REPORT FROM INVESTMENT AND TRADE WORKING GROUP

Investment & Trade Working Group
Presented by Fred Burke
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I. INTRODUCTION

The Investment and Trade Working Group and its various sub-working groups are keenly interested in the theme of improving domestic and FDI linkages. Although our issues are diverse, an underlying theme is that only by reducing the barriers to efficient cooperation between local, foreign invested, and foreign companies can Vietnam continue to succeed in its bid to become a key player in the global supply chain.

Vietnam has done well in this respect in the past, but there is much more that could be done to deepen integration for domestic suppliers and service providers, especially Small and Medium Sized Enterprises. New issues emerge almost every day. Although our issues may seem technical and specific, each of them has an impact on the overall competitiveness of the domestic economy and the prospects for SMEs in their effort to strengthen linkages with foreign counterparts.

This is not an exhaustive list of the concerns of the members of the Investment & Trade Working Group and its Sub-Groups. Given time and space constraints, we limit ourselves to the following.

II. OVERVIEW

Among the various issues investors and traders, including domestic SMEs, face today are the following nine issues:

- Trade regulations introduce supply chain obstacles, thereby making it more difficult for SMEs to export, **trade facilitation** and **market access** should be embraced at all levels to enable domestic and foreign enterprises to cooperate more deeply.
- New, additional licensing requirements are being prepared for introduction that would only exacerbate the paperwork burdens of enterprises.
- Many SMEs unclear about tax regulations or the incentives they could be eligible for, especially;
    - How to comply with the law on import and export business transactions
    - The correct VAT rates when importing and exporting
- Customs regulations are increasing in transparency but still a challenge for SMEs to understand and comply with.
- The recent change in law to stop allowing residential property developments to use foreign debt capital financing may hurt the healthy development of the housing market.
- Proposed amendments to the Competition Law are a chance to remedy problems that have arisen during its first (nearly) decade of implementation, if properly consulted with stakeholders.
- Proposed new rules governing representative offices may undermine the important role those entities play in linking domestic suppliers with global markets.
- Industrial sectors such as the automotive sector are ripe for growth of SME suppliers of parts and services, but these potential suppliers are handicapped in a number of ways.
- Cybersecurity is a vital part of the infrastructure for SMEs to develop stably, but new rules threaten to isolate Vietnam and limit its participation in the booming global digital economy.

As with other topics, FDIs are willing to share their experience from other jurisdictions to help overcome these obstacles and encourage their domestic counterparts to more fully participate in the global supply chain.

III. SPECIFIC COMMENTS AND SUGGESTIONS

1. Trade Facilitation

First, we support the comments already made about the importance of trade facilitation. Trade facilitation is critical in maximizing benefits of trade to all economic stakeholders. With the pending entry into effect of the global Trade Facilitation Agreement, which will immediately become part of the WTO Agreements that provide the framework for the global trading system, Vietnam has opportunities to smooth the way for its integration into the global supply chain and provide new opportunities for enterprises of all types well before many other important but pending trade agreements will allow.

Director General of the WTO, Roverto Azevedo estimates that implementation of Vietnam's trade facilitation commitments would reduce trade costs by 20%. Unlike reductions in tariffs which benefit specific classes of products, costs savings from trade facilitation impact all trade participants regardless of company size or nationality, or product category or origin.

Shared benefits from the TFA create shared interests and the newly established National Committee on Trade Facilitation provides an excellent opportunity for investors outside of Vietnam to share best practices developed by their own countries as they managed increased trade while seeking a balance between reducing time, costs and procedures in cross border transactions on the one hand with sufficient border controls on the other.

We therefore encourage this new National Committee on Trade Facilitation to reach out to experts and trade facilitation bodies from other countries and experienced foreign multinationals to help smooth the way for Vietnam's SMEs to take advantage of the opportunities that are waiting in the global supply chain.

2. Licensing and Conditional Areas for Foreign Investment in Service Industries

The supply chain is driven by innumerable services that link domestic SMEs and the international marketplace. These vital support services are both an opportunity and a necessary part of the infrastructure of the global supply chain.

But the 8th draft of the implementing decree on trading activities (intended to replace Decree 23) for the amended Investment Law and the Enterprise Law are putting up new roadblocks between foreign and domestic enterprises, especially SMEs. We are very concerned about the adoption of this decree. In particular, under the draft new Decree, not only companies doing trading/distribution but many other services, as listed below, will need an additional business license from the MOIT. This license would be valid for a maximum of five years, which would discourage long term capital investment. The services that would be subject to this new "business license" include:

- Commercial promotion services;
- Commercial brokerage services;
- Leasing goods service;
- E-commerce service;
- Logistic service;
- Inspection service;
- Market research service;

- Management consulting service;
- Service related to production;
- Auction service;
- Tendering service;
- Commodity exchange, or member of a Commodity exchange; and
- Other commercial activities related to the purchase and sale of goods.

