

## REPORT FROM INVESTMENT & TRADE WORKING GROUP

*Presented by  
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Investment & Trade Working Group*

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

On behalf of the Investment and Trade Working Group (“I&T Group”), I would like to express our thanks for your continued involvement and support of the Vietnam Business Forum.

### **Working Group Activities over the Past Six Months**

Vietnam is wisely beginning to pivot its economy from stabilization towards revitalization. In this context, the members of the Investment and Trade Working Group have worked to contribute suggestions for how to enable job creating growth notwithstanding continued uncertainties in our major export markets and new competition arising from countries like Myanmar for export oriented manufacturing. We have had the opportunity to engage in constructive meetings with the Ministry of Planning and Investment (MPI), the Central Institute for Economic Management (CIEM), the Ministry of Natural Resources and the Environment (MONRE), the Ministry of Construction (MOC), the Ministry of Finance (MOF) and the General Department of Taxation, etc. Directly and indirectly, through meetings held by some of our member business groups, we’ve also had productive meetings and exchanges of letters with the Ministry of Labor, Social Affairs and War Invalids (MOLISA), the General Department of Customs (GDC) and the National Federation of Labor. We have worked together on issues concerning the implementation of the Enterprise Law, the draft amendments to the Land Law, the Labor Code, the Law on Pricing, the Advertising Law Amendments and two draft decrees affecting IT and Internet businesses, among other things. In particular, the Enterprise Law sub-group met with the MPI and CIEM on April 26<sup>th</sup> to discuss changes to the amended Enterprise Law, expected in 2013.

We are very pleased with the overall progress and results of these meetings, and we have found common ground on many issues. In our limited time today, I’d like to elaborate on a few outstanding issues that we need to continue to work on in terms of Enterprise Law, before turning over the floor to my colleagues who will speak about the sub-groups on land and tax.

### **Repositioning for Revitalization**

Broadly speaking, I&T Group members favour policies that enhance competitiveness and encourage growth. Particularly in the challenging economic environment today, enterprises need a level playing field, free of red tape and corruption.

Export manufacturers who have invested in Vietnam are watching nervously how quickly Myanmar is coming back into the international community, noting that if it gets MFN in the US and EU markets soon, its competitiveness in the garment, footwear and furniture sectors will quickly outstrip Vietnam’s resulting in potentially millions of lost jobs in the next few years. We have to readjust Vietnam’s economy quickly to adapt to these changing circumstances. Complacency and accepting the *status quo* will mean falling behind, with potentially serious consequences to social stability.

## Creating an Enabling Environment

The Government has tried hard to implement administrative reform through Project 30 and its successor, but the results have not been as obvious as we would like. In the meantime, new administrative procedures that ignore the principles of prior public consultation, regulatory impact assessment and accountability are still being issued willy nilly. 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. For those who think it is a small thing, we suggest you talk to some of the managers who've been rejected, or try applying without going through a well connected consultant.

The issue of work permits under Decree 46 and its implementing circular has undermined foreign investor confidence in Vietnam. This is because foreign investors are no longer assured of being able to appoint their own managers, regardless of nationality, to look after their investments. Localization is something businesses do naturally in a country like Vietnam to reduce costs, but they also need to look after their investments and for any that means using foreign personnel for some positions. 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. For senior managerial personnel, the problem with the rules today is that "intra-company transfers" are not allowed except from a parent company to a subsidiary, and not from one affiliate to another. This ignores how multinational businesses operate and unreasonably restricts the implementation of this important basis for allowing an investor to appoint its own management.

But on the larger issue of administrative reform, at some point, administrative reform will never succeed without the active collaboration of the relevant authorities. Only when Government encourages its departments to be pro-active and bold, and there is a broad consensus that "a rising tide will lift all ships", will the implementation of the administrative procedures be applied in an efficient manner.

