributed capital proportion in an enterprise; provisions on reduction in charter capital of a limited liability company;

- To revise the provisions in the standard charter to be consistent with the Law on enterprises to ensure the benefits of all shareholders in a joint stock company; provisions on the conditions and formalities to conduct a meeting of BOM, BOD; on authority to make decision on the rate of dividends to be paid; quorum of a GSM; which shareholders can attend the meeting; which contracts and transactions need to be approved by GSM or BOD; how to approve a decision of BOD when the BOD meeting is not convened by the Chairman of BOD; procedures and formalities for public offering of shares.

3. Proposed revocations:

- To delete the provision "Investment certificates shall at the same time be Business registration certificates" set out in Article 20 of the 2005 Law on enterprises to avoid overlaps and difficulties to enterprises during their investment implementation; types of licenses to be obtained for establishment of an enterprise as currently set out in relevant laws.

- To delete the provisions which result in discrimination in terms of locally applicable procedures between enterprises with or without foreign invested capital or between enterprises with foreign invested capital occupying less or more than 51% of an

enterprise' charter capital. To delete the discrimination between domestic enterprises and foreign-invested enterprises, to use only one single term for example Vietnamese enterprises or enterprises established and operating under the law of Vietnam;

- To delete the provisions requiring an approval of the agenda of a meeting when such meeting is convened by shareholders or groups of shareholders and instead provide that such agenda shall automatically be approved to protect minor shareholders by helping them to prove that their requests are legitimate;

- To delete Article 15.4 of the 2005 Law on enterprises. CB has the right to convene a GSM as soon as the previous decision to convene a meeting is cancelled. Once a decision to convene a meeting is cancelled, the meeting is regarded as not being convened and the right to convene a [new] meeting should be valid right from the cancellation of the previous decision;

- To delete some unnecessary provisions in the Law on enterprises such as those on the notification of the authorized representative, the minutes of a meeting must be signed by the participants (which is impossible when a meeting is conducted through mass media); shareholders owning 5% or more of an enterprises must register with the business registration agency, publication in newspapers of public offerings, notification of the time for start of business at the head office, notification of changes to the types of assets to be used for capital contribution as committed; notification of the progress of the capital contribution; notification of the capital contribution; registration of the hiring of another person to act as the director; and those that require the legal representative of an enterprise who is absent in Vietnam for more than 30 days to authorize another person in writing as provided for in the company's Charter.



COMMENTS AND RECOMMENDATIONS ON ENTERPRISE LAW 2005 AND INVESTMENT LAW 2005

We welcome that the Government has issued Decree 102/2010/ND-CP on 1st October 2010 guiding certain provisions of the Law on Enterprises (and replacing Decree 139 of 5th September 2007), which went into effect on 15th November 2010. Most importantly, Decree 102 clarifies that companies established in Vietnam with foreign ownership of up to 49% can enjoy the same investment rules and conditions as those applicable to local companies. Concurrently, those with foreign ownership of more than 49% will be subject to the same conditions as applicable to foreign investors. This should make the acquisition and operation of companies with less than 49% foreign ownership easier. Decree 102 for the first time sets a time limit within which members of a multi-member limited liability company have to contribute their committed charter capital into a company, of three years from the business registration. A company's legal representative is required to report to the licensing authority on the status of capital contributions within 15 days from the date such contributions are due. Pending the completion of capital contributions, a member shall only enjoy voting rights and dividends in proportion to the capital actually contributed to the company. Whilst these new developments are generally positive, challenges remain:

1. Adopting a One-Stop-Shop Approval

For investment in conditional sectors, the licensing authorities in practice still rarely meet the deadlines for processing the submission for investment certificates, with the result that the processing may take much longer than expected and makes it impossible for investors to plan ahead. There is consensus in the foreign business community that the approval process for investing and setting up businesses in Vietnam is still difficult and time-consuming. For many foreign companies, the complexity of administrative procedures and the sometimes un-coordinated and inconsistent implementation of laws and regulations between different authorities can present a serious hindrance to running a successful business in Vietnam.

We note that the obligation for the investor to approach in sequence a number of government agencies renders the process unduly time consuming. We therefore recommend that Vietnam moves to a "one-stop shop" approval. It would then be the responsibility of the relevant ministry to coordinate with other government bodies where necessary. In most ASEAN countries this mechanism has proved extremely useful and effective. In this context, we like to remind of the simple rule that "time is money": Investors who have to wait for an investment license for six to 12 months in Vietnam (rather than five or six weeks in other countries in the region) are not only losing time, but money as they cannot manufacture or do their business as soon as they wish. The effects of above unpredictable bureaucracy and timing have already caused Vietnam to lose competitiveness in the eyes of foreign investors.

We finally note that often, investment certificates to foreign invested enterprises

for investment in service sectors are issued for a very short term (usually 5 years). In the absence of implementing circular or decree on the implementation of WTO commitments, the licensing authorities will often only rely on official letters from concerned ministries (MPI, MoF, MoIT, etc). However, often there are no such official letters. If there are, they are often not public and their legal status is unclear. Procedures - if available at all - are often unclear, in particular with regards to coordination between local and national level, e. g. for licensing issues the MPI and the local DPIs.

Recommendation: Implementing a “one-stop shop” approval for investment licensing in which the local licensing authority is in full charge of the process.

2. Changes to the Investment Certificate

Current licensing regulations often result in many unnecessary amendments to the Investment Certificate, e.g. whenever there are any changes to the name of the legal representative, his address, representatives of the investors, branches, addresses of branches etc. In the normal course of business, the above changes are common and should be let within the power of the enterprise/investor itself, without the need to amending the Investment Certificate. The multiple yet minor amendments to the Investment Certificate result in unnecessary workload to both enterprises and licensing authorities.

At present, an enterprise wishing to open a branch, or relocate a branch, must obtain two types of licences: first the branch operating licence from the provincial Peoples' Committee where the branch is located. Secondly, the enterprise must also apply to amend the Investment Certificate to reflect the changes to details of the branch. In addition, different licensing authorities have different interpretation/application regarding branches of an enterprise, for example requiring separate capital for the branch which is stated in a separate branch operating certificate, and not being included in the total capital of the enterprise. This causes difficulties to enterprises when registering their branches (new branches or registering any changes to the branch such as change of address, registration of branch after corporate restructuring).

Recommendation: We recommend that licensing requirements be simplified, in particular, the Investment Certificate does not need to reflect too many details, and investors/enterprises should not be required to apply for amending Investment Certificates for changes that are common in their course of business. Enterprises/investors are willing to notify licensing authorities on these changes, but multiple amendments to the Investment Certificate, and also the requirement on dual licence for branches, should be removed to reduce unnecessary work load and costs to both enterprises and government agencies.

3. Acquisition of shares in Vietnamese companies by foreign investors

The ability of foreign investors to acquire shares in Vietnamese companies is increasingly important for the Vietnamese economy. Unfortunately, the procedures for such acquisition are still unclear, unpredictable and entirely subject to the discretion of the licensing authorities. One of reasons for this is that there are no clear rules on how to treat a Vietnamese company after an acquisition by a foreign investor – does it become a foreign owned company or is it still a Vietnamese company? Does such company need to obtain an investment certificate or continue with the existing enterprise registration certificate?

Under Decree 102, the investment conditions applicable to foreign investors would also apply to an enterprise already established in Vietnam if more than 49% of its shares are owned by foreign investors. Under the Investment Law, a foreign investor making an investment in Vietnam for the first time must have an investment project and carry out the investment procedures to obtain an investment certificate. This suggests that if the foreign investor acquires more than 49% of a Vietnamese company, it must obtain an investment certificate. The corollary should be that if the foreign investor acquires 49% or less of the shares of a Vietnamese company, then the Vietnamese company should only have to carry out the procedures to change its business registration contents under the Enterprise Law and no investment certificate should be required.

Due to the lack of clarity in the regulations, there is no consistency among the local licensing authorities. Some take the view that the Vietnamese company would become a foreign owned company regardless of the foreign ownership percentage and must apply for an investment certificate to replace the existing enterprise registration certificate. Other licensing authorities apply another rule, under which the Vietnamese company whose shares are acquired by a foreign investor (regardless of the foreign ownership percentage) will retain its existing enterprise registration certificate but must also apply for an investment certificate for its project at the same time.

Recommendations: EuroCham recommends that there should be clear and transparent rules for the acquisition of shares by foreign investors in Vietnamese companies. Specifically, if a foreign investor acquires 49% or less of a Vietnamese company, then this company should be treated as a Vietnamese company for all purposes and should only need to carry out the business registration procedures under the Enterprise Law, without any need to obtain an investment certificate. By contrast, if the foreign investor acquires more than 49%, the company should obtain an investment certificate to replace the existing enterprise registration certificate.

4. Clarification of Investment Incentives

The lists of areas which are entitled to favourable investment conditions/incentives are currently provided both under regulations on investment and tax regulations (import duty and corporate income tax). There are therefore overlaps, leading to unclarities and conflicting interpretations of the law. Because of this, tax authorities adopt favourable investment conditions/incentives only in accordance with the tax laws (and not the more favourable investment laws). As a consequence, licensing authorities in some cases refuse to state investment incentives in investment certificates (as required in the prescribed form of investment certificate issued under the Law on Enterprises and Law on Investment), causing uncertainty to investors.

Recommendations:

- We recommend that the list of areas where investment is entitled to incentives should be stated in one combined document, preferably in regulations on investment as a guarantee to investors. Accordingly, investment incentives should also be stated clearly in investment certificates as a guarantee to investors.
- We further recommend that tax incentives should be uniformly applied to both the *establishment of a new investment project* and the *expansion of an existing investment project*. Both situations reflect economically the same, so the same tax incentives should prevail. To this end, we believe the tax laws should be clarified: *Any existing and operating investment project that expands its operations*

should be treated the same as a *newly established* investment project, and for the same time period of time.

5. Flexibility for capital contribution

Many large infrastructure projects take more than three years to build. It is therefore not appropriate to require all capital to be contributed within three years. For projects that are not financed by third party lenders, this is not a huge issue as long as the investors are comfortable with the risk of obtaining an amendment to the relevant investment certificate. However, lenders need to be sure that a project can be built, and that requires an investment certificate authorizing the full amount of the required capital.

Recommendation: EuroCham would therefore recommend that the licensing authorities be given the power to stipulate a longer period for capital contribution in those cases where construction of the project is reasonably expected to take longer than three years.

SUMMARY OF ROUNDTABLE DISCUSSION ON ENTERPRISE LAW

- *Time:* 14:00 ~ 17:30, Wednesday, 26/09/2012
- *Venue:* Vietnam Chamber of Commerce and Industry, HCMC Branch, No. 171 Vo Thi Sau Street, Ward 7, District 3, HCMC

I. INVESTMENT LAW REVISING SCHEDULE AND DIRECTION

Mr. Phan Duc Hieu - Deputy Head, Research Department on Business Environment and Competitiveness, Central Institute for Economic Management (CIEM), Ministry of Planning and Investment

- The amendment of the Enterprise Law ("EL") is underway in tandem with the Investment Law ("IL") and is expected to be discussed and passed by the National Assembly before the end of 2013.
- As the EL itself undergoes scrutiny, related inconsistencies in implementing documents will also be revised. For example Circular 14, attributed to Decree 43 on business registration, is now being revised by the Business Registration Administration.
- The drafting team ("DT") identified five major issues associated with the EL to be reviewed and optimized:
 - Provisions in the EL that fall short of clearly, completely and reasonably reflecting local and international practices
 - Provisions in the EL that are ambiguous and may invite different and inconsistent interpretations
 - Provisions in the EL that are not practically adhered to by businesses
 - Provisions emerging from recent changes, including technology and know-how, that need to be updated in the revised EL
 - Other issues.
- The DT is looking into the root cause of the above issues and appropriate changes to promote business by providing better protection and equity for investors' rights and interests.

II. SUMMARY OF RECOMMENDED CHANGES TO THE ENTERPRISE LAW

Mr. Hadrien Wolff – Representative of European Chamber of Commerce (EuroCham)

- Decree 102/2010/ND-CP, issued in October 2010, is a very positive development as it clarifies that companies established in Vietnam with foreign ownership of 49% or less are subject to investment or business conditions applicable to domestic investors. However, the IL requires a foreign investor to follow investment procedures to obtain an investment certificate when entering into an investment project in Vietnam for the first time.
- Accordingly, there are two scenarios - one clear and one opaque. The clear scenario is when a foreign investor for the first time acquires more than 49% of a Vietnamese company, Decree 102 and the Investment Law are clear, an investment certificate is requested. However, when a foreign investor acquires 49% or less of the shares of a

Vietnamese company, Decree 102 says there is no need to issue an investment certificate. However, the IL states an investment certificate is necessary as it is a first time project.

Therefore, many clarifications and the need for clear regulations should be addressed in the new EL.

Response from Mr. Nguyen Dinh Cung - Vice Director, CIEM (MPI)

- The aforementioned situation is common. To come up with a good strategy, consensus in the drafters' thinking on foreign investors' rights in doing business is required. First and foremost, what is a foreign-invested company? Then, these companies' business rights and the extent such rights may be exercised should be defined. Then coming to other technical issues.

Ms. Nguyen Lan Phuong - Lawyer, Baker & McKenzie

- Scope of activities of foreign-invested enterprises: The IL in 1992 first specified no discrimination between investors of different nationalities in Vietnam. But after Vietnam's WTO accession in 2007, a few business areas emerged where only investors from WTO member states were in line with the 'open door' pathway for specific services. So, how should investors from non-WTO member states be treated? Will these investors be bound by the above mentioned commitments? If the IL and other local laws are more open, will they be allowed to take advantage of regulations to gain a competitive edge over businesses from WTO member states? Additionally, with regards to services not listed in WTO commitment schedules, if no local law limitations exist, will companies be able to apply for and obtain licenses for such services? These areas of the IL are not clear enough for Planning, Investment Departments and businesses to operate in sync.
- Foreign-invested enterprises may provide services, import and distribution services to be specific, that were opened up after Vietnam's WTO entry. While Vietnamese companies only need business registration certificates including simply merchandising trade to provide these services, their foreign counterparts need a very clear indication in their business licenses that import, distribution and exportation rights are included under Decree 23, 2007. The definitions of these rights, however, interrupt the inter-connectedness in the import and distribution of goods. These definitions include, for example, "The importing right is a right to import commodities from other countries in Vietnam for resale to dealers who are allowed to distribute such commodities", "The distributing right is a right to distribute imported or locally-made commodities to wholesale dealers or end users"; and "The exporting right is a right to export commodities out of Vietnam". In respect of the distributing right, end users may be located either in Vietnam or another country, which implies that distribution for foreign buyers is permitted. Nevertheless, as specified in the license, what really applies to foreign-invested enterprises is that "they may import an A product, but are not allowed to export what they have imported". This means that they will have to resell the product to another company that is allowed to import the same product. Consequently, even if a company has obtained the three above rights, it cannot be sure whether it can actually exercise those rights. This is a conundrum for Planning, Investment Departments in interpreting the language of Decree 23.

Mr. Fred Burke – Managing Partner, Baker & McKenzie

- Many investors have experience of local authorities interpreting WTO commitments as the ceiling not the floor. The supply chain issue has impacts on exports' competitiveness even when they enter the local economy. If the local economy is protected and does not allow competition then prices go up. Therefore, components for export products also become more expensive.

Mr. Nguyen Viet Khoa - Director, Business Law Consulting and Orientation Center, HCMC University of Economics

- The EL and IL should be revised to take into account the extension of freedom for investors to do business, while guaranteeing equality between Vietnamese and foreign investors. Moreover, a consistent perception of locally-incorporated businesses with foreign shareholdings should be achieved.
- A bold and necessary step is to retire the IL altogether at this stage. Investment procedures applicable to foreign investors will then be transferred to the EL, as other issues including investment incentives have been addressed in other legislative documents.
- Clearer stipulations pertaining to such issues as business lines, business names and stamps are needed to create a friendlier environment for companies to operate in.
- Guidelines on registered capital reductions for joint stock companies and power of supervisory boards should be in place. As evidence shows, supervisory boards of joint stock companies virtually exist on a nominal basis. In reality, numerous acts that are detrimental to the company have been carried out by the board of directors or executives. Supervisory boards. Therefore, the supervisory board needs to be further empowered.
- Ordinance on merger and acquisitions should be enacted to adapt to the changing business landscape. Added to that, while the law is there, few companies actually complete legal dissolution procedures and often a company is just left inactive.

Ms. Tran Kim Dung - Vo Thi Thanh Law Firm

- *Notifying competent regulators:* Article 81.2 of the EL, 2005 should be retained to allow regulators to keep track of shareholding movements within 90 days and to initiate inspections, if needed, to ensure that a company is adequately financed for operations. Evidence suggests that many companies start operating even when all shareholding commitments have not been met, resulting in abuse of funds from suppliers or other partners, and even litigation in the case of conflict.

Article 143.2 requires that the owner of a private enterprise may manage and administer the business operations or employ other persons to do so. Where another person is employed as the director managing the enterprise, the owner of a private enterprise must register same with the business registration body and shall remain responsible for all business activities of the enterprise.. This procedure is related to other external business activities and not only an internal routine. But instead of registering, the company should only notify a business registration office.

- *Company stamp*: Article 36 of the EL specifies that the “stamp is the company’s property”. But, changes to this article are recommended as a stamp is not property, but rather a form of identity between companies.

Mr. Hoang Van Son – Lawyer, VNC Law Firm

- *Company names translated into a foreign language*: Companies should be allowed to do translations themselves and be accountable for the translated titles to avoid potential problems with uncommon languages such as Lao, Cambodian, Thai and various ethnic group languages where an official dictionary is not agreed upon.
- *Company stamp*: The EL specifies that the stamp is the company’s property. When a company relocates, however, this “property” must be returned to the State and the company must pay another VND400,000 for a new stamp. It is suggested that companies be allowed to make their own stamps and register them with a relevant authority, similar to the invoices printed by companies.
- *Value added invoice*: Invoices printed by companies may cost a little more, but they allow the company to keep a track of their own inputs. Furthermore, companies should also be allowed to embed their logos, branding advertisements and other unique features on the value added invoices they print.
- *Dissolution*: It is suggested that if a company stops operations for six months to one year, it will be deemed dissolved and the remaining liabilities (e.g. debts) will fall on the owners or legal representatives. In this way, if disputes arise, specific individuals will be responsible.

Mr. Tran Vu Hai - Lawyer, Tran Vu Hai Law Firm

- *There should be a clearer definition of a company’s representatives*. Multiple representatives for a company are recommended, with at least one being a locally resident and Vietnamese national. There have been some cases of foreign representatives of the company having fled Vietnam, leaving those remaining to pick up the pieces. Moreover, the EL should specify that company representatives have no waiver privileges for their responsibilities if going concern problems arise. Added to that, penal charges may be imposed for desertion of position.
- *Company regulators*: In the current regulations, there are two types of company regulators - the members’ council for limited liability companies, and board of directors and general shareholders’ meetings for joint-stock companies. In fact, there may be multi-role entities like board of directors and board of founders as seen with the troubled ACB Bank. It is recommended that corporate governance models, other than the two specified in the EL, be prohibited.
- *Dissolution*: In agreement with the recommendation that a company that is inactive for a specific period of time be deemed dissolved, from there the company representatives will be directly responsible for settlement of any issues pertaining to the company.

Mr. Mai Tran - Lawyer, M&H Law Firm

- It is common with all existing local laws that local line agencies always consult with related ministries for enforcement. To avoid this situation, it is recommended that: (i) a uniform law dictionary - an official dictionary providing definitions for all terminology in the existing legislative system - is developed and (ii) a separate code of conduct is introduced, governing the behavior of public officials, businesses and other stakeholders. Clearer legal definitions will create equality and address the lack of transparency in various processes in accordance with regulations.
- *Contribution of equity*: In the EL, public companies are very important and that is why EL drafters need to refer to the Securities Law. In response to the recommendation on equity contributions, it is necessary that shareholding commitments be completed within a specific period of time, such as 90 days. This should be clearly spelt out in the law, as immediately after a company is incorporated, committed shareholders who have not completed their liabilities shall be immediately debited. From this point on, if these parties fail to fulfill their capital contribution liabilities, their rights and obligations will be deemed lost. Nevertheless, more discussion is needed for cases where companies that have been operational and committed shareholders' liabilities have been recognized, but not fully realized.

Mr. Phan Tu Lap - Lawyer, Head of Phan Law Firm

- Business licensing should be made through a single channel, being the MPI. Currently, licensing is still the responsibility of specialized agencies of various ministries. With this trend, the EL is likely to be distorted, as in addition to the MPI's management principles, businesses are also subject to regulations from various industry-specific authorities, while there are significant possibilities of governance conflicts between these agencies.
- It is suggested that strong efforts be made to incorporate tougher penalties into the EL to ensure strict compliance. While various EL issues have been addressed, enforcement is weak due to a lack of punitive mechanisms. Legal representation and dissolution issues are a typical case. While the EL says liabilities and rights fall on shareholders, this hardly takes place in practice. While Planning, Investment Departments are responsible to provide copies of business registration certificates and shareholder lists, these documents are rarely delivered to the requesting parties.

Ms. Hoang Nguyen Ha Quyen – Lawyer, LCT Lawyers

- The drafting team could be reinforced with a few individuals or entities directly involved in business activities or have practical experience at a company level to help the team view various issues from public administration and corporate environment perspectives when comments become available.

Comments from other members

- The EL's provisions on business functions overlap with those of other industry-specific laws. For example, the EL allows companies to make equity-based or financial investments. The Securities Law, on the other hand, only allows securities institutions to make financial investments. As such, companies incorporated under the EL, like capital investment or finance companies may risk abusing their designated functions, resulting

in higher costs, higher returns and ultimately adverse tax implications. In another example, the EL allows lawyers counseling on legal issues to provide advice on other areas such as accounting, which is not permitted by the Accounting Law.

- The current EL allows for below-par value stock issues, which may lead to questions as to whether such issuing complies with the EL in terms of registered capital and potential costs incurred attributed to corporate income tax and personal income tax.
- The current EL also allows for the conversion of corporate designation, where a limited liability company may transform to a joint stock company. Nonetheless, the EL does not mention partnerships converting to other forms of enterprise.
- It is recommended that a relevant internal authorizing scheme be introduced to businesses. For example, it could mean a competent company representative may not necessarily be the company's legal representative.
- The removal of the company stamp is recommended. It could be replaced by the fingerprints of a company member who is legally accountable for simplicity and easier management.
- Supervisory boards now have very little power and are unable to effectively play the role of a corporate supervisor. It is suggested that the law specify the rights of supervisory boards, including (i) engaging auditing firms instead of the company's legal representative and (ii) being allowed access to the company's assets or funds without executives' or the board's approval.
- To find an answer to the equity contribution question, the EL should specify, (i) if foreign capital is involved, whether funds when available should be transferred without delay to a bank account and (ii) a public business watchdog should closely monitor the equity contribution process, so if a deadline is not adhered to, the company in question will be suspended.

III. RESPONSE FROM MINISTRY OF PLANNING AND INVESTMENT

Mr. Quach Ngoc Tuan - Deputy Director of Legal Department, MPI

Issues pertaining to the application of WTO commitments to non-binding business lines for non-WTO countries have been responded to in the draft Decree replacing Decree 108 submitted to the Government

- Encoding business lines in the business registration processes for business lines not listed in the current system. This is related to Article 7.4, Decree 43, 2010, a EL implementing document. The said regulation is being revised and a draft has been posted on the ministry's website.

Mr. Tran Dinh Cung - Vice Director of CIEM, MPI

- The 2005 EL aims to (i) create a level, non-discriminatory playing field for all economic sectors, public and private, Vietnamese and foreign-invested enterprises and (ii) solidify and increase corporate governance effectiveness, especially for public companies.

- The inclusion of state-owned enterprises in this level playing field has failed to materialize. The governance of state-owned companies, especially large corporations, has deviated from the EL. Article 168 of the EL provides fundamental principles for a shift in governance for state-owned companies. However, this has not been adhered to.
- The governance of public companies, on the other hand, mostly takes place at face value, while practical effectiveness remains minimal.

Labor

IMPACTS OF NEW LABOR CODE, NEW UNION LAW AND DRAFT EMPLOYMENT LAW

*Prepared by
Baker & McKenzie*

In 2012, the National Assembly passed two important laws regarding labor matters including Labor Code No. 10/2012/QH13 dated 18 June 2012 taking effect effective date from 1 May 2013 (the "**New Labor Code**") and Law No. 12/2012/QH13 on Trade Union dated 20 June 2012 taking effect from 1 January 2013 (the "**New Union Law**"). These laws will replace the current Labor Code passed on 23 June 1994, amended and supplemented in 2002, 2006 and 2007 (the "**Current Labor Code**") and current Law No. 40-LCT/HDNN8 on Trade Union dated 30 June 1990 (the "**Current Union Law**"). Also, the new draft of Employment Law is under discussion and expected to take effective from 1 January 2015 (the "**Draft Employment Law**").

Providing many new regulations, these new laws will explicitly impact to labor relationship and employers' business. In the scope of this document, we will focus on the impact of new laws to company (employer) costs. Specifically, the revisions can make company direct / indirect costs (as defined below) increased:

- "**Direct cost**" revisions mean legal requirements that would directly impose higher taxes, fees and labor costs on the enterprises, *e.g.*, increase of probationary salary, minimal salary rates, insurance contribution rates, change of leave regimes, increase of salary for overtime, new regulation of union fund, etc.
- "**Indirect cost**" revisions mean legal requirements that would cost company more administrative and management time, *e.g.*, imposition of union levy (2%) to all enterprises even if such enterprises have no grassroots union, shortening the term of work permit, etc.

1. Direct Costs

1.1. Increase of Probationary Salary

Under the Current Labor Code, the salary of employees during the probationary period must be at least 70% of official salary¹ but not lower than the minimal salary rates prescribed by the Government.² The New Labor Code increases the minimal rate of employee salary during probationary period to 85% of official salary³ and this salary must also not be lower than the minimal salary rate prescribed by the Government.⁴ Although this change contributes more protection to the employees, it may cause the increase of salary fund which the employers use to pay for the employees.

1.2. Increase of Regional Minimum Salaries

The regional minimum salaries are prescribed by the Government from time to time in order to ensure the income for employee's minimal living standards. The regional minimum salaries are divided into 4 groups based on the geographic areas. The current

¹ Article 32, the Current Labor Code.

² Article 7.1, the Current Labor Code.

³ Article 28, the New Labor Code.

⁴ Article 90.1, the New Labor Code.

regional minimum salaries are VND2,000,000 for Area 1, VND1,780,000 for Area 2, VND1,550,000 for Area 3 and VND1,400,000 for Area 4.⁵ Increase of regional minimum salaries lead to general increase of total payroll since many companies need to restructure their salary schemes to comply with and reflect the increase of regional minimum salaries.

The Ministry of Labor, Invalids and Social Affairs (MOLISA) raised the idea of increase of minimum salaries which are expectedly effective from 1 January 2013. Under the latest Official Dispatch⁶, MOLISA requested organizations and companies to send their opinions on the increase of regional minimum salaries. There are two options for increase of regional minimum salaries raised by MOLISA with (1) the increase of 36% (Option 1), or the increase of 25% (Option 2). Almost enterprises and organizations attending the latest meeting held by MOLISA did not agree with these proposals of changes due to the current difficulties of Vietnam/ global economy and requested for lessening the increase rates and postponing the effective date of this change. After the meeting, MOLISA tends to choose Option 2 of increase of regional minimum salary rate but the effective date may not change. Please see below table the current regional minimum salary rates and the proposal of MOLISA.

	Options	Area 1 (VND)	Area 2 (VND)	Area 3 (VND)	Area 4 (VND)
Current		2,000,000 (about US\$96)	1,780,000 (about US\$86)	1,550,000 (about US\$75)	1,400,000 (about US\$67)
Proposal of increase⁷	Option 1: increase of 36%	2,700,000 (about US\$130)	2,400,000 (about US\$115)	2,130,000 (about US\$102)	1,930,000 (about US\$90)
	Option 2: increase of 25%	2,500,000 (about US\$120)	2,250,000 (about US\$108)	1,950,000 (about US\$91)	1,800,000 (about US\$86)

As mentioned above, the increase of regional minimum salaries lead to the general increase of payroll. As a result, together with the schedule of contribution ratio of social insurance as provided under the Law on Social Insurance, the increase of general / regional minimum salaries can also lead to the general increase of social insurance contribution amount by both employers and employees. Please see below table the insurance contribution rates under the Law on Social Insurance.

Year	2007-2009		2010-2011		2012-2013		2014 and then	
Contributors	Employer	Employee	Employer	Employee	Employer	Employee	Employer	Employee
Social Insurance Fund	15%	5%	16%	6%	17%	7%	18%	8%
	20%		22%		24%		26%	

⁵ Decree No. 70/2011/ND-CP.

⁶ Official Dispatch No. 2750/LĐTBXH-LĐTL dated 9 August 2012

⁷ Official Dispatch No. 2750/LĐTBXH-LĐTL dated 9 August 2012.

Health Insurance Fund	2%	1%	3%	1.50%	3%	1.50%	TBA, but no more than 4%	TBA, but no more than 2%
	3%		4.50%		4.50%		TBA, but no more than 6%	
Unemployment Insurance Fund	1%	1%	1%	1%	1%	1%	1%	1%
	2%		2%		2%		2%	

1.3. Changes to Leave Regimes

Increase of Lunar New Year Holidays and maternity leave leads to the major changes of leave regimes. Under the New Labor Code, Lunar New Year Holidays is increased from 4 days⁸ to 5 days⁹ (one day increase).

Regarding the maternity leave, the current maternity leave period of Vietnam (*i.e.*, 4 months¹⁰ in standard labor conditions, except for certain limited cases that female employees can enjoy 5 or 6 months leave) is quite long in comparison with other countries in the Asian area (*e.g.*, 4 weeks in Brunei,¹¹ 6 weeks in Philippine,¹² 10 weeks in Hong Kong,¹³ 3 months in Indonesia¹⁴, etc.). The New Labor Code increases the maternity leave period to 6 months¹⁵, which brings much more benefits for female employees on the one hand, such as more care for the new born child, more leave period with full salary paid by social insurance fund in the form of maternity allowances. However, this new provision may trouble the enterprises in arranging temporary personnel in replacement of female employees in maternity leave and may make difficulties for their operation and business. Further, it may increase the discrimination in recruitment, or use of female employees while the regulations and enforcement on anti-discrimination by gender is still poor under Vietnamese law.

1.4. Increase of Overtime Salary Rate

Overtime salary for working on holiday or paid leave under the Current Labor Code is at least 300% of normal salary¹⁶, which is understood to be inclusive of 100% of normal salary and 200% of normal salary for overtime.¹⁷ However, under the New Labor Code, overtime salary for in holiday/ paid-leave for employees enjoying daily salary is at least 300% of the normal salary plus normal salary for such holidays/ paid leave.¹⁸

Regarding employees working overtime in night-shift, in addition to entitlement of overtime

⁸ Article 73 of Current Labor Code.

⁹ Article 115 of New Labor Code.

¹⁰ Article 114 of Current Labor Code.

¹¹ Article 83 of Law of Brunei - Chapter 93 (Labour).

¹² Article 133.a Labor Code of Philippine as amended by Presidential Decree No. 442.

¹³ Section 12 - Part III - Chapter 57 of Employment Ordinance of Hong Kong.

¹⁴ Article 82.1 of Manpower Act No. 13 2003 of Republic of Indonesia.

¹⁵ Article 157 of New Labor Code.

¹⁶ Article 61.1(c) of Current Labor Code.

¹⁷ As per guidance of MOLISA under Official Dispatch No. 1339/LĐTBXH-LĐTL dated 2 May 2012

¹⁸ Article 97.1(c) of New Labor Code.

salary and night-shift allowances as provided under the Current Labor Code,¹⁹ the employees working overtime in night-shift are also entitled to additional salary of 20% of the normal salary for the day time.²⁰

The above increase of overtime salary will bring more benefits for employees; however, these provisions will lead to increase of salary fund of companies.

1.5. Employees Entitlement of Health Examinations Twice per Year

Under the Current Labor Code, employers must organize annual health examinations (once/year) for the employees, including apprentices, trainees. Health examinations at least twice/year only apply to employees who perform hard and hazardous works.²¹ However, the New Labor Code extends the types employees who are entitled to health examinations at least twice/year including female employees (for gynaecology examination), disabled and under-age employees and elderly employees.²² This provision may lead to increase of company cost regarding health check for employees.

1.6. New Regulations on Union Fund

Under the Current Union Law, union fund originates from union levy by employers, union membership fee by employees (union due employees) and other incomes. Union levy just applies to companies which have grassroots trade union. The amount is 2% of the total local employees' payroll for domestic enterprises²³ and 1% of the total local employees' payroll for foreign invested enterprises.²⁴ As a matter of practice, the union levy will not apply to enterprises (both domestic and foreign invested enterprises) where there is no grassroots trade union.

However, the New Union Law imposes a 2% of union levy calculated on total local employees' payroll used to contribute to social insurance fund,²⁵ which applies to all companies (i) regardless of domestic and foreign invested companies; and (ii) regardless of existence of grassroots trade union in such companies. This new provision may make all companies, especially the ones without grassroots trade union, have to pay much union levy which they used not to pay. In addition to the increase of company cost, this new provision also lead to the needs to establish a grassroots trade union which is discussed in Part 2 of this document. Please see below table the summary of union fund in comparison between the Current Union Law and the New Union Law.

Items	Current Union Law and Regulations		New Union Law	
	Union Levy by Employer	Union Due Employee	Union Levy by Employer	Union Due Employee
Fee payer	Enterprises having a grassroots union	Members	All Enterprises	Members

¹⁹ Article 31 of Current Labor Code; Articles 97.1 and 97.2 of New Labor Code.

²⁰ Article 97.3 of New Labor Code.

²¹ Article 102 of Current Labor Code; Article 7 of Decree No. 06/CP as amended by Decree No. 110/2002/ND-CP.

²² Article 152.2 of New Labor Code.

²³ Joint - Circular No. 119/2004/TTLT-BTC-TLDDVN.

²⁴ Circular No. 17/2009/TT-BTC.

²⁵ Article 26.2 of New Union Law.

Contribution fees	Domestic: 2% Foreign invested: 1% of the total local employees' payroll ²⁶	1% of monthly salary; and not exceed 10% of min. salary ²⁷	2% of the total local employees' payroll used to contribute to social insurance fund Max. salary base/employees (20 month general min. salary) ²⁸	1% of actual salary; Capped at 10% of general min. salary
--------------------------	--	---	---	--

We are of opinion, trade union is similar to other social-politic organizations that should operate based on (1) membership fees; (2) the State financing (if provided by law); and (3) other financial sources from their own activities (if any). To some extent, trade union is an opposite organization to employers while employers have responsibility to pay for trade union operation.

Also, the first and important rule of trade union is voluntariness. However, the New Trade Union Law seems to break this rule when it requires companies without trade union to pay trade union levy. Also, even when employers accept to pay trade union levy, that should be calculated on payroll of trade union members, rather than the one of all local employees including employees who are not trade union members.

1.7. A New Provision on "Employment Insurance Fund"

Draft Employment Law provides a new "Employment Insurance Fund" which is a fund to support, maintain and develop employment; prevent unemployment; partially support income and soon bring the unemployed people back to the labor market.²⁹ This fund requires contribution similar to Unemployment Insurance Fund.³⁰ Further guidance from the State agencies may still be needed regarding contribution of this fund and whether this fund will replace the unemployment insurance one, or it will be another separate fund, which will double costs to both employer and employee?

2. INDIRECT COSTS

2.1. Grassroots Union Establishment Becoming *De facto* Compulsory

As discussed above, the new provision on union levy of 2% of total local employees' payroll used to contribute to social insurance fund³¹ and the rights and obligations of immediate upper level trade union of grassroots trade union (the "Immediate Upper Union") to represent and protect legitimate rights and benefits of employees at enterprises without grassroots union³² make establishment of grassroots union becomes *de facto* compulsory, since:

Firstly, under the Current Union Law, union levy just imposes on companies having grassroots unions (*i.e.*, this levy does not impose on companies which grassroots union has not been established yet). In addition, as discussed in Part 1.6 above, union fund will be

²⁶ Joint - Circular No. 119/2004/TTLT-BTC-TLDDVN and Circular No. 17/2009/TT-BTC.

²⁷ Instruction No. 826 /HD-TLD dated 1 June 2009 of the Vietnam General Confederation of Labor.

²⁸ Art. 26.2, the New Union Law.

²⁹ Article 84, the Draft Employment Law - source: <http://www.chinhphu.vn>.

³⁰ Articles 85 and 86, the Draft Employment Law - source: <http://www.chinhphu.vn>.

³¹ Article 26.2, the New Union Law.

³² Article 3.4, the New Labor Code; Article 17, the New Union Law.

partially kept for use at grassroots union for some purposes³³ and the rest will be transfer to upper level unions.

Under the New Union Law, all companies are required to pay union levy even if there is no grassroots union in such companies. The levy imposed under the New Union Law is explicitly used for, among other things, activities of all levels of trade unions (including grassroots trade unions and upper level trade unions).³⁴ Further guidance from the Vietnam General Confederation of Labor are needed regarding the contribution and the use of this trade union fund. However, per confirmation with the competent unions authorities, this fund will be first paid to the upper level trade union; afterwards, part of the fund will then be sent back to grassroots trade union. If there is no grassroots trade union at the enterprise level, the entire union fund would be kept at the Immediate Upper Union. Practically, employers, therefore, may consider to have an union in their companies in order to take back a part of their contribution which can directly benefit their own employees.

Secondly, under the Current Union Law, if a company has no grassroots union, it can practically bypass the union consultation in lots of procedures related to its employment and labor issues. These procedures include application of labor disciplines on the employees, issuance and registration of Internal Labor Regulations, etc.

However, under the New Labor Code, the rights and obligations of the Immediate Upper Union to present and protect the legitimate and lawful rights and interests of grassroots level employees are automatic, and are not just only based on the employees' request. The Immediate Upper Trade Union is considered "the representative organization of the employees" at enterprises without grassroots trade unions³⁵ and employers are required to consult, and sometimes reach an agreement with these representative organizations for any matters related to the labor regulations or employees benefits. This means, under the New Union Law and the New Labor Code, if companies do not have a grassroots union, it must consult and sometimes reach an agreement with the Immediate Upper Union for matters related to employees and employees' benefits, such as issuance and registration of Internal Labor Regulations and salary schemes, negotiation and execution of Collective Labor Agreement, application of labor disciplines, etc.³⁶ It seems that the new law requires employers to work with/ consult / and even agree with trade union officers of Immediate Upper Union who are not familiar with or understand the actual situation / business / production of companies. It is therefore not easy and convenient for companies to contact and communicate with Immediate Upper Union other than grassroots union. The consultation / agreement may be lengthened and ineffective. Employers, therefore, may consider to have a grassroots trade union of which officers are closed to the employers, and deeply understand companies, thus, can facilitate the decision making process.

Above all discussed, with such new provisions, establishment of grassroots union becomes *de facto* compulsory, which may cost enterprises more administrative and management time and fees.

³³ Decision No. 1445/QĐ-TLĐ dated 16 December 2011: such as salary for full time union officer, expenses for travel and tourism, expenses for assistance to its members in difficult conditions, etc.

³⁴ Article 27.2(I), the New Union Law.

³⁵ Article 3.4, the New Labor Code.

³⁶ Articles 46.2, 74.1, 83.1(a), 93.2, 119.3, 123.1.(b), the New Labor Code.

2.2. More Protection of Non-dedicated Part-time Union Officer

A part - time union officer is an employee who does not only perform an employee's tasks under a signed employment contract but also carries out the functions, responsibilities and rights of a union officer. Consistent with the New Labor Code,³⁷ the New Union Law provides more protection to part - time trade union officers.

One protection is that if the employment contract of a part - time trade union officer expires while such officer is still within the term of his or her office, then such employment contract must be extended until expiry of the term of such office.³⁸ We are of opinion that it is unreasonable when at the starting point, the trade union relationship is originated from the employment one, while at the end, trade union relationship can override the employment relationship. This provision may be good for dedicated part - time union officers who are worthy of protection and extension of labor contract. However, for some non-dedicated part-time union officers, whether the new laws "*lend a hand*" for them to continue working at company which they have not dedicatedly contributed to it? Also, employer are not allowed to terminate the labor contract upon expiry date of labor contract but strained continue the employment relationship with such non-dedicated employees.

Further guidance from the Government are necessary regarding this matter. However, the Government should exclude the non-dedicated part-time union officers from enjoying this protection by providing that "*only part-time union officers who have not seriously breached labor contract, ILRs and other relevant regulations have the right to enjoy the right provided in Article 192.6 of the New Labor Code and Article 25.1 of the New Union Law*".

2.3. More Restriction on Overtime

The new Code adds one more cap on the total overtime hours in a month which can not exceed 30 hours,³⁹ which will make difficulties to many companies, especially garment, processing ones which usually have to gather a big number of labor force for a short time to satisfy urgent purchase orders.

2.4. Shortening the Term of Work Permit

While the Current Labor Code allows for a maximum term of work permit of 3 years,⁴⁰ the New Labor Code limits that term to a maximum of 2 years only.⁴¹ With this new regulation, employers will pay much time on application for work permit for their foreign employees.

Besides, there seem to be less exemptions from work permit requirements in the New Labor Code. Indeed, while the current regulations allow work permit exemptions for any foreign national working in Vietnam for a term of less than three months,⁴² it seems that the New Labor Code no longer allows these exemptions. Accordingly, the New Labor Code only allow foreigner entering Vietnam with the term less than 3 months for the purpose of (i) offering services; and (ii) handling the problem, technical situation and complex technology arising that affect or threaten to affect the production and business

³⁷ Article 192.6, the New Labor Code.

³⁸ Article 25.1, the New Union Law.

³⁹ Article 106.2(b), the New Labor Code.

⁴⁰ Article 133, the Current Labor Code.

⁴¹ Article 173, the New Labor Code.

⁴² Article 9.1(a), Decree No. 34/2008/ND-CP as amended by Decree No. 46/2011/ND-CP (Decree No. 34/2008/ND-CP).

that the Vietnamese and foreign experts currently in Vietnam cannot be handled.⁴³

Also, the New Labor Code strictly administers the recruitment of foreigner working in Vietnam. Indeed, while the current regulations, the employers just have to register annually their needs on recruitment of foreign employees,⁴⁴ the New Labor Code requires employers to report on their needs of recruitment of foreign employees and the employer must obtain approval from labor authorities before recruiting.⁴⁵ This new regulation may trouble the employer upon recruiting foreign employees.

On the other hand, a not-new but un-clear regulation regarding the apprenticeship/ training contract signed between employer and Vietnamese employees who will work in the position currently held by foreigner in case of extension of work permit⁴⁶ may make much trouble for both employers and foreign employees in process of application for extension of work permit.

* *
*

In the situation of economic turndown, the considerable increase of labor costs will surely lead to consideration of retrenchment of employees or increase of product/ service prices. Labor cost is also one of the factor of investment environment, and country competitiveness. The sudden changes would affect decisions of new investors to choose Vietnam or other neighbor countries as their investment destination. We do hope that Government of Vietnam will consider these issues carefully for the coming implementation guidance of the Code and / or its future amendments and revisions.

⁴³ Articles 172.4 and 172.5, the New Labor Code.

⁴⁴ Article 132, the Current Labor Code; Article 19.7, the Decree No. 34/2008/ND-CP.

⁴⁵ Article 170, the New Labor Code.

⁴⁶ Article 10.2(a), the Decree No. 34/2008/ND-CP.

CONSOLIDATED RECOMMENDATIONS TO THE IMPLEMENTATION OF THE AMEDED LABOR CODE

*Prepared by
Investment & Trade Working Group*

No.	Labor Code	Comments/Recommendations
1		December 09, 2010, the Government issued Resolution No. 48/NQ-CP regarding the simplification of administrative procedure in the management scope of the Ministry of Labor, War Invalids and Social Affairs. Many administrative procedures have been simplified or removed. Does the Labor Code 2012 take into account regulations in Resolution 48? Will regulations in Resolution 48 be still effective when this Labor Code goes into effective?
2		The difference between Labor Contract (Labor Code) and Service Contract (Civil Code) is difficult to be identified which contract should be applied? More criteria are required to identify in which cases Labor Contract or Service Contract should be applied.
3	Article 5. Rights and duties of employees 1. The employees are entitled to: c) Establish, join and participate in activities of the Union, professional organizations and other organizations as prescribed by law; request and participating in discussions with the employer, exercise the democratic regulation and get consultancy at workplaces in order to protect the lawful rights and interests; participate in the management under the regulations of the employer.	How to address the situation that no Union is able to established due to the refuse of employees to join the Union, especially to disciplinary dismissal cases according to Article 126 of Labor Code?

