



JAPANESE CHAMBER OF COMMERCE & INDUSTRY IN VIETNAM (JCCI)

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Prepared by JCCI

The Japan Chamber of Commerce and Industry (JCCI) would like to review four key issues that it wishes the Government of Vietnam to address with priority to improve the country's investment environment, as well as three priority requests of individual member firms.

KEY AREAS FOR IMPROVEMENT

1. Public-Private Partnership (PPP)

Vietnam's public debt to GDP ratio is now close to the 65% ceiling set by the Diet, and it is our understanding that the Government of Vietnam has strengthened measures to inhibit borrowings in recent years. Nevertheless, we believe that "the active introduction of PPP schemes" is an effective way to allow the implementation of necessary infrastructure projects.

JCCI welcomes the various measures that have been taken to simplify procedures, such as the passing of Decree 63 in May 2018 eliminating the need to obtain an Investment Registration Certificate (IRC) for a build-operate-transfer (BOT) project, as well as the enactment of various rules to promote PPP schemes.

We appreciate Vietnamese Government understand clearly the importance of PPP scheme for developing infrastructure and also would like to keep the dialogue between Government and Private sector for further projects. However, there are still a number of issues hindering PPP. Today we would like to mention the following four aspects that need further improvement:

- i. Clearly stipulate that "foreign law" may be specified as the governing law
Article 467 of Decree 63 stipulates that parties can now decide to apply foreign law to govern project-related contracts. However, there are no clear provisions for the application of foreign law to govern contracts where a foreign corporation is one of the parties.
- ii. Allow dispute resolution by arbitration outside Vietnam on all infrastructure projects, including those involving "real estate"
Article 67 of Decree 63 provides for dispute resolution by arbitration outside Vietnam on all infrastructure projects, but there is an additional provision in regard to "real estate" projects, where resolution in a court inside Vietnam can be required at the authorities' discretion. There is

a possibility that any dispute arising from a PPP project involving infrastructure development and operation will be construed as being real estate-related, which may likely to hinder the procurement of financing from financial institutions abroad.

- iii. Allow investors and project executors to mortgage land use rights, assets on land and the right to operate project facilities

Decree 63 allows investors to mortgage land use rights, assets on land and the right to operate project facilities for commercial purposes. However, it is not clear whether a foreign bank's branch office in Vietnam is permitted by the Law on Land or the Civil Code to grant mortgages on land use rights or assets on land. Owing to this factor, it would still be difficult to extend loans.

- iv. Share a certain amount of risk with the Vietnamese government pertaining to termination payment and foreign exchange certificate

We are certain that Vietnam has vital projects that require government funding and guarantee under a PPP framework. Such projects should be identified by listing them up, etc. and promoted even if the country is in a tight financial position.

JCCI recommends the above improvements in order to facilitate the implementation of PPP projects, which can contribute to the further economic growth of Vietnam.

2. Reform of state-owned enterprises

To promote the demutualization of state-owned enterprises (hereinafter, "SOEs") and facilitate the divestment of state-owned shares, the Government of Vietnam is preparing a roadmap for SOE stock divestment and amending various rules. But so far divestment activity has not been very active, and initial goals such as "strengthening of corporate governance" and "improvement of management efficiency and productivity" are far from being achieved.

Japanese companies have collaborated with many Vietnamese SOEs (including financial institutions) as "strategic partners", making minority investments and entering into joint ventures. Even now, there are many firms considering investing in an SOE. JCCI sincerely hopes that Japanese capital participation in and acquisition of SOEs will increase hereafter, thereby contributing to the advancement of SOE reform. To promote SOE reform, it is above all essential to attract "quality investment" from Japan and other countries.

There are a number of reasons why stock divestment is moving slowly. First, concerning good-standing SOEs that are highly popular with investors, it is necessary to further re-evaluate current regulations, such as those concerning the sale of state-owned shares and other aspects. Specifically, JCCI requests the following three actions:

The first is to "ensure rational pricing for the sale of state-owned shares". It is understandable that the Government of Vietnam wishes to sell its shares at the highest possible price. But unless the selling price (minimum bidding price) is rational as seen from the eyes of overseas investors, it will be difficult to

attract bids from them. A method for determining the selling prices of SOEs is prescribed in Decrees 126 and 32, but the method entails various problems, including the fact that (1) the method used by the appraisal organization to evaluate SOE share price is considerably different from the international standard and (2) in many cases, it is difficult to establish a rational share price for a listed SOE owing to poor market liquidity. If things are left as is, it will become difficult to obtain the understanding of quality investors in Japan and other countries concerning pricing. It is necessary for Vietnam to take steps to improve its share price valuation method (including the introduction of book building) and strengthen the market liquidity of listed shares (by introducing more appropriate standards for listing on the stock exchange and other measures).

