

## REPORT FROM TRADE & INVESTMENT WORKING GROUP

*Presented by  
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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.<sup>1</sup>

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

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<sup>1</sup> 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 implementation<sup>2</sup> (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 value<sup>3</sup>, 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 1997<sup>4</sup>. 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.

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<sup>2</sup> 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

<sup>3</sup> 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

<sup>4</sup> 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](http://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.

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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.

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