4	<p>Article 19. Responsibilities to provide information before the labor contract conclusion</p> <p>2. The employee must provide information for the employer about their full name, gender, residence, educational background, vocational skills, health condition and other issues directly related to the labor contract conclusion requested by the employer.</p>	<p>What is the legal consequence if employees do not provide or provided incorrect information upon request of the employer due to some reasons? Is it invalid contract? Does the employer hold the right to terminate the contract and ask for compensation?</p>
5	<p>Article 21:</p> <p>“An employee may enter into multiple labour contracts with multiple employers, provided that all the contents in the executed contracts are fully performed.</p> <p>For contracts entered with multiple employers, the social insurance, medical insurance of the employee must comply with the Government’s provisions.”</p>	<p>It should concretize the medical and social insurance mechanism of an employee who entered into labor contract with multiple employers.</p> <p>It should also permit an employer to restrict an employee from working for competitors operating within the employer's business lines, as agreed in the labour contract.</p>
6	<p>Article 22. Kinds of labor contracts</p> <p>1. The labor contract must be concluded in one of the following kind:</p> <p>a) Labor contracts without fixed term;</p> <p>b) Fixed-term labor contracts;</p> <p>The fixed-term labor contract is a contract in which both parties specify the term and the expiry date of the contract within 12 to 36 months.</p>	<p>Is it valid to sign non-fixed-term contract with foreign employees having Visa and fixed term work permit in Vietnam?</p> <p>The State currently is encouraging the training and usage of Vietnamese labors in replacement for foreign ones. The extension of work permit, therefore, can only be exercised if no Vietnamese labor is available. Should the signing of non-fixed-term contract with foreign employees be taken into consideration?</p> <p>Duration of Labor contract with foreign employees, typically, equivalent to that of their work permit whose maximum period is 2 years while that of fixed-term Labor contract is 36 months. Is there any irrationality in this regulation?</p>

7	<p>Article 22:</p> <p>“2. In case the employee keeps working when the labor contract prescribed in Point b and Point c Clause 1 this Article expires, both parties must conclude the new labor contract within 30 days as from its expiry date; if the new labor contract is not concluded, the contracts concluded as prescribed in Clause 1 this Article shall be come a labor contract without fixed term, and the contract concluded as prescribed in Point c Clause 1 this Article shall be come a labor contract with a fixed term of 24 months</p> <p>The new labor contract being a fixed-term contract shall be concluded only one more time. After that, if the employee keeps working, the labor contract without fixed-term must be concluded.”</p>	<p>Point 2 of Article 22 of Amended Labor Code provides the employee and employer should enter into the new contract within 30 days as from the expiry date of initial labor contract. May we understand that although the employee keeps working, either party, within this period, can terminate the contract without compensation? For example, the contract expires on 1 Sep 2012, the employee still keep working until 15 Sep 2012 when the employer notified to him that the contract will not be renewed, as it is permitted under this provision.</p> <p>Besides, as the provision stipulates that “<i>The new labor contract being a fixed-term contract shall be concluded only one more time. After that, if the employee keeps working, the labor contract without fixed-term must be concluded.</i>” We would like to confirm if the period of 30 days shall be applied after the second contract or just serve for the expiry of the first contract?</p>
8	<p>Article 26:</p> <p>“2. The employees working under casual labor contract do not have to undergo probation.”</p>	<p>Under this Article an employee with a seasonal contract (a contract with less than 12 months) does not need to have a probation period. Employers may want to have a probation period for a new employee. We suggest that a short term of probation (not exceeding 6 days) must be applied to this type of contract.</p>
9	<p>Article 27. Probation duration and Article 29. Probation expiry</p>	<p>How the employer solve the situation that employees’s probations have expired and he/she does not fulfil the requirement of the employer for a labour contract but wish to extend the probation duration?</p>
10	<p>Article 29:</p>	<p>Point 2 of Article 29 stipulates that each party is entitled to terminate the probation without prior notice and without</p>

	<p>"2. During the probationary period, each party has the right to rescind the agreement on probationary work without providing advance notice and without paying compensation if the employee's probationary work does not satisfy the requirements agreed by the two parties."</p>	<p>compensation if probation fails to satisfy the requirements agreed by both parties. However, as the written probation contract is not compulsory, it is not easy to certify what is agreed by both parties. We expect the guiding regulation to the Amended Labor Code will clarify this point.</p> <p>To avoid disputes, this Article should clarify that in case a probation agreement is unilaterally terminated by any party, a probationary employee shall be entitled to receive the agreed salary for each day worked, and the employer must pay within 3 days from the day of termination.</p>
11	<p>Article 33:</p> <p>"Within 15 days from expiry of the term of suspension of performance of the labour contract in the cases prescribed in article 32, the employee must attend the workplace and the employer must receive the employee back to work, unless the two parties have some other agreement."</p>	<p>As there is no distinction, this provision requires an employer to receive an employee back to work after expiration of temporary custody or detention or implementation of administrative sanctions which may have been caused by a violation of the law. This is burdensome for the employer given that such employee may no longer be suitable to work, or there may no longer be work for an employee returning from custody or detention or after implementation of an administrative sanction. Thus, this requirement should be limited to cases where the period of the suspension is under 1 year.</p>
12	<p>Article 34: Part-time employee</p>	<p>More specific or guidance to be provided on this type of labor.</p>
13	<p>Article 35:</p> <p>"1. During the performance of labor contract, the party that demands to amend and supplement the labor contract must notify to the other party in advance at least 3 working days of the contents being</p>	<p>Strictly speaking under Article 35, any change to the employment contract requires compliance with procedures for revisions as provided for by Article 35. As the "contents" of the contract are various, it would be inconvenient if a</p>

	<p>amended and supplemented.</p> <p>2. If the agreement is reached, the amendment and supplement of the labor contract must be carried out by concluding the labor contract annex or concluding the new labor contract.</p> <p>3. If the agreement on the amendment and supplement of the labor contract cannot be reached, the concluded labor contract shall continue to be performed.”</p>	<p>minor change would be subject to such procedures. It is therefore necessary to specify that only the main contents that impact the employee’s rights and benefits would be subject to the procedures for revision.</p>
14	Article 36: Termination of labor contract	<p>More explanation for “economic reason”.</p>
15	<p>Article 43. Obligations of the employee when illegally unilaterally terminating the labor contract</p> <p>3. The training cost must be returned to the employer as prescribed in Article 62 of this Code.</p>	<p>This regulation does not protect the rights of employers. There are cases employers send their employees overseas for training courses of tens of thousands USD, but these employees legally terminate the labour contract adducing regulations of Labour Code (expiration of contract, non-fixed-term contract and its 45 days of notice) without having to compensate the cost to their employers.</p> <p>A tighter regulation on obligations of employees should be employed that when terminating of labor contract, employees must return the training cost including their salaries paid by their employers during their studying.</p>
16	<p>Article 44:</p> <p>“3. Many employees may only be retrenched pursuant to this article after discussion with the organization representing the labour collective at the grassroots level and after 30 working days’ advance notice has been provided to the provincial State administrative body for labour.”</p>	<p>This item is not clear as to how many employees subject to retrenchment in this case will be deemed to be “many”.</p>
17	<p>Article 49:</p> <p>“1. The employer is responsible to give the redundancy pay to the</p>	<p>In case the total duration that the employee has actually worked for the employer is as same as the duration the</p>

	<p>dismissed regular employees that have worked for 12 months or more as prescribed in Article 44 and 45 of this Code. 1-month salary is paid for each working year but must not be lower than the salary of 02 months.</p> <p>2. The working time for redundancy pay calculation is the total duration that the employee has actually worked for the employer excluding the time the employee has taken the unemployment insurance as prescribed in the Law on Social insurance and the time the employer paid the severance pay.</p> <p>3. The salary for redundancy pay calculation is the average salary under the labor contract of the preceding 06 months before the employee is dismissed.”</p>	<p>employee has taken the unemployment insurance as prescribed in the Law on Social insurance and the time the employer paid the severance pay, the provision of minimum redundancy pay (not be lower than the salary of 02 months) is still applicable? For example, an employee has worked for us for 02 years from 1 Jan 2011 until 31 December 2012, and the time the employee taken the unemployment insurance started from 1 Jan 2011 to December 2012, the same as working duration. In that case, the employer is not obligated to pay the redundancy as the employee can enjoy the unemployment insurance or the employer should pay the minimum redundancy equivalent to the salary of 2 months?</p>
18	<p>Article 52:</p> <p><i>“2. The totally invalidated labor contract shall be handled as follows:</i></p> <p><i>a) In case of ultra vires signing prescribed in Point b Clause 1 Article 50 of this Code, <u>the State labor management agencies shall guide the parties to sign it again;</u></i></p> <p><i>b) The rights, obligations and interests of employees shall be settled under the collective labor agreement or law provisions;”</i></p>	<p>After the parties sign the contract again, the validity of such contract shall be the signing date upon the judgment of State labor management or the effective date mentioned in the invalidated contract? For example, a labor contract was signed and enforced on 1 Jan 2012 and it was judged as invalidated contract. Under guiding of the State labor management, both parties signed it again on 1 Sep 2012. Then the question is the right and responsibility of both parties occurred from the signing date of old contract which was 1 Jan 2012 or the signing date of new contract which was September 1, 2012?</p>
19	<p>Article 54:</p> <p>“2. The period of any labour sublease must not exceed 12 months.”</p>	<p>This limitation will be a barrier for both labour outsourcing companies and the subleasing employer. In practice, most subleasing employers want to hire a specific subleased employee to do the whole project. It will be very difficult for subleasing employer to change its subleased employee every 12 months for a long term project. Therefore, the</p>

		implementing decree or circular should state that a labour sublease must not exceed 12 months, but it can be renewed many times and the renewal period will not exceed 12 months.
20	Article 94: “1. The employer has the right to make the salary payment by time, products or piecework. The chosen form of payment must be maintained for a certain period; in case of change of the payment form, the employer must notify the employee at least 10 days in advance.”	Article 94 permits an employer to pay the employee a products based salary which can be different from month to month. However, under the Law on Social Insurance, the salary used to calculate statutory insurance is the salary stated in the employment contract. As the parties agree on the products based salary, there is no fixed salary in the contract. There should be guidelines regarding how to calculate statutory insurance in this case.
21	Article 101. Deduction of salary 1. The employer is only entitled to deduct the salary of employee for the compensation of damages of tools and equipment of the employer as prescribed in Article 130 of this Code.	If employees, who unilaterally terminate the labour contract must compensate their employers an amount of money, such as compensation for infringement of notice duration, or for the training cost, agree to compensate by their salaries, how to practise this deduction?
22	Article 104: Working time “1. Weekly normal working time allows no more than 10 hours on a given day and 48 hours/week”	How overtime is calculated for 12 hours/4 days working shifts?
23	Article 111: “3. The employee can agree with the employer on taking annual leave in installments or combining 03 annual leave into one leave maximally.”	Under the Point 3 of Art 111 it can be interpreted that the employee may save their annual leaves for maximum 3 years? For example, an employee has 12 annual leave for 01 working year from 1 Jan 2010 to 31 December 2010, he took only 06 annual leave and remain 06 days not yet used. Under this provision, may we understand that he/she can combine with the other annual leaves of next years and such annual leave shall be valid until 32 December 2012, if the employer agrees with his/her request?

24	Article 114: “1. An employee of an enterprise who, due to job leaving, job loss or other reasons, fails to take his annual leave or has not used up all his annual leave shall be paid salary for those days not taken.”	This Article should be specifically provide that pay in lieu for unused annual leave days is required only in the year of termination of employment to avoid misunderstanding that unused annual leave of all years may be calculated and be paid in lieu.
25	Article 116. Personal leave and leave without Pay 2. An employee may take 01 day leaves unpaid and must notify the employer when his grandparents, natural brother and sister dies; parent or mother gets married; natural brother and sister gets married.	How to identify paternal and maternal grandparents? Does it count from the wife side?
26	Article 126: “1. The employee has the act of theft, embezzlement, gambling, intentionally causing injury, using drug within the workplace, disclosing the technology and business secrets, intellectual property infringement of the employer, having the act of causing serious damage or threatening to cause extremely serious damage to the property and interests of the employer.”	There should be a provision guiding on what constitutes “an act causing serious damage to the employer’s property or interests” to serve the basis for dismissal. For example, the guiding legislation should provide for an amount of money that represents the serious damage.
27	Article 157: 1. The time the female employee is entitled to take leave before and after birth is <u>06 months.</u> and Article 240: “b) The stipulation on the time of enjoyment of the policies when giving birth in the Social Insurance Law No. 71/2006/QH11 shall comply with the provisions of this Code.	In case the female employee on maternity leave before the effective date of this Code is still in the time of maternity leave to May 1, 2013, the time of enjoyment will be automatically extended for more 02 months? For example, the maternity leave of 04 months, based on the Law of insurance No 71/2006/QH11), expires on 1 May 2012, the employee can be enjoyed more 02 months with the provisions of this Code?

	The female employee on maternity leave before the effective date of this Code, <u>is still in the time of maternity leave to May 1, 2013 as prescribed in the Law on social insurance No. 71/2006/QH11, the time of enjoyment of the policies when giving birth complies with the provisions of this Code.</u> "	
28	Article 158: <u>"The female employee shall be guaranteed the old job upon returning to work after the end of maternity leave as prescribed in Clause 1 and Clause 3 of Article 157 of this Code, in case the old job no longer exists, the employer must arrange another job for her with the salary rate not lower than that before maternity leave."</u>	In case the definite contract with the female employee expires within her maternity leave, and the employer has no demand to renew it, could we terminate the contract with such employee by a notice to her under the Art. 36 point 1 of termination by the expiry of contract?
29	Article 170: "2. The foreign enterprises, agencies, organizations, individuals and contractors before recruiting employees who are foreign citizens to work in the territory of Vietnam must explain the demand for labor employment and be approved in writing from the competent state agency."	Approval from the relevant authority is required for recruitment of foreign employees. It is unclear what authority will approve and what are the procedures.
30	Article 172: Foreign citizen working in Vietnam not subject to the grant of work permit	This article should be interpreted that any foreign worker who has been licensed by another Ministry (for example, doctors by the Ministry of Health, teachers by the MOET, chief representative of a representative office or foreign branch by the MOIT, etc.) should be exempted from the work permit requirements to avoid double licensing procedures and to treat them equally with foreign lawyers who have been licensed by the MOJ. Under the new Labour Code, there are many decisions of

		<p>the employer that require consultation with the organization representing the labour collective including retrenchment of many employees (Article 44), formulation of a labour use plan (Article 45), application of labour disciplinary measure (Article 123), suspension of work (Article 129), etc. Under Article 3, the organization representing the labour collective is the trade union operating at the employer and the higher trade union. While it is reasonable that consultation with trade union operating at the employer should be made, consultation with the higher trade union would be time consuming and would be troublesome for the employer, as the higher trade union would not be in a position to understand the subject matter, and therefore would hesitate to give consultation.</p>
--	--	---

SUMMARY OF MEETING ON LABOR-RELATED ISSUES

- *Time:* 14:00 – 16:30, Friday, November 2, 2012
- *Venue:* Ministry of Planning and Investment – No. 6B Hoang Dieu, Hanoi
- *Participants:* See Appendix

I. AGENDA

- Summary of recommendations on labor issues - Vietnam Business Forum (VBF)
- Responses by representatives of the Ministry of Labor, Invalids and Social Affairs (MOLISA) and Vietnam General Confederation of Labor (VGCL)
- Free discussion/Q&A

II. SUMMARY OF RECOMMENDATIONS ON LABOR ISSUES

Ms. Nguyen Thuy Hang - Lawyer, Baker & McKenzie

- The National Assembly has passed two important laws on labor in 2012, Labor Code No. 10/2012/QH13 dated on June 18, 2012, effective on May 1, 2013 (Labor Code 2012) and Law No. 12/2012/QH13 on trade unions dated on June 20, 2012, effective on January 1, 2013 (Trade Union Law 2012). These new regulations will affect enterprises' direct and indirect costs when they come into effect.

- Direct costs

- + Increase in Probationary Salary: The New Labor Code increases the minimum salary rate of employees during probationary period to 85% of the official salary.
- + Increases in maternity leave duration and overtime salary rate

Although these changes contribute more protection and benefits to the employees, it may cause the increase of salary fund which the employers use to pay for the employees. Furthermore, the new provision on maternity leave duration may trouble enterprises in arranging temporary personnel in replacement of female employees in maternity leave and may make difficulties for their operation and business.

- Increase in minimum salaries: The Ministry of Labor, Invalids and Social Affairs (MOLISA) raised the idea of increase of regional minimum salaries and subsequently general minimum salaries. Enterprises expressed their attention to this policy and recommended MOLISA reconsider the roadmap for salary increase
- Trade Union Fund: The New Union Law imposes a 2% of union levy calculated on total local employees' payroll used to contribute to social insurance fund which applies to all companies (i) regardless of domestic and foreign invested companies; and (ii) regardless of existence of grassroots trade union in such companies. The new law will take effect from January 1, 2013. Specific guiding regulations, however, have not been provided on a number of issues. For example, how this fee will be collected, how this will be calculated as a percentage to distribute to enterprises and what is the purpose of use?

- Employment Insurance Fund: The draft Employment Law provides a new "Employment Insurance Fund" which is a fund to support, maintain and develop employment, prevent unemployment, partially support income to unemployed people and bring them back to work. This fund requires contributions similar to the Unemployment Insurance Fund. Further guidance from the State agencies may still be needed regarding the nature of the fund, operation mechanism of the fund, the role of the fund while the Unemployment Insurance Fund is still in place, connections between the two Funds.
- Indirect costs
 - + Protection of non-dedicated part-time union officer: One protection is that if the employment contract of a part-time trade union officer expires while such officer is still within the term of his/her office, then such employment contract must be extended until the expiry of the term of such office. This provision may be good for dedicated part-time union officers who are worthy of protection and extension of labor contracts. However, for some non-dedicated part-time union officers, will the new laws "lend a hand" to them to continue working at company which they have not contributed to?
- Foreign workers: The trend to advance local workers' careers is welcomed. In the current economic environment, however, foreign employees are still important to Vietnam's economy. Requirements for foreign employees to apply for work permits are sensible. However, the practical governance of foreign workers who do not have work permits is an issue that needs to be tackled.

Besides, while the current regulations allow work permit exemptions for any foreign national working in Vietnam for a term of less than three months, it seems that the new Labor Code no longer allows these exemptions. What is the policy for the narrow in the scope of work permit exemption? Furthermore, while the current Labor Code allows for a maximum work permit term of three years, the new Labor Code limits that term to a maximum of two years. With this new regulation, employers will be forced to spend much time applying for work permits for foreign employees.

Mr. Phan Manh Hung – Lawyer, KinderWorld

- The difference between Labor Contract (Labor Code) and Service Contract (Civil Code) is difficult to be identified which contract should be applied? More criteria are required to identify in which cases Labor Contract or Service Contract should be applied.
- How to address the situation that no Union is able to established due to the refuse of employees to join the Union, especially in disciplinary dismissal cases according to Article 126 of Labor Code?
- Article 19. Responsibilities to provide information before the labor contract conclusion. The employee must provide information for the employer about their full name, gender, residence, educational background, vocational skills, health condition and other issues directly related to the labor contract conclusion requested by the employer. What is the legal consequence if employees do not provide or provided incorrect information upon request of the employer due to some reasons? Is it invalid contract? Does the employer hold the right to terminate the contract and ask for compensation?

III. RESPONSES BY REPRESENTATIVES OF RELATED GOVERNMENT AGENCIES

Response by Mr. Hoang Minh Hao - Deputy Director of Labor and Salary Department, MOLISA

- By comparing the Labor Code of 1994 to that of 2012, the cost of labor has increased. As Vietnam has joined international organizations and integrated with the global economy, the economic and industrial relationships should be market-oriented. The payment system, nevertheless, has not reflected this platform. According to the global poverty benchmark for developing nations, which identifies a salary under \$2/head/day as poverty, the minimum wage in Vietnam is still low. The lowest rate of the minimum legal wage in Vietnam places at VND1.4 million per month, as low as under VND100.000/day. This level does not allow workers to make ends meet considering high inflation's impact on utility (electricity, fuel, water) bills currently.
- Minimum wage: The MOLISA suggested a scheme for regional minimum wages to the Government for approval and implementation from January 1, 2013. Through discussions, small and medium-sized enterprises (SMEs) and businesses with large numbers of employees (textile, shoes and leather, aquatic products processing sectors) agreed to increase the minimum wage to a fair level. The two schemes for increase of regional minimum wages have been published for consultation. After taking into account comments from stakeholders, the MOLISA submitted the Government another scheme with the adjustment of the regional minimum wages at lower level in comparison with levels of the two published plans.
- Article 91 of the Labor Code 2012 stipulated that the minimum wage must satisfy the minimum living standards of employees. However, the current minimum rate can only meet 57-63% of minimum living standards, according to the MOLISA and General Statistic Office (GSO). Therefore, the minimum wage to be increased to the level which fully meets the minimum living standards will result in remarkable increase in labor costs.

The Central Conference 5, Term XI concluded that the minimum wage must satisfy the minimum living standards by 2015. If the adjustment in 2013 is low then those in other years must be high. The MOLISA will consider specific conditions to propose a plan to prolong the deadline of 2015 by one to two years.

- Increasing the probationary salary is to protect workers' rights since they are normally in a weaker position during the negotiation process. Additionally, the current minimum wage is still insufficient, especially as the current probationary rate is just 70% of the official rate.
- Labor contract: the percentage of businesses having trade unions is currently 30%. According to the Labor Code and Trade Union Code, the immediate upper unions shall represent and protect legitimate and lawful rights and interests of employees in enterprises with the absence of grassroots trade unions.
- Labor contract or service contract: the difference mainly lies in the state of employees. Employees are those from 15 years old and above, having working capacity, working under agreements with employers, being paid salary, and most importantly is under governance of employers. Employees must enter into labor contract. Cases such as

house construction service with no element of governance then service contract should otherwise be applied.

Response by Mr. Pham Gia Ngo - Deputy Director of Finance Department, VGCL

- The Trade Union Law will be effective from January 1, 2013 and the Ministry of Finance (MoF) is facilitating a Decree guiding the Trade Union Law on finance. The content will focus on budgeting the union by businesses under Article 26.2 of the Trade Union Law.
 - + To whom is the union fee contributed to? The fee is contributed to the Vietnamese Trade Union and the distribution of the collected fee to upper or grassroots unions shall be determined by the VGCL
 - + From where is the union fee contributed to? The upcoming guiding Decree shall attribute the union fee to the pre-tax income of businesses
 - + How to distribute the union budget to local unions? In 2012, 60% of the budget was reserved for local unions to look after employees and union members. As planned, the new guidance shall regulate 65% of the budget be reversed for local unions, while the rest is for upper unions.
- The role of immediate upper unions to organizations without unions: Under Article 188.1 of the Labor Code, immediate upper unions represent and protect legitimate and lawful rights and interests of employees, union members; jointly negotiate, sign and supervise the implementation of the collective agreement, salary schemes, working norms, payment and bonus mechanisms, working regulations and democracy in organizations; support labor dispute settlement; communicate and collaborate with employers to formulate a harmonic and sustainable employment relationships in organizations.

Article 17 of the Trade Union Law regulates differently for organizations having no union. Immediate upper unions shall perform the mentioned functions upon the **request** of employees.

As a result, the MOLISA is documenting a Decree guiding the Trade Union Law so that immediate upper unions shall only perform their representative role upon the request of employees in organizations having no union.

- One of the viewpoints to further complete the Labor Code and Trade Union Law is to secure a harmonic and sustainable industrial relationship, in line with the socialist-oriented market mechanism of Vietnam. The change in regulations, which does not benefit enterprises when compared to the existing Labor Code, is understandable. Compared to neighboring countries that have similar conditions to Vietnam, Vietnamese workers' salaries are still low.

Response by Mr. Le Quang Trung - Deputy Director of Employment Department, MOLISA

- Employment Insurance Fund: This will replace the Unemployment Insurance Fund. The Employment Insurance Fund plans to have two components, one is similar to the existing fund but with improvements and the other is about the prevention and mitigation of the discharge of employment. The second component expects two elements in association with training employees and supporting employers to create

jobs through loans and aided loans. The current Draft Law on Employment maintains the current deposit rate of the current Unemployment Insurance Fund (1% from employee, 1% from employer and 1% supported by the State). Enterprises, therefore, do not need to worry about higher costs. The policy will facilitate the best conditions for businesses in the use of labor.

- Granting work permits to foreign workers: There are three issues that concern businesses: (i) the duration of work permit reduced from three to two years, (ii) foreign workers working in Vietnam for less than three months are now required to get a work permit as opposed to the absence of this requirement previously and (iii) the registration for employment demand and approval from authorized bodies.

These three issues are regulated under five articles in the Labor Code 2012.

- + Issue 1: Almost all neighboring countries issue work permits for one to two years. This regulation aims at increasing the governance of foreign workers.
- + Issue 2: Previously, foreign workers in Vietnam for less than three months were not required to get a work permit, but they and their employers still had to undergo an equivalent procedure. The Employment Department is drafting a Circular guiding the implementation of some articles of the Labor Code regarding foreign workers in Vietnam. The draft will help reduce administrative procedures, facilitating hi-tech workers who are in short supply to work in Vietnam.
- + Issue 3: Registration demands for employment have been stipulated in Decree 46. The regulation on the authority that approves the recruitment of foreign workers is being drafted in the Decree guiding the implementation of some articles of the Labor Code on foreign workers. As a result, it will be easier for enterprises to work with this authority.

Response by Mr. Pham Truong Giang - Deputy Director of Social Insurance Department, MOLISA

- According to Article 186 of the Labor Code, besides the existing social insurance, the State encourages employees and employers to engage in other forms of insurance. Vietnam currently only has social insurance to provide a basic pension. The MOLISA is cooperating with the MoF, Government Office and Ministry of Justice to study a supplementary pension plan. This could be optional for employees and employers in addition to the basic pension.
- The new maternity leave applies to female workers giving birth from May 1, 2013 or before? According to the Labor Code 2012, female workers who take maternity leave before the effective day of the new Labor Code, but still on maternity leave in May 1, 2013 according to the Social Insurance Law No. 71/2006/QH11 are qualify for the new maternity leave program.

How an employee working for different employers pays his/her insurance while having one insurance book only? The existing guiding document regulates one book per person, their insurance book is with one employer, other employers state in the labor contract that the insurance payment has been paid directly or added to the salary. Specific guidance will be provided in the future.

IV. FREE DISCUSSION

1. Work permits and labor contracts with foreign employees

Ms. Pham Bach Duong - Head of Human Resource Management, Standard Chartered Bank

- The employment relationship is a mutual one that should be the foundation for Decrees and Circulars guiding the Labor Code.
- Salary: the idea of guaranteeing employees' minimum living standards is supported. However in addition to salary, other labor-related costs such as tax and insurance (→20%) should also be considered during the drafting of guiding documents. The drafting team should, moreover, take into account enterprises' total costs and ability to pay employees.
- Work permit: Documents guiding the new Labor Code should clarify those who are eligible for work permit exemptions. Is a board of directors' member, for example, eligible for this exemption?

Required documents for work permits should be reconsidered. The validation of foreign qualifications, for example, needs to be validated in the issuing state. For example, take the case of a Canadian worker, who has an American qualification and wants to work in Vietnam. According to the current regulations, this qualification needs to be validated by the US, for which only the Minister of Foreign Affairs can sign the validation for the paper. This process results in great amounts of money and time spent.

Ms. Nguyen Thuy Hang - Lawyer, Baker & McKenzie

- Exempting work permits for members of members' council in limited liability companies. This point is missing in Decree 34 that resulted in many arguments and concerns because the exemption list includes members of boards of directors of joint stock companies, which is the equivalent to members' council of limited companies.
- The list of required documents for work permits is sensible, but consular legalization is very difficult. In some countries the applicant is responsible for submitted documents. The employer supporting the work permit application must confirm and be liable for sanction for any misconduct. This is practical and will prevent fraudulent action due to serious punishments such as terminating the permission for the foreign worker to work in Vietnam for three to five years or punishing the employer.

Response by Mr. Dang Xuan Quang - Deputy Director of Foreign Investment Agency, MPI

- Businesses are recommended to provide more evidence and experience in other nations in information validation in the application process for work permits.

Mr. Phan Manh Hung - Lawyer, KinderWorld

- The duration of work permits is shortened to two years, but the labor contract is still a maximum 36 months. What kind of contract should be made in this case?
- Are foreigners eligible for indefinite labor contracts?

Response by Mr. Le Quang Trung - Deputy Director of Employment Department, MOLISA

- The Labor Code regulates that the duration of work permits is 24 months. The signing of labor contracts must abide by the law.
- The current legislation regulates three types of labor contracts. New regulations for the Labor Code will be accompanied by guiding documents.

Mr. Pham Tri Trung - Lawyer, Baker & McKenzie

- The existing Labor Code limits the fixed-term contracts to twice. The third time will automatically change the type to indefinite contract. Will the MOLISA regulate specific cases for foreign workers?

2. Labor disputes

Mr. Vu Huu Tuyen - Project Deputy Director, USAID Industrial Relations Promotion Project

- Section 14, Article 194 of the new Labor Code mentions the principle to settle labor disputes that emphasizes the principle of self-negotiation between employers and employees. Does this principle override the system of authorized bodies for labor dispute settlement? If so, can employees use conciliation services provided by non-authorized Government bodies such as lawyers, a conciliation service company or commercial arbitrators?

Response by Mr. Hoang Minh Hao - Deputy Director of Labor and Salary Department, MOLISA

- The MOLISA will review sections and articles in the Labor Code, which cannot be implemented without guidance.
- Labor dispute conciliation: Is best to be taken internally. The State is not banning the use of conciliation services, while they can offer an effective solution to build strong employment relationships.

3. Compensation of training costs

Mr. Phan Manh Hung - Lawyer, KinderWorld

- Training cost compensation: Article 43 of the Labor Code 2012 only regulates compensation in the case of illegal unilateral termination of the contract by employees. In many cases, after finishing the training course, employees may take the advantage of the expiry of the fixed-term contract or termination of the indefinite contract with 45 days notice in advance so they can legally terminate the contract without facing compensation issues. From the viewpoint of employers, however, this causes damage.

Response by Mr. Hoang Minh Hao - Deputy Director of Labor and Salary Department, MOLISA

- Employers and employees should enter into an agreement to tie down their responsibilities and obligations as a base for settlement of disputes (if any).

4. Trade Union Fees

Ms. Nguyen Thuy Hang - Lawyer, Baker & McKenzie

- Trade union fee: Do businesses without a union have to pay the fee? If so, do upper unions keep 100% of the collected fee since grassroots unions have not been set up?

Response by Mr. Pham Gia Ngo - Deputy Director of Finance Department, VGCL

- Organizations without unions are still allowed to use 65% of the collected union fee. Upper unions will spend the collected fee for employees, according to union regulations. If the budget still has a surplus, it will be reserved to handover to grassroots unions when they are established. Upper unions are not allowed to use the budget of grassroots unions. This is the plan for guidance.

Ms. Nguyen Thuy Hang - Lawyer, Baker & McKenzie

- Upper unions only intervene upon the request of employees. Some administrative procedures, however, require the presence of upper unions. For example, the formulation of salary schemes or working regulations needs the presence of an employees' representative (grassroots or upper unions). How is this issue to be addressed?

5. Others

Members of Vietnam Business Forum

- Is editing contract contents on duration allowed?

Ms. Bui Thi Hoan - Labor and Salary Department, MOLISA

- Contents of contracts can be edited on duration with no change to the type of contract. One-year-long fixed-term contracts, for example, can be edited as long as the total length does not exceed 36 months, meaning no change to the type of contract.

Appendix - Participant list

Sgt.	Name	Title	Org.
Ministry of Labors, Invalids and Social Affairs & Vietnam General Cofederation of Labor			
1	Mr. Hoang Minh Hao	Deputy Director	Department of Labour - Salary, MOLISA
2	Ms. Do Thi Thuy Nguyet	Deputy Director	Department of Occupational Safety and Health, MOLISA
3	Mr. Pham Truong Giang	Deputy Director	Department of Social Insurance, MOLISA
4	Mr. Le Quang Trung	Deputy Director	Department of Employment, MOLISA
5	Mr. Pham Gia Ngo	Deputy Director	Department of Finance, VGCL
6	Mr. Le Dinh Quang	Officer	VGCL
7	Ms. Bui Thi Hoan	Officer	Department of Labour - Salary, MOLISA
8	Mr. Phung Quoc Vuong	Officer	MOLISA
Ministry of Planning and Investment			
1	Mr. Dang Xuan Quang	Deputy Director	Foreign Investment Agency
2	Mr. Le Tuyen Cu	Deputy Director	Department for Economic Zones Management
3	Ms. Le Thi Nguyet Anh	Deputy Head Policy Dept.	Foreign Investment Agency
4	Ms. Pham Thi Nam Phuong	Officer	Legal Department
Vietnam Business Forum			
1	Ms. Nguyen Thuy Hang	Associate	Baker & Mc Kenzie
2	Mr. Pham Tri Trung	Associate	Baker & Mc Kenzie
3	Ms. Hoang Thi Minh Hang	Operations Manager - Hanoi	KCS Vietnam
4	Ms. Pham Bach Duong	Head of Human Resources	Standard Chartered Bank (Vietnam) Ltd.
5	Mr. Phan Manh Hung	Legal Manager	Kinderworld
6	Ms. Le Thi Thanh Van	Human Resources – Admin Manager	Pizza Vietnam Limited
7	Mr. William Conklin	Project Director	USDOL-MOLISA
8	Mr. Vu Huu Tuyen	Project Deputy Director	USDOL-MOLISA
9	Mr. Khritzopher Phay	EXCO Member	Singapore Business Group, Ho Chi Minh City Chapter
10	Ms. Vu Thi Le Lan	Associate Director	PricewaterhouseCoopers Vietnam
11	Mr. Daniel Carl	Economic Officer	US Embassy in Hanoi
12	Ms. Nguyen Khanh Cam Chau	Economic Assistant	US Embassy in Hanoi
13	Ms. Nguyen Hoang Yen	Manager	TMF Vietnam Company Limited
14	Ms. Co Thi Hoa	HR Manager	NOKIA VIETNAM
15	Ms. Tran Kim Chi	Corporate Relations Manager	NOKIA VIETNAM

16	Ms. Hoang Thi Bich Ngoc	Lawyer	Russin & Vecchi
17	Ms. Nguyen Hoang Yen	Manager	TMF Vietnam Company Limited
18	Mr. Khuat Van Trung	Trainee Solicitor	Baker & Mc Kenzie
19	Mr. Nguyen Hong Hai	Lawyer	Duane Morris Vietnam LLC
20	Mr. Laurent Quistrebert	Hanoi Chief Representative	Resident Vietnam
21	Ms. Nguyen Thanh Lan	Legal Manager	Vietnamobile
22	Ms. Hoang Thi Phuong Anh	Legal Executive	Vietnamobile
23	Ms. Nguyen Thi Thanh	Officer	Kinderworld
24	Ms. Nguyen Thi Thu Ha	HR Manager	Kinderworld
25	Mr. Co Viet Huu	Manager	Vietship Co. Ltd
26	Mr. Pham Thanh Binh	HR Manager	Vosco VN

Tax

PROPOSAL TO GOVERNMENT ON TAX ISSUES

*Presented by
Ms. Huong Vu
Tax Sub-group*

CORPORATE INCOME TAX LAW

1. Tax treatment on other income

Issue: The 2008 CIT Law requires companies to account separately other income and operating income for the purpose of applying tax incentives. Other income is not entitled to incentive rate but subject to standard CIT rate. Prior to 2008, there was no differential tax treatment between other income generated during the tax period and operating income.

Over the last four years of implementing the 2008 CIT Law, the Ministry of Finance issued a number of supplemental guidance, including the recent released Circular 123/2012/TT-BTC on the types of other income required to determine separately which is taxed at 25%. Although the guidance tried to narrow the categories of other income subject to 25% CIT, companies are still faced with difficulty in classifying the correct types of other income entitled to/or not entitled to preferential tax rates. The requirement clearly entails significant and unnecessary administrative burden and risks for companies which are in tax holiday period. By substance, other income generated as by-product of the main operating activity (e.g. interest deposit, disposal of assets, insurance compensation for damaged goods, principal' subsidy, etc.) should not be treated differently because they are not income actively and intentionally earned by companies in pursuing business activities other than those with tax incentives.

Proposal: We propose the Government to consider having consistent tax treatment of other income generated by/ related to business activities which are enjoying tax incentives. This makes the tax calculation at companies much easier and transparent. The treatment is also sensible in view that other income is not a distinct business activity pursued by companies but generated during the course of normal operations, which should not be tax differently.

2. A&P expenses

Issue: A&P cap policy was introduced to aim at supporting Vietnamese companies to compete with foreign invested enterprises in developing their brands. It is viewed that by capping the deductible A&P expenses, FDI companies would reduce their A&P expenditure, allowing local companies to match their foreign counterparts' spending.

Over years, as Vietnam integrates more into the global economy and aligns its policy with international practices with an aim to create a transparent and fair business environment, such type of policy is no longer suitable:

- it interferes into the right to do business of companies and distort economic relations between transacting parties
- companies have even greater motivation than the Government to control A&P expenses to achieve maximum profit
- it now becomes a hindrance to big Vietnamese companies to develop their own brands which are able to compete on regional and world markets
- research shows that companies which are in favor of this policy are inefficient state owned companies and small companies, implying that this policy actually support companies which are already not competitive.

The call to change this policy has been raised to the Government for long time but so far, not enough change has taken place. It is appreciated that the Government has made some relax in Cir 130 compared to Cir 134 but overall, it was a set-back as opposed to OL 1766.

Companies, especially foreign investors will watch the Government's move to see how responsive the Government of Vietnam is toward the change of economy and its determination to create a transparent and fair environment for companies to compete and develop. Any further delay in removing the cap will impact the investment attractiveness of Vietnam and the confidence of investors.

Proposal: We urge the Government to consider removing the A&P cap policy totally.

3. Investment Protection

Issue: All FDI companies shall be granted with the Investment Certificate/ Investment License by the licensing authorities (the local People's Committee, the local Industry Zones Authorities or the Ministry of Planning and Investment previously). Some of those companies have received a written confirmation on specific tax incentives which are mentioned in their Investment Certificate before they disburse their capital in the projects in Vietnam. The rate of tax incentives stated in their Investment Certificate is a very important factor for all the investors to parameter the financial benefits and make a decision on investment in Vietnam or other countries.

During the company's operation, however, the tax incentives under its Investment Certificate have been challenged and reduced by the local tax authorities although the conditions for those tax incentives are satisfied. Many foreign investors claimed that the investment protection commitment would not be secured because there appears different opinions from the competent State authorities on the same issue after granting the Investment Certificate to them. A decision from the tax office on tax incentive rate can not replace a decision which was made previously by the licensing authority because, in nature, both a tax office and a licensing authority are the State management agencies of Vietnam and that's not a fault from the company and its owners.

Proposal: We propose the Government to consider and provide a legislative principle that any tax incentive which is already stated under the company's Investment Certificate shall not be changed by any State authority if the conditions for that tax incentive is satisfied.

MEETING SUMMARY ON TAX-RELATED ISSUES

- *Time:* 14:00 – 16:30, Friday, November 16, 2012
- *Venue:* Ministry of Planning & Investment, 6B Hoang Dieu, Hanoi
- *Participants:* see Appendix

DISCUSSED ISSUES

I. CORPORATE INCOME TAX (CIT)

Mr. Phan Vu Hoang – Tax Director, Deloitte Vietnam/EuroCham’s representative

- Staffing costs: Life insurance premium costs for staff, as recently revised in relevant regulations, are not subject to CIT. We suggest tax authorities consider allowing the setting off of staffing costs and benefits of similar nature, such as healthcare expenses, voluntary health insurance, voluntary pension contributions, etc.
- Tax incentives for business expansions: Since 2009, tax incentives for business expansion have been rescinded, deterring many businesses, especially foreign investors, from undertaking expansion plans. We suggest that tax incentives are reinstated for business expansion and there should be more specific rules as to what is defined as “business expansion”. For example a local tax office, following inspection, ruled that the additional procurement of fixed assets is defined as business expansion. This is unreasonable as the increased investment is still within the first stage of the project.

Mr. Tran Gia The – Director, Tax & Advisory Services, Ernst&Young

- The valuation of non-compensable losses seems to be contradictory between Circular No. 123/2012/BTC and Circular No. 06/2012/TT-BTC of the Ministry of Finance (“MOF”). In Circular 123, only losses due to acts of God, diseases, fires or other *force majeure* events that are non-compensable may be accounted for as eligible costs. But, Circular 06 rules that damaged goods resulting in losses to firms may be deducted. This means that non-compensable losses not caused by acts of God, diseases, fires and other *force majeure* events are deductible under Circular 06, but may not be accounted for as eligible costs. There should be guidelines to maintain consistency between the two above circulars by specifically defining that any non-compensable losses may be accounted for as eligible costs.
- Depreciation of fixed assets and improvements to leased and borrowed land. Depreciation of improvements to land must satisfy specific requirements, including those on the registration of properties’ use rights. In principle, fixed assets may only be amortized to eligible costs if a company can present documents evidencing ownership. Nevertheless, property ownership registration and certification in Vietnam are very complicated and time-consuming. We suggest that businesses continue to be allowed to set off depreciation costs when the assets are actually put into use and businesses only need to present these title documents as required in tax audits.
- Input material consumption norms. Circular 123 requires the registration of input material consumption norms and businesses may request adjustments to these norms

where applicable. The procedure is only skin deep and we suggest the removal of this registration.

- Tax incentives. Sometimes, the investment certificate very clearly defines tax breaks and preferential tax rates approved by the licensing authorities and businesses also act upon the license. However, sometimes tax authorities rule that businesses are not entitled to all the incentives defined in the license, even though the Tax law has set a principle that in case any new less favorable regulations emerge, the previous incentives granted in the investment certificate will prevail. We suggest the MOF reconsiders this issue and duly takes investment protective action to build confidence among foreign investors in Vietnam.

Response by Mr. Nguyen Van Phung - Vice Director, Tax Policies Department, MOF

- Circular 123 and Circular 06 provide different scopes for losses and taxation. Circular 123 specifies that only *force majeure* and non-compensable risks are accounted for as eligible costs, while anthropogenic losses are not. In the meantime, Circular 06 addresses issues pertaining to commodities that also cover losses to commodities in transit and not yet in the warehouse. In that sense, the losses mentioned in the two circulars are different, as is their nature.
- Depreciation of fixed assets on leased and borrowed land. This is a major advancement as previously, land leasing and lending were subject to notarization (which is a very complicated regulation and has been removed), and the leasing/lending times must be longer than the property depreciation duration. For that reason, the registration of property ownership is still required.

Response by Ms. Nguyen Thi Bich Ngoc, Vice Director, Foreign Investment Agency, Ministry of Planning & Investment ("MPI") –

- CIT incentive for business expansion
 - + Vietnam's President Truong Tan Sang recently sent an official correspondence to the MPI and MOF Ministers on this issue. The MPI supports granting incentives to businesses for expansion of investment and will work with the MOF to address this issue. Additionally, the two ministries will cooperate to review the question of investment incentives for projects based in industrial parks.
 - + For the time being, it is true that the list of investment incentives pertaining to the CIT Law and import/export activities are inconsistent with the list of fields and locations entitled to incentives in the Investment Law. The Prime Minister has agreed with the MPI and is coordinating various agencies to develop a uniform Decree on sectors eligible for investment incentives applicable nationwide and not leaving import/export duties, CIT or land taxes scattered in different laws and regulations. This Decree will be reviewed in tandem with upcoming amendments to the Investment Law in 2013.
- Investment protection through incentives granted in the investment certificate: The Investment Law and other previous implementing documents specify that investment incentives are listed on the investment certificate and the State of Vietnam sees that as a way to protect investment. This rule is actually still valid. The MPI is now revising

Decree 108 with a view to inclusion of investment incentives, if any, or investment support in issued investment certificates.

- The investment certificate may define incentive levels, but through inspections by tax authorities, businesses that fail to qualify will not be eligible for such incentives. This is a reasonable and sound approach, given the existence of few conditional incentives, including export ratios or other employment considerations. By the same token, this has nothing to do with consistency between the investment certificate and incentives for investors. This will be made clear in the upcoming Decree to replace Decree 108.

Response by Mr. Nguyen Ngoc Hai – Deputy Director, Policies Department, General Department of Taxation, MOF

- Taxes on other incomes
Concern: The CIT Law states that businesses may separately maintain accounts for other incomes from activities applied for tax incentives, where other incomes not eligible for preferential taxation, but subject to normal tax rates. However, prior to 2008 such disaggregation did not exist. Article 3.1, CIT Law, specifies that corporate taxable income includes earnings from business operations, services and other incomes. Other incomes, in reference to Article 3.2, are very clearly defined to include earnings from assignments, earnings from realty, titles and so on. In fact, this provision may lead to a situation where companies currently under tax incentive schemes may have specific incomes directly associated with business operations that are not eligible for tax incentives. As a result, these incomes are classified as other incomes, such as income from the sale of waste products and bank deposit interest.

Answer: The Tax Policies Department recognizes this has been a concern for businesses and has introduced specific provisions in the revised CIT Law to tackle this problem. Furthermore, to help address the problem, the government has released Decree 122, revising Circular 124, with more transparent regulations on other incomes.

- Loss carry forward
Concern: The CIT Law of 2008 sets a time frame for loss carry forward at five years, since the loss incurring year. The problem remains with the provisions of Article 6.1, CIT Law of 2008 and Article 7.2, Decree 124, specifying that businesses incurring losses may carry forward the losses to the next year and the losses may be gradually deductible from taxable income, for a loss carry forward period of no longer than five years.

Answer: The subgroup recommends that the National Assembly makes clear in the CIT Law that *losses may be carried forward to a selected next year not beyond five years after the loss incurring year*. This question is duly noted and will be reported to relevant authorities for review.

- CIT incentive for business expansion
Concern: Prior to 2008, laws on investment incentives for business expansion existed, but the CIT Law of 2008 nullified these privileges.

Answer: The subgroup's comment on this issue is duly noted.

- Advertising and promotion spending cap

Answer: The MOF duly takes note of the group's comments for follow-ups with relevant subsequent legislative instruments.

II. VALUE ADDED TAX (VAT)

Mr. Phan Vu Hoang – Tax Director, Deloitte Vietnam/EuroCham's representative

- A mandatory requirement for services to be considered as export services eligible for the 0% VAT rate is that the overseas buyer must not have a residential address in Vietnam. Nevertheless, the current definition of "residential address" in some official correspondence is often very generic or sometimes too broad-ranging. For example, a foreign party having a contract with a Vietnamese party with a contract term of more than 183 days, but sending staff to work in Vietnam even for periods not longer than 183 days, will still be considered as having a residential address. Such regulations seem inconsistent with the definition of "residential address" of the CIT Law. In some other cases, the definition makes reference to some of Vietnam's international treaties. As many conflicts have occurred between the existing regulations pertaining to the definition of "residential facility", we expect the MOF to review this issue.
- Software exports via electronic channels - Software exporters forwarding products via the internet and not in tangible forms: To be entitled to the 0% VAT rate, relevant Customs procedures are required. This is, however, unfeasible as often tax authorities impose a 10% VAT rate, which represents a substantial cost for businesses. We suggest allowing the use of other documents for this purpose, such as airway bills or customer's certification to meet current export requirements.