At the same time, leading SOE's have grown enormously in scale, and it is sometimes difficult for investors to clearly understand the business contents of individual sectors in the multilayered organizations. Therefore, we believe an effective strategy would be to select for priority investment SOE subsidiaries (first and second generation) that have a clear-cut business content.

The second is to “adopt standard international M&A processes wherever possible for divesting state-owned shares”. Specifically, it is necessary to introduce measures that will allow potential investors to ascertain the actual status (including issues to be addressed) of investment targets by conducting legal, financial and tax due diligence (hereinafter, “DD”) and that will allow them to appropriately stipulate improvement measures in the relevant contracts (stock transfer agreement, shareholders' agreement).

Listed companies overseas, including those in Japan, are highly attractive as prospective strategic partners. In view of the duty of care to shareholders, such companies are certain to focus, when screening an M&A candidate, on whether the candidate conducts risk analysis and management in line with the above process at the time of decision making by the Board of Directors or other governing body. If this aspect is inadequate, it is extremely unlikely that a decision will be made in favor of the candidate. We hope you will understand this point and take steps to improve the above-mentioned divestment process.

The third is to “introduce stronger measures to protect the rights of minority shareholders”. Many of the SOEs in which Japanese firms have made investments consist of those required by law to be more than 50% state-owned, and in many cases such SOEs are legally subject to foreign ownership restrictions. In other words, Japanese firms have invested as strategic partners in many SOEs where their capital participation is legally restricted to minority ownership (with many of them not even allowed to hold the minimum [35% of voting rights] required to exercise veto power on important matters under the Law on Enterprises).

When trying to attract good-standing investors in cases where investors are not allowed to have more than minority ownership owing to legal restrictions, it is necessary to provide stronger than usual measures to protect the rights of minority shareholders and ensure that good-standing investors can make long-term investments without worry. If the investment target is a private firm, the usual practice is to exchange a shareholders agreement that protects the rights of the new investor by “prohibiting the

sale of shares to a competitor of the investor”, “preventing the dilution of shares”, and “granting pre-emptive rights and right of first refusal” to the investor. While such protective measures are starting to be applied to a certain extent more frequently in investments targeting SOEs as well, the Government of Vietnam (especially those in the top echelons) has yet to become fully aware of the importance of this aspect. In the future, we hope that the Committee for Management of State Capital (CMSC; unifies the management of state capital) and the State Capital Investment Corporation (established in 2005 by presidential decree and managed by CMSC), as major shareholders of SOEs, take stronger action to protect the rights of overseas investors who become strategic partners of SOEs as minority shareholders.

In particular, the sale of state-owned shares is basically required by law to be conducted by public tender. In such a situation, if an SOE in which a Japanese company has invested as strategic partner sells additional shares by public tender and the Japanese company loses out to a competitor, its profits could be affected. We ask Vietnam to seriously and urgently consider the introduction of measures to prevent such an occurrence.

In regard to enterprises that are not included in the good-standing SOE group, we believe the Government should not try to divest its shares in a hurry after demutualization. Instead, it should first concentrate on improving the attractiveness of the enterprises as an investment target by, for example, strengthening corporate governance, improving management efficiency and productivity, and taking restructuring measures such as reorganization and elimination of excess debt, working in tandem with the private sector to introduce measures aimed at stimulating interest among strategic investors abroad.

The strong leadership of top government officials coupled with effective implementation and monitoring systems at CMSC are essential for the successful promotion of the above-mentioned “SOE reforms”, not to mention the achievement of primary goals and the improvement of state finance.

3. Cybersecurity Law

JCCI recognizes that the Cybersecurity Law passed by the National Assembly on June 12 this year and promulgated on the same day is aimed at maintaining national security and order in cyberspace.