## Enterprise Law Issues:

### 1. Definition of "Foreign Invested Enterprise"

One subject of concern that arises out of our meetings with the MPI and CIEM counterparts has to do with the definition of "**foreign invested enterprise**". This seemingly simple term was understood during the WTO negotiations as meaning voting control of an enterprise, which at that time meant 51% of the shares or chartered capital of the enterprise. However, the Enterprise Law was amended at just about the same time as the WTO accession took effect and when it was the threshold for voting control was raised to 65%, or 75% for matters such as amending the charter.<sup>1</sup>

What's worse, as you'll hear in more detail later this morning, the Land Law, like many other laws, does not define "foreign invested company" at all, so the authorities who interpret it can take the position, when it suits them, that just 1% foreign investment makes the company a "foreign invested enterprise" subject to all of the restriction on national treatment and market access that Vietnam negotiated in the WTO commitments, and that nothing that was not listed in those commitments can be done by the foreign invested company. As we learned with the MEKOPHAR case<sup>2</sup>, this has had absurd results and the issue needs resolution urgently, but it has

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<sup>1</sup> This 75% requirement applies, according to conservative local investment certificate issuing authorities, even to the change of the personal particulars of the company's legal representative, meaning that a 75% vote is required even to replace a manager due to the 75% threshold.

<sup>2</sup> In the Mekophar case, a local pharmaceutical distribution services joint stock company lost its license to distribute pharmaceuticals because it had a small percentage of its shares that had been bought by foreign investors. Elaborated in prior

languished for several years. According to the records from the recent meeting on Enterprise Law, the threshold of 10% in line with practices in OECD countries was mentioned. Apparently, this is a reference to statistical reporting thresholds for measuring the amount of foreign investment in an economy, not a threshold for applying market access and national treatment limitations under WTO commitments. In any case, we urge the Government to review this issue carefully before adopting any standard for defining “foreign invested enterprise” other than the obvious voting control standard that the WTO negotiators obviously had in mind.

## **2. SME Access to Capital**

In terms of macro-economic policies, we understand that to fight excessive credit the Government has needed to keep interest rates high, but there have been many private businesses, especially SMEs, that could have been successful if only they’d been allowed to raise equity funding by issuing new shares to minority foreign shareholders. There are investors who are able to take a higher risk than banks by injecting new investment into struggling but promising private Vietnamese companies, but they have been stymied by technical complications in the implementation of the Enterprise Law and the Investment Law. Among other things, the refusal of some local authorities<sup>3</sup> to implement the Enterprise Law and register new foreign investors in local private companies is proving, as we warned last year, damaging to the very survival of companies in fields such as sea product exports and foodstuffs.

## **3. International Integration**

As part of the move from stabilization to revitalization, it is important to maintain no less favourable access to export markets as compared to other exporting countries. Vietnam has made great strides in the past two decades with its economic integration strategy, but if it does not take the next steps it may miss the train entirely. What are these next steps? Mainly, the Trans-Pacific Partnership (TPP) and a 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. Moreover, the reforms required by the TPP are actually 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.

## **4. What Separates Enterprise Success and Failure?**

In the manufacturing and distribution sector, we have seen successes and failures in the past year. Successes include the INTEL project, which seems to have worked well due to the huge commitment of both the investor and the HCMC High Tech Park authorities. Although the project has met with unexpected weaknesses on the human resources side, it has invested heavily in addressing those, again with good cooperation from the relevant authorities. The education working group will speak about this point more later this morning.

On the other hand, where foreign investments have failed, it is sometimes entirely due to outside forces. For example, the First Solar plant in HCMC had to be abandoned when the global price for the type of solar panels it was intended to produce dropped from US\$90 to US\$30 per panel over a period of months, due to heavy subsidization from a certain exporting country. This destroyed the feasibility of the project, which had to be abandoned.

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M&D WG Papers, this case highlighted the absurdity that almost all Vietnamese distribution companies already have some small level of foreign investment and if they are all subject to the WTO restrictions then none of them will be able to continue doing business.

<sup>3</sup> Though the practice is inconsistent, the Department of Planning and Investment in Ho Chi Minh City, among other places, will not register foreign shareholders who contribute new capital to a locally owned, private joint stock company, even if the area is open under the WTO commitments. Foreign investors can buy over existing shares, but not be issued new shares.

However, not every failure can be blamed on outside sources. We've seen sea products exporters go hungry for working capital while foreign investors are lining up to provide it but can't due to the inconsistencies in the rules governing private placement of shares.

**The Coming Period**

In the view of the manufacturing community, we are entering a new and even more challenging period for the global economy, where austerity must be balanced with prudent measures that enable growth. Vietnam is fortunate in so far as it does not need to use debt alone to stimulate growth, rather, it merely needs to reduce the number of obstacles burdening the private sector and create a truly cooperative government - business partnership to raise GDP, create new jobs and taxes, and revitalize a virtuous cycle of sustainable development.

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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