Mr. Tran Gia The – Director, Tax & Advisory Services, Ernst&Young

- VAT and lending activities. The Prime Minister's Official Correspondence 1551 and Law on Credit Institutions define allowed lending activities in Vietnam that are non-VAT taxable. But, Circular No.06/2012/TT-BTC otherwise specifies that lending services delivered to non-financial institutions are subject to VAT. We suggest a revision for consistency with the implementing documents of the Law and the Prime Minister's official correspondence. Besides, we recommend that interest earnings of non-financial institutions' loans are not subject to VAT.
- Education and vocational training by academic centers, under the Education Law, are not subject to VAT. However, some businesses with training as a supporting line of activities (e.g. fee-based end user training for technologies, machinery and equipment) are still subject to VAT in accordance with prevailing laws. We suggest that consistent VAT rules are applicable to the training activities of businesses not having education and vocational training as a registered line of work.

Mr. Nguyen Minh Hoang – Director, Hoang&Thang Company

- In respect of 0% or 10% VAT rates for Vietnamese companies providing services to offshore buyers with or without a residential address in Vietnam. Circular No.133/2004/TT-BTC on avoidance of double taxation has provided a definition of residential facilities and persons. Other CIT and VAT regulatory documents often rely on this document for a definition of a residential address to explain VAT-related policies. The current definition of residential address does not explain whether the buyer

consumes the services provided by a Vietnamese business for an overseas buyer, but considers whether the residential address is based in Vietnam or another country.

VAT, by nature, is a tax locally imposed on users of services within a country and as such the current law in Vietnam based on whether a foreign company has a residential address or not to affix the 0% or 10% VAT rate for consuming services provided by a Vietnamese company is unreasonable. This weakens local businesses' competitiveness in comparison with foreign companies' rights on Vietnam soil. Instead of outsourcing a local provider, customers may look to China, for example, so they do not have to pay tax, whereas they need to pay 10% tax if they hire a Vietnamese company. This will stop Vietnamese businesses from exporting services.

- Payable VAT during extended tax paying periods. For example, a company has a VND5 billion in VAT due in June, but receives extension to December. The company, in the meantime, is due to receive VND6 billion in deductible VAT in July. In this case, can the company set off the tax amounts or does it still have to pay the VND5 billion due in December and wait for a long time before getting back the VND6 billion? In principle, as the tax amount increases, finalization of accounts by the month is the right thing to do. But if tax extension is granted, the tax payer is then no longer a debtor, but one who receives preferential treatment from the government. In this case, VAT set off is acceptable. Unfortunately, there are now no specific regulations allowing this and we would appreciate the MOF's consideration of an introduction of detailed guidelines.

Response by Mr. Nguyen Van Phung - Vice Director, Tax Policies Department, MOF

- VAT and lending activities: Previous laws imposed no taxation on lending activities. Recent inspections and audits by regulatory authorities, however, unveiled cross-lending among businesses. By definition, this activity is not considered lending. In response, Decree 122 and Circular 06 removed this activity from the nontaxable list, since existing laws allow non-taxation for lending only. Vice Prime Minister Vu Van Ninh himself endorsed Official Correspondence No. 1551/TTg-KTTH. An implementing document for the Official Correspondence is now in the pipeline.
- VAT for vocational training and educational services: Educational services are subject to 5% or 10% tax rates and vocational training is nontaxable as it has to do with the Education Law, providing a tuition framework to guarantee service quality. Educational service fees are determined by service providers. These two areas of services are different in terms of pricing and target users. The MOF duly takes note of this comment and will consider differentiating these two services more clearly.
- A 0% or 10% VAT rate applicable to Vietnamese companies providing services to overseas customers that are with or without a residential address in Vietnam. The MOF recognizes the issue and will review the current taxation schemes in relation to the requirement of a local seller having to make clear whether the buyer has a residential or non-residential presence in Vietnam. The existing requirement for a residential presence is determined based on whether the tax is direct or indirect. As for exported services, identification of the end user's location is difficult, even with advanced countries like France or Germany. Besides, we need the Tax subgroup to file a written note to the MOF describing in detail this concern so we have something concrete to discuss with relevant authorities to find a solution.

Response by Mr. Nguyen Ngoc Hai – Deputy Director, Policies Department, General Department of Taxation

- Tax rate:
Recommendation: Downsizing tax rate categories from the current three to one single tax rate.

Answer: This has been part of the tax reform strategy for 2011-2020 and is being reviewed by the General Department of Taxation and MOF.

III. WITHHOLDING TAX**Mr. Phan Vu Hoang – Tax Director, Deloitte Vietnam/EuroCham’s representative**

- Derivative instruments: We want more detailed guidelines on the valuation of derivative instruments, as evidence has consistently shown that derivative instruments involve receipt of offshore remittances on one occasion and making payments overseas during the next, since ones may profit this time and suffer a loss next time. In this case, profits made overseas will be taxed, whereas the losses incurred are not deductible.
- *Free services attached, e.g. warranty services.* Under Article 7.2, Circular No. 60/2012/TT-BTC (“Circular 60”), if the provision of products comes with free-of-charge attached services, the entire contract will be taxed (charged) upon. As a warranty is a very common term in procurement, specific guidelines on warranties are needed, making clear which cases are subject to taxation (e.g. coming to Vietnam to provide a warranty) and which are not.

Mr. Tran Gia The – Director, Tax & Advisory Services, Ernst&Young

- Determination of taxable revenue if one foreign contractor subcontracts to a second foreign contractor, who in turn subcontracts part of the work to a Vietnam-based contractor. Under Circular 60, if a foreign contractor subcontracts to a local contractor, the taxable revenue may be deductible, but there are no guidelines if the foreign contractor is a secondary contractor. We suggest that in case of double contracting mentioned above, the deduction of taxable revenue is also allowed to make sure double taxation does not occur.
- Filing methodology. Under Circular 60, if a foreign contractor is paying taxes through one of the three modes under Circular 60, a second project must follow the same filing mode as the first one. This is unnecessary and creates more administrative procedures for contractors, especially if a contractor is using the mixed filing mode, whereas a new project is simply the provision of goods. We recommend removal of paragraph 4.2, Article 17, Circular 60, to make it easier for contractors’ tax filing for individual projects.

Response by Mr. Nguyen Van Phung - Vice Director, Tax Policies Department, MOF

- The government's stance on its right to withholding tax is very resolute, given the fact that foreign investors enter, do business and generate income in Vietnam.
- Determination of taxable revenue if a primary foreign contractor subcontracts a secondary contractor and then further subcontracts part of the work to another

contractor in Vietnam. Under Circular 60, if a foreign contractor hires a local contractor, the taxable revenue may be deductible, but there are no specific guidelines for situations where the hiring party is a secondary foreign contractor. It is, therefore, recommended that double subcontracting as described above is eligible for set off in taxable revenue to avoid double taxation.

VAT treatment: The local subcontractor must issue invoices to the secondary subcontractor. If the primary contractor adopts the set off tax filing method, tax arrangements will not be affected even if five to seven subcontractors are used.

CIT: The primary foreign contractor is still eligible for deductions if the contract is further awarded to a Vietnam-based subcontractor, but the deduction will only be made on the invoice and not from the contract amount. The taxable revenue is the remaining amount less the part of the first subcontractor and the costs include the primary foreign contractor's expenses and the amount paid to the third Vietnam-based subcontractor.

- Contractor's ways of tax filing: As part of the market opening policy for foreign companies doing business in Vietnam, there are three options for tax filing: (i) paying VAT through the set off method and paying CIT by listing revenue and expenses to determine taxable income, (ii) paying taxes directly based on added value and paying CIT as a percentage of earnings and (iii) paying VAT through the set off method and paying CIT as a percentage of earnings. Uniform tax filing approaches are applicable to contractors to ensure transparency and clarity. Contractors should strictly adhere to this requirement.
- Derivative instruments: This issue is under review. Provisions on price adjustments and interest rate swaps in Circular 06 have been completed and other issues pertaining to derivatives will be addressed over time.

Response by Mr. Nguyen Quy Trung, Head, Policies Department, General Department of Taxation

- Contractors' ways of tax filing: The current position is that contractors doing business in Vietnam or project implementing entities are not viewed as investors. The uniform rules on tax filing modes, apart from other taxing regulatory purposes, are the responsibility of contractors to understand them thoroughly.

Circular 60 specifies that for a specific project, once a contractor has chosen a tax filing mode, such mode will have to be further employed until the contract terminates. If during an on-going project, another contract is awarded, the registered filing mode should continue to apply. Only when the existing contract winds up and all accounts are cleared, can the contractor apply for another tax filing mode that he/she thinks better fits the newly awarded contract.

IV. PERSONAL INCOME TAX

Mr. Tran Gia The – Director, Tax & Advisory Services, Ernst&Young

- Tax cycle. Under Circular No. 84/2008/TT-BTC, the tax cycle is 12 consecutive months from the first day a business is present in Vietnam. For individuals, the tax year is also 12 consecutive months from the first day. Nevertheless, Official Correspondences 486,

451 and 230 state that for individuals staying in Vietnam for 183 days or longer in a calendar year, the tax year is the entire calendar year, even though the first day they entered Vietnam remains the starting point for taxing. Consistent guidelines in line with international practices are needed, with the first day a person enters Vietnam used as the starting point.

Response by Mr. Nguyen Van Phung - Vice Director, Tax Policies Department, MOF

- The National Assembly has discussed and passed the PIT law and the MOF is developing the implementing a Decree to replace Decree 100. The new Decree will feature fundamental changes, for example, the provision for imposing the resident status for a 90-day leased house stay will be removed. The tax cycle of 183 days since the first day of the stay will be reviewed to be fair to businesses, while not affecting the government's income.

V. LAW ON TAXATION ADMINISTRATION

Mr. Phan Vu Hoang – Tax Director, Deloitte Vietnam/EuroCham's representative

Tax filing:

- The 90-day filing timeline is a major challenge. After the 90 days, businesses must prepare audited statements while also filing tax declarations. The timelines in other countries are longer and we suggest lengthening the filing timeline to six months to help industry and tax authorities make better preparations and comply with the law.

Regulatory archives of accounting documents:

- The existing schemes require that accounting documents be filed for 10 years. As many companies have now applied electronic accounting, the 10-year archiving term seems much longer than necessary. This term may be reduced to five to seven years.

Tax recollection statute of limitations:

- In the current Tax Administration Law, there is no specific statute of limitations for tax recollection. This is also a major area of uncertainty for foreign investors when considering investing in Vietnam. We suggest the reuse of the former five-year term for tax recollection.

Response by Mr. Nguyen Ngoc Hai – Deputy Director, Policies Department, General Department of Taxation

- Tax filing:
The recommendation that 90 days was too short for tax filing and should be increased was submitted to the National Assembly, but not approved.
- Tax recollection statute of limitations:
Concern: In the current Tax Administration Law, there is no specific statute of limitations for tax recollection. This is also a major area of uncertainty for foreign investors when considering investing in Vietnam. We suggest the reuse of the former five-year term for tax recollection.

Answer: In previous rules, five years was the valid term for penalizing civil offenses, but there was no mentioning of tax liabilities. The current Tax Administration Law defines tax as a life-time liability, while offences will be retrospectively dealt with within five

years. For that reason, the recommendation to shorten the recollecting and retrospective penalizing term to five years is not accepted.

- Tax filing frequency
Industry proposed VAT filing on a monthly basis.

Answer: For small, medium and micro-sized enterprises, and household businesses, monthly filing is very difficult. In the draft revised Tax Administration Law, expected to be passed by the National Assembly, the MOF is proposing quarterly VAT filing, i.e. every three months.

- Binding responsibilities of tax inspectors in tax recollection decision-making
Concern: The current Tax Administration Law lays down very stringent penalties for filing mistakes and incompleteness on the side of taxpayers, but says nothing about tax inspectors making wrong decisions about tax recollection.

Answer: Article 113, Tax Administration Law, specifies the penalization of tax administering officials, stating that tax officials making mistakes due to negligence of duty and causing damage are subject to punitive measures or legal actions depending on the extent of misconduct. This will be further reviewed for more specific details.

- Statute of limitation in addressing tax-related offences
Concern: The current Tax Administration Law does not provide a statute of limitation on tax collection relating to resolution of tax-related offences. This means that taxpayers may be subject to indefinite tax collecting. Also, the current law requires the archiving of accounting documents for 10 years.

Answer: The draft revised Tax Administration Law has added a provision stating that beyond the statute of limitation for addressing tax-related offences, perpetrating taxpayers may not be penalized, but still need to pay the tax liabilities in full he/she owes. If a taxpayer fails to register for tax payment, he/she must pay all the tax that is missing, eluded or avoided by fraud and for the entire period from the date the offence is unveiled.

- Installment tax payment
Concern: In various audits, recollected and penalty tax amounts were too large for businesses to pay in one lump sum. This places a significant burden and pressure on the company's cash flow and affects its normal operations.

Answer: The draft Tax Administration Law has added a provision that taxpayers may make progressive payments of tax for periods not exceeding 12 months since the start of the applied tax paying enforcement period. Installment tax payments will be reviewed based on the taxpayer's request, providing that a credit institution's guarantee is secured and the taxpayer is subject to a delayed payment fine of 0.5%/day for any delayed tax amounts.

- Procedures for company division, merger, acquisition and closure.
Concern: This requirement only has face value in requiring tax clearance, but if tax authorities do take audit actions to confirm whether the company has completed its tax liabilities, it will stymie the company's restructuring efforts. Furthermore, the

procedure does not clearly state a definite timeframe, leading to lengthy periods that may amount to years, affecting Vietnam's overall business environment.

Answer: Article 15, Circular No. 80/2012/TT-BTC specifies that within 10 working days since receipt of documents pertaining to tax clearance, the tax auditing agency shall start reviewing the documents in line with existing tax office rules. Any problems that emerge can be shared with the local tax authorities to make sure that the prevailing law is complied with.

VI. IMPORT/EXPORT DUTY

Mr. Tran Gia The – Director, Tax & Advisory Services, Ernst&Young

- Customs pricing for duty affixing. Under Circular No.205/2010/TT-BTC and Decree No.40/2007/ND-CP on Customs pricing of import/export goods, in the case of import goods, if royalty terms are stated, tax authorities are entitled to add the royalty fees in the taxable price. In practice however, many companies have been challenged for purchase contracts of materials or machineries and equipment that do not involve a service providing Party. For example, despite patent and technology transfers being two different agreements, Customs authorities still added royalty fees to the tax base after inspection, demanding clearing companies pay massive tax amounts. In accordance with existing laws, royalties if having no relation with the purchase contract and technology transfer/patent agreement, must not be added to the import price for Customs clearance. We suggest the MOF and Tax Department branches give specific guidelines to Customs units in the field to remain in line with the intent of Circular 40.

Response by Mr. Nguyen Van Phung - Vice Director, Tax Policies Department, MOF

- Royalties are only affixed to services and products that require ownership licenses, e.g. software licenses that come with equipment. Input materials should have no royalties, so adding royalties is unreasonable. Specific evidence can be provided with company names, details of shipment, for the MOF to investigate. The MOF appreciates this issue being brought to its attention and will review current Customs practices in the field. Meanwhile, it feels the need to stress that firms should also inspect its operations in related departments on this matter to make sure everything is in order.

VII. EXPORT DUTY FOR SPECIFIC MINERAL PRODUCTS

Mr. Phan Vu Hoang – Tax Director, Deloitte Vietnam/EuroCham's representative

- We suggest the MOF considers revising export tariffs for specific mineral products for adoption within 2013. Such adjustments should run along a specified pathway for firms to be better prepared and take into account mining companies' current difficult situation.

Ms. Nguyen Ngoc Anh – Deputy General Manager, Ban Phuc Nickel Mines

- Official Correspondence 14364 of Oct. 19, 2012, addresses the draft Circular changing export tariffs for specific mineral products ("OC 14364"), with nickel, nickel pure ores and nickel matte added. According to the draft, all minerals in general are subject to very high tariff increases, with ores and pure ores expected to rocket by 150% from the current common rate of 20% to 30%. This is a huge margin, particularly given the recent

mining industry's global decline by 60%-70% in price as a result of the world economic crisis.

- Ban Phuc Nickel Mines has a concession in Son La, where the reserves are very low, at about 2.6 million tons, as approved by the National Mineral Reserves Commission. The tax increase in 2008 from 0% to 10%, then 15% and 20% brought the company's production to a halt throughout 2008-2011. In early 2012, as shareholders agreed to continue the project, but this plan to raise the tax rate to 30% caught us by surprise. This anticipated new tax rate will be a huge barrier, given the starting tax rate used for project preparation was 0%.
- Even to solve the problem of the current 20% tax rate, we have resorted to increased processing, from primary nickel pure ores to nickel matte, to balance between the taxpaying and a payback levels that reasonably allows the business to go on. At the current nickel price of US\$15,000/ton (compared to US\$55,000/ton of 2007 and 2008) and a tax rate of 20%, the company is sustaining a loss of US\$30.6 million. The loss will be much higher if a 30% tax rate applies.
- Challenges to mining companies: Mining requires use of heavy machinery and automation, while production is difficult and costly. Added to that, construction, operations, fuel and utilities costs have all increased by at least 20%, adding to production costs. Furthermore, some other fees are also expected to rise, including the environmental fee at VND150,000/crude ton, environmental and natural resources levies with significant increases and the 10% VAT rate, whereas input VAT used to be deductible before 2009. Also in the foreseeable future, under the new Mineral Law, the MOF and the Ministry of Natural Resources and Environment are considering the addition of a 5% "mineral tenement ward" fee, based on residual reserves. This underscores how a large variety of fees and taxes have increased between 2008 and 2012, while various other levies, fees and concession charges have been added.
- Given these considerable concerns, we suggest that there should be a taxation roadmap for mining activities to help investors map out a more long-term and sustainable plan. Besides that, we respectfully hope that MOF, when considering adjustments to taxes and fees, has a broader view for harmony with different types of taxes and also takes into account world market prices. At a 20% tax rate for pure ores, the local price is about US\$1,336/ton compared to the global price of US\$1,240/ton makes it very difficult for Vietnamese products to compete. The products, on the other hand, cannot be stockpiled for sale at a later stage, as they may be exposed to oxidation and deterioration.
- Nickel matte is an advanced product, being pure ore with nickel content of about 9.5%. To produce nickel matte, the company plans to build a second plant at an estimated cost of about US\$4 million, to raise its nickel content of the product to 32%-37%, also in an effort to increase the percentage of local processing in line with the stated strategy and Decision 11 of the Ministry of Industry and Trade ("MOIT"). As the current export tariff does not include nickel matte, we recommend adding this item in the list with a tax rate of 5%, since the constituents and nature of the product are similar to nickel alloy, now subject to a 5% tax rate in the tariff.

Mr. Le Van Tich – Chairman, Vietnam Titanium Association

- We have two main proposals: (i) allowing the export of normal titanium ores before acquiring sufficient conditions for increased processing and (ii) providing tax breaks, given difficult production conditions and continuously increasing production costs.
- Recommendations pertaining to MOF Official Correspondence 14364 for increasing the export tax for specific mineral products:
 - + The existing laws require that mining taxes be collected based on output, where the tax base is the unit sales price of products at production sites. But in some municipalities, mining taxes are being collected based on the sales prices at port. This is unreasonable and causing huge problems for the industry.
 - + Pure ore tax. Pure ores are very rare in Vietnam and exports are subject to a 30% tariff rate. Added to that, Official Correspondence 14364 is planning to impose a new whopping tariff of 40%. Higher tax rates have caused contraband exports to rise. For the time being, of the 1.6 million tons of pure ores exported from Vietnam, nearly one million tons have been illicitly leaked to China, leaving only some 600,700 tons of ores under local regulators' control. We suggest cutting the current tax rate to 15%.
 - + Reducing the export tariff for beneficiated ilmenite ($\text{TiO}_2 \geq 56\%$ and $\text{FeO} \leq 11\%$) from 15% to 7%
 - + Reducing the export tariff for titanium cinder, with TiO_2 content of $\geq 85\%$ from 15% to 10% and titanium cinder with TiO_2 content of 75-84% from 15% to 7%
 - + Reducing the export tariff for synthesized rutile with TiO_2 content of more than 85% from 15% to 10%
 - + Reducing the export tariff for powder and superfine Zircon from 10% to 5% and other types of Zircon from 20% to 15%.
- Challenges faced by titanium producers:
 - + The investment costs for products requiring increased processing such as titanium cinder, beneficiated ilmenite, power zircon and superfine zircon, are very high. For example, to sell titanium cinder at US\$4,000-5,000/ton, it costs US\$3,000/ton for production in optimal conditions. In addition, building an artificial rutile plant costs about US\$30 million.
 - + Costs for utilities, fuels, steel and spare parts have also increased substantially, adding to production costs.
 - + Bank loans are expensive and not accessible for much of the industry, since no exports were made in 2011 and only a few completed during February and June, 2012. This export suspension has been costly as many customers have turned to other markets. When exports are relaxed again, customers will be more demanding about prices and output. Between 2010-2012, titanium producers have been almost non-operational as they cannot export. This has resulted in a massive inventory of titanium products, with more than one million tons in stockpile.
 - + Land clearance costs are high.

- + Taxes, fees and charges for Vietnamese products are among the highest in the region.

Response by Mr. Nguyen Van Phung - Vice Director, Tax Policies Department, MOF

- We share our sympathy with businesses as sales prices have dropped sharply from US\$55,000 to US\$15,000/ton, international markets have narrowed and tax rates remain high. This is also a major concern for the government and may parliamentarians. The MOF actually only has control over export tariffs and other taxes like resources taxes are subject to other tax schemes, often defined by the National Assembly Standing Board. Given the constant changes in global markets, the tax rates should be set at reasonable levels, but not in conjunction with world prices. Mineral taxation is a major issue, for which an answer cannot be found overnight. More thorough discussion is needed.

Response by Ms. Nguyen Thanh Hang – Specialist, MOF

- According to the intent of the MOF's official correspondence, the export of crude minerals and specific pure ores is prohibited. In addition, the MOIT is now drafting a Circular to replace Circular 08/2008, allowing for the export of only a few products. Along that line, in the MOF's draft forwarded to relevant ministries and agencies, tax rates are expected to increase in defined pathways for ores, minerals and pure ores. But the MOF has heard numerous opinions from other ministries and agencies, which agree that products such as Ban Phuc Co.'s nickel will not see immediate tax increases for pure ores, to make it easier for the project to export and accumulate capital for on-going production and increased processing.
- In respect to the Titanium Association's petitions, the MOF acknowledges its recommendation for a tax rate adjustment for titanium products. The proposed tax rates are, however, lower than the bottom line set by the National Assembly Financial Committee and outside the reach of the MOF. On the other hand, the MOIT has also commented on the production process and how to classify products of increased processing and pure ore groups. Based on such information, the MOF is studying the mining and production process to come up with a more appropriate tax scheme. In summary, no immediate tax rate increase will take place as it remains an on-going law-making process.

Response by Mr. Le Thuy Chung - Vice Director, Industrial Economics Department, MPI

- The government's views have been demonstrated in the Mineral Law, various mining development strategies and related Decrees, with a view to promote increased processing, enhance added value and launch Vietnam as an industrial country and not simply a seller of crude minerals, with metallurgy factories, industrial products and metal processing. In addition, the government also wants to concentrate on a few major mining investors, instead of numerous small-holding investors, with scattered production.
- The purpose of the mineral export tariff is to keep natural resources within the country and promote increased processing. For local minerals, we have processing factories for iron, lead or zinc ores and tax increases in line with the taxation framework set by the National Assembly completely aligned with the stated intent of keeping natural

resources inside the country. For other minerals, the local capacity is insufficient for increased processing or production at some levels, like nickel or titanium ores. So, tax rates will be maintained at particular levels for two purposes: (i) to generate income for the state budget and (ii) promote increased processing businesses. The Ban Phuc Nickel case, where US\$40 million has been invested to produce nickel matte at a 20% tax rate, proves that the government has to some extent achieved the target of promoting increased processing.

- The master plan for titanium production is under review and a question has emerged that the output licensed by MoNRE and provincial governments has many times exceeded local demand.
- Regarding Ban Phuc Nickel's comments, the MPI has in a written response to the MOF, stated that the recommendation for a 5% export tariff for nickel matte and keep the 20% export tariff for nickel pure ores is reasonable to help investors recover costs and have confidence in further investment. In the process, if the world nickel price rises or falls, changes to local taxation policies are possible to guarantee acceptable earnings for investors and revenue for state coffers.
- Historically, the exportation of ilmenite was prohibited and products considered as processed items such as beneficiated ilmenite, zircon, artificial rutin and titanium cinder will be subject to different export tariffs depending on the levels of processing, but not too high to avoid contraband exports.
- A balance must be struck between licensing limitations to maintain the local supply-demand harmony and reasonable export tariff rates to allow major businesses to operate, as mergers are encouraged to avoid a situation where companies having a processing plant have no access to ores, whereas those with ores sell them to overseas buyers.

VIII. OTHER CONCERNS

Mr. Phan Vu Hoang – Tax Director, Deloitte Vietnam/EuroCham's representative

- Electronic invoice: While Circular No. 32/2011/BTC on the adoption of electronic invoices has been released, paper-based invoices are still required in the logistic process. Also, Article 12, Circular 32, requires conversion of electronic invoices to a paper-based version. This leads to an added burden of having the paper and electronic invoices. We propose using shipment notes in place of paper-based invoices to make it easier for electronic invoices to be used and save costs for businesses.

-

Mr. Nguyen Minh Hoang – Director, Hoang & Thang Company

- Gifts in business environment. Current regulations are unclear about whether gifts are considered a cost item. In general, any expenses with legitimate vouchers and used for business purposes may be considered business costs. There are, however, inconsistencies on this issue between the MOF and Tax Department branches. We suggest the MOF to review this question and promptly introduce consistent guidelines.

Mr. Bui Tuan – Tax Partner, Deloitte Vietnam

- Article 14.1.b, Decree 153, on invoice management, requires that all merchandise used for promotions, gifts, donation and internal use should have an issued invoice. This regulation offers an opportunity for tax authorities to recollect taxes and trouble businesses. If gifts for customers are considered as a promotion, all related registrations will have to be made in line with Decree No. 37/2006/ND-CP. But in economics, gifts (e.g. beverages) are not promotional activities and should be considered as normal overheads. If invoices are required for these items, the normal flow of operations may be disrupted.

Response by Mr. Nguyen Van Phung - Vice Director, Tax Policies Department, MOF

- Electronic invoice: The Tax subgroup's comment is duly noted and will be reported to the MOF leadership for amendment of the Accounting Law.
- Gifts in business environment: Circular 153 is being revised and this comment is noted for review in the drafting process.

Appendix: List of Participants

Sqt.	Full-name	Title	Org
Ministry of Finance and Ministry of Planning & Investment			
1	Mr. Nguyen Van Phung	Vice Director	Tax Policies Department, MOF
2	Ms. Ta Thi Phuong Lan	Vice Director	PIT Management Department, General Department of Taxation (“GDT”), MOF
3	Mr. Nguyen Ngoc Hai	Vice Director	Policies Department, GDT, MOF
4	Ms. Vu Thanh Huong	Deputy Head	Policies Department, GDT, MOF
5	Ms. Tran Thanh Huong	Deputy Head	Policies Department, GDT, MOF
6	Ms. Tran Tuyet Trang	Deputy Head	Policies Department, GDT, MOF
7	Ms. Nguyen Minh Anh	Officer	Policies Department, GDT, MOF
8	Mr. Bui Duc Hien	Officer	Policies Department, GDT, MOF
9	Mr. Nguyen Quy Trung	Head	Policies Department, GDT, MOF
10	Ms. Hoang Thi Nam Phuong	Officer	Legal Department, MOF
11	Ms. Nguyen Thanh Hang	Officer	MOF
12	Mr. Le Minh Khiem	Officer	MOF
13	Ms. Nguyen Thi Bich Ngoc	Vice Director	Foreign Investment Agency, MPI
14	Mr. Do Cao Nguyen	Officer	Foreign Investment Agency, MPI
15	Ms. Le Thuy Trung	Deputy Director	Industrial Economics Department, MPI
16	Ms. Vu Xuan Thuyen	Officer	Business Development Department, MPI
17	Mr. Vu Quoc Huy	Officer	Economic Zone Management Department, MPI
18	Mr. Nguyen Quoc Anh	Officer	MPI
Tax Sub-group, Vietnam Business Forum			
1	Mr. Tran Gia The	Tax Director	Ernst & Young Vietnam
2	Mr. Phan Vu Hoang	Tax Partner	Deloitte
3	Mr. Bui Tuan		Deloitte
4	Mr. Le Van Lich	Chairman	Titan Association
5	Mr. Tran Ngoc Anh	Deputy General Manager	Ban Phuc Nickel Mines
6	Mr. Nguyen Thanh Hai	Associate	Baker & McKenzie
7	Mr. Nguyen Minh Hoang	Director	Hoang&Thang Company
8	Ms. Dao Thu Huyen	Office Chief	Canon Vietnam
9	Ms. Nguyen Thi Tham	Representative	Panasonic
10	Ms. Le Tram Anh	Senior Consultant	KSC Vietnam Co., Ltd
11	Ms. Vu Tra My		VBF Secretariat
12	Ms. Phung Thu Ha		VBF Secretariat

Land & Property

POSITION PAPER ON MEASURES TO REDUCE REAL ESTATE INVENTORY

*Prepared by
Mr David Lim
Head of Land Sub-group*

Based on a report by a local research house in September 2012, it is reported there are currently 70,000 units of residential apartments in Hanoi and Ho Chi Minh City which remain unsold. In the current global economic condition, this is not unusual. Severe economic conditions have caused countries in Europe to introduce measures to encourage purchasers to invest in their real estate sectors. The United States of America has also seen housing prices plummet with numerous abandoned projects arising from its housing mortgage crisis.

Whilst it is not unusual to experience real estate inventory overhang especially in today's economic climate, it is important to look at measures to stimulate the market and consider what other countries are doing. In today's globalized world, investors have more choices as to where they invest and countries are all competing aggressively for investment dollars.

We set out below some examples and suggestions for reduction of real estate inventory in Vietnam.

1. Favourable Tax Framework

One of the very practical ways to encourage real estate transactions would be to provide a favourable tax framework for real estate transactions. One of the main considerations for any real estate investor, be they retail or institutional, would be the commercial aspects of the decision.

Currently, the following taxes are imposed on real estate transactions in Vietnam:

- (a) Real property gains tax (RPGT);
- (b) Value added tax (VAT);
- (c) Registration tax; and
- (d) Non-agricultural land tax.

Waiver or Exemption

Other countries in the region have reduced or waived similar taxes in order to stimulate real estate transactions in the past. For instance, in the year 2007, Malaysia waived RPGT for real estate transactions via an exemption order in order to stimulate the real estate market. Malaysia also exempted stamp duty for certain house purchases in the year 2008. Similarly, there is a 50% stamp duty exemption for first time house buyers in Malaysia for the year 2013 subject to a price cap for the property.

Staggered Rates

Other measures to consider would be to introduce a schedule with tax rates reducing over a period of time the property is held by the purchaser. In Malaysia, if property is held for up to 2 years, 10% RPGT is imposed. For a holding period of 2 – 5 years, 5% RPGT is imposed and in the case of more than 5 years holding period, no RPGT is payable.

2. Foreign Participation

Currently, non-resident foreign entities are not allowed to lease or buy property in Vietnam. Resident foreign individuals and foreign invested enterprises incorporated in Vietnam are permitted to acquire limited residential apartments for own residential use only. Note that this is inconsistent with other countries in the region which already allow foreign ownership of real estate properties subject to various terms and conditions.

Retail Purchasers

In Thailand, a certain percentage of units in an apartment block may be purchased and owned directly by foreigners. It is also possible for a foreigner to own a minority stake in a Thai company that owns the property. In Singapore, there is no restriction on foreign ownership of condominium units. Similarly, in Malaysia, foreigners may purchase residential and commercial property with a price higher than a fixed minimum amount.

Real Estate Business

Currently the Law on Real Estate Business prohibits foreign individuals and organisations from using property for any purpose aside from residential purpose. This means that foreign individuals and organisations cannot purchase properties for business purposes eg sub-lease. Foreign individuals and organisations and foreign invested enterprises incorporated in Vietnam are also not permitted as a matter of practice to acquire completed buildings.

It may be useful to consider revisiting this prohibition as it restricts the ability of foreign individuals and organisations to obtain the maximum commercial benefit out of their properties. This also prevents legitimate real estate business operators from operating in Vietnam. It would be useful for instance if a property developer could sell a large number of apartments in a building to a foreign investor which could then re-sell such properties on the secondary market or lease them out. Any change in this prohibition would make the real estate market in Vietnam more attractive to a real estate investor.

Provisions relating to taxes and repatriation of funds out of the country must also be implemented so that it is attractive commercially for foreign investors to purchase property for this purpose. It is not beneficial to grant the right for foreign individuals and organisations to purchase property which is then utilized to generate income which cannot be repatriated without complication.

Special Programmes

Another development currently occurring in the global real estate market is special schemes to attract foreign buyers. For instance, Spain has announced that it plans to offer foreigners long term residency permits in return for purchasing properties with a minimum price of approximately US\$200,000. Portugal and Ireland have implemented similar schemes this year to reactivate their domestic housing markets. Closer to home, Malaysia has a similar programme for foreigners seeking to retire in Malaysia. This is an attractive alternative measure to adopt if it is not possible to outrightly allow foreign individuals and organisations the right to buy property in Vietnam.

3. End Financing

In most other countries, the main source of funds for acquiring real estate property is by way of bank financing. Whilst it is possible to obtain bank financing from banks in Vietnam, interest rates currently in Vietnam are at the level of 15%. This high interest rate is prohibitive and is a deterrent to those seeking to purchase real estate property. One way to

encourage home buyers is for credit institutions to make available end financing at lower interest rates or have more flexible payment terms.

The State Bank may wish to subsidise such credit facilities so that more favourable lending rates may be offered. For instance, one option would be to make available such credit facilities for middle and low income earners to purchase affordable housing. For this to work, a set of guidelines on eligibility will have to be tabled and implemented. This will enable more people with limited financial means to own homes.

Conclusion

In order to deal with the real estate inventory overhang, it is important that there is a clear policy and action to introduce measures to stimulate real estate transactions. The characteristics of each of the suggestions made above can be tweaked according to the policies of the country and objectives to be achieved. It is critical however to be nimble and flexible to introduce measures which are beneficial to the real estate sector quickly to address any specific deficiencies.

COMMENTS ON DRAFT AMENDED LAND LAW

*Prepared by
Baker & McKenzie*

We thank Vietnam Business Forum for giving us an opportunity to attend in the roundtable discussion with the Ministry of Natural Resource and Environment, and present our comments in relation to the draft amended Land Law ("**the Draft**"). Given the limited time since we last received the draft amended law, we only focus our comments in the draft provisions which are deemed affecting real estate investors and developers in Vietnam, in overall.

I. General comments

We appreciate that the Draft has addressed and clarified many of the issues that were raised at the forum over the last few years. For example, the Draft provides a clearer definition of land users (i.e. economic organizations, foreign individuals/organizations investing into real properties in Vietnam, joint venture organizations) in order to comply with the Enterprise Law. This Draft also distinguishes specific land use status (i.e. land allocation for residential purposes and land lease for commercial and business purposes) and provides more clarifications on the rights and obligations of land users acquiring various types of land. We are happy to see a broaden land use purposes of certain types of land like Inland-water-surface land or sea front land, not only for agricultural but also for non- agricultural and business purposes. In addition, for the first time this Draft directly addresses concerns from practice in relation to the land ownership from the ex-governments, additional cases eligible for incentives and exemptions of the land use payments, related provisions on the land price, and assignment/transfer of land use right in residential project, etc.

On the other hand, we take a serious look into the provisions relating the State's power to control and regulate the land use in Vietnam, in which we seek further clarifications and amendments for the land use regimes applicable for foreign investors doing business in Vietnam. For example, the acquisition of land for the project implementation- article 6.7 and 166.2 and 175.1; the land planning and zoning- article 36; the right of first refusal of the government to acquire the land- article 20; the determination of land price- article 96; transfer of land use right during the implementation of the project- article 175. Please see our specific comments below for details.

II. Specific comments

Article 6.7, Article 166.2, Article 175.1(b)- Transfer of land use right to foreign investors during the implementation of the project.

Currently, foreign investors acquiring land for business in Vietnam can only lease land from the State or sublease land from the Industrial Zone developers. Under Article 6.7 of the draft, foreign investors now can obtain the land in terms of land allocation from the State, but only for the purpose of residential development. Under Article 175.1(b) of the Draft, regarding residential project for sale/lease, entities including foreign investors are allowed to receive transfer of LURC together with transfer of the whole project, upon the completion of ground facilities respectively in accordance with approved constructional progress of the project, provided however that general conditions of transfer of project under Article 169 (procedural conditions for transfer) must be met, and the Government shall provide further guidelines.

That is for the residential project. Other than that, the Draft is silent as to whether the foreign investor can receive transfer of the land use right for its commercial/business developments. We suggest having a new provision addressing this concern, for the equal treatment between domestic and foreign invested entities.

Article 121- Inland-water-surface land

Currently, the purposes of land use provided in this provision omit other purposes of use, such as tourism or other business/commercial uses. This means those uses do not have sufficient legal basis. We notice that article 121 of the draft amended Land Law has broaden the purposes of land use specified under Article 78 to include "agricultural purpose combining with non- agricultural purpose". However, as mentioned the business/commercial purposes (e.g. resort, golf course, amusing parks...) somehow can not and should not always "combine" with agricultural purpose. We recommend to separate the purpose of non-agricultural, to make it easier for Investors who wish to implement projects purely for either business or public purposes.

Article 6- Land users

To our knowledge, the list of land users under article 6 does not include the fund. According to current securities law, fund is not a legal entity. Under new Decree No. 58, which is effective last month and implementing the securities laws, a new type of fund called real estate investment fund (REIF(s)) is first time regulated and allowed to invest maximum 65% of its net asset value (NAV) into the completed real properties. So if fund is not one of the land users under article 6, then it can not hold the use right certificate.

Article 97- Determination of Land price

This issue has been discussed on some press over the last week. We will wait for implementing decree to comment further, but it looks like the Government still, at its solely discretion, determine the land price, without any need to consult from any professional evaluator. And also, it is vague to apply the provision of land price adjustment when there is a huge change of land price in the market, because the draft has not provided any justification on the : " huge change of land price in the market".

Article 36- Land zoning /planning

Term of land use zoning: 10 years with 20 year vision. While for property project, the land use term is normally 50-70 years. Quite risky for developers if the zoning changes every 10 years.

Article 20- Right of first refusal of the State to acquire land & properties

Article 20 provides that when the land users wish to transfer the LUR, and sell the assets attached to the land, the State has the right of first refusal to receive transfer of the LUR and buy the assets attached to the land. We have also found that the State exercises this pre-emptive right to purchase the asset attached on land under Article 170.2.

First, please clarify this pre-emptive right of the State. Is it a new mechanism to exercise State's power in relation to the recovery of land?

Second, these provisions are silent on the price when the State exercises its pre-emptive right.

COMMENTS TO DRAFT LAND LAW

*Prepared by
Vilaf*

1. Definition of “Land user”

1.1. Although Article 6 of the draft grouped land users into 8 categories, its definition of land user remains complicated and unclear, especially those of “foreign investor”, “domestic investor”, and “a joint venture between domestic and foreign investors.” Phrases such as “foreign-capital enterprises”, “joint venture” and “foreign investor” are not clearly differentiated and each overlaps the other.

1.2. The term land user in the draft defined in such the way that includes “foreign organisations and individuals investing in Vietnam.” This regulation may result in overlap, misunderstanding with definition of “foreign investor.”

1.3. The draft is also not consistent in terminologies/terms such as the uses of “economic development project” and “investment project.” The recommendation would be “investment project” used throughout the law for the consistency with other legal documents. The term “economic development project” is likely to cause confusion and inconsistency with other regulations.

Recommendations

According to the provisions of the existing Land Law, sites are leased from the State to foreign organisations and individuals investing in Vietnam for their projects. The land lease contract and related tax duties, however, are conducted by these foreign organisations and individuals. The new Land Law, therefore, is urged to clarify the following:

(i) Foreign investors include foreign organisations and individuals investing in Vietnam for projects. To avoid misinterpretation, Land Law should use only one term “foreign investor” for both organisations and individuals investing in Vietnam, thereby fitting to regulations of Investment Law.

(ii) Foreign-invested enterprises include joint venture and 100% foreign-owned company to implement an investment project in Vietnam.

(iii) Domestic economic organisations and enterprises are 100% Vietnamese-owned company.

Such provisions show consistency, uniform, and transparency in its interpretation and application and those of other related regulations

2. Rights of land user

2.1. Currently, there are many suggestions on regulating the equal rights of land user between domestic economic organisations and foreign-invested enterprises. In particular, allowing domestic economic organisations to lease land collected in lump sum, and foreign-invested enterprises to use land for a stable long term for residential real estate projects.

2.2. Above recommendations somehow reflected in this draft partially. We totally welcome the equal treatment to both domestic and foreign investors. In order to facilitate its application and implementation in practice, we highly recommend the following:

Recommendations

The differentiation in the rights of land use should only be based on the form of land use and of payment (e.g. lump sum, annual base, land allocation with/without the collection of land use levies) not on the nationality (domestic/foreign) of the user.

3. Land allocation, land lease

3.1. Article 60 of the draft Land Law sets forth conditions for investors to be allocated/leased land, including auditing report and a deposit for a project. These requirements under Article 60 are not practical and also create barriers to investors during the process of granting investment license. When investing in a new project, it is a fact that many investors normally use the project-based company established overseas specifically for their new project. Therefore, it is impossible to meet the requirement of auditing report as stipulated in Article 60

Besides, regulation on a deposit for a project is also not suitable to investment regulations.

3.2. Land allocation and land lease procedures regulated in the existing Land Law and other related guiding documents remain a question in terms of order of procedure, duration, and dossier that impedes investors from applying. It also causes different interpretations and applications in different provinces. The draft Land Law has no regulation on an order of procedure of land allocation and land lease.

Recommendations

- (i) Remove regulation on conditions for land allocation and land lease for project in Article 60;
- (ii) Complement regulations on a clear order of procedure of land allocation and land lease which describes in detail implementing steps and duration. The procedure should be divided into land allocation, land lease which have been compensated for site-clearance and land allocation, land lease which have not been compensated for site-clearance. The clearly guidance on order of procedure and executing period stated in the law will prevent future guiding documents from overlaps and inconsistency.

4. Industrial zone land and economic zone land

4.1. Provisions in the existing Land Law and the Draft have not prescribed clearly authority to allocate land in industrial and economic zones. These are the reality:

- (i) Management committees of industrial zones and economic zones are allocated land by provincial people's committees then re-allocate the land to infrastructure development companies. These companies afterwards lease the land to investor;
- (ii) Management committees of industrial zones and economic zones are allocated land by the provincial people's committee; then re-allocate or lease directly to investor;
- (iii) Land has not been allocated to management committees of industrial zones and economic zones.

As the Law is not clear, it is very difficult to identify the authority to allocate, lease land; especially to industrial zones and economic zones where having no infrastructure

development companies.

4.2. The existing Land Law and the Draft have not included provisions to address the case where infrastructure development companies in industrial and economic zones are disbanded, bankrupted or their land is retrieved by the State. No regulation provided for such situation to address the rights and benefits of investor, especially those who already paid the lump sum.

Recommendations

A clearer provision on authority to re-allocate, re-lease land in industrial zones and economic zones is required. The following should be included to avoid overlaps:

- Provincial people's committee allocates land to the management committee of an industrial zone and economic zone;

- If the management committee of an industrial zone/economic zone re-allocate or lease land to infrastructure development company, the management committee shall not make decision on allocating/leasing land to investor. In this case, infrastructure development company will directly negotiate and contract with investor.

- If there is no infrastructure development company, the management committee of an industrial zone/economic zones holds the right to re-allocate/re-lease land.

- Remove the provision that provincial people's committee allocate/lease land in industrial zone/economic zones not being put in planning scheme since the construction and development in industrial zones/economic zones must be considered whether it is suitable and under the plan

In case an infrastructure development company in industrial zone/economic zone is disbanded, bankrupted, it should be regulated clearly that the inheriting party must take over and continue the land lease contract with the investor. If the State retrieves the land to allocate to another company, this company must inherit land and guarantee the continuity of the contract with the investor. If the State retrieves the land for other projects, the investor who made a lump-sum payment must be compensated properly for land use rights and assets attached to the land and the investor who paid annual rental fee should be compensated for assets attached to the land

5. Contribute capital using land use rights

5.1. The draft does not regulate the case when contributing capital using land use rights, whether the enterprise receiving capital contribution is able to re-contract the land lease with competent authority (Department of Natural Resources and Environment) or the enterprise receiving capital contribution follows the Land Law 2003 to be granted only new land use right certificate with basic provisions.

5.2. The draft has not clearly stipulated how to cope with the land use rights in case the contributor of capital using the land use rights is disbanded, bankrupted, or transfers the contributed capital using the land use rights. This issue is seriously complicated to cases where the capital contributor using the land use rights is state-owned enterprise.

Recommendations

Parties sign new land lease contract with Department of Natural Resources and Environment, explicitly affirming that the company receiving contributed capital is the rental party during

the period of capital contribution, and prescribing the rights of parties after the expiry of capital contribution.

It is recommended to clearly define that land use rights after contributing capital to enterprise is asset of the enterprise receiving contributed capital. If the contributor bankrupts or transfers the contributed capital, asset which must be addressed according to bankruptcy procedure or transferred is the value of the contributed capital of the contributor in the enterprise, not the land use rights.

6. Compensation for site clearance

6.1. Current regulations and the draft stipulate land compensation rate, site clearance compensation must be close or suitable to market price. However, there are no criteria available to measure the market price. This leads to arbitrary explanations and applications, hindering the procedure itself, damaging both investor and land user having their land retrieved

6.2. The current Land Law and the draft have not regulated the case that investor directly negotiates with land user (annual basis) on compensation and site clearance. The law does not give a procedure for parties to implement and ensure their agreements

Recommendation

To ensure the rights of land user when the State retrieve as well as the ease of site clearance compensation, a mechanism to measure the market price of the retrieved land of land user for site clearance compensation must be explicitly provided.