However, we are also concerned that the law is highly “likely to dramatically lower the attractiveness of Vietnam as an investment target” for foreign investors. In particular, the following stipulations in Article 26 of the Cybersecurity Law are highly likely to reduce foreign direct investment in projects targeting “domestic demand”, thereby preventing any expansion in Vietnam’s domestic demand hereafter. We would like the Government reconsider the following requirements (stated under Article 26 of this Law):

- i. The obligation to store service users’ personal information on servers located in Vietnam
- ii. The obligation to establish a head office or representative office in Vietnam
- iii. The obligation to delete contents or provide user data when instructed to do so by the Ministry of Information and Communication or the People’s Public Security

Many member firms of JCCI are likely to be adversely affected by the new Cybersecurity Law. We are

also aware that documents detailing the implementation of this Law is under drafting process. We very much hope that the scope of application will be clearly defined and limited to the minimum necessary, in order to minimize the impact on FDI businesses when implementing this Law.

4. Development of supporting industries

For Vietnam to achieve sustainable economic growth hereafter without falling into the trap that has caught many semi-developed countries in the past, it is urgent that the country develop industries with international competitiveness. It is essential that the country aim at the sophistication of its industry by focusing on priority sectors and adopting appropriate industrial policies to strengthen linkage between Vietnamese and foreign firms in order to bring about the further growth of the Vietnamese economy.

The key factors for realizing “industry sophistication” is “to strengthen technological capabilities in science and manufacturing”, “to educate and develop local talent” to enable this, and “to build industrial value chains” based on these. In the case of Vietnam’s manufacturing sector, this would constitute the “development of supporting industries” in order to increase the internal procurement rate and strengthen international competitiveness.

To develop supporting industries, it is first of all necessary to expand the framework that the Government of Vietnam and Japanese firms have promoted over the years to further enhance the framework of “a system to develop local technical experts”, making strong efforts to steadily turn out Vietnamese designers, plant engineers, maintenance technicians and other technical experts. We believe a highly effective method would be to relax visa requirements for highly skilled and experienced technical experts in Japan and invite them to Vietnam to serve as “master instructors” to help train and foster local talent.

Secondly, we recommend the introduction of measures to encourage well-reputed Japanese supporting firms in priority sectors to commence production in Vietnam. A certain amount of time is required to develop human resources and bring about autonomous improvement of science and manufacturing technologies, and during this time Vietnam would be vulnerable to competition from neighboring countries. Local production by Japanese supporting industries with high technical capabilities will speed up technical transfer and help develop the necessary human resources.

Concerning industrial sectors that are seen to have future potential but are currently too small in terms of final-product output to be attractive as a target for investment, we believe the Government should introduce various “investment incentives” (such as “reduction of depreciation costs for metal molds and fixtures”, “subsidies and tax incentives” to encourage partnership and technical transfer between Japanese and Vietnamese firms, etc.) as interim measures until scale merit can be achieved.

PROPOSALS BY JCCI INDIVIDUAL MEMBER COMPANIES

1. Decree providing the details and guiding the implementation of the Law on environmental protection

Currently, the draft decree which provides the details and guides the implementation of the Law on

environmental protection has still been in the process of obtaining opinions. According to such draft decree, to respond to untreated sewage in case of any incident in the plant, the enterprises are required to build sewage treatment works to ensure the storage of treated sewage in at least 72 hours. Such works are required to use biological indicators which facilitate the inspection of treated sewage quality.

However, currently, some enterprises have invested in application of methods of which contents are different from the draft decree but such methods could ensure to prevent the untreated sewage from discharging into the environment. Japanese enterprises are fully aware of the importance of environmental protection from the experiences of troubleshooting which has every happened in Japan in the past. From such experiences, the enterprises have applied the suitable methods of environmental protection when they invest in Vietnam. We are aware of the application of additional methods of environmental protection on the basis of necessary level. However, any regulations which are unsuitable in the actuality and lack of objective basis shall seriously affect the maintenance of activities of such enterprises in Vietnam. However, we hope that the Government will reconsider the enterprise's obligation of building such sewage treatment works as stated in the draft decree and pay more attention to the enterprises which must apply such regulations.