Mechanism for negotiation between investor and land user (annually) as well as procedure for investor and land user to implement their agreements are needed. These mechanisms can reduce administrative procedures and help simplify site clearance compensation procedure providing that investor and land user can reach an agreement.

Site clearance compensation order and procedure also needs regulating as part of the united procedure of land assignment/lease

7. Mortgaging land use rights

7.1. Some suggestions would be the allowance to mortgage the land use rights to organisations outside Vietnam and non-economic organisations. These recommendations though have been recognised in the draft but just at the general level. Specific cases will be considered by the Government.

7.2. The draft does not regulate inherit rights after mortgagees address measures of insurance

7.3. Previous regulations do not allow land user exempted from rental fees to mortgage the land use rights. In reality, this regulation attempted arguments and difficulties in the mobilisation of capital in many BOT projects, which are eligible to land rental fee exemption

Recommendation

Recommend an explicit regulation on cases that are allowed to mortgage the land use rights to organisations outside Vietnam, requirements for mortgagees in these cases and regulations on inherit rights when settling secured assets.

The draft should have regulation on the assurance of the inherit rights of mortgagees for land use rights used as security

Recommend remove the regulation that forbids land user exempted from rental fee from mortgaging their land use rights. The exemption is to support enterprises. However, not allowing them to mortgage their land use rights may impede their capital mobilisation and operations.

8. Transferring land use rights and projects

8.1. According to the draft and Article 24.1 of Decree 84, foreign enterprises does not allow to receive transfer of land use rights other than receiving transfer of land use rights together with transfer of project.

8.2. However, regulations in Decree 84 do not explicitly prescribe cases of transfer of project and how to address the land use rights accordingly

8.3. On opposition, Decree 84 allows enterprises to enter into agreements with land user to practise site clearance compensation if land users hold the right to transfer their land

8.4. In addition, the draft also allows mortgaging to non-credit institutions

Recommendation

To be in line with other regulations in the draft and facilitate enterprises' operations and investments, recommendation is given for foreign enterprises to receive transfer of land use rights for their projects in Vietnam. After receiving the transfer, enterprises can apply for changing the use purposes of land, if necessary, and sign land lease contract with the State, in which enterprises do not pay rental fee to the State.

Section IV

INFRASTRUCTURE

FOREIGN PRIVATE SECTOR POWER IN VIETNAM

*Presented by
Mr. Tony Foster
Head of Infrastructure Working Group*

1. OVERALL ISSUE

1.1 Over the years Vietnam has made substantial investments in infrastructure. Investment on electricity, water supply, waste treatment, transport and communications in Vietnam amounted to about 12 percent of GDP from 2006 to 2010, which is a high percentage by comparison with other regional countries, including China. Successful countries build the infrastructure needed to maintain growth.

1.2 However, despite this high level of investment, Vietnam's infrastructure is still regularly rated by businesses and chambers of commerce in Vietnam as a constraint on growth. Vietnam is still far behind other Asian emerging economies in terms of infrastructure development, possibly because Vietnam started with much poorer infrastructure and therefore has to invest heavily to catch up. But the mismatch between spending and performance indicates that there has often been inefficient implementation.

1.3 More importantly, the money is no longer there to sustain high levels of investment. There are several interlinked reasons for this including the tightening of government policies on foreign debt and the shifting of Vietnam to a mid-income economy in the eyes of donor agencies. In addition, the past few years of macroeconomic instability has shown that the expansionary monetary and fiscal policies that supported this investment cannot be sustained by the underlying fundamentals of Vietnam's economy. The government has already decided to reduce total investment from more than 40 percent of GDP in the past to 34 percent in 2012. Infrastructure investment should be reduced to 8 or 9 percent of GDP, which is more in line with regional standards.

1.4 If the public investment process is to be more limited, the question is whether private investment can take its place to any meaningful extent.

1.5 One aspect of this is foreign private sector investment and the other is domestic Vietnamese private sector investment. The former brings in foreign funds to support the Vietnamese economy. The latter often relies on State-owned banks, which in an era of limited credit, can have a negative knock-on effect for other sectors.

1.6 There are currently at least 15,000 MW of power currently under development by foreign private sector developers. This represents potential investment of about \$25 billion.¹ Assuming that these projects are at least as efficient as projects built by the State, this would save the State from having to find an equivalent amount of money. Yet nearly all of these projects are unexpectedly slow to develop. Some have commercial negotiations (even before financing) that have been going on for well over five years without an end yet in sight.

¹ The total investment capital required for 2011–30 is estimated to be around VND2,359 trillion (approximately US\$123.8bn). Vietnam Electricity is unlikely to be able to contribute all of this investment capital, especially considering its financial situation. PetroVietnam has recently played an increasing role in this sector, and has helped to fill some of the needs left open by EVN's financial issues. Yet the Government now requires that State-owned companies focus on their core competencies. The VBF sub-group would request the views of the Government on whether power is a core area for PetroVietnam, and whether it expects PetroVietnam to play an increasing or a reduced role in this sector.

In other Asian economies, similar projects typically take 24 months to negotiate and reach financial close. Ground can only be broken on a project once financial close is reached. Usually construction runs another four years after commencement of work. This means that the total development time for an infrastructure project can be in excess of a decade before Vietnam sees any direct benefit from such project. With other Asian economies such as Indonesia, Philippines and Myanmar making significant reforms in their investment policies, such as the rapid development of PPP in Indonesia and Philippines and the strong U.S. focus on Myanmar's economy, Vietnam could well find itself as a less than attractive investment environment, unless significant steps are taken to speed up the time it takes to tender and implement infrastructure projects in the country.

2. VBF SUGGESTIONS

If Vietnam wishes to attract private foreign funds to finance infrastructure, its projects need to offer an attractive commercial proposition to foreign investors and lenders. To do this, the projects will need to deliver an acceptable return and legal security to foreign investors and lenders.

The VBF infrastructure group would like to focus on a few steps in each of the BOT, PPP and Renewables areas that could encourage much-needed foreign private sector investment. The goal of this paper is simply to hit the high points, the ones that are holding up progress. By solving them, the Government could remove the barriers that are preventing billions of dollars in needed investment from flowing into the country and create a more positive profile for the country.

2.1 BOT Projects

Recommendation 1: Issue Government guarantees of foreign exchange to solid projects with solid sponsors and lender groups.

- (a) In practice, the Vietnamese Government has entered into five or six Government guarantee agreements for BOT projects, including for the Phu My 2-2 BOT power project, the Phu My 3 BOT power project and the AES - Mong Duong 2 BOT power project. The Vietnamese Government has also issued Government guarantee agreements in respect of upstream/midstream gas projects (Nam Con Son and tie-ins to the Nam Con Son pipeline). There have been no calls on these guarantees. This compares positively to the guarantees issued by the State for loans provided to SOEs for infrastructure projects. According to official correspondence 17164 of the MOF dated 15 December 2011, 88 projects had received government guarantees, including 37 power projects, 10% of them had loan repayment difficulties. A solid government guarantee is fundamental to obtaining foreign lending on infrastructure projects.
- (b) One particular area of concern for foreign lenders to power projects is foreign exchange convertibility, remittability and availability. Unfortunately, Official Correspondence 1604 (**OC 1604**) entrenches a position on government guarantees for foreign exchange that is very difficult for foreign lenders and developers to live with.
- (c) OC 1604 provides that the guarantee of foreign exchange will only extend to 30 per cent of revenues after deducting expenses incurred in Vietnamese dong. This does not provide foreign developers and foreign lenders sufficient comfort. The only

power projects of any size in Vietnam that have been financed to date have been financed on the basis of 100% foreign exchange guarantees.

- (d) There is an additional problem that stems from lack of uniform applicability of guarantee principles. Some power projects have been licensed (or, in the case of Nghi Son 2, have been tendered), on the basis of 100% foreign exchange guarantees. As the commercial project finance markets are extremely narrow in Asia (and getting narrower all the time), banks can be very choosy about which project to fund. If they have a choice of a project that has a 100% foreign exchange guarantee and one with a 30% foreign exchange guarantee, then if everything else is roughly equal they will fund the former. As a result no project with a 30% foreign exchange guarantee is likely to be financeable in the near future in the commercial market.
- (e) Please see our comments in section 2.2(c) below on guarantees in the PPP context. The comments there apply to BOT as well.

Recommendation 2: Assume the cost of land

The VBF sub-group would request a stronger commitment of the Government to prepare for land transfer in advance and to allocate appropriate budgets to the process. Otherwise, the risk is shifted to the private sector, which results in a passing through of the costs, which will necessarily be higher than the costs to the Government in the first place.

Recommendation 3: Allow mortgages of land

There is an indirect financing cost of not being able (according to certain arms of the Government) to mortgage land for which no payment has been made. This is an easily soluble issue.² All that is needed is a regulation that states that land that is leased at no rent is deemed to have been paid for in full when it is leased. There is a compromise in OC 1604 issued by the Prime Minister on 12 September 2011, which states that investors have the right to mortgage the assets attached to the land. And *“if the assets attached to the land are assigned, then the assignee shall inherit the use right of the land to which the assets are attached for the residual term of the project contract term [or duration].”* While this may eventually give banks the comfort that they need, by adding to the overall impression of Vietnam as an eccentric legal jurisdiction, it does not assist in Vietnam’s goal of obtaining the best terms for its borrowings.

Recommendation 4: Provide necessary supporting infrastructure

All power projects require certain infrastructure in order to operate and produce electricity. For example, they need water and they need transmission lines to take electricity to the national grid. As the issue of infrastructure sharing is currently not specifically regulated, the VBF would suggest that it would be more efficient if the Ministry of Industry and Trade procured the completion of any infrastructure outside the boundary of the power plant. This would have cost benefits as well as avoid any delays to the estimated project schedules.

² Indeed, the VBF sub-group does not believe the issue should have arisen at all. Land rent exemptions for BOT projects are an investment incentive, and should not prejudice investors’ entitlement to grant security interests over the land they need for their project.

Recommendation 5: Reduce administrative complexity

The Phu My 2-2 and Phu My 3 projects took about 7 years to get to financing. The Mong Duong 2 project took about 6 years. The Nghi Son 2 project has been going for over 4 years and the investment licence has not been issued so the financing stage has not even begun. The Block B – 0 Mon gas to power project has been going on for a lot longer than any of the above. The VBF acknowledges that the government has made an effort centralise negotiations for BOT projects. In particular, it notes that in BOT power projects, the MOIT acts as the convener of general meetings and requests the presence of different ministries and bodies. But ministries and other bodies do not necessarily act with a unity of national purpose. Every stakeholder seems to have a veto or at least substantial delaying power. The VBF would suggest that it may be better not to wait another 10 years to address the issue.

The VBF would suggest that it is time for some radical action. This could take the form of improving the substance of the BOT regulations to provide greater support for investors. In addition, there should be a serious examination of the cost/benefits of so called inter-ministerial working groups where participants have veto rights on projects but little incentive to promote the speedy development of the project. Or at least the imprecision of existing regulations could be eliminated so as to remove administrative discretion (and hence reduce delays). Many investors who are willing to commit hundreds of millions of dollars find it unnecessarily tiresome that the regulations contain so few clear answers and that everything depends on administrative discretion. The cost of these delays to the Vietnamese State and people can be substantial.

2.2 PPP

Recommendation 1: Establish a structure

The VBF would welcome further clarity on the organisational structure that the Government anticipates for PPP, and in particular what scope and authority the PPP office will have in working across ministry lines to facilitate PPP projects. The most successful PPP programs in the world have very clear institutional structures for promoting, selecting, tendering, negotiating, implementing and then monitoring PPP projects. Vietnam has to date received significant support from the donor community to structure its PPP program, and the VBF recognizes that key elements of a PPP program are coming together at this very moment. However, details of what is happening are not known to the general business community. The VBF would welcome a public dialogue that informs the investor community of the current status of PPP and when investors can expect to see tangible projects tendered under this alternative to BOT.

Recommendation 2: Formulate appropriate procurement regulations

Attached as Schedule 1 are the VBF's comments on the draft Procurement Law relating to PPP.

Recommendation 3: Determine what support the State can provide

Under Decision 71, the Government can fund up to 30 per cent of the required investments, unless otherwise decided by the Prime Minister. This has given rise to numerous questions, such as:

- (a) Are the costs of land rental, land clearance and compensation and land preparation to be counted within the 30 per cent? The general market consensus would probably be that land rights contributed by a public authority should not count within the calculation of public support or viability gap fund usage (where a viability gap fund is established).

- (b) Is capital contributed by State-owned companies considered to be part of the 30 per cent? The Government expects State-owned companies to act as private, commercial enterprises. In the absence of some sort of capital injection for a specific PPP project, their participation in such project should presumably not be viewed as a State contribution.
- (c) How are guarantees from the Government to be valued? An issue with guarantees under the nascent PPP program is whether the guarantee is counted into the cap on State contribution to the project. For example, Decision 71 seeks to limit State contribution to a maximum of 30% of the total investment cost of a PPP project. Given the current state of Vietnam's development and economy, it is difficult to imagine any large scale PPP project where at least some form of government guarantee will not be required. When analysing the need for guarantees in infrastructure projects, the actual needs of the project to make it bankable and viable should be weighed without limitations imposed by an arbitrary cap on State contribution. There is a clear trend in other economies, such as Korea, where greater government guarantees are needed early on in the economy's PPP program to kick start the economy with fewer guarantees being needed at later, healthier stages in such economy's development.
- (d) Are tax incentives to count as State contributions?
- (e) Should the State participation be in the form of equity (and if so, how except through State-owned companies), debt, grants, provision of other projects necessary for the viability of the PPP project (and if so, how does one limit the determination of what is "necessary") or any of the above?

Recommendation 4: Determine responsibility for risks

The pilot projects are supposed to provide the experience on which fuller regulations can be based. The VBF realises that these regulations are open-ended in order to leave maximum flexibility for creation of pilot projects of different types. But it appears to be very difficult for projects to be developed without clear guidelines about what is and is not permissible. The most important issue is what risks the State will bear and what risks will be allocated to the private sector. But all of the above issues on the meaning of State contribution have to be worked out as well in these guidelines. The VBF sub-group would welcome some further detail about the likely timing and content of these guidelines. If the goal is to have guidelines that are comprehensive, in order to make Decision 71 framework a complete force, this would of course be welcomed by the PPP community. But it is a goal that has eluded the BOT sector.

2.3 Renewables

Recommendation 1: Revise the Renewable Energy Targets in the Master Plan VII to a more modest, and achievable level.

Recommendation 2: Develop a comprehensive Renewable Energy Plan including, solar thermal, solar PV, biomass and biogas in addition to wind.

Recommendation 3: Issue effective feed-in tariffs for each energy source that deliver a cost plus reasonable economic profit to investors.

Unfortunately the Circular issued in mid-November 2012 relating to the wind market is unlikely to be sufficient. It confirms that the PPA and feed-in tariff will be a maximum of US 7.8 cents and all will be paid by EVN, which will then recover the feed-in tariff US 1 cent from the Vietnam Environmental Protection Fund. The VBF welcomes the clarification that the prescribed 7.8 cents will be converted into VND to be paid at the market rate on the date of payment each month, not at a fixed rate, thus removing exchange rate risk in the PPA. Unfortunately, the tariff is still not at an economically viable income level to result in foreign private wind power projects in Vietnam.

The Circular also contains provision for adjustment of the tariff each October, which will be recommended by the Department of Energy of the MOIT and must be approved by the Prime Minister. This adds nothing to helping an investor define future cash-flows, as neither the basis for the recommended adjustment (whether it be up or down) or the basis for the use of the Prime Minister's discretion to approve it are defined. There is just a vague reference to "costs" (we assume the power projects' costs) and to the "general tariff of the whole system" as subjects that MOIT will consider.

Recommendation 4: Enhance the incentives to manufacturing of renewable energy equipment in Vietnam to promote employment and inward investment to Vietnam.

SCHEDULE 1 LAW ON PROCUREMENT

1. BASIC REVIEW

- (a) Review of the draft (amended) Law on Procurement (the *Draft Law*) as it relates to the procurement of public-private partnership (*PPP*) projects in Vietnam.
- (b) Consideration of the fundamental principles which PPP procurement law should cover, including a review of:
 - (i) EBRD Core Principles for a Modern Concession Law;
 - (ii) OECD Basic Elements of a Law on Concession Agreements;
 - (iii) European Commission Guidelines for Successful Public-Private Partnerships; and
 - (iv) Country's PPP laws which have launched successful PPP programmes.
- (c) The application of lessons previously learnt from the cases of Phu My 2-2 and Nghi Son 2 should be applied in order to make the Draft Law clear and transparent, avoiding the potential of investor confusion.
- (d) Review of whether the Draft Law adequately addresses those fundamental elements and in a manner that will mean that the Draft Law can support a successful PPP programme, and any subsequent recommendations for improvement.
- (e) Suggestions include clarifying the procedures set out in the law in order to boost the confidence that potential investors will have in the law (prompting them to participate in PPP tenders) and ultimately impacting upon the law's success as a platform for Vietnam's PPP programme.

2. THE PURPOSE AND VALUE TO VIETNAM OF THE DRAFT LAW

- (a) Dual purpose of PPP legislation:
 - (i) Robust enough for PPP participants (both potential investors and financiers) to have confidence in the process
 - (ii) Flexible enough to allow the Government and other ministries to customise it to specific projects
- (b) Any recommended changes are simply to aid consistency with procurement laws in other jurisdictions and established PPP principles, aiding confidence in the Draft Law amongst investors and financiers
- (c) Suggestions include clarifying the procedures set out in the law in order to boost the confidence that potential investors will have in the law (prompting them to participate in PPP tenders) and ultimately impacting upon the law's success as a platform for Vietnam's PPP programme.

3. SUMMARY OF KEY RECOMMENDATIONS

- (a) The Government's objectives should be clearly stated at the start.
- (b) "PPP Projects" should be a clearly defined concept, with provisions related to them addressed in a standalone section.

- (c) The mandatory nature of the Draft Law for PPPs should be clarified.
- (d) Responsibilities for overseeing the procurement of, negotiating and implementing PPPs to be a transparent streamlined process, with procuring agencies empowered by the new procurement law clearly identified, and “powers” clarified.
- (e) Suggested new central independent body or ‘task force’ monitoring the PPP procurement process would help international investor confidence in the process.
- (f) Evaluation criteria and selection process should be clearly determined by the ‘most economically advantageous tender’ and not restricted to price considerations only.
- (g) Draft Law should explain how the new procurement law sits alongside existing regulations and address any conflict of laws in the context of PPPs.

4. CORE ELEMENTS

- (a) Objectives and policy statement
- (b) Scope of Draft Law
- (c) Place of the Draft Law within the overarching legislative framework
- (d) Empowered entities and procuring authorities
- (e) The selection criteria and procedure
- (f) Challenging the procedure

5. OBJECTIVES AND POLICY STATEMENT – PPP IN PROCUREMENT LAW

- (a) Fundamental principle
 - (i) The law is the cornerstone for the government to develop both a stable and sustainable investment environment, so the policy and objectives should be clear.
- (b) Application of principle to the Draft Law
 - (i) Although scope and authority are addressed, there are no clear objectives.
- (c) Recommendations
 - (i) The Government's objectives should be clearly stated at the start and established as an overriding principle. This allows any other provisions of the Draft Law to be interpreted against them in the event of ambiguity.
 - (ii) Objectives would typically include:
 - (A) establishing legislation to promote and facilitate PPP projects by enhancing transparency, fairness and long-term sustainability in infrastructure development and operation;
 - (B) to maximise efficiency and value for money of PPP schemes;
 - (C) the division of improved risk allocation and sharing among public and private sectors; and
 - (D) the advancement of Government policy objectives generally, such as the decentralisation of public sector.

6. PPP SCOPE – DRAFT LAW

- (a) Fundamental principle
 - (i) As the primary legislation the Draft Law should clearly describe the platform for both PPPs and the subsequent successful implementation of projects.

- (ii) The EBRD Core Principles state “The [PPP] law should clearly define the scope of its application, i.e. the legal relations to which the law extends. Such clarity is essential for the predictability of the [PPP] regime, for the stability and validity of the [PPP] agreement as well as for the prevention of ungrounded arbitrary actions by the contracting authorities. With this purpose, the [law] should provide an exhaustive definition of “concession” [or “PPP projects”], a list of sectors concerned, contracting authorities, and eligible concessionaires.”
- (b) Application of principle to the Draft Law
 - (i) It is not expressly clear that the Draft Law covers PPP projects.
- (c) Recommendations
 - (i) The definition of “Investor” and the type and scope of projects applicable to them should be clarified.
 - (ii) “PPP Projects” or a similar term should be defined to indicate key elements such as relevant sectors, contracting authorities and eligible investors. Additionally, different types of projects, including between ECA-backed IPPs and ODA funded projects should be distinguished from PPPs.
- (d) Further recommendations
 - (i) Provisions relating to PPP projects should be categorised and provided for in a separate chapter of the Draft Law rather than addressed alongside the bidder process for ‘State funds developments’.
 - (ii) Investor should be clearly defined once in relation to PPP Projects. The eligibility requirements of any such ‘Investor’ should be revisited in order to remove any uncertainty or overly onerous requirements.
 - (iii) Articles 85 to 96 should refer expressly to the defined concept of PPP Projects, the competent agency and its relevant authority.
 - (iv) It is highly unusual that the minutes of contract negotiation are included as if not expressly incorporated into the contract, negotiations do not usually have direct application on the contract terms. This inclusion will only confuse investors.

7. PLACE OF THE DRAFT LAW WITHIN THE PPP/BOT LEGISLATIVE FRAMEWORK

- (a) Fundamental principle
 - (i) Any new law should aim to identify and clarify any conflicting provision of existing national law, and, if necessary, amend it.
 - (ii) If conflicting laws remain in force without such clarification then confusion and potential disagreement will arise in relation to the basis for procurement, potentially deterring investors.
 - (iii) Inconsistencies and ambiguities among existing laws and the Draft Law will impact bidders' costs, which is ultimately passed onto the Government
- (b) Application of principle to the Draft Law
 - (i) The Draft Law refers to some previous laws but not all those with which some interaction will be required, such as Decree 71 and specific BOT contracts.
 - (ii) “Concession” and “BOT” contracts are referred to by the Draft Law, but it is not clear if PPP fall under these concepts.
 - (iii) The interaction of Decree 71 with the Draft Law is unclear, while Decree 71 itself requires substantial clarification in relation to the application of 30 per cent Government funding capability.

- (c) Recommendations
 - (i) Clarify the relationship between the Draft Law and the BOT regulations and Decree 71.
 - (ii) Decree 71 should be fully explained through specific Government guidelines, including the interaction of it with the Draft Law.
 - (iii) Inclusion of a statement that in the event of inconsistency the Draft Law will prevail.

8. PPP – EMPOWERED ENTITIES AND PROCURING AUTHORITIES

- (a) Fundamental principle
 - (i) It is important to identify and empower those entities responsible for implementation of the PPP programme.
 - (ii) A sound PPP legislative framework will also provide the procuring ministry/agency's officials with a basis for negotiating the terms of the project documents and the inclusion of governmental support therein.
- (b) Application of principle to the Draft Law
 - (i) It is not clear which entities are empowered under the Draft Law, and there appears to be overlaps between the mandates and authorities of different Government ministries.
 - (ii) Confusion as to empowered entities may cause potential investors to lose confidence in the Draft Law as an authoritative piece of legislation (detering the participation of key players).
 - (iii) Currently there are no express rights for competent authorities to offer Governmental financial support or guarantees, which could aid the chances of success in financing a project.
- (c) Recommendations
 - (i) The PPP law should expressly identify those government agencies which are authorised and empowered to procure a project under the PPP law.
 - (ii) The Draft law should expressly allow 'competent persons' to negotiate, including the ability to offer Government financial support and undertakings.
 - (iii) Further flexibility should be included to allow 'competent persons' to be responsive to the specific comments and feedback of financiers (in particular ECAs/MLAs given the potential importance of them to Vietnam's PPP programme with the dearth of liquidity amongst commercial banks for PPP projects in the region).
 - (iv) It is critical that potential investors are confident relying on the authority given to a procuring agency by the law. As such, there should be a clear delineation of responsibilities and authority in the Draft Law.
 - (v) The interaction of ministries and agencies should be a streamlines process addressed by provisions within the Draft Law, allowing decisions to be made if no answers have been received in respect of a particular issue within a stated time.
 - (vi) The creation of a central independent body or 'task force' monitoring the PPP procurement process would further improve international investor confidence in the Draft Law.

9. PPP SELECTION CRITERIA AND PROCEDURE

- (a) Fundamental principle
 - (i) The procurement law should set out a selection procedure which will guarantee a fair, transparent and competitive PPP selection process

- (including exceptions from competitive procedure), equal treatment of potential investors, opportunity to challenge the rules and decisions of procuring ministries/agencies and competitive rules for unsolicited proposals.
- (ii) The procedures and rules should be: objective and accessible (made public); a solid framework with sufficient flexibility for adaptation; and reviewable by an independent body with appropriate remedies.
- (b) Application of principle to the Draft Law
- (i) Although provisions are included which are intended to address the eligibility and selection of investors, there are several aspects where the Draft Law could be improved.
- (c) Recommendations
- (i) It should be explicit exactly which provisions are intended to specifically apply to investors and PPP projects, and the selection criteria clarified.
 - (ii) There should also be a more selective criteria applied to PPPs which looks beyond price as the primary or sole criterion, and identifies the 'most economically advantageous tender'.
 - (iii) A provision should be included to explicitly state that procuring ministries/agencies are prohibited from favouring SOEs or domestic bidders for PPPs (including ensuring that definitions of 'international bidding' and 'national bidding' do not inadvertently exclude foreign bidders from bidding).
 - (iv) The conflict of interest provisions should be broader in order to cover more instances of individuals having a financial interest in potential investors, which subsequently may effect impartiality.
 - (v) It is not necessary for time periods to be included within the Draft Law in relation to decisions relating to selection of an investor. This can be addressed in each relevant procurement plan for the relevant project.
- (d) Further Recommendations
- (i) In addition to the list of prohibited acts under Article 33 a requirement should be included that all investors comply with all laws of Vietnam dealing with anti-corruption and all anti-corruption laws, and otherwise applicable to the investor.
 - (ii) It is advisable for the Draft Law to include a 'proposal clarification process', requiring the 'competent person' to clarify the reasons in writing where bidders may take divergent views (especially on issues such as bankability).

10. CHALLENGING THE PROCEDURE

- (a) Fundamental principle
- (i) Private sector parties will expect a PPP procurement law to have a dispute settlement mechanism that is regarded by the participating parties as appropriate to the nature of the project.
- (b) Application of principle to the Draft Law
- (i) The Draft Law includes a review/dispute resolution process (with adequate remedies) but is flawed in that:
 - (ii) the ultimate deciding member is the competent person (which means they are not independent); and
 - (iii) the role of consulting counsel is not clear.

(c) Recommendations

- (i) The Draft Law should make the arbiter of complaints an independent entity while expressly permitting the final recourse of a complaining investor to binding international arbitration.
- (ii) Remedies (i.e. damages/retendering rather than recourse through the courts) available to a complaining investor should be set out in the Draft Law in order to avoid ambiguity.

Telecom

COMMENTS ON DRAFT DECREE ON INFORMATION TECHNOLOGY (“IT”) SERVICES

*Prepared by
Banking Working Group
Investment & Trade Working Group*

No.	Article	Comments/Recommendations
		<p>The Draft Decree categorizes IT services into nine groups:</p> <ol style="list-style-type: none">1) IT consultancy services;2) Hardware and electronic services;3) Software services;4) Digital content services;5) IT training services;6) IT resources leasing and sharing services;7) Information safety services;8) IT products publishing and distribution services; and9) Other IT services, including research, development and transfer of hardware, software and digital content technologies; integration of information technology systems; installation and maintenance of information technology products; management, operation and maintenance of information technology systems; testing of information technology products; market research on information technology; processing of business processes through information technology; other IT services to be specified by the Ministry of Information and Communications. <p>The Draft Decree sets out various conditions and requirements for the provision of IT services. In order to provide IT services, except for simple IT services, an IT service provider must obtain a license or register its service with the MIC. Certain IT services must obtain a code of product management. We see no obvious reason to require such licensing/registration. Moreover, these conditions and requirements will burden and cause enormous paperwork for enterprises which operate in the IT sector and other sectors as well.</p>

<p>Decentralization the MIC's authority regarding the license issuance and registration of IT services</p> <p>Under the Draft Decree, the application for a license or to register IT services must be filed with the MIC. This will create a huge bureaucratic process.</p> <p>Consequently, licensing/registration will be delayed because the MIC will clearly be overloaded. At the very least authority to license/register simple IT</p>		
1	<p>Article 14 - Licensing application and procedure</p> <p>1. Licensing application</p>	Application should be submitted electronically using relevant IT software and not manually in 6 sets.
2	<p>Article 15 - Practising conditions for specific IT services</p> <p>Clause 3</p>	The requirement of the second bullet point will prove impractical as many detailed areas of knowledge in a consultation project will reside with specialist staff members and not the team leader. The team leader should have general knowledge of the subject matter and, above all, good management skills.
3	<p>Article 16 - IT practising certificates</p> <p>2. The practicing certificates for IT consultation</p> <p>d) In case the individual has obtained the appropriate IT consultation certificate granted by an international organization, the MIC shall consider giving recognition to the certificate as equivalent to the practicing certificate.</p> <p>The MIC shall provide detailed guidelines on regulations and procedures in relation with the issuance of the practice certificate and recognition of equivalent certificates of IT consultation services.</p>	<p>It is unclear from the English translation what is meant by an "international organization". Does this refer to an international body such as the UN or a foreign government? Many foreign governments do not issue such certificates.</p> <p>IT does not yet have a professional group (Accountants have CA, CPA; Engineers have their guild). Most certifications are developed by a company to teach people how to use their software (Microsoft, VMWare,...). There are some exceptions to that but they come from not widely accepted organizations as in the case of other professions.</p>

4	Article 16 - IT practice certificates 3. A dossier for IT consultation practising certificate	Application should be submitted electronically using relevant IT software, not manually.
5	Article 18 - Registration of IT service provision 1. Application procedure the entities established and operated under Vietnam law....;	This excludes the participation of foreign-registered companies and may be contrary to Vietnam's obligations under WTO
6	Article 19 – Management of trans-border IT services	The addition of the proposed trans-border service agency will add costs to the IT industry and act as a barrier to entry. It also adds an unnecessary procedural loop into the process of acquiring IT services from overseas companies and, as such, may be contrary to Vietnam's WTO obligations.
7	Article 19 - Management of trans-border IT services	<p>The draft Decree, while not intended to specifically regulate banking related services, would be creating difficulties especially for foreign banks which usually rely on regional or head office (offshore) IT support.</p> <p>If possible, it is proposed to have some exclusion for credit institutions from the subjects of application of this Decree. For example, Internet Banking Services and other e-banking activities were regulated under existing legislations such as:</p> <ul style="list-style-type: none"> + Circular 01/2011/TT-NHNN about IT security System + Circular 29/2011/TT-NHNN about Internet Banking Services + Decree 97/2008/CP about Services on internet + Decree 35/2007/ND-CP about E-Transaction + Decision 35/2006/QD-NHNN about Risk Management in e-Banking + Law 51/2005/QH11 about Law of e-transaction

Comments on the Draft Decree on IT Services – Version 3.8

Prepared by
Telecom Sub-group

1. Provisions apply to cross border supply of IT Services (Articles 19)

We understand from the Draft Decree that cross border suppliers of IT services are only subject to Article 19, not other provisions of the Draft Decree. As such, registration and licensing requirements under Section 1 and 3 of the Draft Decree, for example, will not apply to cross border suppliers (as the requirements are imposed on entities established in Vietnam). If that is the case, please clarify the same by adding this sentence to the beginning of Article 19: *“Only Article 19 is applicable to foreign organizations, enterprises providing cross-border IT services”*

2. Potential WTO inconsistency (Article 19.3)

Article 19.3 requires that cross border supply of IT services that are subject to licensing requirements or registration requirements must be conducted through the commercial branch or the commercial intermediaries of the foreign supplier in Vietnam. This requirement may be inconsistent with WTO obligations of Vietnam on market access: GATS Article XVI.2 and Vietnam’s commitments under the Services Schedule.

Specifically, according to GATS Article XVI.2, Vietnam must not maintain or adopt six types of market access limitations, unless otherwise specified in its Service Schedule.

The requirement under Article 19.3 may constitute limitations under paragraphs (a), (c) or (e) of GATS Article XVI.2.

Some services subject to the requirement of Article 19.3 can be classified as data base services, data processing services according to the CPC system of the United Nation. These services may also contain advertising services.

Meanwhile, the WTO Services Schedule of Vietnam on computer and related services and advertising services does not reserve any market access limitations similar to the requirement of Article 19.3.

Further, if a foreign supplier has to establish a branch to provide its IT services, the service supply mode is no longer “cross border”. This is because according to GATS Article XXVIII (d) (ii) “any type of business or professional establishment, including through the creation or maintenance of a branch or a representative office” constitutes “commercial presence”. As such, Article 19.3 de-facto prohibits cross border supply of relevant IT services.

For the above reasons, we recommend deletion of Article 19.3 to ensure WTO consistency.

3. Tax issue (Articles 19.1, 19.2 and 19.3)

With respect to cross-border transactions, even if tax arises, the local party making payments will be responsible for tax payment on behalf of the foreign entity. This article 19.1 says that “trans-border IT service providers shall pay the value added tax (“VAT”), corporate income tax, and other taxes as stipulated in law on taxation and other documentations regarding revenues generated in Vietnam.” This is inconsistent with the general tax rule. This provision is also inconsistent with the last sentence of

article 19.3 "Vietnamese party shall comply with Article 1 herein and fulfill tax obligations for trans-border IT service providers according to law on taxation, law on VAT, law on corporate income tax and other relevant documentations concerning revenues generated in Vietnam."

We suggest revising article 19.1 as follows: "Any taxes arising from trans-border IT services shall be implemented in accordance with current provisions of Vietnamese laws and regulations on tax." Accordingly, the last sentence of article 19.3 should be deleted. In line with our above comments, the whole Article 19.3 should be deleted.

Under Article 19.2, VAT and other taxes seem to be penalties for local customers who acquire trans-border IT services not through branches or intermediaries. This is odd since firstly IT services themselves in general are subject to VAT regardless of the sale channels and secondly taxes should be different from penalties. We suggest deleting this Article.

4. Removal of licensing and registration requirements under Sections 1 and 3, Chapter IV

The licensing requirements and registration requirements under Sections 1 and 3, Chapter IV of the Draft Decree are burdensome and unnecessary and thus should be deleted from the Draft Decree.

When applying for a business registration certificate ("BRC") or an investment certificate ("IC") to provide IT consultancy services, the applicant must provide evidence and explanation to prove its experience and capability. Where the project is subject to appraisal procedures, the MIC itself, as the management authorities in the IT sector, must have reviewed and approved such explanation and evidence before the licensing authorities issue the BRC or the IC to enterprises.

We believe that very often the MIC involves in reviewing IC application dossier related to IT services because most of IT services covered under the Draft Decree might be classified as computer and related services or might contain service components that are inscribed in the WTO Services Schedule of Vietnam.

The addition of the licensing and registration requirements under the Draft Decree just creates additional burdensome administrative procedures, which does not necessarily ensure the quality of relevant IT services or investment. Rather, the requirements create double licensing effects that will make the investment environment in Vietnam less attractive. Such additional requirements are contrary to the administrative reform spirit of the Vietnamese Government. With such effect, it will be harder for Vietnam to realize its goals of becoming a nation strong in information technology.

Meanwhile, cross communications among authorities and implementation of e-government can be an alternative measure, which is less costly, less burdensome and more effective, for State agencies to monitor IT services businesses.

For all the above, we recommend remove Sections 1 & 3, Chapter IV and related provisions of the Draft Decree;

5. Removal of IT professional certificate requirement (Section 2, Chapter IV)

As mentioned above, before receiving a BRC or an IC from licensing authorities, an applicant must have provided evidence and explanation to persuade the authorities of its capability, including those on personnel, for the provision of the relevant IT services.

Further, from business perspective, to be successful in the market, the service supplier is self motivated to ensure the quality of its staff and its services.

Thus, the additional of this certification requirement does not necessary ensure the quality of IT services. Rather, it just creates an additional burdensome administrative procedure, which will be time consuming and costly for both enterprises and authorities. Again, the requirement is contrary to the administrative reform spirit of the Vietnamese Government.

For all the above, we recommend remove Section 2, Chapter IV and related provisions of the Draft Decree.

6. Other issues (Article 14.4) – Clarification of terms (Articles 12.1, 15 & 16)

If it is impossible to remove the licensing, registration or certification requirement as recommended above, please consider the following additional issues:

- IT professional certificate requirement (Articles 15 & 16)
 - Article 16.4(a) of the Draft Decree seems to imply that IT professional certificate is compulsorily required only for the provision of IT services to State agencies. If that is the case, please revise Article 15 accordingly for consistency.
 - Also, as the IT professional certificate will affect the transparency of government procurements in this sector, the conditions for granting an IT professional certificate must be concrete and transparent. As such, please clarify how a person's capability and experience can be treated as being "appropriate" with the consulting field, and how an international certificate can be treated as "appropriate".
- Term of license
 - The license for IT services business is valid for a maximum term of 5 years according to Article 14.4 of the Draft Decree. This term might be too short, which can be burdensome for both the authorities and enterprises in practice, particularly when the investment in certain IT services is huge. Please consider revising this provision so that there is no limitation of license terms and providing specific cases where a granted license can be withdrawn instead.
- Clarification of term
 - Article 12.1 refers to the services of renewing, recycling, and renovating hardware and electronic products at "industrial scale". Please define the term "industrial scale" to avoid discretionary interpretation in practice.
 - Article 17.2 requires that the IT services that incorporate a lot of specialized products must have a management code for each product. It is unclear how many products included in an IT service will be treated as "a lot". Thus, this needs to be clarified as

well.

7. BPO services coverage (Article 3.15)

Article 3.15 of the Draft Decree defines business process outsourcing (BPO) service as a service, in which the organizations and individual service providers perform one or many business processes for customers outside the territory of Vietnam via IT and telecommunications facilities.

We understand that this definition serve to classify which kind of BPO can enjoy incentives under Chapter III of the Draft Decree. It by no means prevents enterprises from providing business process outsourcing services to customers based in Vietnam. As such, please clarify this point directly in Article 3.15 or in Chapter II of the Draft Decree.



INFORMATION TECHNOLOGY SECTOR COMMITTEE
EUROPEAN CHAMBER OF COMMERCE IN VIETNAM

COMMENTS ON

Draft Decree on IT services (version No. 3.8)

Draft Decree	Explanation	Recommendations
General comments: Reviewing the latest IT Law Draft version No. 3.8, we note that some critical points, which received negative responses, have been deleted or revised. Particularly, regarding the conditions for provision of several IT services such as cloud computing, data base, which are subject to licenses, the draft has removed the requirement on location of server, engineering systems and related infrastructures in Vietnam. Therefore, the regulations become more practical and lessen the restrictions for IT foreign investors and in the future. The draft also deals with the concerns regarding compulsory qualifications for persons managing IT consultation by removing requirement of university degree and establishing a regime to recognize IT certificates issued by foreign/international organizations. In addition, the imposition on special consumption tax on IT services, which are provided to the local consumers by foreign IT service providers not through agents in Vietnam, has been removed.		
Article 14.4	The Article still stipulates license validity for some IT services, such as Cloud Computing for at most 5 years. This is not very welcoming also for customers of these services, if they might need to transfer their data from one Cloud Computing provider to the other every five years. Also, this is impractical and discouraging investment in this sector, which mostly requires great capital amount and long time to reimburse.	We recommend removing this limitation of term for such license.

Article 15	This Article still requires certificates for Consultants, of which, situations for foreigners remain unclear.	We request for further clarification.
Article 17.2	This Article still requires the Product Management Codes without further information. No examples about "a lot of special services" are mentioned.	We recommend deleting the requirement.
Article 19.2	This Article allows individuals, organizations directly retaining IT services from cross-border service providers to use in Vietnamese territory but requires paying VAT tax and other applicable taxes. On the other side, it provides that the cross-border providers of the IT services which are subject to license (according to Article 12 of this Decree) or registration requirement (under Article 17.1 of this Decree), MUST conduct business via their commercial branches in Vietnam or commercial agents in Vietnam. In other words, they are not allowed to provide their services directly to the customers in Vietnam. This is potentially contrary to Vietnam's WTO commitments, under which there is no restriction on cross-border services supply (as presented in our last position paper). Additionally, it is not clear whether the "IT services" that the local customers can obtain under Article 19.2 covers or excludes IT services subject to license and registration requirements under Article 19.3.	We recommend removing this restriction on cross-border supply to make the regulation consistent with WTO commitments.
Article 20.2		We welcome that with the privacy. More information to which privacy laws this relates to might be a plus.
Article 20.3:	Should that be stated in a law or isn't it something between the parties made in contract?	

Chapter V:		<p>We welcome that, but in terms of a free economy, we suggest to open Article 23.3 also for foreign companies (or at least in combination with domestic partners), so the best service can be chosen.</p> <p>Additionally, this encourages competition as the domestic companies want to offer similar services as the foreign ones, if only</p>
------------	--	---

SUMMARY OF THE MEETING ON THE DRAFT DECREE ON INFORMATION TECHNOLOGY SERVICES

- *Time:* 09:00 – 11:30, Friday, August 17, 2012
- *Venue:* Ministry of Planning and Investment, No. 65 Van Mieu Street, Hanoi
- *Participants:* See Appendix

I. AGENDA

- Overview of the Draft Decree on IT Services (“The Draft”) – Representative of Ministry of Information and Communication (“MIC”)
- Recommendations by Vietnam Business Forum - Working Group Representatives
- Responses from MIC
- Free discussion.

II. OVERVIEW OF DRAFT DECREE ON IT SERVICES

Mr. Nguyen Thanh Tuyen - Deputy Director of IT Department, Ministry of Information and Communication

1. Context

- The drafting of the Decree on IT services aims to recognize the legal position of IT services in Vietnam’s system of economic branches and install a transparent legal environment for the provision of IT services.
- The IT services sector does not have a specific legal framework and incentive policy, apart from general regulations provided in Law on Information Technology 2006, Decree No. 71/2007/ND-CP on detailing and guiding a number of articles of the Law on Information Technology.
- Businesses in the IT industry face difficulties right from the initial business registration stage. As the system of economic branches has not provided sufficient IT service sector specifications, businesses cannot accurately place revenues and reasonable expenses into accounting books when supplying services, leading to hardships in calculating and applying for tax incentives.
- IT services regulations should also provide a clear incentive mechanism to develop some categories of IT services. Currently, a few organizations take advantage of the lack of a clear IT services classification to apply for incentives as provided in the software area.
- Safety of digital information: This has recently become an increasingly complex issue. Many organizations face data security challenges due to the lack of regulations on supply and consumption of professional IT services.

2. Legal base

- + Law on Information Technology 2006 recognized a number of IT services and incentive policies
- + Law on High Technologies 2008 regulated IT as one of the four high-tech sectors prioritized for development
- + Article 13 and 14 of Corporate Income Tax Law 2008 provided tax incentives for the IT sector

- + Article 7.4 of Enterprise Law 2005 provided policy and petitions on the issuance of new business conditions in accordance with State governance requirements.

3. Development process

- The Draft Decree on IT services was in the 2009 working schedule of the Government and assigned to the MIC to compile. Accordingly, the Minister of Information and Communication issued Decision No. 1087 dated August 6, 2009 on the establishment of the drafting team for the Decree on IT Services.
- Through various channels, the MIC has collected recommendations from information and communication sector organizations and units and other parties directly affected by the regulation.
- The MIC has also consulted the Ministry of Justice (MOJ), Department of Administrative Procedure-Government Office and related ministerial agencies such as Ministry of Home Affairs, Ministry of Foreign Affairs, Ministry of Public Security and Vietnam Chamber of Commerce and Industry.
- The Drafting team is completing the final version to present to MIC leaders so it can soon be submitted to the Government.

4. Fundamental changes after consultation

- Classification of IT services

The Drafting team has simplified IT service categories to avoid the overlapping of services in other sectors such as telecoms, voice and television broadcasting, digital data, digital health services and electronic commerce. The list of IT services has been cut from 50 to 35.

- Incentive mechanism and policies for IT service development

The latest Draft has increased the IT services and groups of services eligible for incentives to 24 from just the service of software production in previous Draft versions.

- Management of some IT services

The Drafting team has recognized recommendations from businesses and only imposed State management on IT services that (i) highly impact on the environment, (ii) contain the risk of economic damage, (iii) possibly sequence unfair competition, affect customers' interests or (iv) infringe intellectual property rights.

The total number of services subject to management, registration and licensing has reduced from 25 to 11.

- Registration procedures have been simplified and the entire process can be conducted online. Enterprises can fill in templates and take full responsibility for the information provided.
- The requirement for locating the entire system and equipment for provision of a number of IT services such as data centers, cloud computing and data portals within Vietnamese territory has been removed to favor the development of IT services.

- The bachelor degree requirement in the licensing of IT consultation practising certificates has also been removed after examination.
- Provisions for managing cross-border IT services shall be amended so that foreign companies/organizations are allowed to supply cross-border services in Vietnam with the guarantee to fulfil tax duties and other related obligations under Vietnamese law.
- The special consumption tax on the direct purchase of IT services for use in the territory of Vietnam from any service provider that has not yet registered its rendering of services in Vietnam; and has not been through commercial branches in Vietnam or commercial intermediaries in Vietnam, has been removed.
- The Draft provided a number of provisions in relation to business cooperation between content service providers and telecom infrastructure providers. The Draft also presented some provisions to balance the benefits for all parties.
- The Draft also introduced policies to encourage State bodies to use companies' IT services. This is the foundation to surmount the inadequate self-supply and self-consumption of IT services in State agencies, while opening the market to businesses, especially domestic ones.

III. RECOMMENDATIONS BY REPRESENTATIVES OF VBF WORKING GROUPS

Mr. Enrico Schulaks - Vice Chairman, EuroCham Information Technology Sector Committee

- *Product management code:* Article 17 requires product management codes (PMC) for certain IT services. It is not yet aware of No industry standard code used for these services has been aware of due to the dynamic nature of the services providers. Furthermore, the PMC requirement may escalate autocracy. This requirement should be abolished.
- *Management of trans-border IT services:* Article 19 allows individuals, organizations directly purchasing IT services from cross-border services providers to use in Vietnamese territory, but requires the payment of VAT and other applicable taxes.

On the other side, the Article provides that cross-border providers of IT services which are subject to licencing according to Article 12 of this Decree or registration requirements under Article 17.1 of this Decree, must conduct their businesses via their commercial branches or intermediates in Vietnam. In other words, they are not allowed to supply the service directly to the customers in Vietnam. This violates Vietnam's World Trade Organization (WTO) service commitments, which provide that Vietnam does not make any market access restrictions to the cross-border supply of computer and related services (CPC 841-845 and CPC 849) and online information data processing including transaction-processing services (CPC 843).

Meanwhile, Article 19.3 of the latest draft Decree provides that for some certain IT services, overseas cross-border suppliers must supply IT services via commercial branches or commercial intermediaries in Vietnam. For example, (i) IT services subject to licensing requirements such as large-scale data center services and cloud computing services, or (ii) IT services subject to registration requirements such as digitalisation of text documents, publishing/distributing software products, distributing IT security products or web search portal services.

Almost all of these services can be classified under the group of IT services that Vietnam grants market access under Vietnam's WTO service commitment and online information data processing including transaction processing services under CPC 843. For example, cloud computing services and search portal services can be classified under subgroup CPC 84390 (other data processing services) and CPC 849 (other computing services).

Article XVI of GATS requests each member to treat any other WTO member's services and service suppliers no less favorably than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.

- *Supply of IT services to State agencies*

Provisions in Chapter 5 of the Draft are positive, but in terms of a free economy, Article 22.3 could be opened for foreign companies or at least in combination with domestic partners so the best services can be chosen.

In addition, this encourages competition as domestic companies might be forced to improve their services if they realize foreign companies could be chosen.

Ms. Nguyen Thi Thu Thuy – Lawyer, Baker & McKenzie

- Is it correct to say that the supply of cross-border services through commercial branches or intermediaries is no longer compulsory, but there is the requirement to comply with taxation regulations?

Response by Mr. Nguyen Thanh Tuyen - Deputy Director of IT Department, MIC

- Article 19.3: The MIC does not intend to limit foreign services providers in Vietnam in favor of domestic ones, but to ensure that cross-border services providers shall fulfill tax, fees, charges and related duties arising out of revenue generated in Vietnam. However, after receiving comments from the business community, the Drafting team is reviewing and amending this provision towards the allowance for cross-border service providers to either provide their services directly or indirectly via commercial branches or intermediaries in Vietnam if these providers fulfill the requirements for licenses or registration in accordance with laws in case of direct provision of services or through commercial branches/intermediaries in case of indirect provision of services.

Ms. Nguyen Thi Thu Thuy – Lawyer, Baker & McKenzie

- The allowance of direct supply of cross-border services while requiring registration as prescribed in other chapters, conflicts with the regulation that enterprises must be established in Vietnam in order to be registered/licensed.
- The indirect supply of cross-border services through commercial branches or intermediaries: According to GATS, "any type of business or professional establishment, including through the creation or maintenance of a branch or a representative office" constitutes "commercial presence". As such, Article 19.3 de-facto prohibits the cross-border supply of relevant IT services.
- Cross-border IT services (Article 19.1 and 19.2)

“Trans-border IT service provider shall pay the value added tax (“VAT”), corporate income tax, and other taxes as stipulated in law on taxation and other documentations regarding revenues generated in Vietnam”. Under the current law on taxation regulated tax duties of the supply of cross-border services in Vietnam, the local party shall fulfil tax duties on behalf of the foreign entity. Article 19.1 should be amended to only refer to the current provisions of Vietnamese laws and regulations on tax.

Article 19.2, especially, regulated that organizations and individuals directly purchasing IT services for use in Vietnam from trans-border IT service providers, that have not been through commercial branches in Vietnam or commercial intermediaries in Vietnam, must carry VAT and other taxes as stipulated in law on VAT and other documentation regarding the purchasing and use of these IT services. This regulation is interpreted as a penalty to individuals and organizations directly purchasing IT services from foreign IT service providers instead of purchasing from commercial branches or intermediaries. Accordingly, this regulation is inefficient and should be removed. Instead, a provision referring to the current law on taxation in Vietnam, mentioned above, is recommended.

- Regulations on registering and licensing (Section 1 and Section 3, Chapter IV)

Improved cross communications among authorities and implementation of e-government can be alternative measures to achieve cost saving and efficiency targets.

An additional option is to combine the process for licensing or registration of IT services provision with the process for business registration certificates (“BRC”) or investment certificates (“IC”). In other words, when applying for a BRC or IC to provide IT consultancy services, the applicant must provide evidence and an explanation to prove its experience and capability. Where the project is subject to appraisal procedures, the MIC itself as the management authorities in the IT sector, shall review and approve such an explanation and evidence before the licensing authorities issue the BRC or IC to enterprises.

Improving post-examination is one of the alternatives which can bring identical effect expected by this Decree. As opposed to the requirement of registration or licensing, the provisions of conditions to enhance post-examination is suggested together with the imposition of penalties if enterprises fail to abide by these terms.

- IT professional certificate requirements

As mentioned above, before receiving a BRC or IC from licensing authorities, an applicant must have provided evidence and an explanation to persuade the authorities of its capability and personnel, for the provision of relevant IT services. Furthermore, from a business perspective, to be successful in the market, the service supplier is self-motivated to ensure the quality of its staff and services. Hence, Section 2, Chapter IV and related provisions of the Draft Decree should be abolished.

Article 16.4(a) of the Draft seems to imply that an IT professional certificate is only compulsory for the provision of IT services to State agencies. This point needs to be clarified throughout the Draft to ensure consistency.

Also, as the IT professional certificate will affect the transparency of government procurement in this sector, the conditions for granting an IT professional certificate must be concrete and transparent. As such, please clarify how a person’s capability

and experience can be treated as being “appropriate” with the consulting field and how an international certificate can be treated as “appropriate”.

- Term of license (Article 14.4)

The Article should be re-considered so that there is no limitation on license terms and provide for specific cases where a granted license can be instead withdrawn.

- Clarification of terms

Article 12.1 refers to the services of renewing, recycling and renovating hardware and electronic products at “industrial scale”. Please define the term “industrial scale” to avoid discretionary interpretation in practice.

Article 17.2 requires that the IT services that incorporate “a lot” of specialized products must have a management code for each product. It is unclear how many products included in an IT service will be treated as “a lot”. Thus, this needs to be clarified as well.

- Business process outsourcing service (BPO)

In Article 3.15, a BPO service is a service in which the organization and individual service providers perform one or many business processes for customers outside the territory of Vietnam via IT and telecommunications facilities. This definition should only be aimed at redefining IT services eligible for incentives. It by no means implies that BPO service providers only provide services to customers outside Vietnam, but not domestic ones.

Mr. Nguyen Vinh Ban – Lawyer, DNAS Lawyers

- IT professional certificate (Article 15)

Detail on consultation head that clarifies their job as one or numerous projects or they are responsible for IT issues in an organization since the definition in the Decree remains broad.

- Extension and re-issuance of license (Article 14)

A clear regulation on the number of instances that a license can be extended has been omitted. It remains unclear whether the extension is unlimited or businesses have to re-prepare a new dossier for an extension application. It is suggested that businesses can extend a license as often as they are able without a new application as long as they abide by regulations.

IV. RESPONSES FROM MIC

Responses by Mr. Nguyen Thanh Tuyen – Deputy Director of IT Department, MIC

- Registration and licensing of IT consultation practising certificates: This regulation concerns IT services affecting the environment, economy and society. The spirit of administrative reform should not be rigidly interpreted by numbers. Instead, the process of simplifying and making them transparent is key. The previous Draft required

a hard copy for the registration process, including a plan of service supply, area of supply, target market, commercial viability and effectiveness, service quality guarantee, customers' benefits, information on capacity, assets, finances of enterprises and technical equipment for the supply of services.

- After receiving comments from relevant parties, the Drafting team has amended the Draft to allow organizations to register IT services online. The application dossier is simple with standard templates with the following information to be filled in: name of organization, commercial address, legal representative, telephone, email address, taxation code, business registration certificate or investment certificate or establishment decision of organizations, IT services for supply, financial status, personnel, service quality guarantee and responsibility for information provided. The Draft also devolves registration/licensing procedures to MIC authorized agencies.
- Recommendation to merge the process of registering IT services with the BRC or IC process: The drafting team will examine this, as when enterprises register IT services following the current regulations, Departments of Planning and Investment will transfer application dossiers to the MIC for consultation to speed-up the process.
- Recommendation to remove the IT professional certificate: The IT consultancy service highly impacts on the quality of products. The State also mandates licenses to some specific consultancy services to control quality and workability such as in construction design, accounting, auditing, construction supervision, or licences for radiation workers.

IT consultation services customers are not just Government bodies, but also private organizations and individuals. Article 16.4.a, therefore, will be amended to individuals granted an IT consultation practising licence are qualified to consult on IT for Government bodies, organizations, and individuals within the domain licensed.

- Product management codes of IT services are those corresponding with certain IT services in order to support State agencies in product management, settlement of violations and disputes of intellectual property rights. The Decree stops at a framework for IT service codes and specific guidelines will be provided in Circulars guiding the Decree. Product management codes for IT services will be segmented into three sections: Section I concerns two codes in relation to Group services, Section II regards codes for businesses providing services and Section III covers product codes.
- Managing cross-border IT services: The purpose of Article 19 is by no means to restrict market access and not against Vietnam's international commitments such as GATS. Clause 3 of the Article now regulates cross-border IT services must be provided through commercial branches or intermediates in Vietnam. The drafting team is considering the direct supply or indirect supply through commercial branches/intermediates complying with related tax duties. Licensing conditions will be reviewed and amended for foreign enterprises to register or to be licensed properly in accordance with the Enterprise Law and related regulations.
- Article 19.1 "Trans-border IT service providers shall pay value added tax ("VAT"), corporate income tax and other taxes as stipulated in law on taxation and other documentation regarding revenues generated in Vietnam" will be adjusted to "Any revenue generated in Vietnam from cross-border IT service shall be subject to fees and charges, and taxes in accordance with regulations on value added tax ("VAT"), corporate

income tax, and other taxes, regulations on fees and charges and other related documents”.

- Comments on Article 19.2: Taxation is an obligation according to current regulations, specifically in Circular 60/2012/TT-BTC dated April 12, 2012 guiding the execution of a tax liability applicable to foreign organizations and individuals doing business or earning incomes in Vietnam.
- Suggestion to allow foreign companies to provide IT consultancy services to State agencies: Vietnam is not involved in the WTO Government Procurement Agreement. The Bidding Law clearly regulates that bidding of a service is widely opened only when no domestic company is able to provide such services. This Decree with open provisions, nevertheless, does permit foreign organizations to provide IT services which domestic organizations are not able to.
- License validity: IT is a fast developing sector with ever changing technology. The long license duration may cause five-year registered services improper. Therefore, services in relation to information and communications technology, telecommunications and digital signature certification have the licensing duration of five years. The extension duration then is one extra year for enterprises to re-register if they still wish to continue their businesses.
- The head of consultancy is the one responsible for consultancy quality, which has extreme impacts on the consultancy product. It raises the requirement of a proper certificate and head of consultancy experience to ensure his/her management skills. This regulation is not new and has been around in some legal documents such as Decree 102/2009/ND-CP detailing the management of investment and application of information technology projects using State budget funds.
- The range of some terminologies such as “large-scale data center”: The Ministry of Science & Technology has issued the data standard package TCVN: 9250/2012. This standard is correlative with the standard TIA 942. The Draft, therefore, was amended to require licensing to data center level 2 and above according to TCVN: 9250.

V. FREE DISCUSSION

Mr. Seck Yee Chung – Lawyer, Baker & McKenzie

- By requiring registrations after the IC process, the question is does that mean all investors and IT companies cannot perform the services without permit from the MIC. From a technical and legal point of view, can clarity be provided on this?
- It is noticeable that an online system with a standard template is being considered to be applied when registering IT services. The question is whether this IT system can be used for the application process of investment certificates?
- Practising certificates for IT personnel: Companies that are highly compliant struggle as to whether or not they should bring in employees even though they have a work permit. The question is, can such IT personnel be employed in Vietnam and perform and work before this practising certificate is issued?

Response by Mr. Quach Ngoc Tuan - Deputy Director of Legal Department, MPI

- Investment procedure: The MPI is planning to amend the Investment Law to reduce the length of application appraisal, split procedures for business registration and investment certification, in a bid to simplify these processes.
- Online registration: Circular 14 on business registration is being amended and this new model will be piloted for some domestic enterprises.
- Merging the licencing of providing some IT services into the business registration procedure: The MPI will continue to collaborate with the MIC to produce solutions for saving time and transparent procedures.

Response by Mr. Nguyen Thanh Tuyen - Deputy Director of IT Department, MIC

- Enterprises with an investment certificate, but have not registered to provide IT services as required: Article 28 of this Draft regulated that "Organizations, companies having involved in conditional businesses of IT services provided herein before the effective date of this Decree are allowed to continue operations, yet they shall ensure conditions for rendering the services as stipulated within 270 (two hundred seventy) days as of the effective date of this Decree".
- Duration of licensing, registration and professional practising certification (to valid application): 35 days to the licensing of providing IT services, 30 days to IT consultation certification and five days to the registration of providing IT services.
- Foreign employees holding work permits, but without issued IT consultation practising certificates: The law applies to everyone. Therefore, foreign employees shall comply with regulations of Vietnamese Law if they wish to work in this sector. To be able to simplify the procedure, the concept of merging the issuance of practising certificates, work permits and business registration procedures will be considered.
- Information safety: The development of Law on Digital Information Safety is in progress.

Mr. Mark Tappin – Chairman, Asian Corporate Solutions

- As Vietnam, as a market, becomes more complex, the introduction of very sophisticated technologies should help Government and private enterprises improve their operation. Regarding the numbers of occasions when experts are needed for one or two days to provide niche expertise to help customers or Government groups observe the technology, and improve and deliver better solutions to the country, should foreign consultants be required to have a practising certificate to provide such services?
- According to experiences in many countries, such as the US UK and India, none require similar professional certificates. The UK has a concept of professional membership and organizations, but no similar process. How does Vietnam expect to manage certificate quality?

Response by Mr. Nguyen Thanh Tuyen - Deputy Director of IT Department, MIC

- Short-term professionals: Proper regulations on professionals coming to work in Vietnam in the sector for within 30 days will be considered in the Circular detailing professional practising certification.

Mr. Huynh Dai Thang - Lawyer, DFDL Mekong

- Online registration for licensing from MIC: The online registration procedure is not always effective. Examination of the effectiveness of this system, therefore, is required for appropriate solutions.
- When foreign-invested companies with investment certificates apply for licenses following regulations in this Decree, the MIC sometimes does not issue them due to the applications' invalidity. How is this situation being tackled?

Response by Mr. Nguyen Thanh Tuyen - Deputy Director of IT Department, MIC

- Enterprises with investment certificates that do not abide by requirements in the Decree, in the period of 270 days shall either complete the requirements or stop operations.

Mr. Huynh Kim Tuoc - Planning and Development Manager, Facebook Vietnam

- Would advertising agencies be considered as IT service providers according to regulations in the Decree?
- In case of Yahoo, Google and Facebook, are the advertisements on these sites subject to this Decree?

Response by Mr. Nguyen Thanh Tuyen, Deputy Director of IT Department, MIC

- According to Article 5.6.d, it classifies the leasing of locations and sale of networking spaces for advertising as IT services, not advertising services. The contents of advertisements are not subject to this Decree.
- The advertisement contents on Yahoo, Google, and Facebook are not subject to this Decree.

Mr. Dang Thanh Son - Lawyer, Baker & McKenzie

- Cloud computing: The Draft does mention cloud computing which, however, is actually a technology, not a service. When a Vietnamese party uses the services of a provider having infrastructure in Vietnam, this party is attached to the service contract, while the application of cloud computing or other technologies to store data is upon the party. In this case, requiring enterprises exploiting cloud computing to face compulsory registration is illogical.

Response by Mr. Nguyen Thanh Tuyen - Deputy Director of IT Department, MIC

- Enterprises utilize cloud computing to supply IT services: Article 3.1 defines IT services as a commercial activity. Only commercial activities having the nature of rendering commercial services and generating revenue shall be subject to this Decree.

Ms. Nguyen Thi Thu Thuy - Lawyer, Baker & McKenzie

- Will the VBF continue to provide comments on this Draft Decree?
- What is the schedule for issuing the Draft?

Response by Mr. Nguyen Thanh Tuyen - Deputy Director of IT Department, MIC

- The final Draft will be completed in August, 2012 for submission to the leader of the MIC and comments are still welcomed.

Appendix - Participant List

<i>Sgt.</i>	<i>Full-name</i>	<i>Title</i>	<i>Org</i>
Ministry of Information and Communication			
	Mr. Nguyen Thanh Tuyen	Deputy Director	Information Technology Department
	Mr. Nguyen Tien Hung	Officer	Information Technology Department
	Mr. Nguyen Duc Toan	Officer	Information Technology Department
Ministry of Planning and Investment			
	Mr. Quach Ngoc Tuan	Deputy Director	Legal Department
	Ms. Nguyen Thi Nguyet Anh	Deputy Head of Policy Department	Foreign Investment Agency
	Ms. Hoang Thanh Tam	Officer	Foreign Investment Agency
	Mr. Ho Quoc Anh	Officer	Foreign Investment Agency
	Ms. Ngo Thi Huong Lan	Officer	Legal Department
	Mr. Nguyen Duc Trung	Officer	Service Economy Department
	Ms. Le Nhu Ngoc	Officer	Investment Promotion Centre of the North
	Mr. Vu Manh Thang	Officer	Investment Promotion Centre of the North
	Mr. Van Duc Phu	Officer	Investment Promotion Centre of the North
Vietnam Business Forum			
1	Mr. Enrico Schulaks	Vice Chairman	EuroCham Information Technology Sector Committee
2	Mr. Jean-Jacques Bouflet	Minister Counsellor - Head of Section	Economics & Trade Section, EU Delegation
3	Mr. Le Ky Anh	Economic and Trade Officer	Economics & Trade Section, EU Delegation
4	Ms. Sarah E. Kemp	Commercial Counselor	U.S. Embassy Hanoi
5	Ms. Mary Beth Turner	Deputy Chief of the Economics Section	U.S. Embassy Hanoi
6	Ms. Nguyen Khanh Cam Chau	Economic Assistant	U.S. Embassy Hanoi

7	Ms. Nguyen Hoai Phuong	Executive Assistant	US-ASEAN Business Council
8	Mr. Mike Orgill	Country Lead	Google
10	Mr. Huynh Kim Tuoc	Growth Manager	Facebook
11	Ms. Nhi Le		Microsoft
12	Mr. Nguyen Viet Ha	Lawyer	Frasers Law Company
14	Mr. Seck Yee Chung	Lawyer	Baker & McKenzie Ltd.
15	Mr. Dang Thanh Son	Lawyer	Baker & McKenzie Ltd.
16	Mrs. Nguyen Thi Thu Thuy	Lawyer	Baker & McKenzie Ltd.
17	Mr. Michitaka Yoshida	Deputy General Manager	BTMU Hanoi Branch
18	Mr. Tran Trung Hieu	Officer of EDP Department	BTMU Hanoi Branch
20	Ms. Nguyen Thi Mai Thom	Attorney-at-Law	Tilleke & Gibbins
21	Ms. Nguyen Thi Thuy Dung	Lawyer	Tilleke & Gibbins
22	Ms. Vu Van Anh	Government Relations	Ericsson Vietnam
23	Ms. Nguyen Bich Hang	Chief Representative in Hanoi	RJB Consultants Ltd
24	Ms. Nguyen Thanh Lan	Legal Manager	Vietnamobile Communications Center
25	Ms. Hoang Thi Bich Ngoc	Lawyer	Russin & Vecchi
27	Mr. GOH Seow Hiong	Government Affairs	Cisco Systems (USA) Pte. Ltd.
29	Ms. Dinh Thi Thanh Huyen	Country Governmental Relations & Legal Counsel	Hewlett - Packard Vietnam Limited
30	Mr. Bui Quang Huy	External Relations Manager	CitiBank
32	Mr. Brendan Green	Head of IT & Transformation	ANZ
33	Mr Nguyen Vinh Ban	Partner	DNAS Lawyers
34	Mr. Doan Hong Son	Managing Partner	IPMAX Law Firm
36	Mr. Dao Anh Tuan	Representative	BSA Vietnam
37	Ms. Phuong Vo	Chief Representative	Vriens & Partners
38	Mr. Mark Tappin	IT Professional	Asian Corporate Solutions
39	Ms. Nguyen Hoang Yen	Manager	TMF Vietnam Company Limited
40	Mr. Thang Nguyen	Managing Director	Bay Global Strategies
41	Mr. Hoang Minh Duc	Lawyer	Duane Morris Vietnam
42	Ms. Vu Thu Phuong	Trainee Lawyer	Duane Morris Vietnam
43	Ms. Nguyen Thi Bich Uyen	Government Relations	Yahoo
44	Ms. Ta Thanh Hoa	Officer	VCCI
45	Mr. Huynh Dai Thang	Lawyer	DFDL Mekong
46	Ms. Pham Nguyen Linh	Lawyer	DFDL Mekong

Port & Shipping

PORT REPORT

*Prepared by
Mr. Peter Smidt-Nielsen
Port Sub-group*

It is my pleasure to have the opportunity to address key Vietnamese government officials and business leaders in this important forum. Today I represent the views of the Port & Shipping working group, which consists of very large shipping lines and port operators, who all have considerable interest in supporting the sustained economic growth across Vietnam. We believe that Vietnam's exports are possibly the single most important element of the country's overall economic development. As we all know, there are some relatively dark clouds in the immediate horizon for Vietnamese exports and ports, and a number of actions that can and must be taken to ensure continued and improved competitiveness within in the region, to the benefit of Vietnamese exporters and importers as well as shipping lines and port operators.

We would like to highlight the following areas of concerns/suggestions for your attention, all of which we believe could assist the further growth of Vietnamese exports if given timely and sufficient attention by relevant authorities:

1. A glut of container Terminal Capacity in the greater Ho Chi Minh City area

In 2009, after years of serious capacity constraints where importers and exporters suffered from congestion in and around the various city ports, the new deep sea ports in Cai Mep – Thi Vai began to open up. Leading up to that many companies, mostly foreign invested, had been issued investment licences and started building their respective ports. Unfortunately, little coordination had been done between relevant authorities which led to a free for all situation where additional port licences were issued whilst little attention was paid to the vast amount of capacity being build and released into the market within a too short period of time.

The current and previous Port Master Plans called for the relocation of a number of older city ports to the Cai Mep – Thi Vai area; a process that had started with the building of many new state-of-art deep sea facilities yet the old ports in the greater city area are still left operating with no definitive plan in place to close down. This too has contributed to the significant over capacity.

With capacity now at twice the size of the market, and with more new terminals under construction it will take the industry between 8-12 years to recover and become profitable. Many terminal operators are thus at the brink of bankruptcy, and with the Vietnamese Government as main shareholders in many of the ventures the exposure to the National state budget is significant.

We therefore hope the relevant Vietnamese authorities will address the situation with appropriate measures and urgency. We would like to offer our active support and involvement should the Government so wish; in the meantime we have for the purpose of

this session put together a short list of suggestions which we believe will be effective, some of which would be quite in line with Government plans and policies:

Suggested measures to address the severe over-capacity situation:

- With immediate effect stop all new licencing of inner-city container port projects.
- Follow through on earlier and current Port Master Plans which call for the closing of select container port facilities along Saigon River (Saigon Port's Nha Rong and Khanh Hoi terminals, Tan Thuan Dong Port and Vegeport).
- Restrict the ongoing expansion of current inner-city port facilities.
- Delay the planned opening of the MoTr-owned Cai Mep ODA container port until the market has stabilized and additional capacity is required.

Longer term measures:

- Through effective regulation gradually reduce the operating capacity of inner-city port terminals including ports located along the lower part of Dong Nai river; this will also benefit the traffic situation in and around the greater HCMC area and help curb the ever growing pollution from trucks and other heavy vehicles.
- Over a reasonable phase-in period assign the best performing inner-city terminals to cater to domestic and short-sea regional trade lanes only whereas new and better equipped deep-sea terminals in Cai Mep – Thi Vai must be assigned to handle long haul international markets such as Transpacific, Europe, Middle East and Austral-Asia plus international transshipment cargo to/from other Vietnamese ports

We believe only resolute action from the authorities will have the required effect; should proper policies and regulation not be invoked we are afraid that the commercial and financial health of the container terminal industry in South Vietnam will suffer for many more years to come.

2. Transshipment of full and empty containers between Vietnamese ports by foreign shipping lines

As of January 1st 2013 Vietnam will no longer give foreign shipping lines access to load their own full containers in one Vietnamese port and transship it to another vessel in another Vietnamese port. Also, as per our understanding, foreign shipping lines will as of the same date no longer be allowed to position empty containers between Vietnamese ports.

These measures have been taken to protect the local Vietnamese container shipping industry, but as we have previously pointed out in this forum and elsewhere, we are convinced that rather than adding revenue to Vietnamese ship owners, the new regulation will force most international shipping lines to move their transshipment operation to regional hubs outside Vietnam as will the positioning of empty containers. The reason for these by us expected consequences is irregular shipping schedules and uncompetitive pricing by the local Vietnamese shipping lines.

The consequence will thus be that Vietnamese ports will miss income they could have had, and costs for international shipping will increase, which in the end will be billed to the Vietnamese exporter and importer and increase their costs and make their products less competitive. This is obviously a very unattractive scenario for all parties and not in line with the reasoning for making these regulations and we respectfully urge the Ministry of Transport to review the decision.

3. Uncompetitive high port dues in Vietnamese ports

As we have also pointed out previously, we would again like to voice our concerns about the very high and uncompetitive level of port dues in Vietnamese ports. The current port dues tariff makes it prohibitively expensive for **large container vessels** to call Vietnamese ports in Cai Mep – Thi Vai due to the limited cargo volumes currently generated; therefore, and until the market is at a scale where the volumes are significantly higher, the Vietnamese authorities would, by reducing the port dues, assist making Vietnam more attractive to call with large sized mother vessels.

Similarly, by reducing the port dues for **smaller sized container vessels** (typically called feeder vessels) Vietnam would create an environment where both local Vietnamese but also regional transshipment would be more attractive to the operators of feeder vessels.

As per the comparisons previously provided to the MOT, Vietnam is overall significantly more costly for shippinglines to service. We firmly believe a full review and subsequent adjustment of the current port dues will assist harmonizing the costs with other comparable ASEAN countries and help Vietnam attract more shipping activity, and thus also promote a further reduction of the overall logistics cost applicable to local vietnamese exporters and importers , which is also something which foreign investors are typically considering very carefully when analyzing cost of setting up local manufacturing.

We hope you will consider our recommendations as part of assisting the shipping and ports industry in servicing Vietnam better and more competitively, which again would benefit the Vietnamese importer and exporter, and we would like to stress our hope for and willingness to have a close and constructive dialogue on the matters raised.

Section V

REPORT FROM OTHER WORKING GROUP

Education

EDUCATION POSITION PAPER

*Prepared by
VBF Education and Training Working Group
Mr. Khalid Muhmood MBE, Co-head
Mr. Brian O'Reilly, Co-head
Mr. Junichi Mori, Member*

Introduction

Honourable Ministers, Ambassadors, Consuls, Ladies and Gentlemen, on behalf of the members of the Education and Training Working Group we would like to thank the Vietnamese Government for facilitating this integral and ongoing dialogue with the VBF. We, as in the past, welcome the opportunity to contribute at this forum.

The education and training business community is proud of its contribution to Vietnam's economic development and through this forum would like to encourage new initiatives to further increase growth in the Vietnamese economy. In the present economic climate there are a number of issues, relating to other industrial sectors that need urgent attention. However, the foundation of long term economic success is a robust education system covering all aspects of education.

As we have stated in previous submissions, our Working Group, representing many Chambers of Commerce, is prepared to work closely with MOET, MOLISA and other Government agencies such as the ACAPR. We would also like to liaise closely with educational institutions in addition to the World Bank and Intel who have a substantial interest in this area.

One of the hot topics at the sessions of National Assembly is the provision of high quality Higher Education in Vietnam. There are many reasons for the current situation as well as proposed solutions, however, in this VBF Forum, the Education and Training Working Group would like to focus on the following two sectors:

- 1. Higher Education;*
- 2. Technical and Vocational Education and Training*

1. Higher Education

Within the higher education sector we wish to work much closer with the Ministry of Education and Training in the implementation of the new education law that has recently been approved by the National Assembly.

The spirit of the law is meant to provide non state Vietnamese and Foreign higher education institutions with more autonomy but it will be in the implementation of the law that we can see what happens in practice.

We also note that establishing a branch of a higher education establishment remains a cumbersome process but we hope we a healthy dialogue with the Ministry of Education and Training as well as other Government organisations we can report positive developments by the next forum.

2. Technical and Vocational Education and Training

While higher education is needed to improve research and development capacity in Vietnam, technical and vocational education and training (TVET) is also important as the supply source of production engineers and technicians. They are the one who operationalizes ideas and designs developed by engineers, product designers or managers. Despite various policies issues by the Government to strengthen vocational education and training, we have still seen the gaps between demand and supply of highly skilled production engineers of technicians. In particular, we are concerned of two issues which may even widen the demand-and-supply gap: (i) insufficient quality of TVET programs; and (ii) unpopularity of TVET programs among young people.

It seems that many enterprises are not satisfied with the quality of graduates from TVET institutions. TVET institutions should seriously analyze basic skills required in enterprises and improve their training programs, in order to supply human resources who meet industry demand. For this, it is suggested that the responsible government agencies, such as the General Department of Vocational Training (GDVT) under MOLISA, should improve the policies to encourage TVET institutions to actively develop partnerships with industry.

To close the gap in providing up-to-date skills, TVET institutions would need to develop various forms of partnerships with industry such as: (i) periodic survey or dialogue to learn industry needs; (ii) internships which provides students with opportunity to improve their practical skills and business manners and enterprises with opportunity to identify suitable candidates; (iii) short-term training courses for students in collaboration with enterprises; (iv) short-term training courses for technicians in enterprises; and (iv) joint research for applied technology in production sites.

For developing the effective policies to promote partnerships between TVET institutions and industry, we propose the Government to carefully study industry's perception on TVET programs and good practices which some TVET institutions and enterprises have already started. The Higher Engineering Education Alliance Program (HEEAP) brings together government, academia, and industry to modernize Vietnamese public higher education in engineering with an overarching goal is transforming engineering education from passive, purely theory-based instruction to active, applied and theory-based instruction and learning.

^{1,2} Please also refer to Figure 1 below.

¹ Please refer to the Higher Engineering Education Alliance Program (HEEAP). Available in: <http://www.heeap.org/>

Another concern is that TVET programs remain unpopular among young people and their parents. By not attracting enough applicants, TVET institutions will not be able to supply sufficient volume of skilled technicians, even if they try to improve training programs. Unpopularity of TVET programs stems from low status of technicians in the Vietnamese society and unsure career paths of TVET graduates.

In order to attract more young students to TVET programs, the Government would need to organize more public relations activities to improve the social status of skilled technicians. They should also urge TVET institutions to actively build cooperation with high schools. In addition, the Government should push forward the improvement of skill evaluation system, in the way to gain sufficient recognition from industry. Moreover, it is recommended that the Government should support TVET institutions to improve the employment support system, in order to ensure students get appropriate jobs after the training. To begin with, TVET institutions should grasp job hunting results of their students precisely. Then, they may need to introduce career counselling system for their students. Finally, it is suggested that the Government should further improve the paths so that qualified vocational college graduates can transfer to university courses³. This would have already been implemented in several universities, but, if more universities will open the path for transfer from vocational college graduates, more high school graduates would consider TVET programs as an option.

In summary, we want to emphasize the necessity to improve TVET programs by promoting close partnerships with industry and cope with unpopularity of TVET programs among young people, in order to reduce the imbalance between demand and supply of skilled technicians. We believe that business communities such as foreign and local chambers of commerce will support the initiatives by the Government and TVET institutions, if they will seriously commit to tackle those issues in full cooperation with industry. At first, the VBF would be willing to help the Government and TVET institutions understand industry needs on skill development in its members"

Conclusion

The Vietnamese economy needs continued growth and this will be of benefit to the citizens of Vietnam. Quality education lays the foundation the continued growth of its skilled workforce. As mentioned in our introduction this would require the combined efforts of relevant stakeholders working closely together to find effective solutions. The Education and Training Working Group, through the VBF, will continue with its commitment to assist Vietnam in achieving its economic potential.

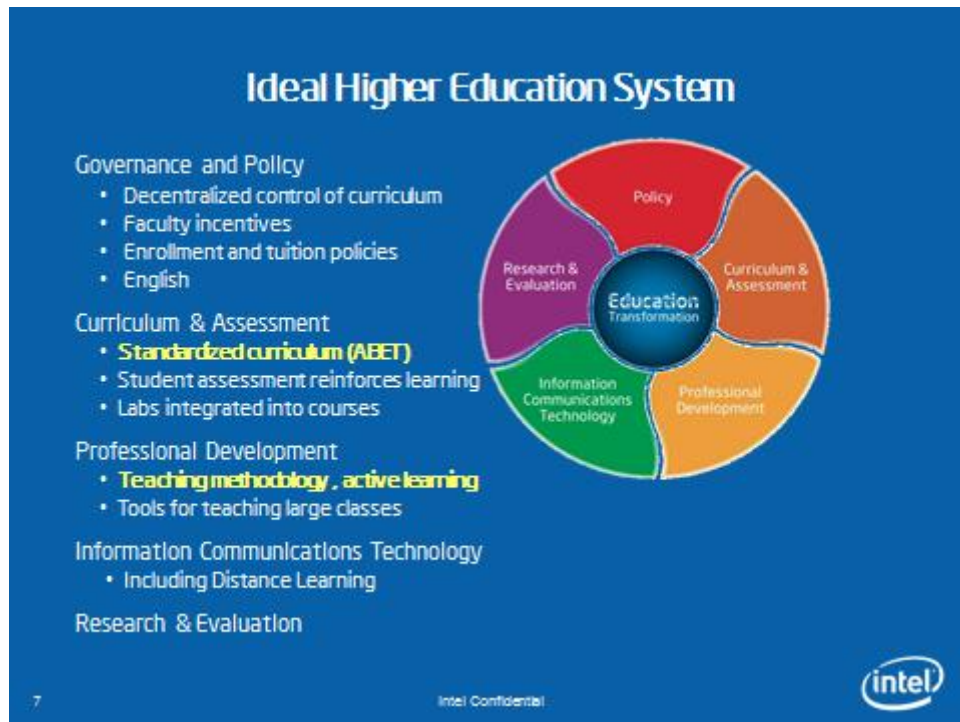
² For further information about industry's perception of TVET graduates and good practices of TVET institutions in Vietnam, please refer to the following documents:

- Mori, J (2012). "Development of High Skilled Industrial Human Resources in Partnerships with Enterprises". Presentation made in the seminar organized by the Ministry of Industry and Trade and UNIDO on 16 July 2012. Hanoi, Vietnam. Available in: <http://haui.edu.vn/en/page/jicapproject/news/publication>
- Mori, J., Nguyen, T.X.T., Pham, T.H. (2009). "Skill Development for Vietnam's Industrialization: Promotion of Technology Transfer by Partnership between TVET Institutions and FDI Enterprises". *The final report to Hiroshima University's COE project entitled "Research on Cooperation in the Field of Skill Development Education and Economic Development"*. Hiroshima, Japan: Hiroshima University. Available from: http://www.grips.ac.jp/vietnam/VDFTokyo/Doc/Mori_SkillsDevVN.pdf
- Mori, J., Vu, D.T., Do, N.H., Vu., T.K., Duong., T.M. (2012). "Survey Report on Industry's Perception of the Graduates of Hanoi University of Industry's Training and Educational Programs". Hanoi, Vietnam: HaUI-JICA Project. Available from: <http://haui.edu.vn/en/page/jicapproject/news/publication>

³ Refer to: Joint Circular No. 27/2010/TTLT-BGDDT dated 28 October 2010 issued by the Ministry of Education and Training and the Ministry of Labor, Invalids and Social Affairs.

We look forward to seeing progress in the above areas and again would like to thank the VBF for inviting us to present at this forum.

Figure 1



Automotive

POSITION PAPER OF AUTOMOTIVE WORKING GROUP

*Prepared by
Automotive Working Group*

I. GENERAL OVERVIEW OF THE VIETNAM'S AUTOMOTIVE INDUSTRY

Automotive industry - Introduction

The automotive industry is usually considered a symbol of the progress and development of a nation. In addition to providing and supporting the means of transportation for the citizens, the automotive sector plays a vital role in the enhancement of efficiencies of overall supply chain and growth in business and commerce.

Automotive industry's contribution to Vietnam's GDP

Automotive industry consists of a multi-tiered business model consisting of suppliers, manufacturers, and dealers. This combined multi-tiered automotive business model adds up to contribute at significant levels to the GDP of a country. Different estimates have indicated this contribution at Vietnam to range from **3-5%**. This is small when compared to the adjoining countries i.e. Thailand where the automotive industry has a strategic relevance to trade and export growth and is estimated at contributing approx. 10% of the manufacturing GDP. However, the auto industry's importance to Vietnam should not be underestimated.

Although Vietnam contributed to only 3% of ASEAN production and 4% of ASEAN sales in 2011, the potential of Vietnam is high and if adequately leveraged the industry can contribute more actively and significantly to the development and growth.

Sizeable direct employment provided by the industry

The industry is still a significant employer with more than 60,000 people working in the factories of Vietnam Automobile Manufacturers' Association (VAMA) members. If this number were to be expanded to include the other Original Equipment Manufacturers ("OEMs") and 2 wheelers and parts & component suppliers and dealers the number would be much higher. Initial guess estimates lead the numbers to be close to 125,000.

Additionally taking into account family dependants, there are more than 500,000 people whose livelihoods depend on are linked with the automotive industry. The number has been arrived by taking into account automotive dealerships where approximately 50 people are employed at one facility.

Tax collected from the automotive sector

The high taxes on automotive assembly and imports generate sizeable income for the Vietnamese Government. Local assembly kits (CKD) face an average import tax of 20%, while imported CBU vehicles bear a 68%-78% import tax, made up of 45%-60% Special Consumption Tax, 10% VAT and 10%-20% Registration tax. Finally the CIT on importers, assemblers and dealers adds to make the industry a major taxpayer in Vietnam.

From January to August, 2011 some 27,100 CBU generated US\$670 million in tax and 40,229 CKD about US\$653.7 million. From January to August, this year some 9,509 CBU imports generated US\$183.6 million in tax revenue, while 21,030 CKD amounted to US\$273.4 million, down by 55% in volume and 65% in tax revenue. As a result, there was a US\$867 million variance against the corresponding to period last year.

Technology transfer to the country

Over the years Automobile industry has continuously brought into Vietnam the latest technology in assembly and manufacturing processes in the entire supply chain, trained, upgraded and transferred new skills and knowledge to the Vietnamese labor force by dispatching numerous relevant overseas experts to Vietnam as well as dispatching selected relevant Vietnamese staff to be trained in overseas which will ultimately lead to Vietnam accumulating technology, skill and knowledge.

Vietnam's motor vehicle assembly industry is tax protected and as such it has an underutilized capacity. Technical CKD investment requirements discourage new entrants. Sub-contracting assembly to existing operators is proving a challenge tax-wise, as technically the importer is not the assembler and parts are considered CBU rather CKD, tax-wise.

Creating an environment to generate local content for ASEAN exports

As Vietnam's market lacks the necessary scale to generate its own growth and volume, the only way left to compete with bigger and more experienced ASEAN automotive production bases like Thailand, Indonesia or Malaysia is to benefit from their development by supporting their industries via automotive parts-related SMEs. To incentivize foreign companies to set-up such operations in Vietnam, export processing zones already exist. Allowing such companies to sell a percentage of their products on the local market would develop local sourcing capacity for Vietnam and regionally.

II. OPPORTUNITIES FOR THE AUTOMOTIVE SECTOR**1. Growth and development opportunities in the sector**

Vietnam has a population of nearly 90 million that is expected to reach 100 million within a decade. The per capita GDP is US\$1,300, expected to rise to US\$4,000 by 2020. These two factors will impact on car spending habits, especially when the current car density per 1,000 Vietnamese citizens is two. Similar growth across other countries has resulted in an increase in consumption of automotive products leading to automotive industry growth.

Vietnam holds a strategic position within the Asean and Asian supply chain and manufacturing footprint plans. A number of automotive companies in Vietnam have underscored the nation's potential to become a major ASEAN production hub and export base. Furthermore, Vietnam's WTO accession has laid the foundation for favorable legal conditions to entice investors. Besides, Vietnam is attractive with a dynamic and young population, which is a huge source of low labor cost and utilities.

The auto industry's growth has developed and promoted the skill sets of Vietnam's work force, while increased business opportunities with a higher volume and familiarization with international products will develop workers' skills. Meanwhile, the development of surface transportation infrastructure to link cities, ports, upcountry territories and industrial zones will further accelerate economic development.

Localization and attraction of investment in Vietnam's automotive sector should be seen from an ASEAN opportunity/exports-oriented manufacturing perspective. This is particularly important and relevant as the AFTA enters full implementation from 2018 onwards.

Recommendation of the Working Group

We request the Government take quick action to fully develop the industry to desired levels within the window of opportunity before 2018.

2. Incentives needed for investment in the automotive industry's manufacturing and supporting industry

The Government seems to under-estimate or overlooks the contribution automotive industry is making towards tax revenue and employment. Furthermore, the automotive industry is not subject to any particular investment incentives, such as those enjoyed by "high tech" industries. The Automotive Working Group is of the opinion that the automotive industry should be defined as "high tech" and should be subject to the same incentive system. Strong evidence and international studies show that the automotive industry is a key player in technological development within numerous countries. Moreover, the industry's development is strongly correlated with the development of skills, country know-how and ultimately its educational system. The numbers of engineers in a country is a key metric of innovation capability and competitiveness.

Particular supporting industry investments in certain high value added components such as engines, engine parts and electrical systems is of paramount importance to transition the country from a pure cost base advantage to a more sustainable technological advantage. Metallurgy, machining and high precision assembly are key automotive manufacturing processes that currently are slow to grow in Vietnam due to its lack of available know-how. A strong incentive system will lower the risk for new entrants and could over time help Vietnam develop a cluster advantage recognized regionally.

Recommendation of the Working Group

We request the Government consider special incentive support for the automotive sector as a "high tech" business sector.

III. PRESSING ISSUES/CONCERNS IN THE AUTOMOTIVE SECTOR**1. Immediate concerns for 2013**

The automotive industry in Vietnam has fallen drastically in 2012. Just the four-wheeler category (import/CKD) is estimated to have fallen in the range of ~40%-50%. If expanded to the two-wheeler industry the overall impact will be higher. This is a very serious concern for the industry participants and has affected many businesses. The reduction in tax revenue has already been reflected above. The automotive working group has summarized the concerns of the industry and also requests the government to support the recovery of the industry at the earliest through a list of recommendations below.

1.1. Taxation and Licenses

Current context: The high level of taxation has already been described in the introduction section. The concern of the industry is the frequent changes made with respect to taxes. Currently the automotive taxes change at least once a year in Vietnam and affects the automotive sector. These changes make it difficult for planning and in fact these changes create confusion with customers and other affected parties often resulting in knee jerk reaction. Particularly in 2011: passenger cars import tax reduced from 82% to 78%, 78% to 74% and 72% to 68%; and specific import taxes reduction to 70% for CBU cars imported from ASEAN, China, Korea and Japan. Further registration taxes paid on the total value of a car increased from 12% to 15% in HCMC and 15% to 20% in Hanoi. Other taxes and proposals announced on transportation and access to inner city areas, limiting vehicle ownership have been shelved due to public reactions. Frequent and often drastic changes in

taxes, in particular VAT, SCT and registration taxes, have significantly disrupted production lines, supply chain and retail operations of automotive players by creating artificial peaks and troughs in market demand. In this regard, we would like to raise some pressing issues, which need to be addressed.

Tax Walk

Issues: For the time being, identifying which tax will be applied depending of the origin of a vehicle is a challenge as various exclusion clauses can be applied to numerous bilateral treaties such as ATIGA, JVEPA with Japan, AFTA, etc. For new vehicles, the new country of origin, new technology such as hybrids, the tax applicable and the application date are opaque and each industry player cannot know these for certain until the vehicle is physically cleared relevant authorities (e.g. customs) which is usually too late. In some cases, commercial vehicles need to be re-exported as the tax classification decision can prevent the vehicles to be sold for a much higher price because of the final taxes applied.

Recommendations: A clear road map for different automotive sector taxes and policies till 2025 will benefit the industry, customers and the country overall. Further tax and policy stability will fortify investor confidence and growth in the industry. All of this will lead to increased customer choice and development of the country. Consultation with automotive working group and other industry associations will be helpful to work together with the government.

Ownership Transfer Procedure and incurred fee

Issues: The newly-issued Decree 71/2012/NĐ-CP tightening the ownership transfer procedure/regulation which was reflected in the Circular 36/2010/TT-BCA dated October 12, 2010 on vehicle registration. This regulation is extremely confusing as it tries to cover geographical, unit value, social positions and age of the vehicle. The creation of so many price levels at a marginal cost difference in the end offers little help, especially for motorbikes. Complexity benefits no one and simplification of the new regulation would be welcomed by tax payers and local authorities.