2. Natural Disaster Prevention Fund

Many regions are starting to collect contributions to the Natural Disaster Prevention Fund in accordance with Decree No. 94/2014/ND-CP. But the law, as it is at present, contains many issues pertaining to corporate procedures for paying into the Fund, preventing the execution of the required operations. In addition, it is difficult to maintain fairness in the collection of Employee Contributions. If contributions are collected forcibly, it will only increase employee dissatisfaction, possibly triggering strikes and other unwelcome events.

Operating in Vietnam as we do, we recognize the importance of the Fund. We believe employers' understanding of the need to pay Corporate Contributions is likely to advance once there are clear indications of how the Fund will be used, how to make contribution payments, and how to receive relief benefits from the Fund. We would like the relevant laws be appropriately amended to clarify these points.

The current law requires employers to collect contributions from their employees and pay the collected amount to the Fund. As fair collection cannot be made, it is necessary to switch to a method of direct collection by the government. Possible alternative methods include collection in the form of residential tax at the place of residence based on the Residency Book and collection in the form of fixed assets tax for individuals as well as corporations. We request that the relevant laws and taxation systems be appropriately amended to enable a fair and realistic method of collecting contributions to the Fund.

i. Issues concerning collection of Employee Contributions

Employees of corporations are required to contribute one day's worth of salary at the region's minimum wage. This would be around VND 150,000 per person per year in Area 1. The amount for workers who do not belong to companies is VND 15,000, a difference of 10 times and the discrepancy is causing strong resistance among employees. The amount paid by government employees is also lower, resulting

in a lack of fairness.

There are many employees who refuse collection by the employee, instead submitting a receipt showing that they have already paid at their place of residence. There are also employees who claim that they have already made the payment at their previous place of employment. It is extremely complicated for a company to ascertain who has already paid and who has not and to collect contributions from each person who has not.

Some employees request the company to issue a receipt for their contributions. However, companies are unable to issue receipts in the name of a public agency. Even if it were possible to have the Fund issue receipts for each of the employees, it would be impossible for a company with many employees to deliver the correct receipts to the correct individuals. Moreover, employees may leave the company before the company receives the receipts from the Fund.

According to the Labor Code, Employee Contributions may not be deducted from salaries. Collection must be in cash. It is extremely dangerous and cumbersome for a company to handle large amounts of cash transactions.

Companies cannot collect contributions from employees who have already left the company at the time the company receives notice of contribution amount from the Fund, nor from employees who leave in the middle of the collection process.

In some cases the district Fund requests a company to collect contributions for past years, but it is impossible to collect from employees who have left the company.

ii. Issues concerning Corporate Contributions

Many companies refuse to make Corporate Contributions, as no information has been released concerning Fund disbursement details, Fund disbursement plan, and application criteria and procedures for companies to receive relief benefits from the Fund.

In some cases, companies have not been informed of what conditions must be satisfied to qualify for Corporate Contribution reductions and postponements and what they must do to be granted such reduction or postponement.

The method for calculating branch office assets, which is the basis for determining the Corporate Contribution amount, is not suitable, especially with company that has branches across many provinces.

3. Requests concerning labor outsourcing regulations

In the 2019 Labor Code amendment, we request that provisions for the following be included: expansion of types of occupation to which labor outsourcing is applicable and extension of employment period for outsourced labor.

Article 23 of Decree No. 55/2013/ND-CP stipulates that labor outsourcing is permitted in cases where

there is a temporary shortage in labor or where there is a demand for expert workers with advanced skills.

Manufacturing industries are not permitted to rely on outsourced labor, except for companies engaged in the production/installation of television and communication facilities. The production volumes of ordinary manufacturing companies fluctuate sharply over the short term due to changes in market demand, which condition fulfills the requirement for labor outsourcing. There is a limit to what a company alone can do to recruit necessary labor when the need is urgent and large, and therefore there is a strong need for labor outsourcing. We request that labor outsourcing be permitted to ordinary manufacturing companies, so that they can respond in a timely manner to domestic and overseas demand and promote both domestic consumption and exports.

The outsourcing period is currently limited to 12 months. However, for project-related jobs and other expert-level work, around 24 months are needed in some cases. Please consider establishing separate ceilings on the outsourcing period for cases where a temporary labor shortage is being addressed and cases where workers with high-level expertise are needed.