Recommendations: Enforcements by law and police checks on the streets for the automotive insurance, including that for motorbikes will reduce traffic hazards, better protect all road users and a number of vehicles on the streets. It will also provide a mechanism to ensure proper repairs are conducted in professional workshops so only well maintained vehicles will be on the road.

Number Plate Fee

Issues: The publication of reliable official registration data will help track local level automotive development and drive engagement with the city planners. That reliable data will help shape local urban development where real automotive users are located. Also, the registration tax rate discrepancy between Ho Chi Minh City (15%) and Hanoi (20%) is resulting in inflated vehicle sales in Ho Chi Minh City and depressed sales in Hanoi as companies with an office in both cities tend to register their vehicles in Ho Chi Minh City – preferably Binh Duong (10%) – rather than Hanoi. This is a perfect example of a dissuasive tax rate generating higher tax collection in a different place.

Recommendation: Have a uniform number plate and registration tax in the country. Additionally due to the fall in the industry, it will help to reduce the rates significantly to provide easier ownership and also help in recovery of the industry.

Import Duty imposed on royalties and other payments for use of intangible assets

Issues: Currently, guidelines on how royalty and other payments for intangible assets may be considered as “conditions” of imports are unclear. There are some cases where tax audit team concludes that a payment is dutiable where no other countries consider similar payments made under similar contracts as dutiable. In some cases, an audit team treats a contract stipulating a payment as indicating that the payment under such contract is a “condition” of import, where the contract never explicitly says that it is a condition. In such case, both the parties suffer unproductive and tiring arguments, and company and State budget are exposed to a potential huge loss. On the other hand, the intention to add domestic royalty into dutiable price is not reasonable because:

Royalty comprised of fees for transferred technology and royalty for IP (trademarks, design & invention patents), then:

(i) the fees for technology add value to the localization in Vietnam only and thus, by nature, they cannot be included in the imports’ value, as well as they are already subject to FCT tax; and

(ii) the royalty for trademarks, design & invention patents appears only in Vietnam and thus, by nature, it cannot be included in the imports’ value, as well as it is already subject to FCT tax.

An intentional application of an additional import duty in this case may risk violating ATIGA [stipulating that a member cannot increase import tax].

Recommendations: Abolish import duties on royalties and other payments related to the usage of intangible assets made under similar contracts and accepted as non-dutiable expenses in other WTO participating countries.

Lack of clarity in language used in tax-related legal documents/policies at working-level (circulars decrees)

Issues: In Vietnam, issues usually emerge after the legal documents and decisions on automotive sector published at a local implementation level. Different offices have different understandings and so do different provinces. As there is no follow-up to ensure the smooth application of decisions made at central level, the implementation stage becomes a bottleneck.

Another issue is Vietnam’s preference for using its own fiscal classification self generates issues regarding wording to identify the product before classification and consequently the tax to be applied. We see more benefit in using the existing worldwide fiscal numbering system or publishing official equivalence tables with the various existing HS codes, rather than leaving it up to local Customs officers to classify this in Vietnamese language.

Recommendations: Adopt international HS codes to simplify tax classification for cars, motorcycles and its spare parts and address the lack of coherent language.

1.2. Bonded warehouse and Duty Refund process

Issues: Currently, more companies have chosen Vietnam to be their regional hub from which goods are imported and then re-exported and distributed regionally. However, the current import process does not allow for temporary transit. All import duties, SCT and VAT must be paid even though the goods are for re-export and the refund process is opaque and takes up to three months. This is too costly considering the current cost of finance.

Recommendations: Allow bonded warehouses for CKD assemblers and official importers

(both Vietnamese and foreign-owned parties). It is also recommended that automotive goods such as cars, parts, tools imported into Vietnam purely for re-export are exempt from taxes. This would, however, generate revenue and foreign currencies for the Government.

1.3. Export processing zones in Vietnam attract quality manufacturers

To increase local content, Vietnam should allow quality automotive parts producers to work from export processing zones and allow them to sell a sizeable percentage of local production in Vietnam. Granting the same export rights to already existing world-class automotive OEMs in Vietnam would also benefit the local industry.

2. Medium-term concern (2014-2018) - Road Map for development and retention of competitiveness of the automotive sector

Impact on CKD businesses based on AFTA/ASEAN +2/3 alignment by 2018

Issues: Following agreement on tariff reduction commitments under AFTA, from 2018 Vietnam is expected to reduce import duties to zero for all vehicles manufactured within ASEAN and to adhere to the minimum level of AFTA's commitments. This is further extended based on ASEAN +2/3 Agreements.

There is a concern about the Government's vague plans to leverage and support current CKD operations in Vietnam after 2018. This has led to a "wait and watch approach" by global investors.

Recommendations:

- A clear plan should be revealed by the Government

Lack of clarity on Strategic Cars for Vietnam

Issues: A strategic car approach for Vietnam has been a work in progress for many years. Individual organizations and the VAMA have provided inputs to various Government departments. However, as of now, no firm guidance on a strategic car is apparent. Clear direction would have a positive impact on the industry's growth potential and earmarking strategic cars has helped other ASEAN countries' automotive industries rapidly grow. Clarity on a strategic car would allow OEMs to prepare and plan to support the Government's direction in a timely manner. Furthermore, it would help Vietnam facilitate the switch from motorbikes to cars.

Recommendations: The consultation process on the strategic vehicle for Vietnam should be opened for discussion with interested parties such as automotive associations (e.g. VBF's automotive working group, VAMA), automakers, etc. We believe the inputs of private sector will help the Government to soon publish a clear direction on a potential strategic car. Besides, we think that compact eco-friendly models could qualify as strategic cars for Vietnam. Therefore, it is recommended the Government to consider promoting the below vehicle models:

- Compact vehicles to facilitate the switch from motorbikes to cars
- Compact delivery vans to access crowded inner city streets without traffic restrictions
- Commercial vehicles (trucks and buses) which already occupied about 50% share of the car market. However, the diesel quality and reliability after storage and distribution in service stations needs upgrading.

Facilities to support vehicles on roads & overall economy

Issues: Lack of parking, while the number of office and residential buildings grows in major cities.

Recommendations: A reasonable percentage within new real estate developments be dedicated as underground multi-storey car parks. Such operators should be able to sub-rent access to such car parks to outsiders to alleviate inner city car parking shortages. The development of such facilities will support vehicle users and stimulate the automotive industry and overall economy.

Direction and special support to Hybrid/Alt Fuel/Electric vehicles and low CO2 emission vehicles

Current context: Thailand enjoys local production of the Toyota Prius, Camry Hybrid and Honda Jazz Hybrid and has recently created environmentally-friendly concept cars. Meanwhile, Malaysia is pushing green technologies. In some countries in Europe, Governments have set-up taxes based on vehicle emission levels, whilst in other countries Government incentives support alternative power trains such as hybrids or electrical.

Recommendations: It will be in the interest of the government of Vietnam to:

- Clarify tax criteria for hybrid vehicles, for CKDs and CBUs
- Different government bodies to build a co-owned and co-developed plan towards environmental protection across areas such as emissions, fuel consumption, component recycling and end-of-life vehicles
- Start engaging OEM/Associations/Technical centers and develop a road map with several steps as follows:
 - (i) Establish a reliable basis and set of criteria to measure a vehicle's fuel consumption or adopt and promote higher standards in fuel consumption, fuel quality, emissions and environmental awareness. This goal will only be reached by focusing on high-technology vehicles
 - (ii) Work out a plan which is in consistent with ASEAN neighbors and Europe, if Vietnam is to follow the Euro emission pattern
 - (iii) Define a fuel efficiency improvement plan based on country achievements
 - (iv) Define emission levels to comply with international low-carbon emission standards. Particularly with regard to new CBU cars' homologation, the Vietnam Register should simplify the homologating procedure without the need for any additional local emission test cars with EU4 and EU5 emission standards, which are more stringent than EU2.

Stability and predictability of policies to build a sustainable growth environment

Issues: 2011 and 2012 have seen multiple proposals on fees and taxes provided to the media either prior to or simultaneous sharing of information with the OEMs and automotive and consumers associations in Vietnam.

The leaking of information with different interpretations leads to speculative actions by different stakeholders, such as consumers and suppliers. Moreover, information is widely scattered with no consistency leaving automakers in a pickle for two reasons: (i) the manufacturing and supplying system is based on an average 10-month pattern and (ii) the automaker is an up-front capital intensive business model where the initial investment is three to four years before producing the first product. Furthermore, in some cases decisions have been made without consulting interested parties and stakeholders resulting in inappropriate decisions and further obstacles.

Recommendations: To sustain the industry's development, it is recommended the Government should:

- Consult automobile manufacturers' associations such as the VBF Automotive Working Group and VAMA for inputs into key proposals and policies affecting the automotive industry. Through prior consultation and discussion with the private sector, Government policies will be more practical, better understood and implemented.
- Take the method of pre-testing and piloting new proposals/policies into consideration since this is the most effective and less disruptive method.
- Share ideas and a clear industry policy roadmap to 2025 with OEMs and industry associations to offer investors a long-term horizon and better predictability for future growth.

It is worth emphasizing that a clear road map for different automotive sector taxes and policies to 2025 will benefit the industry, customers and Vietnam. Taxation scheme and policy stability drives investors' confidence to grow the industry and leverage Vietnam's development.

IV. CONCLUSION

Industry players are of the opinion that along with overall economic environment, a key factor for the automotive industry's crash in 2012 was the Government's different proposals and policies.

Statistics have revealed that the drop in automotive industry in other countries which were impacted by natural disaster/political unrest ranged around 20%. The current drop in sales/production in Vietnam ranges from 35%-50% depending on the segment and province. Coupled with the cost of rising inventory for both assemblers and dealers, business operations have become unviable and unsustainable with such drastic drops. We have seen in other countries that Governments have come to the rescue of automotive industries to help them recover and continue to provide employment. The industry, in return, will make good contribution to the State exchequer.

We plead with the Government to introduce **some quick measures to accelerate the revival of the industry** as soon as possible. Without Government support, the industry will not be able to recover in the immediate future. The normal industrial growth rate after such a crash will not take the industry back to its estimated potential per earlier timelines. This will impact on the investments made by companies and also future investments planned in Vietnam.

We sincerely request the Government quickly act to support the industry and help it recover during 2013.

Tourism

TOURISM AND HOSPITALITY

*Prepared by
EuroCham's Tourism Sector Committee
VBF Tourism Working Group*

1.1 Introduction

On the penultimate day of 2011 the Minister of Culture, Sports and Tourism (MoCST) approved the new logo to be used officially for the National Tourism Promotion Programme during 2012-2015. We compliment the Government with this choice and we strongly believe that the new slogan "Vietnam - Timeless Charm" and a lotus symbol with five different colours best represent Vietnam's diverse tourism products; and marks a new growth phase of Vietnam's tourism industry.

We further compliment the Government on the move to establish a Tourism Advisory Board (TAB) under the Environmentally and Socially Responsible Tourism (ESRT) project funded by the European Union (EU).¹ This has taken some time but now the composition of the TAB has been agreed, we would also like to request that meetings be initiated on a regular basis. We also suggest that working groups should be formed on important issues so that significant work can be done between meetings. We strongly believe that the TAB group can be an effective support tool for Vietnam National Administration of Tourism (VNAT) in achieving their objectives and helping Vietnam reach its tourism potential due to the collective experience of the members of the TAB.

The tourism and service industry currently accounts for 4.3% of the country's GDP and is employing approximately 3.7% of total employment plus a further 3.9%² indirectly, thus making the tourism and service industry one of the country's key employment sectors.³ After the global economic downturn, Vietnam's travel and tourism industry rebounded strongly in 2010, a trend which has continued in 2011 and 2012, with foreign tourist arrivals in Vietnam rising more than 30% in 2010 and 19% in 2011.⁴ Domestic tourists also increased to 30 million, up 7.14% from 2010.⁵ Vietnam welcomed over 3.8 million overseas arrivals in the January-July 2012 period, representing a year-on-year increase of 10.8%, according to the VNAT.⁶ We share the view of the World Travel & Tourism Council (WTTC) that tourism is one of the world's fastest growing sectors, but that in order to achieve that it must have support from governments.⁷ We also agree with the view of the United Nations World Tourism Organisation (UNWTO) that tourism can be the creator of jobs in today's still economically difficult situation.⁸ In this light we also share the content of the combined open letter of the UNWTO and the WTTC.⁹

It is now some seven years since the current Tourism Law was adopted. Over time some shortfalls have become visible requiring the Tourism Law to be modernised. A new law is expected to be adopted in 2013. We will discuss issues related to the Tourism Law in paragraph 1.10.

¹ The lotus has five coloured petals. These petals represent the following: bright green represents "island and sea tourism"; green represents "ecological tourism and nature"; yellow symbolises "cultural and historical tourism"; violet stands for "adventure tourism" and pink displays "Vietnamese's hospitality".

² Description of ERST-project on www.erst.vn.

³ Vietnam report, the World Travel & Tourism Council (WTTC), 2012, page 8.

⁴ Country presentation on Vietnam for UNWTO Asia-Pacific Executive Training, slide 3.

⁵ www.gso.gov.vn for more information, this number includes also non-tourists.

⁶ Country presentation on Vietnam, UNWTO Asia-Pacific Executive Training, slide 3.

⁷ See www.vietnamtourism.gov.vn for more information.

⁸ Strategic priorities and policy of WTTC, www.wttc.org.

⁹ Tourism vital tackling global economic challenges unwto executive council of UNWTO, media.unwto.org.

¹⁰ See open letter of the UNWTO on www.unwto.org, which has also been sent to Vietnam.

It is one year since the project to promote responsible tourism services through public private dialogue, improve tourism planning and regional tourism product development launched by the EU in 2011 in close cooperation with the VNAT was launched and we look forward to seeing positive results in addition to the commencement of the TAB. The fourth project to improve quality of tourism human resources is funded by Luxembourg and is now almost finished. We look forward to being able to share the successes or otherwise of the project with the VNAT.

We are pleased with the development strategy for tourism as approved by the Prime Minister on 30 December 2011. This strategy describes overall and specific targets, solutions and action programs for the sector to 2020 and a vision to 2030. The target is to develop tourism into a key economic industry with a high level of professionalism; a modern tourist infrastructure and diversified tourist products which have high quality and are competitive but are still imprinted with unique traditional cultural characteristics.

The WTTC ranks Vietnam at 80 out of 181 countries for the contribution to GDP from travel and tourism and ranks 21 out of 181 in its potential for long term growth.¹¹ On the Travel and Tourism Competitiveness Index (TTCI) 2011 of the World Economic Forum (WEF), Vietnam ranks 80 out of 139 countries, excluding Myanmar and Laos.¹²

Table 1: Travel & tourism competitiveness index for Vietnam

Topic	2011	2009	change
travel & tourism competitiveness index ¹³	80	89	9
policy rules and regulations	67	96	29
environmental sustainability	115	100	-15
safety and security	68	100	32
health and hygiene	89	95	6
prioritisation of travel and tourism	107	61	-46
air transport infrastructure	85	84	-1
ground transport infrastructure	77	80	3
tourism infrastructure	110	109	-1
ICT infrastructure	67	79	12
price competitiveness	16	11	-5
human resources	72	82	10
affinity for travel and tourism	87	81	-6
natural resources	51	52	1
cultural resources	36	6	-30

We are fully supportive of these findings and we would like to help Vietnam achieve their potential by drawing on collective experiences that can benefit Vietnam and help meet their targets. In order to do this we have developed what we believe are a series of recommendations that can help. We have selected what we believe are the top 10 and we will focus on these which we believe would be best adopted and implemented as soon as possible, recognising the challenges where changes to laws and regulations would need to be adopted.

¹¹ Vietnam report, WTTC 2012, page 1.

¹² The ASEAN Travel & Tourism Competitiveness Report 2012, World Economic Forum, page viii.

¹³ World Economic Forum, ASEAN Travel & Tourism Competitiveness Report 2012 and the Travel & Tourism Competitiveness Report 2009.

This chapter is divided in an overview of our top 10 recommendations first, then promoting Vietnam, followed by training tourism professionals, visa, the protection of cultural heritage, owning of property by foreigners, laws and regulations, and finally help to tourists in difficult situations. At the end of each paragraph you will find our recommendations. You will find a conclusion at the end of the chapter.

1.2 Top 10 recommendations

In this paragraph you will find our top 10 recommendations. We believe these recommendations, would be best implemented with priority in 2013, or at least a start should be made with implementing them. If in our opinion recommendations are so closely connected that they could be implemented together, we have grouped them accordingly.

1. legalise the mandate of VNAT to become the sole tourism marketing authority for Vietnam with the role of a National Tourism Organisation (NTO) (§ 1.3.1)
2. increase funding scheme for tourism planning and development and marketing (§ 1.3.1) and introduce a 1 USD fee per night to fund this campaign (§ 1.4.2)
3. review and update training programs for workers in the sector to ensure curricula at tourism educational colleges and institutions are relevant to the industry , 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 and introduce a requirement for all training establishments and colleges to implement the VTOS training materials with accreditation from the VTCB and VTAC (§ 1.5.1)
4. broaden the group qualifying for visa exemption (§ 1.6.2) and put a real visa-on-arrival procedure in place without pre-submitted documentation (§ 1.6.3)
5. develop, implement and enforce regulations in spatial development plans, land use plans, building codes and environmental impact assessment regulations (§ 1.7.1):
 - a. to assure the appropriate protection of cultural and natural heritage and
 - b. the observation of high environmental protection standards (waste water, energy efficiency) for tourism construction projects
6. implement a programme to allow second-home ownership by foreigners in certain locations (§ 1.9.1)
7. amend the Tourism Law in the following way (§ 1.10.1):
 - a. clarify roles and responsibilities for the protection of tourists' rights and ensure that timely dispute resolution mechanisms are provided
 - b. cancel the legal requirement for tour operators to deposit a certain amount of money as a guarantee
 - c. decentralise authorisation and allow local governments to grant tour-guide certification and evaluations of hotel standards
 - d. ensure that local authorities follow national policies and standards and
 - e. address the disagreement in planning, figures and reporting
8. 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 (§ 1.10.3)
9. create a national tourist police, train the police in basic English and open hot-lines in various languages (§ 1.11.1)
10. open official tourism service centres (§ 1.11.1)

1.3 Destination marketing management

1.3.1 Role and function of VNAT

The importance of tourism for the national economy, expressed in terms of job creation and earnings, is the fundamental rationale for any government's financial involvement. The investment made by any government in tourism is moreover reflected in the structure of the tourism industry. The importance of tourism to the national economy is one of the factors that influence the level of support given by the Government to the marketing of tourism. Political views on the extent to which the Government should support the private sector also play a part. And all these factors are naturally closely linked to the availability of State funds which, in turn, depends on the size of the country and the volume of tourism demand.

VNAT's mandate as the national tourism administration is to market Vietnam abroad as a tourism destination. VNAT is part of the MoCST that is responsible for tourism policy and for more areas of national policy, e.g. culture and sports. As VNAT is an administration body it usually comes under the influence of the MoCST. This influence may be justified because the MoCST is responsible for monitoring the effective and efficient use of public funds. In addition, the VNAT may be responsible for other tasks besides tourism marketing, e.g. tourism development and planning. On the other hand, in order to optimise the national spending on marketing, VNAT's position as the national marketing body for Vietnam may need to be elevated allowing stronger autonomy for marketing purposes, better avoiding political influence and overlap with other authorities and ministries. Such an elevation would better ensure effective targeting of potential tourist demand.

1.3.2 Destination marketing or management organisations

The current lack of effective regional destination marketing or management organisations (DMO) in Vietnam is in part testament to functional and institutional challenges that exist within the sector. Improvement would necessitate, amongst other things, awareness raising for DMO development processes, and the facilitation of collaboration of private and public stakeholders; as well as stakeholder commitment. It requires stakeholders to work together and take responsibility for specific actions to achieve these objectives. Some common issues for DMOs engaged in tourism development include planning and product development, marketing and promotion and lobbying function.

In order to better serve the customers of the tourism sector in Vietnam and improve the strategic destination marketing planning, the MoCST and the VNAT have started a strategic planning initiative by establishing regional DMO's. The ESRT programme is supporting the collaboration of the provinces and private sector stakeholders to jointly work on destination management issues. One of the key principles of the strategy is strengthening partnerships between the public and private sector. To establish these DMO's, we believe it is important to support the existing PPP and Public Private Dialogue (PPD) initiatives undertaken by the ESRT with the formation of a Technical Working Group in northern provinces for Destination Management.¹⁴ Further to this initiative it is in our view also important to support the existing PPP and PPD initiatives of the DMO in central coast provinces also supported by the ESRT.

In taking a leadership role in destination brand development, destination marketing, market research and product development, the DMO will promote a high level of alignment between the public and private sectors through effective engagement and involvement. This will include establishing improved mechanisms for communication between tourism-related businesses, associations and the public sector; to work with industry groups and associations in working groups on a regular basis; to coordinate organisational structures

¹⁴ Destination management for 8 northern highland provinces on www.vietnamtourism.gov.vn, 8 May 2012.

and professional bodies, and to develop efficient ways to share information within the industry.

1.3.3 Recommendations

We would like to make the following recommendations:

1. legalise the mandate of VNAT to become the sole tourism marketing authority for Vietnam with the role of a National Tourism Organisation (NTO) (§ 1.3.1)
2. increase funding scheme for tourism planning and development and marketing (§ 1.3.1)
3. support PPP and PPD initiative:
 - a. undertaken by the ESRT with the formation of a Technical Working Group in the northern provinces for Destination Management (§ 1.3.2) and
 - b. of the Destination Marketing Organisation in central coast provinces (§ 1.3.2)

1.4 Promote Vietnam as a tourism destination

1.4.1 Facing competition

As we have mentioned before, within the ASEAN region, Vietnam competes with similarly attractive tourist destinations like Thailand, Malaysia, Indonesia, the Philippines, Cambodia and more recently Myanmar. The contribution of travel and tourism to the GDP in Cambodia (9.5%) Thailand (7.1%) Malaysia (6.7%), Laos (5.8%) all rank above or equal to Vietnam.¹⁵ In general, feedback from tourists and operators suggest tourists perceive service and customer care in Vietnam as poor. We believe that measures are needed to address this perception and to allocate more funding to marketing Vietnam as a tourist destination.

1.4.2 Advertising

All or the majority of neighbouring countries we mentioned before are spending much more on promoting their countries as a tourism destination. We thus believe Vietnam should do more in this area to retain its current growth rates. Vietnam needs to develop a more comprehensive and sustained marketing campaign highlighting Vietnam's attractiveness because of its rich cultural heritage, its outstanding natural beauty including beaches, its friendly people and delicious and varied cuisine.

We also suggest that the Government allocates more funds towards tourism promotion campaigns and operates in close co-operation with the foreign private tourism and travel providers to make best use of such additional funding; as it is private providers who are best placed to identify what the various nationalities like and are interested in.

We understand that there are limited funds currently available but we also believe that the funding needed for this could be raised through a tourism levy collected at hotels. Even a levy of 1 USD per stay would raise several million dollars per year. Similar levies were made in Hong Kong and Singapore in the 70's and 80's to help fund marketing initiatives and development of the tourism industries in those countries.

We have understood that due to strict regulations of the law on budget and fees and charges, difficulties are foreseen, especially as it will raise the complication of accounting in businesses and related bodies. We are of the view that it is worthwhile considering exploring this possibility and changing the law if necessary. In any case we are pleased that VNAT will propose to the Government to allocate 1 USD per visitor for the tourism sector to prompt its promotion. If successfully implemented this would mean the tourism sector will

¹⁵ Country reports 2012, the WTTC on www.wttc.org.

be allocated about 6 million USD per year for destination marketing at current visitor rates. We have learned that the initiative is supported by the MPI and MoF and will be submitted to the Government for decision. We realise that due to current economic difficulties it will not be easy to execute this immediately. However, we believe that if this financial contribution is made to the tourism sector it will have a positive effect on the economy when – as a result – more tourists will come.

1.4.3 Coordination and cooperation

We believe it would also be helpful if tourism planning and tourism products would be further improved. In particular, a regional approach to tourism which goes beyond provincial borders and allows joint product development will encourage tourists to stay longer as well as encourage return visits to different parts of the country.

Tourists are not restricted by provincial boundaries when they travel. They visit and travel throughout regions based upon the product offerings available. However, working at a regional level needs to be carefully guided by development of regional tourism bodies that develop and implement projects based upon strategic regional tourism plans. The regional plans should be based upon further developing the region's specific strategic placement as a tourism destination in Vietnam.

Further to this, a public-private dialogue in planning and creation of new tourist attractions is important for the success of local and regional tourism strategies. The focus should in our opinion be to develop new attractions such as more cultural attractions; more sports facilities or even more adventure tourism. Information about the local and regional attractions should be made available on the internet for easy planning and as a promotional tool, especially as there are many more interesting attractions than mentioned in the most important tour guides. Furthermore information about tourist sites is often limited on the internet and sites are sometimes difficult to find.

We also see a lack of coordination and cooperation domestically with major cities like Ho Chi Minh City¹⁶ and Danang¹⁷ having their own slogan and tag line which we believe to be counterproductive and wasted expenditure.

1.4.4 Recommendations

We would like to make the following recommendations:

1. design a promotion campaign including advertising and promotional films in close cooperation with foreign tour-operators or large local operators dealing on a regular basis with foreigners (§ 1.4.2)
2. introduce a 1 USD fee per night to fund this campaign (§ 1.4.2)
3. coordinate and cooperate on a regional level to improve tourism planning and products (§ 1.4.3)
4. introduce a public-private dialogue for planning and creation (§ 1.4.3)
5. develop new tourist attractions (§ 1.4.3)

1.5 Train tourism professionals

1.5.1 General

We note that the tourism industry is still experiencing a shortage of well-trained staff. Tourists are confronted with employees not well trained in the service industry, resulting in

¹⁶ City's new slogan needs backup, english.saigontimes.vn, 10 August 2011.

¹⁷ Tourism logo winner decided, www.danangtourism.gov.vn, 30 March 2012.

some tourists leaving with a bad image of Vietnam. We also realise that bad experiences are published more widely and spread faster than good experiences.

Many tour guides are not well paid and seek additional income from other sources related to their work. We are aware that there are several initiatives in this field, like the Luxembourg project we mentioned in our introduction and other international projects like the Australia Aid Development Cooperation Programme (AADCP) phase II to review toolboxes for development of tourism competences for the ASEAN-region. However, one of the issues we have identified is the lack of training by industry professionals with much of the training being delivered by academics. We suggest ways should be found to change this through work experience placements and having experts from the industry deliver some of the training so that students can hear first-hand experiences from trainers.

The Vietnam Tourism Certification Board (VTCB) was established in 2003 with the underlying aim to support the enhancement of products and services delivered within Vietnamese tourism through capacity and skills development across the industry. VTCB currently has no official status within either VNAT or its parent Ministry, MoCST. This is an organisational liability and prevents VTCB accessing resources and support from within VNAT on a similar basis to other operating units. Because it has no official status, its certification, while valued by stakeholders, is not recognised officially by public or private agencies in Vietnam or overseas. As a result, little progress can be made to enhance the skills levels of new entrants and experienced staff within the tourism industry and Vietnam continues to lag considerably behind regional competitors and international standards in this regard. It is also important that employees see the value of their work and study and employers need to be able to recognise the quality of their workers qualifications.

The lack of formal recognition within VNAT and MoCST combined with the absence of legal status are major impediments to the development of national certification, through Vietnam Tourism Occupational Skill Standard System (VTOS) and VTCB. We believe it is important to put a national tourism certification scheme in place. Because in our opinion it is very hard to gain acceptance and recognition of VTOS or other tourism qualifications without a national certification body, Accreditation by the VTCB and VNAT will assure that a tourism company and its employees meet the core standards for key areas of work within the industry and increase the numbers of trained and qualified personnel in all sectors of the tourism and hospitality industry thus enhancing the quality of products and services that are on offer to visitors. We believe it is also important that the VNAT works together with the GDVT of the MoLISA to support the formation of a National Tourism Professional Council (NTPC) within the VTCB as a pilot, as required by the ASEAN Mutual Recognition Agreement (MRA).¹⁸

The 2004-2010 European Union project developed thirteen skills standards as the basis for certification through VTCB for the tourism industry, Vietnam Tourism Occupational Skill Standard System (VTOS).¹⁹ The management of these standards and their assessment are located within the VTCB. ESRT is now bringing the VTOS into a second phase and harmonise the existing standards with the MoLISA and MoCST requirements and align them to the ASEAN standards to ensure regional recognition of standards. We encourage the Government to expand the VTOS as soon as possible. Training programs for tour guides and curricula at tourism educational programs and courses could be reviewed and updated and they could include some cross-cultural courses and customer-service training on what foreign tourists expect and understand as good and international service standards. In this

¹⁸ ASEAN Tourism Ministers Meeting, www.aseansec.org.

¹⁹ VTOS and the impact of the FTA between the EU and Vietnam, www.esrt.vn.

light we also believe that a requirement for all training establishments and colleges to implement the VTOS training materials with accreditation from the VTCB and VTAC should be introduced.

1.5.2 Recommendations

We would like to make the following recommendations:

1. give a legal status to the Vietnam Tourism Certification Board (VTCB) and Vietnam Tourism Accreditation Centre (VTAC) (§ 1.5.1)
2. put in place a national tourism certification scheme (§ 1.5.1)
3. encourage the VNAT to work with the GDVT of MoLISA to support the formation of a National Tourism Professional Council (NTPC) (§ 1.5.1)
4. review and update training programs for workers in the sector to ensure curricula at tourism educational colleges and institutions are relevant to the industry (§ 1.5.1)
5. 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 (§ 1.5.1)
6. introduce a requirement for all training establishments and colleges to implement the VTOS training materials with accreditation from the VTCB and VTAC (§ 1.5.1)

1.6 Visa policy

1.6.1 General

We do recognise that much discussion has already been going on and many recommendations have been delivered on this subject. We also recognise that visa policy extends across multiple ministries and departments. However we strongly believe that the current policy is losing Vietnam high-spending foreign independent travellers (FIT) and is also causing it to lose competitiveness with neighbouring countries. We agree with the WTTC that in order to create jobs and economic growth it is important to change the current visa policy.²⁰ The UNWTO has indicated that visa facilitation can create additional jobs.²¹ We believe that visa facilitation will also create jobs in this sector in Vietnam. There will be also other positive side effects which we will address in the following paragraphs.

1.6.2 Visa exemptions

Most tourists need to apply for a visa if they want to come to Vietnam, even for a short time. Currently, only FIT and ASEAN-passport holders are visa-exempted for stays of thirty days or less, 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 fifteen days without a visa. We have understood from a recent intra-ministerial meeting that travellers who transit in Vietnam and have an onward ticket within some days may enter Vietnam on a transit visa basis. We look forward to seeing this working in practice.

We furthermore would like to point out that it is not always easy to obtain information on visa requirements. You can find information on the internet, but it is not always clear what the source of this information is. On the website of the various embassies, the information is not always up-to-date or easy to find. Sometimes the processing can be difficult and time-consuming. We are aware of situations where the local embassies take weeks to reply to email requests for information. To encourage more tourists to come to Vietnam it would be helpful if more nationalities could enjoy the exemption of thirty days or at least the same level as passport holders from Denmark, Norway, Finland, Sweden, Japan, Korea and Russia. We believe of countries that can potentially account for significant tourism revenue,

²⁰ Freedom to travel, www.wttc.org.

²¹ Visa facilitation can create five million additional jobs in G20 economies, www.unwto.org, 17 May 2012.

such as the EU member states, the United States and Canada, Australia, Hong Kong and Taiwan.

Whilst we agree that the visa waiver for the countries listed above has not increased arrivals from these countries significantly we believe that this is because the majority of arrivals from those countries are long haul travellers and they also tend to travel in groups. These types of visitors tend to plan their trips well ahead and group organisers normally are responsible for visas.

1.6.3 Visa-on-arrival

As an alternative to going to the embassy you can also 'order' a pre-approval on-line and pick up your visa on arrival, showing this document sent to you by email and paying the required amount. However, practice in Vietnam has proven that a visa-on-arrival here is not as simple as it sounds. First you need to use the service of a third party to obtain the pre-approval. Second, once you arrive on the airport it is not always well indicated where you can obtain the visa and what the precise costs are. There is no counter where you can draw a number and wait till it is your turn. It seems that obtaining your visa is random and it can happen that people, who arrive after you, get their visa before you do. A further difficulty is also that because of the foreign names, it is not always clear that they call your name as the pronunciation is not what you are used to. In general little English is spoken, so it is not easy to obtain information if necessary.

In order to facilitate visitors to come to Vietnam, it would be helpful if it would really be possible to obtain a visa-on-arrival. Especially for those coming only for a short time and deciding to travel on a short notice, like British and Australian expats living and working in places like Hong Kong, Singapore, Thailand and Malaysia and who would usually be high-end and high-spending visitors. Therefore, a system similar to Laos²², Cambodia²³ and Bali²⁴, could be considered, where visas are issued on arrival and visa fees are collected at the arrival airport.

We have been pleased to learn that in February 2012, Thailand and Cambodia started to grant a single visa for non-ASEAN tourists and that this model probably will be extended to Laos and Vietnam by the end of this year.²⁵ It is also good news that the region is pursuing several initiatives focused on intra-ASEAN visas and the adoption of e-visas.²⁶ Cambodia has already implemented an e-visa system while Myanmar started to use the procedure in March this year. We have been pleased to learn that during the ASEAN top in May it was agreed to implement a common visa for non-ASEAN arrivals within five years.²⁷ However, as long as these easier procedures do not apply for entrance in Vietnam yet, we believe it would be a good idea if the Government amends the existing regulations.

In case the Government continues with the pre-approval procedure, which we hope will not happen, we would like to point out that the current pre-approval documents violate the privacy of individual tourists, as other people's names including passport numbers are mentioned in the document. For each person or group of persons for whom the request have been made on line at the same time, a separate document should be issued.

1.6.4 Recommendations

²² Visa-on-arrival for Laos on www.laosvisas.com.

²³ Visa-on-arrival for Cambodia on www.cambodia-airports.com.

²⁴ Visa-on-arrival for Bali on www.balitourismboard.org.

²⁵ ASEAN to make tourist visas easier to access on en.vietnamplus.vn.

²⁶ Master plan on ASEAN connectivity on www.aseansec.org, January 2011.

²⁷ Joint Media Statement of the Fifteenth Meeting of ASEAN Tourism Ministers on www.asean.org, 11 January 2012.

We would like to make the following recommendations:

1. broaden the group qualifying for visa exemption (§ 1.6.2)
2. put a real visa-on-arrival procedure in place without pre-submitted documentation (§ 1.6.3)
3. provide more and clearer information in the arrivals hall on where the visa can be obtained (§ 1.6.3)
4. provide more and clearer information on costs (§ 1.6.3)
5. put a counter with a numbering system in place (§ 19.6.3)

1.7 Preserve cultural heritage and natural environment

1.7.1 Cultural heritage

In a country such as Vietnam where supplies of wood are plentiful there are fewer buildings built with bricks or stone and fewer older buildings still in existence. Nevertheless quite a few interesting buildings do remain. However, we have noticed that over the last few years that this cultural heritage is threatened. Some historically interesting buildings have been demolished to be replaced by less-interesting high-rise buildings. In some instances new constructions and developments are made too close to protected heritage sites and thus degrade the attractiveness and the value of the heritage. We believe the Government should protect these buildings as cultural heritage because they are interesting for tourists, especially for foreigners.

These historical buildings are also a valuable and irreplaceable connection for the Vietnamese people between the present and their past which is incredibly important in order for a nation to understand its heritage and what it stands for as a people in the world today.

In terms of Community Based Tourism (CBT)²⁸, a destination's culture, history, and natural environment are the primary motivations for a tourists' visit, and for most communities they are also the only tourism assets or products they actually have to draw tourists to their region. Preventing the erosion of key tourism assets and products in the local areas is thus critical if successful CBT is to occur.

Unfortunately, heritage preservation is often not considered a priority in urban development despite an abundance of land in new urban areas. We believe it is important that provincial authorities audit and prioritise the historical and cultural heritage remaining in their provinces and evaluate the condition, cultural significance and importance, conservation risks and preservation requirements for each.

So far, only a few building owners resist lucrative new projects, which ruin the attractive image of towns in Vietnam. In fact, many sites that tourism authorities are promoting in their campaigns are already lost to big construction projects. This happens not only in Ho Chi Minh City. The first high-rise buildings are now being constructed in Hue and Danang. It appears that only official *United Nations Educational, Scientific and Cultural Organisation* (UNESCO) World Heritage sites such as Hoi An ancient town and Hue citadel are safe from any cultural heritage destruction. One of the last vestiges of historical architecture in Ha Giang Province, the Dong Van Ancient Street, is likewise at risk of being lost forever due to a lack of adequate protection.²⁹ With all these sites it is important that new constructions do not risks the status of these sites, as could have or still might happen in Sevilla in Spain.³⁰

²⁸ See § 19.8 for more information on CBT.

²⁹ [Dong Van's old quarter eyes preservation](#), Viet Nam News, 31 January 2011.

³⁰ See the [report](#) with decisions adopted by the World Heritage Committee at its 36th session in Saint-Petersburg in June 2012, page 127-128. It will be further discussed during the 37th session in 2013.

We encourage the Government to develop and implement guidelines and zoning regulations to audit and efficiently preserve Vietnam's cultural heritage. In particular, spatial development plans, land use plans, building codes and cultural heritage rules should be developed and strictly followed in all kind of tourism infrastructure and lucrative high-rise construction projects to assure the protection of cultural and natural heritage and the introduction of environmental protection standards. A comprehensive strategy of what should be protected should be implemented nation-wide. Special attention should be directed to Hanoi Old Quarter, which is unique in Asia. It would be helpful if clear regulations on hotel and hospitality projects would be drafted, put into practice and enforced with regards to both cultural heritage and environmental standards. It is important to develop, implement and enforce regulations in spatial development plans, land use plans, building codes and environmental impact assessment regulations to assure the appropriate protection of cultural and natural heritage and the observation of high environmental protection standards (waste water, energy efficiency) for tourism construction projects. In particular, proper waste water treatment should be mandatory, and building codes respected and not 'arranged'.

1.7.2 Environment protection standards

Vietnam is facing a very dynamic development of its tourism sector. Many new tourism infrastructure projects and several thousand new beds in accommodation facilities are being constructed this year and are planned for the coming years. This development has the potential to boost the tourism sector, but it also bears the risk of highly negative and irreversible impacts on the environment, the natural and cultural heritage, the attractiveness of the landscape and on local communities. In order to avoid such negative impacts we believe it is necessary to introduce and enforce stringent rules, regulations and procedures for the development and construction of tourism infrastructure and construction projects.

1.7.3 Recommendations

We would like to make the following recommendations:

1. develop, implement and enforce regulations to efficiently preserve the cultural heritage (§ 1.7.1)
2. provincial authorities should:
 - a. audit and prioritise the historical and cultural heritage remaining in their provinces (§ 1.7.1)
 - b. evaluate the condition, cultural significance and importance, conservation risks and preservation requirements for each (§ 1.7.1)
3. draft clear guidelines on hotel and hospitality projects for both cultural heritage and environmental standards (§ 1.7.1)
4. enforce respect of the building codes (§ 1.7.1)
5. make proper waste water treatment mandatory for hotel and hospitality projects (§ 1.7.1)
6. develop, implement and enforce regulations in spatial development plans, land use plans, building codes and environmental impact assessment regulations (§ 1.7.1):
 - a. to assure the appropriate protection of cultural and natural heritage and
 - b. the observation of high environmental protection standards (waste water, energy efficiency) for tourism construction projects
7. revise spatial development plans and land use plans (§ 1.7.1):
 - a. in areas with valuable cultural and natural heritage and
 - b. in the envisaged important tourism development zones to assure the proper protection of the natural and cultural heritage

8. revise building codes and environmental impact assessment regulations (§ 1.7.2):
 - a. to better assure the appropriate protection of cultural and natural heritage in Vietnam and
 - b. the observation of high environmental protection standards (waste water, energy efficiency) for tourism construction projects

1.8 Community-based tourism³¹

1.8.1 Community-based tourism market research

Publically available tourism statistics are generally limited to the national and provincial levels, with little detailed information publically available on tourism at the local level.³² Such a lack of information hinders the successful development of CBT as the decisions are being made by the public and private sector without adequate knowledge of market demand, trends etc. As such, a range of issues such as the over- or under-supply of particular CBT products or services in destinations occurs, or alternatively CBT enterprises are developed that do not respond to a defined target market. Moreover, whilst considerable market research is available on the international market, the mechanics of the domestic market – who are increasingly visiting rural destinations for holidays – is comparably limited. We believe it is important to perform regular community level market research on visitation, both international and domestic, and make the information publically available and easily accessible. Research questions might cover demographics, motivation, purpose of travel, activities undertaken, places visited, trip duration, daily spend, accommodation and travel, market segments, from and to, etc.

1.8.2 Strategic planning and capacity building

Local, district and provincial tourism authorities whilst understanding the importance of CBT are often limited in their capacity to effectively bring about positive change and foster the development of the sub-sector. Most members of local communities, in particular those that are more isolated, do not have the finances to enroll in private or college based hospitality or tourism training courses, whilst any free training courses are restricted to sporadic NGO or Government training programs. In our opinion awareness amongst communities of their CBT products and their social and economic value needs to be built up. Local, district and provincial authorities require assistance in the development and implementation of natural and cultural heritage protection strategies, e.g. zoning regulations, environmental impact assessments for development, development of “community care” groups, etc. Furthermore, we believe it is important that a CBT public sector training programme be implemented that includes such topics as: nature of CBT, components of successful CBT destinations, strategies for mainstreaming CBT into policy and planning and developing Public Private Partnerships in CBT. Besides this public sector training program, a CBT training programme for key local communities should be implemented that includes such topics as: mechanics of tourism industry and tourist needs and wants, CBT product development and management, low-cost marketing and promotions, small business management skills and basic English communication skills.

1.8.3 Co-operation and co-ordination

Co-ordination between relevant Governmental agencies that impact the sustainable development of CBT such as VNAT, the MoNRE and the Ministry of Agriculture and Rural Development is limited, which can reduce the effectiveness of specific policies and legislation on sustainable tourism development, responsible tourism, and CBT development. We believe it is paramount to the improvement of the tourism sector that the

³¹ Community-based tourism is tourism in which local residents, often rural, poor and economically marginalised, invite tourists to visit their communities with the provision of overnight accommodation.

³² Tourism statistics and tourism satellite account in Vietnam, www.esrt.vn.

various tourism-related sectors work together. Further to this, a cross-sectoral panel or body for sustainable tourism development that meets regularly should be created or a regular cross-sectoral discussion forum on tourism development should take place that also incorporates CBT development concerns.

1.8.4 Review and reform of policies

There is also only limited formal legislative recognition, encouragement and granting of powers to communities by the Government for their own self-determination of CBT development and activities at the local level which may hinder progress in CBT development. For example in some situations home-stay prices are set by the Provincial Government, and use of revenue collected from village visitor entrance fees is determined by the Government rather than the local community. In our view it is important to review and reform the various policies, harmonise them but at the same time create more possibilities for local entities to take decisions. Besides this, the roles and responsibilities of the Government, the private sector and the community in the implementation of CBT initiatives at the local level should be reviewed. This review should include the setting and uses of revenue generated from associated activities, and identify and implement reforms in key areas that will encourage the growth of the industry and CBT small and medium enterprises (SME).

1.8.5 Investment and PPP

Most CBT companies have limited access to the knowledge and resources required to start-up or further develop a CBT business. Therefore it is necessary that those companies can profit from other companies that are interested to invest in CBT which can be via PPP. We believe that it is important that the Government drafts policies and makes it possible to create PPP to improve CBT. We believe that the Government should promote the dialogue between the public and private CBT sector specifically aiming to identify PPP opportunities in CBT. This can be achieved by organising investment workshops in key destinations that bring together CBT enterprises, tour operators, non-governmental organisations (NGO), the Government and micro-financers.

1.8.6 Recommendations

We would like to make the following recommendations:

1. perform regular community level market research on visitation both international and domestic and make the information publically available and easily accessible (§ 1.8.1)
2. build up awareness amongst communities of their CBT products and their social and economic value (§ 1.8.1)
3. provide assistance to local, district and provincial authorities in the development and implementation of natural and cultural heritage protection strategies (§ 1.8.2)
4. implement a CBT public sector training programme (§ 1.8.2)
5. implement a CBT training programme for key local communities (§ 1.8.2)
6. develop a cross-sectoral panel or body for sustainable tourism development or hold a regular cross-sectoral discussion forum (§ 1.8.3)
7. review the roles and responsibilities of the government, the private sector and the community in the implementation of CBT initiatives at the local level (§ 1.8.4)
8. identify and implement reforms in key areas that will encourage the growth of the industry and CBT SMEs (§ 1.8.4)
9. promote the dialogue between the public and private CBT sector (§ 1.8.5)
10. organise investment workshops in key destinations that bring together CBT enterprises, tour operators, NGOs, the government and micro-financers (§ 1.8.5)

1.9 Real estate ownership

1.9.1 General

If Vietnam is to reach its potential and ambitions in terms of tourist arrivals and revenues it needs to learn from successes of other countries. If we take Thailand as an example, we can see that it has managed to attract more than 17 million tourist arrivals in 2011 even when it has had both political issues and natural disasters.³³ This is because they have built up a high level of return visitors.³⁴ They have accomplished this by offering a wide variety of choice of destinations within Thailand, offering a wide range of quality of accommodation and prices with Bangkok as an aviation hub, and in particular allowing foreigners to own property which has proven attractive and a lure to both regional and long haul travellers. Owning property would be particularly attractive to foreigners in certain destinations which are designated tourism areas already such as Danang, Hoi An, Nha Trang and Phu Quoc. We believe it would also help reinvigorate the property market in some of these areas. In our view this would provide a huge opportunity for Vietnam as second home ownership in holiday destinations is still a huge market and creates an automatic guaranteed return visitor.

Whilst we understand the sensitivity of this issue we believe that ways can be found to allow this and still preserve the fundamental principle that land is owned by the State. We believe it would therefore be worthwhile to look at the property ownership laws and ownership would only need to be on a leasehold basis. Thailand for example started by allowing foreigners to own long term leasehold interests in apartments in a complex provided more than 51% of the units were owned by nationals.³⁵ In an effort to increase the average stay of visitors, make Vietnam more attractive to families and to help reduce the oversupply in the residential markets Vietnam could consider implementing a programme to allow second home ownership by foreigners in certain locations.

1.9.2 Recommendation

We would like to make the following recommendation:

1. implement a programme to allow second-home ownership by foreigners in certain locations (§ 1.9.1)

1.10 Regulations

1.10.1 Law on Tourism

The law was adopted more than seven years ago and it is foreseen that an amended law will be adopted in March 2013. Many are of the opinion that the existing law failed to recognise the role of tourists as the most important player in this important industry and failed to make adequate provision for protection of tourists' rights. It is understood that this matter is now governed by many cross-cutting laws enacted since the Tourism Law. This needs to be rationalised to ensure that tourists' concerns are addressed in a timely and efficient fashion.

The practice of requiring tour operators to deposit a certain amount of money as a guarantee of their financial capacity to deal with possible tourists' incidents has proved to be of little use at all. There have been very few instances, if any, where a tourist's problems have been settled with the money from this deposit fund. So the deposit funds only benefit the banks where money is kept at zero interest while contributing nothing to the development of the industry. We therefore believe this requirement should be abolished.

³³ Statistical overview of the Thai Ministry of Tourism and Sports. Please note that December 2011 is not included.

³⁴ Laying a thousand-year egg, www.economist.com, 8 October 2010 and Tourism Authority of Thailand focuses on exceptional experiences and excellent value that Thailand offers to German visitors, features spas and wellness at ITB 2012, tatnews.org, 7 March 2012.

³⁵ Foreigners buying and leasing property in Southeast Asia, www.business-in-asia.com.

It might also be a good idea to decentralise authorisation, as this would release the burden for the central authority and make local governments more powerful and responsible. This would also have the effect of improving management. Local governments could be given the authority to grant tour-guide certification and evaluations of hotel standards. However it is important to ensure that in making these delegated decisions, local governments follow and implement national tourism policies and standards.

Finally we believe that the disagreement in planning, figures and reporting are also shortcomings that need to be amended in the law.

1.10.2 Decree 160 and Decree 95

Decree No. 160/2006/ND-CP (Decree 160) of 28 December 2006 provides details on the implementation of the Ordinance on foreign exchange, No. 28/2005/PL-UBTVQH11, of 13 December 2005. *Decree No. 95/2011/ND-CP* (Decree 95) of 20 October 2011 stipulates the penalties for administrative offences in currency and bank activities. According to Decree 160 companies are obliged to state prices in VND. We agree in principle with the government's strict enforcement of Decree 160. However, the application of Decree 160 has caused some concerns and practical problems which are sometimes a result of a lack of clarity as to the interpretation of some of the provisions of Decree 160 and the stricter enforcement. This has resulted in fines and penalties for organisations that we would regard as "good corporate citizens" who would not knowingly break the law.

For example, one of the main concerns of hotel and tour operators, who are selling goods and services to inbound groups and FIT, is that they are not allowed to quote prices in USD. As the VND is not a convertible currency, most visitors and tour operators overseas are not familiar with the VND. They might get the wrong impression about a price, considering there are many zero's involved. We believe it would be helpful if hotels and tour operators would be able to display prices in dual currency on their websites whether hosted in Vietnam or overseas, so possible tourists can view prices in a currency they are familiar with.

Another problem is caused by the fact that many hotels work through local travel agents, who in turn work with overseas travel agents. According to Decree 160, local parties should contract in VND while the party dealing with the overseas parties has to agree pricing in a foreign currency. This causes both administrative issues and currency exposure issues. We believe that these measures have a negative impact on the development of the tourism industry and that the Government should allow contract prices between local entities where clearly the end user is an overseas tour operator or individual to be priced in a foreign currency. We believe that companies working in the tourism sector should be viewed and treated as any other export industry where companies negotiate and sign contracts in foreign currency, when dealing with foreign partners.

1.10.3 Licensing

We believe that creating a favourable image of Vietnam and thus contributing to a growth of foreign arrivals is important. As we have seen in the hotel industry well-run foreign firms help raise the standard of the sector and the standards of local hotels and operators. We acknowledge the importance of training and engaging local personnel and operators, in the longer term the licences to tourist-related services should only be granted to well-trained personnel with a formal education and qualification relating to the service-industry, regardless if they are Vietnamese or a foreigner.

1.10.4 Recommendations

We would like to make the following recommendations:

1. amend the Tourism Law in the following way (§ 1.10.1):
 - a. clarify roles and responsibilities for the protection of tourists' rights and ensure that timely dispute resolution mechanisms are provided
 - b. cancel the legal requirement for tour operators to deposit a certain amount of money as a guarantee
 - c. decentralise authorisation and allow local governments to grant tour-guide certification and evaluations of hotel standards
 - d. ensure that local authorities follow national policies and standards and
 - e. address the disagreement in planning, figures and reporting
2. remove any ambiguities in Decree 160 and make clear what is acceptable and what not (§ 1.10.2)
3. 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 (§ 1.10.3)
4. remove additional restrictions for foreigners to work as tour operators in the tourist-industry (§ 1.10.3)
5. improve the licensing process for tourism companies (§ 1.10.3)

1.11 Help to tourists in difficult situations

1.11.1 General

When you, as a tourist, are robbed, it is not easy to report this in Vietnam. However, for insurance reasons tourists often need a document proving that they reported the theft to the local police. Reporting of thefts and other crimes and misbehaviours is often complicated, due to the language barrier and the time-consuming procedures. Most thefts therefore remain unreported and thereby do not reveal the real situation. We were pleased to learn that the National Assembly during its session in May discussed a national tourist police and that they agreed that Vietnam needed more foreign-language hotlines to receive information and complaints from tourists; and proposed compulsory insurance for foreign visitors.

We suggest that the existing Tourist Police should be more active and present; with better recognisable uniforms and that they should cover all major tourist destinations in Vietnam, and patrol at least the city centres and places of interest frequently. They should also speak basic English. At least one Tourist Police station and a phone hotline should be set up in city centres and be open 24 hours, where visitors can report crimes and misbehaviours, regardless of where they happened.

The major tourism destinations should also have official tourism service centres where tourists can buy official handicrafts, souvenirs and postcards. Moreover, we believe that it would be helpful if the major tourism attractions become more visible. It is now not always easy to find them, because of the complicated street system and numbering in Vietnam, but also due to inexistent signage. Visibility could be achieved by putting signs tourists can follow to arrive at the destination they want to go. It would also be helpful indicating how many kilometres it is to a certain destination.³⁶

1.11.2 Recommendations

We would like to make the following recommendations:

³⁶ Document of VicRoads and Victoria Tourism, Australia and [website](#) of Highway Agency in the United Kingdom.

1. create a national tourist police (§ 1.11.1)
2. train the police in basic English (§ 1.11.1)
3. open hot-lines in various languages (§ 1.11.1)
4. open official tourism service centres (§ 1.11.1)
5. improve the signing to major sights (§ 1.11.1)

1.12 Conclusion

The Vietnam Tourism Master Plan forecasts 10 million foreign visitor arrivals and 47 million domestic tourists by 2020; 14 million and 55 million respectively by 2025 and 18 million and 70 million by 2030. To put this into context Vietnam is aiming to have a similar number of foreign visitor arrivals as Thailand has today. So whilst on the face of it this seems to be an ambitious target it could be easily achieved, in our opinion, if the right regulatory framework is in place and the incentives are given to encourage investment into the travel and tourism sector. Our recommendations before are all designed to help Vietnam achieve their targets and based on our collective experience in this very important sector. We wish to continue to work with the relevant authorities to achieve their stated objectives.

SUMMARY OF TOURISM MEETING

- *Time:* 09:00 – 11:30, Thursday, 18/09/2012
- *Venue:* Ministry of Planning and Investment – No. 6B Hoang Dieu, Hanoi
- *Participants:* See Appendix

I. AGENDA

- Tourism advisory board
- Destination marketing and investment
- Visa on arrival
- Training initiatives

II. TOURISM ADVISORY BOARD (TAB)

Mr. Ken Atkinson - Head of Tourism Working Group, Vietnam Business Forum (VBF)

- The biggest change in the make up of the VBF Working Group is the effective merger between EuroCham Sector Committee on Tourism and Hospitality with the VBF Tourism Working Group. Mr. Ken Atkinson is the new Chairman of the Working Group.
- Both Government and private sector have common goals and objectives to see Vietnam succeed in its strategy and its objectives to be amazing tourism destination from now to 2020. It is a positive sign to see Tourism Advisory Board ("TAB") initiative started to take shape and form. The Group would like to receive an update on where the TAB stands and how Government sees it functioning and fitting into the decision making process.

Response by Mr. Nguyen Manh Cuong - Deputy Director General of Vietnam National Administration of Tourism (VNAT)

- The member list of the TAB has been finalized and is being under consultation. This process is expected to be due in October. The list of 15 members including representatives of relevant local and foreign agencies, organizations, and experts will be confirmed. October, probably, will witness the establishment of the TAB.
- The TAB will act as the bridge to connect enterprises with governmental agencies with respect to access to information and policies. Through this channel, businesses may join the Government in planning development strategies for tourism, including dialogues on tourism operations and policies.
- The TAB aims at helping Vietnamese tourism improve its efficiency and competitiveness in the context of globalization.

III. DESTINATION MARKETING AND INVESTMENT

Mr. Ken Atkinson - Head of Tourism Working Group, VBF

- Major concern at the moment is the destination marketing for Vietnam and the very limited funding available from the Government sources to support marketing Vietnam as a tourism destination.

- The amount of money that neighbouring countries are investing in promoting themselves as tourism destinations particularly Thailand, Malaysia, even Cambodia, probably spending more than Vietnam in promoting their tourism at the moment.
- According to information from members, particularly 4-5 star hotels indicated that the occupancies in hotels are actually declining. This may result from the change in the mix of visitors from higher spending FITs and group travellers from North America and Europe to groups from China, Taiwan, Korea, and Japan. Generally speaking they are much lower spending visitors. So there is a risk of falling over revenue and profitability in the sector.
- One idea had been raised from last year is to impose tourism levy on visitors maybe based on per night, per hotel stay. The industry as a whole will be quite accepted to a levy at \$1 per night which will produce significant additional revenue for marketing purposes.
- If that money would be collected, it has to be regularly controlled on how it would be collected, managed, and spent. This is not new to the industry as Hongkong had tourism levy in 1990s and Singapore in 1980s but it will create significant additional resources for Vietnam's tourism industry.

Mr. Kai Marcus Schroter - Vice President of Tourism and Hospitality Sector Committee, EuroCham Vietnam

- It is the shift from high level spending FITs to more relatively lower groups which also stresses on resources and infrastructure which means the industry has to serve an increase in the amount of customers without receiving the same result.
- The TAB is to build the bridge for the first time between private and public sector. As the ones who are dealing on the daily basis with customers both Vietnamese and overseas, the Group is ready to support and give inputs on how to promote a sustainable tourism or promote quality of tourism, and make that shape into the Government policies.

Response by Mr. Nguyen Manh Cuong - Deputy Director General of VNAT

- Vietnamese tourism reached 5 million visitors in 2010 then increased by 20% to 6 million the following year. However, the year of 2012 only plans the number of visitors in the neighborhood of 6.5 million which is under 10% increase. VNAT eschews quantity in favour of quality.
- Though the tourism sector is administrated by a multi-sector ministry also covering culture and sports, the Vietnamese government still firmly asserts and directs the development of tourism to become a spearhead industry towards 2020.
- VNAT supports the viewpoint of the Group and indeed is pursuing quality in tourism development. This, however, does not mean an abrupt stop to low spending markets.
- VNAT already had a schedule to promote Vietnam's destinations to higher end markets such as being in the World Travel Market 2012 in London. The future of the campaign targets Europe, Middle East, and newly emerging markets such as Eastern Europe.

- VNAT appreciates the recommendation of the Group on the tourism levy of US\$1 per visitor per night. The application, however, is rather complicated due to strict regulations of law on budget and fees and charges. Plus, this levy will raise the complication of accounting in businesses and related bodies.
- Based on the above recommendation, VNAT will propose to the Government to allocate US\$1 per visitor for the tourism sector to prompt its promotion. Corresponding with the number of visitors, the tourism sector shall be budgeted at about US\$6 million per annum for its destination marketing. This introduction appears totally sensible giving consideration to the contribution of the sector of roughly US\$6billion per year.
- The initiative has been supported by MPI and MOF and will be submitted to the Government for decision. It, however, cannot be executed immediately due to the difficult economic time.
- We hope to receive support of the Group through your suggestion to the Government at the VBF in order to reflect the objectiveness of this idea.

Mr. Ken Atkinson - Head of Tourism Working Group, VBF

- Certainly, an increase of 300% in budget for marketing would be significant but obviously still much lower than Thailand, Malaysia. Nevertheless, it is a good step in the right direction.
- The above recommendation of the Group is not trying to slow down the growth in arrivals from China or Taiwan but to increase the high spending tourists from North America and Europe.

IV. VISA ON ARRIVAL

Mr. Ken Atkinson - Head of Tourism Working Group, VBF

- One of the big drivers in tourism, says in Thailand, to a less extend Malaysia, has been the percentage of visitors that come back years after years. But Vietnam is not achieving any significant volume of returning visitors.
- One of the issues is obviously Visa. The sensitivity internally in Vietnam is appreciated and Visa is administered by different Ministries and Departments.
- One of the extreme cases is Thailand where most residents of most countries can get on the plane and see their Visa for 14 or 28 days at the airport even they have to queuing sometimes. On the other hand is Cambodia with Visa on arrival with the fee of \$20-25 depending on whether you are a tourist or business person. The system is very efficient: filling in the form, giving the passport, going to the other end to collect the visa and paying \$20-25. It is facilitating the ease of travel.
- It is recognized that there are nationalities that have sensitivity. But it should be easy to extend the visitors who are allowed to get Visa at the airport when they arrive.

Response by Mr. Bui Quoc Thanh – Deputy Director of Consular Department, Ministry of Foreign Affairs

- Tourists always have interests in natural beauties and attractive sites of their arrival destination. Countries that possess these gifts while offering high quality services will win visitors over.
- People travelling into Vietnam, especially from developed nations, always have airline tickets and visas prepared and full information of the landing place ready. These people normally go on tours. High spending visitors, particularly, prepare for their trips at least 6 months or 1 year ahead. Even backpackers also have had Visa when they arrive Vietnam. Cases of getting Visa on arrival are only a few.
- For these reasons, Vietnamese law only stipulates Visa on arrival for special circumstances such as emergency, natural disaster, salvage, or the absence of the Vietnamese diplomatic agency in that foreign country.
- D-class Visa (no reception and non-extendable): visitors may get D-class Visa for 15 days at the diplomatic agencies in their countries. This type of Visa, still, does not attract visitors due to its requirements of
 - + 2-ways flight tickets or Visa to another country
 - + Minimum of \$1000

This Visa itself, however, does not guarantee entry for visitors if they are in the banned list.

- Visa on arrival: Vietnam has exempted Visa for seven countries, citizens from those seven countries are allowed to come and stay in Vietnam for 15 days without visa. Visitors from these nations, however, show no increase despite of the fact that Nordic countries are developed with potentially high spending travelers. Even Japanese or Korean travelers do not increase regardless that many of them are investing and doing businesses in Vietnam.
- Vietnam has its foreign policy of deep and wide integration, and multilateral and multifunctional relationships. The Visa exemption policy, therefore, should be reviewed according to reciprocity principle. Having said that, Vietnam expresses its will to consider Visa exemption or simplification policies for global citizens based on that basis. During the Visa exemption period of Vietnam for seven countries, they have not reciprocated the request of Vietnam to consider Visa exemption or facilitation for Vietnamese travelers/business persons. Vietnamese's economic ability has improved and people are able to travel but Visa process even to the seven countries is a hardship.
- To sum up, Vietnam is ready to open its policy or even grant Visa exemption on the foundation of bilateral form, reciprocity, including Visa on arrival.

Response by Mr. Tran Van Du - Immigration Department, Ministry of Public Security

- Attracting visitors coming to Vietnam is a focal point. The unilateral policy of Visa exemption for seven countries is a pilot program. These seven countries can represent

their regions of potential tourists but the data analysis shows no significant increase of travelers.

- + Korea: 2009 = 318,000 turns, 2010 = 433,000 turns, 2011 = 493,000 turns
- + Japan: 2009 = 310,000 turns, 2010 = 380,000 turns, 2011 = 422,000 turns
- + Finland: about over 8,000 turns in 3 years
- + Sweden: 2009 = →30,000 turns, 2010 and 2011 = → 20,000 turns

These indicate Visa is not the factor determining visitors to Vietnam.

- Improvements since 2009

- Visa on arrival

- + At the moment, all international borders have signs in both Vietnamese and English instructing clearly place for Visa on arrival.
- + Electronic numbering system has not been deployed due to the small size of airports and border police's working area on Visa arrival is still limited. They are now on the upgrade.
- + A number of capable travel agencies are authorized to have employees at the border gates to take the precaution of unexpected reasons that travelers have no Visa. These passengers can purchase tour at that door and will be issued Visa.

This process, however, is not encouraged because there are cases travelers who do not meet immigration requirements have to stay at the airport. It causes difficulties since the infrastructure such as hotels and fundamental services are still in short supply.

- Transit

- + Dissimilarly from many countries, those who transit through Vietnam do not need Visa. During their transit, they are facilitated with travelling licenses for 15 days, equivalent to unilateral Visa exemption, if there are demands.
- + In short, from the Visa respect, Vietnam has made much progress even Visa on arrival has been expanded compared to other countries.

Mr. Ken Atkinson - Head of Tourism Working Group, VBF

- Totally agree with the view on reciprocity.
- It is not surprised that there is no change in the arrivals because of the exemption for the seven countries. People that come from long distances for sure they plan their trips a month ahead so they have time to get visa. The Japanese and Korean normally travel in groups so again they arrange their visits well ahead.
- It is pleased to hear about the transit permit but that really needs to be well communicated particularly to the airlines because most airlines will not give you passes to Vietnam even if you have a ticket without showing a visa or an invitation letter.

Mr. Kai Marcus Schroter - Vice President of Tourism and Hospitality Sector Committee, EuroCham Vietnam

- The changes in the immigration have been recognized since 2009 until now so it is progress. But the key point for Vietnam is that Vietnam is losing a certain percentage of very important travellers, FIT travellers would come with a relatively high spending and want to visit Vietnam on the short trips.

V. TRAINING INITIATIVE

Mr. Ken Atkinson - Head of Tourism Working Group, VBF

- MOET recently has also commented on the lack of trained professionals in the tourism sector.
- There have been fairly major investments through bilateral programme to improve the training materials and the training for staff working in the sector.
- General understanding and feedback are basically that the number of people entering in the industry and general standards is quite low. This may be misconception but the materials, the VTOS, are not actually being used in many of training institutions.
- The Group would like to know how can help improve the standards, with the training initiatives to support the authorities and training institutions to produce higher capable people in the workforce for the sector.
- The Group has many members particularly foreign hotel operators, members that deliver training, and many of those are open to and willing to help with either extra curricular training or to promote the system of internship in the foreign managed hotels, for example.

Response by Mr. Nguyen Manh Cuong - Deputy Director General of VNAT

- Agree with comments on the current training programs in the tourism sector. Vietnam is gifted with many natural beauties, rich historical culture, and all other potentials of tourism but unskilled labor will damage tourism products.
- VNAT has received support from Luxembourg and EU through projects on improving standard and quality of labor in tourism sector, contributing to the construction of VTOS.
- The tourism sector is collaborating with MOLISA and MOET to match the tourism standard with the VTOS.
- In January 2009, ASEAN members signed the Mutual Recognition Agreement (MRA) on Tourism Sector. This is a foundation for the flow of labor within the block.
- The VTOS sponsored by the EU has 13 vocational standards in which 9 are for hotel and 4 are for tourism. In addition, the tourism English standard has been examined and included 70-80% into the syllabus.

- VNAT is so glad to hear the support of the Group. In addition to experience and skills of experts, the Group can allocate experts to training centers to give extra supports to students.
- Besides, the Group may help train students using their members' premises with the consideration to allowance for students.
- Tourism vocational standard agrees with the ASEAN standard and national standard frame will be established. Invitation for consultation will be sent to experts of the Group.

Mr. Ken Atkinson - Head of Tourism Working Group, VBF

- The Group would like to see more regular meetings but obviously does not want to overlap with the TAB. So once we see the TAB guiding in then a small working group could be set up to look after specific training initiatives.

Appendix 1 - Participant List

<i>Sqt.</i>	<i>Full-name</i>	<i>Title</i>	<i>Org</i>
<i>Government Agencies</i>			
1	Mr. Nguyen Manh Cuong	Deputy Director General	General of Vietnam Administration for Tourism
2	Mr. Bui Quoc Thanh	Deputy Director	Consular Department - Ministry of Foreign Affairs
3	Mr. Tran Van Du	Manager	A72 - Ministry of Public Security
4	Mr. Dang Xuan Quang	Deputy Director	Foreign Investment Department, Ministry of Planning and Investment
5	Ms. Le Minh Que		Travelling Department, VNAT
6	Ms. Bui Thi Xuan Nga		Consular Department - Ministry of Foreign Affairs
7	Mr. Nguyen Van Minh	Deputy Manager	A72 - Ministry of Public Security
8	Ms. Pham Thi Minh Loan	Deputy Manager	A72 - Ministry of Public Security
9	Ms. Le Nguyet Anh		Foreign Investment Department - Ministry of Planning and Investment
<i>Vietnam Business Forum</i>			
1	Mr. Ken Atkinson	Managing Partner	Grant Thornton/ Head of Tourism Working Group, VBF
2	Ms. Do Thi Xuan Thang	Vice Director	Exotissimo Hanoi
3	Mr. Kai Partale	Acting Team Leader	Environmentally & Socially Responsible Tourism Programme
4	Mr. Kai Marcus Schroter	General Director	HTH Management Consultancy
5	Ms. Phung Thu Ha	VBF Secretariat	Vietnam Business Forum
6	Ms. Vu Tra My	VBF Secretariat	Vietnam Business Forum

Mining

NOTES TO THE VIETNAM BUSINESS FORUM

*Prepared by
Mr. Bill Howel
Head of Mining Working Group*

Lack of Investment in Vietnam's Mining Industry by Foreign Mining Companies

Unlike most ASEAN countries, there are no major international mining companies currently active in the mining sector in Vietnam, and only about six technically-capable junior foreign companies listed on recognized stock exchanges such as London, Toronto and Australia.

It is clearly Vietnam's sovereign right to decide the pace at it wishes to develop the country's mineral resources and to what extent it wishes to open up such development to foreign investment. However, on the assumption that Vietnam does welcome foreign participation, it is worth exploring briefly why the country is attracting such little foreign interest in the minerals sector at this time.

Pin-Pointing the Disincentives

International mining experts generally agree that the New Mineral Law 2010 and the fiscal regime related to mining in Vietnam contain two main areas that present significant disincentives:

1. Lack of clarity, transparency and practicality in the wording of the Law and decrees, particularly with regard to the proposed "auctioning" process, despite considerable input from the Mining Working Group and World Bank experts during the formulation of the Law; and
2. The cumulative burden of corporate taxes, royalties, export fees and mining rights fees imposed on mining activities. The recent draft proposal by the Ministry of Finance to significantly increase export tariffs on all mineral concentrates in two stages in 2013 and 2014 merely adds to the disincentive equation. Whilst it is a commendable objective to process minerals as far as possible within Vietnam, such ambition cannot be economically justified until mined or mineable ore inventories in-country are high enough to feed and justify the cost of construction of down-stream facilities such as smelters and refineries.

These disincentives have deterred foreign companies who have the capacity to introduce efficient exploration, mining and processing technology, together with appropriate environmental protection and worker health and safety measures from investing in Vietnam. It is simply not economic for foreign companies to develop a profitable, state-of-art mining operation in Vietnam under current legislation and taxation conditions.

Such companies will take their knowledge and expertise to other countries competing for international exploration and mining funds that have clearer laws and more favourable fiscal regimes.

Consequences

Without tapping world-best-practice mining and processing methods, it is an unfortunate consequence that a significant portion of the country's mineral wealth is currently being permanently squandered and lost, in addition to the cost of serious environmental degradation, and risks to the lives of mine workers.

Vietnamese state-owned companies who are still using relatively low technology in mining operations and, even worse, the widespread artisanal or illegal mining activities that are using primitive methods to high-grade mineral deposits (selectively picking out only the higher grade portions of the deposit) will leave a significant percentage of Vietnam's valuable mineral wealth in the ground permanently, as it is usually not economically feasible to go back later to mine only the remaining lower grade material. By contrast, efficient internationally accepted mine scheduling aims to balance the recovery of higher-grade and lower-grade resources during life-of-mine to achieve the optimum economic recovery of the total deposit. Vietnam should be aiming to recover the optimum percentage of its non-renewable resources.

The international mining community looks forward to working with the relevant Vietnamese authorities to contribute to maximizing the efficiency and safety of mining in Vietnam and minimizing environmental damage, under conditions that encourage profitable, responsible mining practices.

Section VI

APPENDIX

Vietnam Business Forum - Hanoi, 29th May 2012

REPORT TO THE CG MEETING

Quang Tri, 4th June 2012

The Vietnam Business Forum (VBF) met on May 29, 2012 in Hanoi was highlighted with the presence of Deputy Prime Minister H.E. Mr. Vu Van Ninh. Discussion focused on how to move Vietnam's economy forward from stabilization to revitalization.

The Midterm VBF on May 29, 2012 is the first Vietnam Business Forum which is organized by the VBF Consortium in partnership with Ministry of Planning and Investment (MPI), the World Bank (WB) and International Finance Corporation (IFC). This is the preliminary milestone of the VBF after IFC officially transferred the coordination function of the VBF to the Consortium of 14 foreign and local business associations and chambers of commerce in February 2012. The Consortium established a New VBF Secretariat to coordinate all day – to – day activities of the Forum. A Management Board consisting of seven representatives from the VBF Consortium's members was elected (AmCham, EuroCham, VCCI, JBAV, KorCham, IFC, HYBA). The Management Board is led by representatives of EuroCham and VCCI.

The following are highlights of the main themes discussed at the Forum:

REVIEW OF INVESTMENT CLIMATE

Five chambers of commerce and associations representing foreign and local business community reported in this session.

The private sector believes that the Government has taken steps to stabilize the macroeconomic situation in the short term, but that there remains a lot to be done to improve the long term attractiveness of the Vietnamese market for foreign investor and Vietnamese entrepreneurs.

Foreign Business Community

Comprehensive implementation for the three coherent strategic priorities of restructuring the financial sector, restructuring SOEs and improving the efficiency of investment in the public sector is crucial step to be pushed forward. Additionally, it is desirable to receive more specific information about developed plans and critical steps needed for the implementation of the strategies from the World Bank and the Asian Development Bank and others that are supporting Vietnam's economic and social development.

Proper Corporate Governance and transparency should be enhanced to combat corruption and fraud. Investors should be able to access to fruitful and well - organized information which helps encourage investment and the efficient use of time as well as resources.

The issues on work permits, overtime and maternity leave in relation to Draft Labor Code and Decree 46 are still among the top concerned issues of the foreign

business associations and chambers of commerce since very few progresses have been recorded.

Local Business Community

Business community values Resolution 13/NQ - CP on some solutions for easing difficulties against production and supporting the market. Nevertheless, access to finance is still an outstanding issue for small and medium enterprises. The financial support from the Government through concessionary interest based on industrial standards, technologies, and job security is encouraged, rather than just based on the “efficient business plan” judgment of commercial bank staff.

Due actions to promote supporting industries, including direct financing when there are sales exclusivity/product underwriting agreements for core industries should be undertaken as soon as possible, to help industry to expand land, plants; upgrade technologies; have access to research and development, training for highly skilled labor, international cooperation in technology transfer; and promote sales through trade fairs and partnership opportunities.

WORKING GROUP REPORTS

Banking

The Government’s macroeconomic policies have turned most indicators much more positive this year, and the SBV has been able to maintain confidence in the banking system through a difficult time. This is important progress. To maintain progress, the Government’s structural reform agenda also needs to be implemented alongside the day-to-day macroeconomic management. In this regard, the publication of a Banking Restructuring Plan which sets out a strong strategy for banking reform has been well received and supported. However, it would enhance confidence in the plan if a detailed implementation scheme is also published, setting out the tasks of the various work streams, responsibility for them and deadlines for their completion. It is also suggested that if foreign ownership limits were increased, foreign banks could play a more useful role in implementing the governance reforms set out in the Banking Restructuring Plan. If foreign banks could own bigger stakes in local banks, their ability to influence governance practices would be greater.

There has been a high volume of new regulation for the banking system this year, with more to come. While it is understandable that the economic circumstances have caused the issuance of several of the new measures, it is concerned that many represent administrative restrictions in areas where market-oriented measures would be more efficient and effective. Many measures properly prevent weak banks from imprudent activity, but also restrict strong banks’ ability to help the economy as much as they could. The Group is encouraged by the SBV’s assurance that many of these measures are temporary in nature, and support their removal as soon as the economic environment allows.

Credit growth in the economy has been well controlled by the current growth cap regime, to the point where we believe that the growth caps could be relaxed for stronger banks in order to help meet the Government’s credit growth target of 17% this year. The SBV has indicated its willingness to consider higher growth for some banks, and this initiative is appreciated.

Finally, working relationship between the BWG and the SBV continues to deepen and improve. The Group is grateful for the cooperation shown by the SBV at all levels, and looks forward to further progress in the collective agenda.

Capital markets

The capital markets in Vietnam have all the qualities to become one of the emerging markets which are attractive and successful. However, to get success, Vietnam should accelerate the equitization process, rearrangement of securities, raising the quality of corporate governance (e.g. public information and transactions) and simple of account opening.

Equitisation is the backbone of sound economic policy and one only has to see what has been achieved in other Emerging Markets. The key to a successful offering is VALUATION and the only way to achieve this is to hire independent advisers (reputed investment bankers) who can price and place out the issue in line with global industry standards.

Liquidity continues to be a problem due to the trading rate limiting nature of price movements. A 30 - minute halt should be imposed in the trading of a security when a move up or down of more than 10% occurs.

Related to open accounts for foreign investors, the 6 - month time to open an account securities investment in Vietnam and the requirement to obtain judicial status and a non criminal record from the country of origin of the account holder prove to be time consuming and costly. This should be replaced by the simple requirement of a notarized valid passport.

Infrastructure/Power and Energy

The major issues highlighted by the Infrastructure sub-group were that foreign-invested power projects would not be financed until lenders were sure that the BOT Company had access to foreign exchange to repay its loans (at the moment the Government is only offering 30% FX guarantees). In addition, the message was very clear that lenders will have a very hard time financing domestic coal projects unless (i) the MOIT stands behind Vinacomin's obligations to transport coal to the power plant. The group also highlighted that (i) lenders need the right to take a mortgage over the land on which the power plant is built (the current compromise underlines fears about Vietnam's legal environment), (ii) infrastructure that is necessary for power plants - such as transmission lines - need to be built in a coordinated fashion by EVN or another entity, and (iii) there will be delays unless local authorities have the funds to clear sites for projects and to prepare the land for them.

The group also noted that the Government expects to make an effort to provide a full set of guidelines for PPP projects, but pending the effectiveness of such regulations the group suggested more focus on making BOT projects work. It stressed that commercial project finance money was very limited these days and that project finance would only be available to the best projects, therefore it would be useful to have a re-focus on how to work with potential investors in a manner that shares the risk appropriately. The perception of the community was that this had not necessarily occurred well in the Nghi Son 2 tender.

Port

There are many opportunities to attract foreign shipping lines which will benefit Vietnam and Vietnamese Exporters and Importers, specifically within the areas of sufficient dredging levels and maintenance of same, competitive port charges and a capable and competitively priced domestic feeder network, be it with domestic or international carriers.

Investment and Trade

The Investment and Trade Working Group members favour policies that enhance competitiveness and encourage growth. To achieve this, particularly in a challenging economic environment, enterprises need a level playing field, free of red tape and corruption. And Vietnam's economy should adapt to changing circumstances where Myanmar is quickly coming back into the international community.

For administrative reforms regarding Project 30, while the aim is to reduce the cost of enterprises of administrative procedure by 30%, the new Draft Labour Code would triple the administrative compliance cost in one relevance area, by increasing the timing for applying for work permit for once every three years to every single year. The issue of work permits under Decree 46 and its implementing circular has also undermined foreign investor confidence in Vietnam. In this connection, one positive progress has been reported at the Forum where the Ministry of Labours, Invalids and Social Affairs confirmed that the work permit term is planned to be extended to two years according to the Article 175 of the draft Labour Code submitted to National Assembly.

With regard to the enterprise law issues, one subject to great concern that arises out of is the definition of 'foreign invested enterprises' which results in different interpretation of government agencies. The Government should review this issue very carefully before adopting any standard for defining foreign invested enterprise, other than the obvious 'voting control' standard of the WTO negotiators obviously have in mind.

In terms of international integration, as part of the move from stabilization to revitalization, it's very important to maintain no less favourable access to export market as compared to other exporting countries. Therefore, the Government should pursue the TPP and FTA talks aggressively.

Land

The real estate sector in particular has been severely affected by the global financial crisis, and the fiscal policies, which are currently imposed in the country. In connection with the amendment to the Land Law in 2013, the Group recommended a number of guiding principles for consideration during the process to ensure that real estate continues to develop and meet the needs of the public: equal rights for all categories of lands users. Secondly, clear, consistent and transparent procedures for and implementation of procedures for land compensation, clearance and pricing. And the removal of unnecessary procedures and ensuring consistency with existing provisions and other legislation.

Tax

Reforms in tax policy have addressed many disputes and controversial issues encountered by enterprises. Nevertheless, in the practical operations of taxpayers, there exist various unclear and unreasonable tax treatments that need to be clarified and solved to promote investment attraction and improve the investment climate in general.

Among those issues, the full abolishment of 10% A & P cap in long-term run, and raising the cap as immediate remedy action, should be considered in amendment of the Law on Corporate Income Tax in 2013. In addition, as the current regulations are unclear and somehow conflicting, detailed guidelines should be in place to allow enterprises which are approved to keep accounting book in foreign currency to determine the accounting gain/loss by only one conversion at the year - end using the closing exchange rate. Last but not least, the requirement on construction of norms for damaged goods should be abolished, and damaged goods due to expiry or goods destroyed by natural biochemical processes should be deductible in full.

Education

The Group focused on the following key areas: University autonomy; the mechanism between corporate governance and University administration; and quality control of higher education. However, the most effective way to improve the quality of education in Vietnam would be through the concerted effort of all relevant stakeholders working closely together.

The Group is prepared to work closely with MOET, MOLISA, and other Government agencies such as the ACAPR. The Group would also like to liaise closely with educational institutions in addition to the World Bank and Intel who have a substantial interest in this area. The model for an **“Ideal Higher Education System”**, developed by Intel, provides an overview of the relevant components of a quality higher education system. This model could be used as a basis for developing improvements in education in Vietnam.

VIETNAM BUSINESS FORUM

Hanoi, May 29, 2012

OPENING REMARKS

The Government of Vietnam – Mr. Bui Quang Vinh, Minister of Planning and Investment

The Vietnam Business Forum (“VBF”) has been supporting Vietnam’s economic development for more than 14 years and is a very important dialogue channel that assists the Government in developing a policy and legal framework system to improve Vietnam’s business environment. As a result, the business community has contributed to the amendment and issuance of many beneficial legal documents and policies. A key actor in this process has been International Finance Corporation (“IFC”), which has financed and played a VBF coordination role. The year 2012 witnessed a remarkable milestone with the transfer of the VBF Secretariat function from IFC to 14 international and local business associations and chambers of commerce. This is a result of the private sector’s mature growth and will ensure the sustainable development of the Forum. The special participation of the Deputy Prime Minister Vu Van Ninh in the first VBF semi-annual meeting after the transfer demonstrates the Vietnamese Government’s interest and appreciation of the VBF’s contributions over the past years. With the theme “From Stabilization to Revitalization”, the VBF mid-term meeting 2012 will focus on six critical issues that are connected to Vietnam’s economic renovation needs.

The World Bank in Vietnam – Mrs. Victoria Kwakwa, Country Director

In the past few weeks, the Government’s policy focus has shifted to give more attention to stimulating growth given the considerable stabilization progress as outlined in Resolution 11. While Vietnam’s faltering economic growth is in part due to a more difficult global economic environment over the last few years, it is also due in large part to snail’s paced structure reforms to tackle well-known economic inefficiencies. This has translated into Vietnam lacking new sources of efficiency and productivity to drive growth. This finding is highlighted by several recent studies including the Vietnam Competitiveness Report jointly worked on by CIEM and Professor Michael Porter, a recent McKenzie Group report and some World Bank work, notably the 2012 Vietnam Development Report. And the Government recognizes this and has announced a three-part restructuring agenda. However, this focus on short-term policy responses needs to be in step with similar attention to economic structure and efficiency sources. In particular, to the constraints that impede the ability of the private sector to generate growth and jobs. To link discussions today to those at the Mid-term CG on June 4-5, the Government’s attention on growth reflects its important role in Vietnam’s socio-economic development success over the last few decades. Rapid economic growth has been the main driver of poverty reduction in Vietnam and the mid-term CG will pay special attention to poverty reduction. We, therefore, see the discussions today and around poverty reduction at the mid-

term CG as mutually reinforcing and complementary. I want to reaffirm the strong partnership between the Government and private sector to work together and support growth, jobs and poverty reduction in Vietnam.

International Finance Corporation – Mr. Simon Andrews, Regional Manager

I would like to open by welcoming Deputy Prime Minister Ninh to his first VBF, which returns us to welcome practice of having a Deputy Prime Minister in attendance and shows the Government's continued commitment to a strong partnership with the business community. Today marks a new milestone in the VBF story. For the first time, the private sector, in coordination with the Government, has taken the lead in organizing and performing the secretariat function. It is believed that the new leadership will add a new dimension to the proceedings and the business reform process. The first six months of 2012 have seen some solid progress in stabilizing Vietnam's macro-economy, but it is Vietnam's commitment to the reform process that will determine the country's long-term economic fate. Reform and revitalization, today's theme, is a long and hard process and will require many tough decisions. But it is only through this process that capital and other scarce resources can be allocated more efficiently and Vietnam's human capital will become more skilled making Vietnam more competitive. I am greatly encouraged by the commitment of both the private sector and the Government in transitioning the VBF and am excited by the prospects for the Forum to provide a leading dialog platform between the private sector and the Vietnamese Government as it embarks upon the next wave of reform-led growth.

Vietnam Business Forum Consortium ("VBF Consortium") - Mr. Alain Cany, Co-chairman

On behalf of the VBF Consortium, we are honored and pleased to hold the first Mid-term VBF, fully organized by the private sector. As mentioned, IFC officially transferred the coordination function to a group of 14 foreign and local business associations and chambers of commerce. The management board of seven representatives from AmCham, EuroCham, VCCI, JBAV, KorCham, HBYA and IFC was elected. This board is co-chaired by Dr. Loc of the VCCI and myself. Seven working groups have been transferred in terms of structure and activities. In the last two months, eight meetings were held with Government counterparts to address underlying issues and dialogues. The Deputy Prime Minister's presence today is a great honor and underscores the Government's special attention to the on-going dialogue with the private sector through the VBF.

The Government of Vietnam – Mr. Vu Van Ninh, Deputy Prime Minister

Vietnam's economy still faces many challenges and the primary missions in 2012 are to attain single-digit inflation, sustain reasonable growth at roughly 6%, cap the budget deficit at around 4.8% of GDP, maintain good social welfare policies and promote economic restructuring with a focus on public investment, state-owned enterprises and the financial sector. Vietnam's socio-economic development is progressing in a reasonable manner, but economic challenges remain as economic growth is lower than the corresponding period in 2011 and the business

environment continues to struggle with many firms struggling to survive. Given these difficulties, the Government will work to overcome the current challenges by identifying targets, controlling inflation to sustain macro-economic stability, create favorable conditions for stimulating manufacturing production, encourage consumption of goods without corrupting macro-economic stability and causing inflation, meet social welfare needs and sustainably reduce poverty.

SESSION 1: REVIEW OF INVESTMENT CLIMATE

Vietnam Chamber of Commerce and Industry – Dr. Vu Tien Loc, Chairman

- In 2011 and the first five months of 2012, many enterprises dissolved and temporarily suspended business operations and business indices declined. Meanwhile, many firms face difficulties due to the high cost of capital, a contracted market, large inventory levels and elevated market risks. This is underscored by business confidence in 2012 having dipped down to its lowest level since 2005, according to a VCCI survey. A VCCI and Ministry of Planning and Investment (“MPI”) survey also revealed that 70% of business respondents would maintain and expand operations, while 30% would tighten business scales with at least one unit to be closed or dissolved.
- The Government’s issuance of Resolution No. 13 shows that it is ready to share the business community’s concerns, despite a limited budget and the over-riding priorities to control inflation and stabilize the macro-economy.
- To ensure a sustainable and competitive economy, the Government needs a clear direction and commitment to an economic restructuring program, plus the development and execution of an appropriate industrial policy. Short-term solutions aimed at stabilizing the economy must be tied in with medium and long-term economic restructuring itineraries to reduce macro risks and climate policy uncertainties for enterprises.
- The business community supports solutions to reform state-owned enterprises on the basis of reducing their size, increasing operational effectiveness, restructuring the banking system, changing distribution mechanisms and better monitoring public investments.
- Lastly, the creation of a consensus and market confidence is of importance to unlock economic potential. For these reasons, we urge the Government to increase the flow of information and dialogues between it and enterprises to reflect the business community’s actual situation/recommendations and the Government’s business policies.

European Chamber of Commerce (EuroCham) – Mr. Preben Hjortlund, Chairman

- While European companies have been patient and remain hopeful for Vietnam’s longer-term development, their confidence has steady declined since the beginning of 2011 and in EuroCham’s Business Climate Index it was at its lowest point for the last two years. This is also reflected in the latest World Bank Business Report 2012. Of course, the Government

has succeeded and the currency has been stabilized since its devaluation in 2011. Furthermore, the year-on-year inflation has reached a low point, Vietnam's foreign currency reserves have grown and the Government has maintained public confidence in the banking system. However, there is a need to ensure that effective growth momentum is sustained.

- EuroCham believes that the Vietnamese Government has taken steps to stabilize the macroeconomic situation in the short-term, but urgent work is needed to improve the long-term attractiveness of the Vietnamese market for foreign and local investors. But, it is strongly recommended that careful considerations regarding the implementation of new laws are needed, as a rushed approach limits discussion with affected parties, creating more problems than improving the situation.
- The Government's three-stated strategic priorities of restructuring the financial sector, SOEs and improving public sector investments represent the correct reform agenda and without long-term success in these areas, much of the recent macroeconomic policy success benefits may be lost.
- With regard to the implementation of reform, EuroCham continues to emphasize the imperative need to improve transparency and reduce corruption in Vietnam. Corruption also directly impacts on European and other foreign companies, especially local companies. In addition to tackling red tape, corruption and reducing administrative burdens, EuroCham believes the Government should remove unnecessary market access restrictions that affect the freedom of trade and emphasize the protection of intellectual property rights and efficient enforcement in IPR violation cases.
- EuroCham is pleased to see the Vietnamese Government and EU Commission move ahead with FTA negotiations and we are hopeful this process will start in June. EuroCham will continue to work hard to promote Vietnam as a trade and investment destination for European and Vietnamese enterprises, and work with the Vietnamese Government in this endeavor.

American Chamber of Commerce (AmCham) – Mr. Mark Gillin, Vice Chairman

- *The revised Labor Code:* Labor competitiveness is at the top of the list for any investor interested in comparing manufacturing alternatives and has been a major issue for AmCham. AmCham have participated in consultations and about 40 meetings on revised Labor Code since 2008 to help achieve the Prime Minister's Decision 1129 and the Action Plan for the Implementation of Directive No. 22 of the Central Party Committee. After reviewing the draft Labor Code, it is believed that the objectives of Directive 22 and the Prime Minister's Decision 1192 will not be achieved. For example, all business associations, Vietnamese and foreign, unanimously proposed that provisions for overtime and maternity leave be revised in line with international ILO standards to be competitive with neighboring countries. But these direct recommendations were not accepted. As a result, Vietnam's competitiveness may be compromised by these propose changes even the commendable Government's attempt to establish a balance between competitiveness

and workers' quality of life. Regarding this divergence between the proposed law and existing ILO standards, it is strongly recommended that the Government revisit this issue before finalizing the draft Labor Law.

- *SOE reform*: Vietnam needs to focus on emerging challenges, especially restructuring SOEs. It is a request to the Government and those that provide ODA for more information about what measures will be taken to achieve SOE reforms to spur economic growth and open up opportunities for the private sector.
- In conclusion, results from VBF consultations need to be concretized as the World Bank confirms that ODA alone cannot promote growth. Instead, it is FDI, trade and related transfers of technology and skills that promote growth. Good economic policies, a sound legal and regulatory system, transparent and efficient Government agencies, plus good public infrastructure to attract FDI are needed to spur socio-economic development.

Hanoi Young Business Association - Mr. Tran Anh Vuong, Vice Chairman

- *Recent Economic Policies*: The monetary policies during the global financial crisis have partly resulted in high inflation. Due to these stimulation policies since 2009, with interest rates rising from 6.5% to 26% in 2011, the cost of capital has soared, hindering businesses. Recent Government policies, specifically Governments' Resolution 13/NQ-CP, Circular 83/2012/TT-BTC of Ministry of Finance ("MOF") and Circular 14/2012/TT-NHNN of State Bank of Vietnam have mostly targeted small- and medium-sized enterprises ("SMEs"). Decree 56/2009/NĐ-CP, however, defined SMEs by the total capital size or average number of employees per annum, in which the total capital size is equivalent to total assets determined in firms' balance sheets. This definition narrowed the number of enterprises that are eligible for support under Resolution 13 and we recommend ministerial agencies reconsider the definition of SMEs.
- *Supporting Industry*: Decision No. 12/2011/QĐ -TTg on policies to develop a number of supporting industries is impractical since incentives for enterprises mostly refer to previous documents, such as Decree No. 56/2009/NĐ -CP and Decision No. 105/2009/QĐ -TTg promulgating industrial complex management regulations.
- *Urban Transportation*: Transportation in Hanoi and HCMC is a very pressing issue, especially in respect to vehicle development trends and socialization levels in transport infrastructure development projects. SMEs are not entitled to directly contract in a number of transportation projects such as steel bridges and road building. However, the misappropriation of capital may arise when these contracts are signed over from other main contractors.
- *Human Resource Development*: SMEs, which mostly operate in the manufacturing sector, normally seek employees from engineering training institutes and vocational schools. However, many institutions which turn out good engineers reported a strong decline in both student and teacher numbers in 2011. Ministerial agencies are requested to

help attract students to these institutions to help manufacturing enterprises develop human capital.

- *Renewable Energy Development:* With renewable energy resources such as wind power, Vietnam can learn from neighboring countries such as China and the Philippines. Additionally, developing renewable energies will help avoid geology dangers, dam failures or deforestation caused by hydropower or radio-active risks caused by nuclear power. The Government, therefore, should promote appropriate policies to entice investors. When electricity pricing is suitable with Government subsidies, Vietnam will attract high-quality renewable energy projects. These policies, moreover, will help the Government allocate budget efficiently according to schedule rather than the Government invests a massive amount at the beginning.

Singapore Business Association – Mr. Seck Yee Chung, Vice Chairman

- *Access to Information:* Investors need access to information which brings transparency and confidence to an uncertain business climate. Today, some searches and information are well organized, but this should extend to searches on foreign investment companies and these services should be introduced to departments of planning and investment in other cities and provinces. However, information about land titles and usage, zoning plans, bankruptcy and litigation is very difficult to find. Meanwhile, recent draft decrees in relation to internet management and services are very troubling in their current form. For example, access to cross-border IT services, such as search engines, would be disallowed if servers are not in Vietnam. This creates obstacles to Vietnam's drive towards being a modern, value-added and technology-driven economy. On a positive note, the Government's continued dedication to E-government initiatives is highly appreciated and public records and procedures are hoped to make increasingly transparent and efficient.
- *Access to Capital:* Difficulties in accessing funds is hurting many businesses in Vietnam, so struggling companies are looking to new investors through private placement procedures. The Government has recognized the value of such procedures by regulating them under Decree 01 in 2010. However, city level planning and investment departments have refused to process private placements, citing a lack of regulatory guidance. This has impeded new investments and hurt local private joint stock companies looking to increase charter capital through stock issuances to third parties. We ask the Government to take steps to resolve this situation and enable local planning and investment departments to process private placements for private joint stock companies.
- *Mortgages:* In the challenging business climate, borrowers and banks are looking for opportunities to transfer properties to new buyers by way of mortgage foreclosures and property transfer procedures. However, licensing and land use rights systems and procedures make it very difficult for banks to complete these sales. The procedures are cumbersome and difficult, especially when involving foreign investors and they become even more complex in the event of bankruptcy. We would like to continue working with the Government to improve the situation.

- *Healthcare and Pharmaceuticals:* A top-tier healthcare system cannot exist without reliable and affordable access to quality pharmaceuticals. However, the current regulatory framework makes it almost impossible for foreign drug companies to import products. Current regulations are due to be updated and we hope the Government continues to look into this matter.
- *Customs:* It is worth emphasizing a continued concern at customs clearance difficulties, especially demands for improper facilitation payments. E-customs procedures remain a promising solution and these procedures are hoped to become more available to enterprises. It is also expected that the Government rolls back automatic import licensing requirements.

SECTION 2: TOPICS TO BE DISCUSSED WITH THE GOVERNMENT

1) Banking

Banking Working Group - Mr. Louis Taylor, Head

- *Banking restructuring plan:* It is a credit to the Government and State Bank (“SBV”) that most macro-economic indicators have markedly improved. But if this success is to be continued, structural economic reforms must progress alongside the day-to-day management of the economy. The restructuring plan recognizes banking system structural issues and a relevant agenda for its reform. The Banking Working Group (“BWG”) fully supports better risk management practices, increased governance and disclosure transparency and the plan to implement the Basel capital measures by 2015. The BWG encourages the Government to publish a more comprehensive implementation plan to provide greater confidence of the banking system as well as in the overall future of the Vietnamese economy.
- *Foreign shareholdings:* Foreign banks could provide significant help in introducing international governance standards; however, the capping limit of 20% of the local bank's equity makes it difficult to introduce significant reforms. If permitted, foreign share ownership could be increased to allow for the faster adoption of international governance standards.
- *Current flow of regulation:* Circular 01 in January promised that there would be 92 new regulations and decisions from the SBV in 2012 and the flow of documents has lived up to that promise. The BWG would like to highlight three key concerns: (i) a regulation quickly drafted and implemented may not be the best option; (ii) many recent regulations in Vietnam have presented additional administrative restrictions where market-based operations are far more efficient; and (iii) many of these recently introduced measures stop activities at weak banks, but also prevent strong banks from helping the economy. The lending rate cap recently introduced in Circular 14 is an example of this.

- *Lending rate cap:* Circular 14 is an administrative measure which restricts the ability of banks to charge interest rate determined by commercial considerations. A concern emerging is that it may actually reduce the flow of credit to key sectors because banks may rationally choose not to lend rather than to lend at the rate that does not cover their risks.
- *Removal of temporary administrative measures:* in the recent meeting, the Deputy Governor Hung acknowledged the administrative nature of several measures and confirmed that many recent administrative measures were temporary and linked to the current difficult environment. The BWG strongly supports the remove of such measures as soon as the economic environment allows.
- *Credit growth cap:* The BWG supports the Government in restricting overall banking system credit growth, but it seems the mechanism may almost be too successful in limiting credit growth. If the Government wants to achieve its 17% credit growth target this year, a relaxation of some individual growth caps for stronger banks may be needed. The SBV has announced it will review the cap after six months and the BWG supports this.

Response by the State Bank of Vietnam - Mr. Le Minh Hung, Deputy Governor

- According to SBV calculations, the inflation index has sharply declined, with expectations inflation will be tightly controlled. This is the first time both the current balance account and capital balance account have been in excess, resulting in a significant surplus for 2012's first quarter. Meanwhile, interbank rates are stable and foreign exchange reserves have increased.
- The currency market continues to be well-balanced, with improved banking system liquidity. Especially, credit capital flows have flowed into rural areas, the manufacturing sector and SMEs. Deposit interest rates have reduced by 2-3% and lending interest rates have fallen by 1-4% compared to late 2011.
- The banking sector restructuring process has been intensively deployed and the SBV will flexibly use monetary policy instruments to control inflation, lower interest rates and closely monitor the macro-economic situation and inflation to gradually reduce interest rates to 7-8%.
- To be able to unlock the flow of capital in the economy, secure quality and credit growth in 2012 according to given targets, the SBV shall continue to tackle debts, especially non-performing loans between banks, and give solutions to debt restructuring, debt blockade, and debt deferral for potential businesses with temporary difficulties.
- The SBV will continue restructuring commercial banks and discipline poorly performing weak banks. At the same time, the SBV will implement solutions to improve the value of Vietnam dong, maintain a stable exchange rate at the fluctuation of 2 to 3 per cent given the circumstance of no significant external shocks.
- Responses to some BWG recommendations:

- *Regulations on foreign shareholding in local banks:* The Government issued Decision No. 254 on approving “Restructuring credit institutions during 2011-2015” to increase the foreign shareholding cap in local weak banks. The SBV is considering submitting a draft Decree replacing Decree 69, which will provide a legal framework for foreign investors contributing capital and purchasing shares at Vietnamese banks.
- *Strictly implementing deposit interest rate cap regulations:* The SBV guarantees the monitoring and supervision process and to hand down penalties for infringements.
- *Credit growth caps:* The SBV will consider allowing credit expansion based on charter capital for credit institutions and foreign bank branches that have just been established, yet outstanding loans are less than charter capital levels. Well run foreign banks branches may also be able to lift credit levels. Six months after the implementation of the credit growth caps, the SBV will review credit growth targets.
- *Lending foreign currencies to support import enterprises, while VND lending interest rates are high:* The SBV Governor has issued a regulation on short-term foreign currency loans valid to December 31, 2012. At the same time, enterprises may buy foreign currencies to meet foreign capital needs.
- *Lending interest rate cap:* Circular No. 14 allows customers, whose financial status is healthy, to borrow at a maximum interest rate equal to the deposit interest rate for one month and above the plus 3% amplitude. Whereby, lending capital to some prioritized sectors at the maximum interest rate regulated in Circular 14 does not affect risk management and loan pricing procedures of credit institutions and foreign banks branches. This is also one of the solutions to reduce interest rates.

2) Capital Market

Capital Market Working Group – Mr. Terence F. Mahony, Representative

- *Stock market:* The opening of an account is still ponderous and it needs to encourage people to invest in Vietnam.
- *Liquidity:* trading hours have been extended, but the percentage band is 5%. There should be a system where buyers have circuit breakers where if stocks move more than 10%, then you stop trading for a bit.
- *Offshore listing:* Offshore listing should not be a trend because it detracts from the local market’s liquidity.
- *Bond market:* to attract foreign investors the 10bp point transaction tax must be dropped. High inflation is another problem, but a zero coupon bond could be an option.
- *State-owned enterprise reforms:* This is critical for the capital market’s successful development and the privatization of SOEs will not only benefit the capital market, but also

enhance the economy. The key to successful privatization is offering a price with a valuation based on global standards, so well-known international investment bankers are needed to have input into the process in Vietnam. Equitization should become the lynchpin of the CMWG with the Government identifying up to three candidates within the next 12 months.

- *A saving culture, pension funds and mutual funds:* Vietnam is at a critical level in its demographic age profile. The ratio is declining due to lower birth rate and family support for elderly people is being reduced. So, a way to move from the defined benefits scheme is needed.
- The consolidation of brokers is required as out of 106 brokers, six brokers have 50% of the business. That needs to be sorted out. Improved corporate governance, the transparent release of corporate news and openness in trading stocks are also needed.

State Securities Commission of Vietnam – Mr. Vu Bang, Chairman

- In 2011, the State Securities Commission of Vietnam (“SSC”) drafted a Decree on improving listing, issuing, information disclosure, corporate governance and preparation for the establishment of derivatives market standards. The SSC also finalized draft Circulars on securities investment companies, real estate investment funds and ETF transactions. In addition, Ministry of Finance (“MOF”) issued a Circular on open-ended funds and is developing a credit rating system with the support of international professionals.
- Responses to some of the recommendations:
 - Recommendations on lengthening trading hours and issuing a new index have been implemented and the Market Price will be deployed in July, 2012 to improve market liquidity.
 - *Foreign Investors Opening Accounts:* The SSC submitted a draft Circular to the MOF to replace the old account opening procedures with three steps forward: (i) The requirement of judicial status applicable to individual foreign investors has been removed, (ii) organizations may receive codes and have their accounts opened immediately while the application for consular legalization can be conducted afterwards (iii) and the handling duration of applications is reduced from 10 and seven days, to seven and five days for organizations and individuals, respectively.
 - *Liquidity:* If the market progresses, the SSC will request the MOF re-apply the recommendations for a suitable amplitude. Furthermore, the year 2012 may witness the application of a system of circuit breakers as suggested.
 - *Foreign Ownership:* The MPI and MOF recognize and investigate possible solutions to increase foreign share limits and regulate what types of shares are non-voting shares, exclusively for foreign investors.
 - *Private Offering of Shares:* A Decree on the private offering of shares will soon be released and will regulate the private offering of shares by non-public companies and

provide favorable conditions for the private offering of shares by reducing Planning and Investment Department procedures.

- *Bond Market:* A Decree on the issuance of corporate bonds was issued. The MOF is providing development schedules for 2012 and the SSC has been restructuring bonds to trade large lots and achieve sound outcomes.
- *Bond Tax:* Tax related issues in accordance with the stock market, including tax applicable to individual investors, organizational investors, bonds and stocks have been reviewed to provide tax policy improvements. Especially, investment and pension funds will be eligible for more suitable tax policies.
- *Equitization:* Pricing, book-building, schedule and offering ratio issues have been recognized and the MOF is studying these further to provide future guidelines.
- *Pension and Mutual Funds:* The SSC has issued a Circular on open-ended funds. Pension funds have been implemented and there will be products on the market in 2012 to mobilize capital inside and outside the country.

3) Infrastructure

Infrastructure Working Group – Mr. Tony Foster, Head

- The amount of investment needed for Vietnam's infrastructure need is large and there are concerns the Government is clearly trying to limit public spending. Meanwhile, many state-owned companies are struggling, for example EVN. There is a concern among investors about whether Petro Vietnam will continue to take up some of the slack left by EVN and from a power point of view, a concern about what the future looks like.
- The VBF has advocated for a greater role for the foreign private sector to invest in the power sector. But, little foreign money has been put to work in the sector. To address the issue, it is constructive to look at what can be done to limit project costs.
 - One key issue is the cost of land. BOT power projects do not pay rent for used land, but they get asked to pay compensation costs to clear land and site preparation costs, which can amount to many millions of dollars. We would request the Government commits itself to prepare for land for transfer and allocate an appropriate budget in advance of a project going forward.
 - Another land issue is indirect financing costs. Foreign lenders still can't take mortgages of land use rights. The Prime Minister's Official Correspondence 1604 may be close to a mortgage, but it looks unusual to foreign lenders.
 - The cost of inputs is another area to look at. Vietnam relies on imported coal, domestic coal and domestic gas for the bulk of its projects. Imported coal is an expensive option, but obviously necessary. We would like to ask the Government whether Vinacomin is a

monopoly distributor of imported coal and if so, why? With respect to domestic coal, the issue is how to get the coal from the mines to the power plants, as poor logistics turn off lenders. The Government again in Official Correspondence 1604 said it would not guarantee the transportation of coal, which is burdensome for developers. We would ask the Government to take a look at this issue as it could have a significant impact on the feasibility of domestic coal projects.

- The cost of financing is impacted on by a serious issue for all power projects, the issue of Government guarantees for foreign exchange. Official Correspondence 1604 indicates that the Government guarantees 30% of all revenue minus dong expenses. But, many bankers said that this will not enable a Vietnamese power project to be financed in the commercial markets, which are now very limited around Asia and money now goes to the best projects. So, the guarantee issue must be addressed to make more projects feasible.
- Another issue is the Government must look at related infrastructure for all projects and help BOT projects by allowing all infrastructures outside of the boundary of a plant to be done by relevant ministries. This will have cost benefits and avoid delays.
- The Government could also review high fees, high performance bonds, strict equity capital requirements and an inability to repatriate non-profit cash that drive up the cost of power from a BOT project.
- Ongoing negotiations for some key projects are being affected by uncertainty with respect to the Nghi Son power project. An update on the situation would be appreciated.
- Regarding PPP, there are still a number of issues which are unresolved and the key ones revolve around what goes into the Government's ability to fund 30% of a project. Does the land cost count toward the 30%? What's the value of the Government guarantees? Does that get included? If SOEs invest in a PPP, is that part of the Government's 30%, are tax incentives included? A whole raft of issues is slowing down the preparation of projects and more guidelines are needed to provide answers.
- BOT regulations generally leave a lot to be desired. The PPP guidelines are recommended to be detailed and have a similar look at the BOT model. Radical action is needed as investors who are willing to commit hundreds of millions of dollars find it tiresome that the regulations contain few clear answers and everything depends on administrative discretion.

Ministry of Planning and Investment – Mr. Nguyen The Phuong, Vice Minister

- *Land related costs and BOT related issues:* Clause 2, Article 6 of Decree No. 108/2009/ND-CP on investment in the form of BOT, BTO and BT regulates that "For projects to be implemented to meet urgent needs for the use of infrastructure facilities and other important projects, ministries, branches and provincial-level People's Committees shall consider and decide on the use of state budget capital for building auxiliary works, organizing compensation, ground clearance and resettlement or performing other jobs to support project implementation". Decree No. 69/2009/ND-CP on land use planning, land

prices, land recovery, compensation, support and resettlement also regulates responsibilities of provincial People's Committees for compensation and site clearance. According to this, the law has defined a policy framework and responsibilities for the cost and mechanism of site clearance. The support of site clearance for investors, however, depends on the local authorities' ability to balance their budgets. This should be shared by the Government and private sector.

- *Capital costs in relation to guarantees of foreign exchange:* In Article 16 of the Investment Law the Government only guarantees to balance or support FX in some energy and power, transportation infrastructure and waste treatment projects. This guarantee, however, must count on the ability to balance foreign exchange in Vietnam and ensure the overall development of different fields. Consequently, in Official Letter No. 1604/TTg-KTN, the policy to guarantee foreign exchange to 30% of revenue is an effort by the Vietnamese Government to assist energy and power projects.
- *PPP projects:* The MPI is collaborating with related government bodies to study and collect practical experience from PPP pilot projects to complete a legal framework and provide detailed guidelines for applying PPP models.

Response from Ministry of Industry and Trade (MOIT) - Mr. Tran Tuan Anh, Vice Minister

- *Securing infrastructure investment for energy sector BOT projects:* The MOIT recognizes this and will report the Working Group recommendations to the Government on establishing a Government agency to act as central point to offer related infrastructure for BOT projects. The State has issued legal documents regulating the insurance of infrastructure for power and energy projects under the National Power Development Master Plans, such as the National Power Development Master Plan VII.
- *Input costs and cost savings for energy sector BOT projects:* This issue is clearly regulated in legal documents, so local governments can balance budgets for related infrastructure and site clearance costs to secure favorable conditions for investment. Other power and energy project investment costs in the National Power Development Master Plan VII and other prioritized Government programs will be included in the total investment capital and accounted to electricity output prices.
- *Guaranteeing the transportation and supply of coal for power and energy projects:* According to the State's general policy, the Government only pledges to balance supplying sources of coal to projects in the Government-approved Power Master Plans and is not responsible for guaranteeing coal transportation. For independent projects, investors are responsible for balancing the supply, input sources (especially coal) and transportation-related issues.
- *Updating information regarding the appraisal and approval of the Nghi Son 2 project:* The process is being implemented and the outcome will soon be released.
- *Developing supporting industries:* The Government has issued policies and some legal documents to create a foundation for the development of supporting industries, such as in

Decision No. 12/2011/QĐ-TTg on policies for the development of a number of supporting industries. This Decision met the requirements raised by the Hanoi Young Business Association such as identifying areas and products for supporting industries relating to industries in Vietnam such as textiles, shoes and leather, electric computing, manufacturing/assembling cars and products for high-tech industries. In addition to this are other legal documents, such as Decision No. 1412/QĐ-BCT dated March 28, 2011 on a trade industry action plan which provides detailed guidelines on developing supporting industries, Decision No. 4290/QĐ-BCT dated August 24, 2011 on establishing appraisal committee for supporting industries projects; and the Decision No. 5369 on promulgating working mechanism of appraisal committee on the appraisal procedure to approve supporting industries projects.

- *Renewable energy industry:* The National Power Development Master Plan VII has clearly identified long-term strategic goals and specific missions to develop renewable energy in Vietnam such as wind power, solar and bio energy. According to the Master Plan of National Energy Security, renewable energy will play an increasingly important role in Vietnam's energy industry, which is expected to account for 6% of Vietnam's energy output by 2030.
- The Government is continuing to study specific bio and solar energy mechanisms, and a number of other renewable energy industry sectors. Legal documents will mention bidding prices, Government subsidies, incentive mechanisms for investment, infrastructure, human resources, tax and other conditions that can facilitate investment from local and foreign enterprises.

Port and Shipping Sub-Group - Mr. Peter Smidt-Nielsen, Head

- It is a belief that Vietnam's future exports are a crucial element to the country's overall economic development. But, there are dark clouds on the horizon for Vietnamese exports and ports, so action must be taken to benefit Vietnamese exporters, importers as well as shipping lines and port operators.
- The first issues is dredging in Haiphong and Cai Mep-Thi Vai: The Haiphong channel needs regular dredging to allow vessels to enter. The current draft is only 6.3 meters, which means that many vessels can only carry a very limited part of their actual capacity, which obviously is costly to shipping lines and Vietnamese exporters and importers. However, by July 7.2 meters should be reached and we would like to stress that 7.2 meters must be permanently maintained. At present the Thi Vai-Cai Mep channel can cater for a 14 meter draft, which is considerably deeper than other Vietnamese ports. However, 16 meters must be reached to allow for big vessels to enter.
- The second issue is difficulties faced by international shipping lines to get permission to load an export container in one Vietnamese port and transship it to another vessel in another Vietnamese port. Since many international carriers prefer international rather than a Vietnamese feeder operators because of much higher prices, unreliable services and not calling on the same ports where mother vessels call, Vietnam is losing an income

opportunity as the international carriers prefer to transship Vietnamese cargo outside Vietnam. Ultimately this is about providing sufficient infrastructure i.e. a capable domestic network of feeder services that link up the major Vietnamese ports facilitating the fast movement of international transshipment cargo at competitive prices. Further dialogues to address this matter are requested.

- The third issue is competitiveness of Vietnamese ports in term of port charges for vessels below 50,000 DWT. Cai Mep-Thi Vai could become an ideal hub for transshipment, but in addition to the above situation, it is very uncompetitive in terms of port charges for vessels below 50,000DWT compared to other regional hub ports. This again means transshipment of cargo will continue to take place outside Vietnam, despite Cai Mep-Thi Vai having many advantages. It is suggested that a serious review of local port charges in Vietnamese ports to attract more transshipment business.
- The forth issue is additional costs and significant efforts to get permission to enter Cai Mep-Thi Vai ports. Many big vessels (→80,000 DWT) has been calling the Cai Mep – Thi Vai port for more than 2 years on trial basic, and this is still a problem for shipping firms. Vinamarine and the Ministry of Transport (“MOT”) are reviewing this situation and a positive decision on this matter and a official permission for big vessels above 80,000 DWT are requested.
- Lastly, with regard to the Cai Mep-Thi Vai ports investment and conflicting opinions about the viability of the deep port project development in this area, FDI enterprises and financing banks have deep concerns and would like the Government’s clarification and point of view on the future realization of Ports Group No. 5 according to the Master Plan.

Response from Vinamarine, Ministry of Transport – Mr. Do Duc Tien, Deputy Director General

- *Dredging in Haiphong:* In 2012, the Government allocated VND164 billion from the State budget to implement dredging activities in Haiphong to the standard 7 meter draft. At Lach Huyen, the draft will reach 7.2 meters and by 2016 Lach Huyen International Port will be completed and the draft is expected to reach 14 meters.

Dredging in Cai Mep-Thi Vai: In the Cai Mep-Thi Vai development plan, the Government gave access permission to 80,000DWT vessels. In practice, fully loaded 80,000DWT vessels and partially loaded 80,000DWT vessels have been permitted. Currently, Vinamarine’s consultancy agency has investigated and determined vessels of up to 131,000DWT can access the port with special treatment. Besides, to meet ship-owners’ recommendations to give access permission to vessels of up to 170,000DWT, Vinamarine has requested its consultancy agency to research security solutions to respond to ship-owners. Under the guidance of the Prime Minister, Vinamarine is investigating dredging solutions in Cai Mep-Thi Vai from -14 meter to -16 meter draft to allow access for vessels of more than 80,000DWT at an estimated budget of VND12,500 billion (\$600 million). In addition, to fulfill the demand of increasing commodities, Vinamarine will report and ask for Prime Ministerial approval to permit access for fully loaded 100,000DWT vessels and partially loaded 200,000DWT vessels into Cai Mep.

- *Transshipment of Containers between Vietnamese Ports:* According to the Maritime Law of Vietnam and international practices, domestic vessels are protected for domestic transport. The MOT still grants licenses to foreign shipping companies to transport containers between Vietnamese ports for specific routes and under specific conditions. At the moment, 25 container ships have been licensed with a combined total weight of 392,000DWT.
- *Fees and Port Charges at Cai Mep Thi Vai:* The MOF has provided an incentive of a 40% reduction in fees for container ships in the area. The MOT will ask the MOF to amend and present more incentives for vessels of more than 50,000DWT, such as a 50% reduction in fees compared to other areas.

4) Investment and Trade

Investment and Trade Working Group – Mr. Fred Burke, Head of the Group

- Vietnam is wisely beginning to pivot from stabilization towards revitalization. In this context, the Investment and Trade Working Group (ITWG) has worked to contribute suggestions on how to enable job creating growth, notwithstanding continued uncertainties about Vietnam's major export market, and new competition from countries like Myanmar for export-oriented manufacturing.
- The ITWG favors policies that enhance competitiveness and encourage growth. To achieve this, enterprises need a level playing field, free of red tape and corruption. But in addition, export manufacturers that invest in Vietnam are watching nervously at how quickly Myanmar is coming back into the international community, noting that if it gets MFN in the US and the EU market soon, its competitiveness in the garment, footwear and furniture sectors will quickly outstrip Vietnam. This could result in potentially millions of lost jobs in the next few years. Vietnam's economy needs to quickly adapt to these changing circumstances.
- The Government has tried hard to implement administrative reform through Project 30 and its successor, but the results have not been as obvious as hoped. For example, while Project 30 aimed to reduce the costs to enterprises of administrative procedures by 30%, the new Labor Code will ***triple administrative compliance costs*** in one relevant area by increasing the timing for applying for a work permit from once every three years to every single year..Meanwhile, the issue of work permits under Decree 46 and its implementing circular has undermined foreign investor confidence in Vietnam. The apprenticeship requirement of Circular 13 should be replaced by a general policy to incentivize localization programs that do not deprive an investor of its right to manage its own investment, or prohibit a local company from hiring the foreign talent it needs to compete.
- Regarding the Enterprise Law, the definition of 'foreign-invested enterprise' needs discussion. The seemingly simple term was understood during the WTO negotiations as meaning 'voting control of an enterprise', which at that time meant 51% of shares or

charter capital of the enterprise. However, the Enterprise Law was amended almost at the same time as WTO accession took place, with the threshold for voting control raised to 65% or 75% for matters such as amending the Charter. However, in some laws like the Land Law, there is no definition of 'foreign-invested company' at all. So the authorities who interpret this law can take the position when it suits them that just 1% foreign investment makes a company a foreign investor and the enterprise subject to all the restrictions on national treatment and market access that Vietnam negotiated in the WTO commitments. The Mekophar case underscores the need to address this issue.

We urge the Government to carefully review this issue before adopting any standard for defining a foreign-invested enterprise, other than the obvious 'voting control' standard the WTO negotiators obviously had in mind.

- Regarding SMEs' access to capital, some SMEs could have been successful if they had been allowed to raise equity funding by the issuance of new shares to minority foreign shareholders, but they have been stymied by technical complications, and the implementation of the Enterprise Law and the Investment Law. Specifically, the refusal of some local authorities to implement the Enterprise Law for registering new investors and local private joint stock companies is damaging to the survival of these companies.
- In terms of international integration, as part of the move from stabilization to revitalization, it's important to maintain no less favorable access to export markets compared to other exporting countries. Vietnam must take the next steps, the TPP and the EU Free Trade Agreement. We urge the Government to aggressively pursue TPP and FTA talks.
- One other issue our group would like to address and work on in the next six months is evaluation procedures for Customs under WTO rules. We also look forward to constructive dialogue on the Enterprise Law and its implementing rules and anticipation of 2013 overhaul plans.

Tax Sub-Group – Ms. Vu Thu Huong, Head of Sub-Group

- *Control of Advertising & Promotion (A&P) Cap:* The A&P cap has been loosened from 7% to 15% for newly established enterprises in their first three years. However, little has changed during its 13 years of application. With the economy growing and CIT incentives narrowing to filter investors, the A&P cap policy has turned into a barrier for foreign enterprises. According to a Working Group survey, no country in the region has a similar policy except China, which still caps the rate at 15% of revenue and allows for it to accumulate in the following years if not fully used.

In terms of management, as advertising and promotion are actual expenses, firms are motivated to spend money in the most efficient way and the A&P cap does not fit with a market-oriented economy. Moreover, the cap has increased CIT in some sectors to 32% or even 40%, significantly higher than the current rate of 25%. To increase investor confidence in contrast to a slowdown in FDI inflows into Vietnam and the emergence of regional competitors such as Myanmar, the Working Group urges the MOF and Government to

consider the removal of the A&P cap and submit it to the National Assembly for amendment in parallel with CIT Law improvements in 2013.

- *Accounting in Foreign Currencies:* According to Circular 244 of the MOF, some enterprises have been allowed to undergo accounting in foreign currencies. Accordingly, they do not record each transaction in Vietnamese Dong and their accounting books are conducted in foreign currencies. In practice during local tax department inspections, each transaction is required to record in dong. This is a significant burden for firms to remake their accounts. The Group urges the MOF to provide an official guiding document to assist investors' explanations to local officials and tax departments, and simultaneously allow enterprises to convert their books from foreign currencies to dong at the end of the year to identify their tax duty.
- *Norm for Goods Damaged due to Objective Reasons:* According to Circular 130/2008/TT-BTC and Circular 18/2011/TT-BTC on non-deductible expenses when determining taxable incomes: "Goods damaged upon their expiration or due to natural biological and chemical changes which are ineligible for compensation and within the limits set by an enterprise may be accounted as deductible expense upon taxable income determination. For goods damaged upon their expiration or due to natural biological and chemical changes which exceed the limits set by an enterprise, the excessive volume may not be accounted as deductible expense upon taxable income determination". Enterprises agree with this regulation. Nevertheless, it challenges special sectors such as the consumer products manufacturing industry since its business operations may experience many unexpected accidents. We recommend the MOF provide a validation mechanism for these losses without requiring a comparison to the existing norm as it cannot list all the potential situations.

Ministry of Planning and Investment – Mr. Nguyen The Phuong, Vice Minister

Investors Losing Confidence in Vietnam

- According to recent statistics, registered FDI declined from \$23 billion in 2009 to \$19.9 billion in 2010 and to \$15.5 billion in 2011. The disbursement, however, is still at a sustainable level of \$10 billion in 2009 and \$11 billion in 2010 and 2011. In the first five months of 2012, registered FDI dipped to \$5.32 billion, equivalent to 68.2% of 2011's corresponding period, while disbursed FDI reached \$4.51 billion, against \$4.52 billion and \$4.5 billion during the corresponding periods in 2011 and 2010, respectively. Though registered FDI experiences a drop, the disbursement ratio remains stable. The investment structure has positively changed in that real estate investment out of total FDI shrank to 5.8% in 2011 from 34.3% a year earlier.
- To regain investors' confidence, the Government is steering agencies to (i) restructure investment, the financial market and SOEs; (ii) implement breakthroughs in infrastructure, human resource development and administrative procedure reform, (iii) complete legal frameworks and policies such as the Investment Law and Enterprise Law; and (iv) improve State management of foreign investment through the enhancement of cooperation between Government agencies.

- Besides, the Government will continue to issue technical standards or criteria for the granting of investment certificates and inspecting investment activities, stimulate high value investments and maintain policy dialogue with the business community and foreign investors.

Enterprise Law

- The definition of “Foreign Investment” in the Enterprise Law will be investigated and accessed to incorporate it into the coming Draft Revised Enterprise Law and Investment Law.

Trans-Pacific Partnership (TPP) Agreement

- After participating in the two negotiating rounds as an observer, Vietnam has officially become a partner in TPP talks. Vietnam will actively and proactively join TPP talks and the Free Trade Agreement with the EU.

Ministry of Labour, Invalids and Social Affairs - Mr. Nguyen Thanh Hoa, Vice Minister

- *Foreigners Working in Vietnam:* Decree No.46/2011/ND-CP was recently implemented to amend and supplement a number of articles of Decree No.34/2008/ND-CP on the employment and administration of foreigners working in Vietnam. This decree regulates groups of subjects, especially applicable to entities with foreigners working in foreign business associations/chambers of commerce in Vietnam. An initial idea from EuroCham was rewarded in this Decree. The order and administration procedure for the issuance of work permits has been simplified to favor skilled foreign experts in Vietnam. Accordingly, the duration to issue a work permit has been shortened to 10 days, instead of 15 days as before. In fact, it only takes three to five days to complete this process in several provinces. Furthermore, this Decree stipulates the responsibilities of relevant government agencies in the employment and administration of foreigners working in Vietnam. More especially, it has supplemented the subject entitled to work permit exemption, such as foreigners transferred within an enterprise in services sectors subject to Viet Nam's commitments to the WTO. Under the guidance of the Prime Minister, the Ministry of Labour, Invalids and Social Affairs is drafting a Decree amending and supplementing Decrees No. 34 and No. 46 on employment and administration of foreigners in Vietnam to be submitted to the Government this year.
- *Work Permits for Foreigners:* According to Article 175 of the draft amended Labor Code, which is under National Assembly consultation, the duration of work permits has been extended from one to two years.
- *Overtime:* Article 108 of the draft amended Labor Code has proposed two schemes, in which total working hours per year cannot exceed 200 hours or in some special cases, 300 or 360 hours.
- *Maternity Leave:* Article 159 of the draft Labor Code has proposed two schemes for maternity leave periods - six months or five months. The National Assembly will reach a

final decision suitable with Vietnam's conditions. It will not increase operation costs for business, nor affect production profitability. Maternity leave salaries will be paid by the Social Insurance Fund.

Ministry of Finance – Mr. Truong Chi Trung, Vice Minister

- *Customs Related Issues:* Troublesome customs procedures are not a new problem. The Government, MOF and Customs have provided a number of instructions, which have resulted in improvements. E-customs with modernized customs procedures are a MOF development policy focal point. To hasten this, cooperation between Government agencies and the business community is needed. The Working Group's comments and feedback on Customs pricing are welcomed to provide proper WTO standard policies.
- *Concerns about Resolution 13 and Circular 83/2012/TT-BTC:* The inappropriateness of Circular 83/2012/TT-BTC and Decree 56/2009/ND-CP, which led to concerns that many SMEs are not subject to Resolution 13, is recognized and will be incorporated into a report to Government agencies to address this issue.
- *Advertising & Promoting (A&P) Cap Issues:* This issue has been mentioned many times and is being gradually addressed following the scheduled roadmap with Vietnam's economic integration. Particularly, when the CIT Law is amended in 2013, A&P cap related issues will be considered.

In addition, the MOF is adjusting Circular 130/2008/TT-BTC to assist enterprises, loosening or removing the A&P cap policy. The Working Group is requested to cooperate with the General Department of Taxation and Department of Tax Policy to amend Circular 13.

- *Accounting in Foreign Currencies:* This issue has been supported, recognized and considered for adjustment before or in parallel with amendments to the CIT Law.

Land Sub-Group – Mr. David Lim, Head of Sub-Group

- The real estate sector has been severely affected by the global financial crisis and Vietnam's current fiscal policy. However, in this difficult time it is pleased to see that the Land Law will be amended in 2013 and the Group recommends three guiding principles for consideration – (i) equal rights for all categories of land users; (ii) consistent and transparent procedures for compensation, clearance and land pricing; and (iii) the removal of unnecessary procedures for consistency with existing provisions and other legislation.
- Regarding the first point, one example are restrictions on Vietnamese households and individuals from leasing land to foreign entities and for mortgaging land for non-production and business purposes. Vietnamese and foreign entities are also prohibited from mortgaging land to non-credit institutions. These differences in rights are even more pronounced between foreign and domestic investors, with additional requirements to obtain an investment certificate before a land use rights certificate is issued to a foreign investor. These additional procedures and differences are burdensome since it can take

more than six months to obtain an investment certificate. It is respectfully recommended that foreign and domestic investors are treated equally when it comes to land procedures and land acquisitions to allow foreign investors to participate more fully in the development of the real estate market. Non-resident foreigners should be given the right to lease and buy property in Vietnam.

- Regarding land compensation, clearance and land pricing, there are already provisions in place. However, there is confusion as to how such provisions are to be implemented. This is partly due to different procedures relating to calculating land compensation and the treatment of payments needed for different types of investors. The Group would again recommend that the same rules are applied to all investors and clear and detailed guidelines are issued to local officials responsible for implementation to ensure that these provisions are fully implemented in timely manner.
- The final guiding principle is ensuring consistency with other legislation, including the definition of a foreign investor in the Land Law. There are different rules applicable to domestic and foreign investors relating to land matters. There is, however, confusion as to how a foreign investor is defined in the Land Law. Legislators should consider their WTO commitments and provide a consistent adoption in terms of definitions for the Land Law, Enterprise Law and Investment Law. Under the Investment and Enterprise Laws there is already a discussion on the 49% foreign shareholding as being a threshold. So, legislators should continue implementing this for the Land Law as well. In closing the Group would like to reiterate the three guiding principles for all land users regardless of whether they are individuals, households, corporate entities - foreign or domestic, with clear and consistent and transparent procedures relating to land compensation, clearance and pricing.

Response from Ministry of Natural Resources and Environment – Mr. Tran Hong Ha, Vice Minister

- As planned, the Land Law 2003 will be thoroughly amended to construct a proper legal system, meet the reality on the ground and synchronize with other regulations.
- To cope with the cross complexities between the Land Law and other laws such as the Law on Complaints and Denunciations, Civil Code and Real Estate Law, the Ministry of Natural Resources and Environment (MONRE) recognizes the three principles introduced by the Working Group. Vietnam's land administration history, nevertheless, contains specific characteristics. Consequently, there are difficulties in theory and practice when identifying equal rights between state-owned and private enterprises, and between Vietnamese and foreign enterprises. It is a similar case with issues relating to pricing, unifying and simplifying procedures for pricing to site clearance compensation.
- The MONRE will maintain dialogue between the Drafting Team of the amended Land Law 2003 and the Working Group to refine this legislation.

5. Education and Training

Education and Training Working Group – Mr. Brian O'Reilly, Co-Head

- The education and training business community is proud of its contribution to Vietnam's economic development. We suggest the most effective way to improve the quality of education in Vietnam is through the concerted efforts of all relevant stakeholders to work closely together.

The Working Group, representing many Chambers of Commerce, is prepared to work closely with Ministry of Education and Training ("MOET"), and other Government agencies such as the ACAPR. The Group would also like to closely liaise with educational institutions in addition to the World Bank and organizations such as Intel who have a substantial interest in this area.

- One of the hot topics at the National Assembly sessions is the provision of high-quality higher education in Vietnam. The Group would like to focus on strengthening university autonomy, disentangling the mechanism between corporate governance and university administration, complete quality control mechanisms for higher education, some recommendations from the mid-term VBF in May 2011 to address the issue.

To enhance higher education, universities themselves must be granted more autonomy, especially in designing curriculums and offering competitive and specific courses and programs, based on support from independent science and market research councils, with reference to and absorbing international programs and their best practices.

Regarding autonomy in the enrollment on the basis of the facilities and faculty, private universities must ask for MOET's approval of enrollment targets for each course. While waiting for the promulgated legislation and official documents, the MOET should have formal written regulations on the route and conditions for granting autonomy to private universities. The granting of autonomy to private universities should be based on training capacity, faculty and facilities. The better the quality of these three factors, the more autonomy they will have. The degree of autonomy mentioned should equally apply to private and public universities in Vietnam, as well as Vietnamese and international institutions appropriately qualified in training capacity, faculty and facilities.

- Regarding disentangling the mechanism between corporate governance and university administration, according to current regulations private universities have a legal status and the project enterprise itself also has the same status. In fact, the project enterprise holds the assets and is responsible for all activities at the university. To address questions about the existence of two parallel legal entities, the university and the project enterprise, the MOET and MPI is recommended to work together to give specific guidance on this issue. At the same time, the Charter and Regulations on the organization and operation of private universities need to be clarified.
- Regarding completing higher education quality control mechanisms, to control the quality of education when creating autonomy for universities, the current legal provisions need to

build in standard mechanisms for transparency in assessing the quality of education and training institutions. This can be done through the clear regulations on educational quality accreditation and a transparent university ranking system.

- Many of the recommendations from the mid-term VBF in May, 2011 still remain and include the foreign labor policy and processing times for procedures. We expect University Education Law submissions and the National Assembly to suggest possible solutions to investors' above concerns.
- Other issues raised by our members include vocational education, enrolment of Vietnamese students in primary and secondary Schools and the skills of graduates entering the workforce. The Group has also discussed a model for ideal higher education. This model, developed by Intel, provides an overview of the relevant components of a quality higher education system. This model should be used as a basis for developing education improvements in Vietnam. Quality education is required to provide the skilled workforce to maintain Vietnam's economic growth and this requires the combined efforts of relevant stakeholders working closely together to find effective solutions. The Education and Training Working Group, through the VBF, will continue with its commitment to assist Vietnam in achieving its economic potential.

Responses from Ministry of Education and Training – Mr. Bui Van Ga, Vice Minister

- *Strengthening University Autonomy:* Since the implementation of Resolution No. 14/2005/NQ-CP on the basic and comprehensive renovation of Vietnam's higher education for 2006-2020, the MOET has adopted a number of robust policies to increase university autonomy. However, the organizational structure of many institutions has not met qualifications to be granted full autonomy because most Vietnamese state universities and colleges do not have boards of management to inspect and monitor activities of boards of rectors. In the draft Higher Education Law, under discussion by the National Assembly for approval, preliminary autonomy for universities has been recognized. However, the implementation of the autonomy rights shall be synchronized with organizational structures. For example, the management board is a compelled unit to monitor activities and guarantee the autonomy execution.
- *Autonomy in Designing Curriculums and Programs:* Circulars 38 and 08 of the MOET on requirements, dossiers and procedures to open training courses have given autonomy to universities to design training curriculums and offer new courses/programs based on capacity of the university and job requirements of society. The MOET, however, also regulates requirements in opening new courses to achieve quality (e.g. number of permanent lecturers, lecturers' qualifications and necessary facilities).
- *Control of the Enrolment Target:* From this year, the MOET has allowed universities to define the target according to Circular 57/2011/TT-BGDDT. Universities will self-identify the enrolment target based on the two indicators: - the pupil/student teacher ratio corresponding to the university categories and different qualified lecturers and the floor

area of the institution directly allocated for training per student. Universities are not requested to gain MOET approval for the enrolment target as before.

- The coming Higher Education Law will increase the autonomy level of universities, including the printing and granting of diplomas for graduates. Universities will have full authority to print and grant diplomas. At the same time, universities will also hold the right to choose the suitable recruitment method. This law also clearly defines sanctions for infringements of universities' autonomy (suspend operations or disband the university). Autonomy, therefore, must be in step with self-responsible and social accountability.
- *Higher Education Administrative Mechanism of Private Institution:* In reality, internal management conflicts at universities normally happen during the transformation process from people-founded to private universities. Consequently, the property division of non-divisible assets and accumulated assets throughout operations may not be completed due to the lack of an adequate settlement solution. The Ministry welcomes Group recommendations on this issue.
- *Completing Mechanisms for Quality Control of Higher Education:* The quality audit of higher education has been applied to certain universities with the support of international organizations. This process, however, has not been completed due to a lack of a specific legal framework and detailed instructions. The new Higher Education Law will include a chapter regulating quality auditing of higher education. At the moment, before the promulgation of the new Higher Education Law, the MOET is following the three-public policy, where universities must publish the requirements for guaranteeing quality and pledge to society to do so.

CLOSING REMARKS

Ministry of Planning and Investment - Mr. Bui Quang Vinh, Minister

The Government recognizes the six key points in the VBF mid-term meeting 2012 and will select them to supplement and alter Vietnam's policies to improve the attractiveness of the country's investment climate. In the context that some neighboring territories are emerging into attractive business destinations, such as Cambodia, Indonesia, Myanmar and Thailand, investments into Vietnam may drop if the country cannot provide a more favorable environment to businesses. The role of the VBF, therefore, is more important for contributions to improving Vietnam's business environment.

The mid-term VBF 2012 marks the transfer of the Secretariat's coordination function from IFC to the business community. With the joint efforts of Chambers of Commerce/Business Associations foreign and domestic, the Government expects a unified environment for business and investment, facilitating the best conditions for enterprises to operate efficiently, helping Vietnam restructure its economy and renovate its growth model in the direction of improving the quality to achieve stable and sustainable development.

Vietnam Business Forum Consortium - Mr. Vu Tien Loc, Co-chairman

The transfer of the coordination function of the VBF Secretariat from IFC to the business community has generated fresh momentum for new initiatives in coming forums. This Forum has conveyed an important message that the business community is in step with the Government in its efforts to control inflation, maintain growth, support enterprises, restructure the economy and reposition the growth model.

COMPARING BUSINESS REGULATIONS FOR DOMESTIC FIRMS IN 185 ECONOMIES

VIETNAM

Ease of doing business (rank)	99	East Asia & Pacific		GNI per capita (US\$)	1,260
		Lower middle income		Population (m)	87.8
✓ Starting a business (rank)	108	Registering property (rank)	48	Trading across borders (rank)	74
Procedures (number)	10	Procedures (number)	4	Documents to export (number)	6
Time (days)	34	Time (days)	57	Time to export (days)	21
Cost (% of income per capita)	8.7	Cost (% of property value)	0.6	Cost to export (US\$ per container)	610
Minimum capital (% of income per capita)	0.0			Documents to import (number)	8
		Getting credit (rank)	40	Time to import (days)	21
Dealing with construction permits (rank)	28	Strength of legal rights index (0-10)	8	Cost to import (US\$ per container)	600
Procedures (number)	11	Depth of credit information index (0-6)	4		
Time (days)	110	Public registry coverage (% of adults)	37.8	Enforcing contracts (rank)	44
Cost (% of income per capita)	67.3	Private bureau coverage (% of adults)	0.0	Procedures (number)	34
				Time (days)	400
Getting electricity (rank)	155	Protecting investors (rank)	169	Cost (% of claim)	29.0
Procedures (number)	6	Extent of disclosure index (0-10)	6		
Time (days)	115	Extent of director liability index (0-10)	1	Resolving insolvency (rank)	149
Cost (% of income per capita)	1,988.3	Ease of shareholder suits index (0-10)	2	Time (years)	5.0
		Strength of investor protection index (0-10)	3.0	Cost (% of estate)	15
				Recovery rate (cents on the dollar)	13.9
		Paying taxes (rank)	138		
		Payments (number per year)	32		
		Time (hours per year)	872		
		Total tax rate (% of profit)	34.5		