If this draft Decree is adopted, it will create a critical issue for foreign investment in Vietnam, and slow the modernization of the modern, efficient supply chain that SMEs need to link to both domestic and international markets. Centers such as Ho Chi Minh City, which has the potential to develop as a regional hub for the supply chain, will be handicapped by these barriers. A draft "Law on Foreign Trade Management" threatens to institutionalize these market access barriers for years to come. We urge the drafters to refrain from introducing new non-tariff barriers that will hurt local and foreign invested businesses alike.

We understand from recent meetings with the MPI and the Department of Planning and Investment in HCMC that there is a more recent draft of this decree (the 10th), but it seems not to have been made available for public comment yet. We are told, however, that the new Business License requirement would be applied only to those business activities that do not fall into any of the categories of services included in Vietnam's schedule of Commitments for the WTO. That would be helpful, though many enterprises, including Vietnamese SMEs who need international standard services to access international markets, will still be handicapped by the new Decree even if this simplification is incorporated.

If we base ourselves on the 8th draft, and taking into account that the draft is very vaguely drafted, we see the following additional issues arising:

- Under the 8th draft, all of the business activities listed above are subject to a Business License to be issued by the local DOIT.
- The 8th draft stipulates an application dossier for applying the Business License – which will impose heavy paperwork burdens for service providers. While the Government is investing a lot of time and efforts to cut off the unnecessary administrative procedure, this draft just adds more documents to be provided by the investors/company to obtain another license from the authority as below:
- Application form for Business License.
- A written description about the business activities, services provider methods…etc.
- An Explanatory letter to explain about the satisfaction of the business conditions.
- Financial documents;
- A certified true copies of the certification on the completion of tax obligation of the company (issued by the tax authority); and
- Investment Registration Certificate, Enterprise Registration Certificate, etc.

We believe this paperwork is excessive for most of the services covered by the 8th draft, and that the basic necessity of this additional Business License should be re-considered in light of the fact that the relevant enterprise already has to meet three licensing requirements: (1) the Investment Registration Certificate ("IRC"); (2) the Enterprise Registration Certificate ("ERC"); and (3) all legally required professional and industry-specific qualifications and certifications.

Another issue is the timeline for the is Business License, according to the 8th draft: Upon the issuance of the IRC, ERC, the company must prepare and submit 2 copies of dossiers and submit the local office of the Department of Industry and Trade ("DOIT"). It takes 15-20 working days for the DOIT to issue the Business License. This is just a statutory timeline, we all know that in

practice, it may take up to few months. This creates unreasonable delays to the introduction of helpful services to the market, not to mention additional costs to the service providers that have to be passed on to their customers.

We urge the reconsideration of this draft Decree. There seems to be no clear legal need for it given the many other licenses and permits the same enterprises already have to obtain.

3. Proposals to create a stable and attractive tax environment for enterprises

3.1. Respect the principle of investments protection by recognizing and ensuring the CIT incentives stated in the Investment Certificate ("IC") issued for investors

Issue

Recently, tax authorities have conducted inspections at many Enterprises and determined that the incentives criteria stated in the IC issued for many Enterprises do not comply with prevailing tax regulations and thus proposed tax arrears collection instead of respecting the principle of investments protection.

Comment

We understand that the IC issued by Ministry of Planning and Investment or the Department of Planning and Investment or the Industrial zones authority is the legal, commitment basis of the Government of Vietnam when the investors to conduct investments in Vietnam. In case the licensing authority of Vietnam incorrectly states the tax incentive criteria on the IC, the responsibility of which should accordingly be borne by the licensing authority, not the Enterprises.

We also understand that the State of Vietnam has issued policies and regulations on investments protection which are demonstrated throughout the Law on Investment 2005, the Law on Investment 2014, accordingly Investors are ensured to be entitled to incentives as regulated in the IC, even in the case of changing regulation. The State of Vietnam recognizes and protects investments capital, income, the rights and other legal benefits of Investors; and acknowledges the long term existence and development of investment activities.

Therefore, tax incentives for the Enterprises for which ICs are issued should be implemented as stated in the issued IC. Upon discovering inaccuracy in the IC, the licensing authority should explain to the Investors to amend the incorrect terms, then enterprises shall implement calculation of tax in accordance with the amended ICs from the date amended in the ICs.

In practice, we acknowledge that the Government, the Ministry of Finance has handled a number of cases in which Investors are allowed to preserve the incentives stated in IC. Hence, based on the MFN principle, we propose for fair, equal and consistent treatment among investors from different countries to create faithfulness for the potential and current investors in Vietnam.

3.2.Lack of the measure of total capital to determine tax incentives entitlement for the Enterprises with investment projects in Vietnam

Issue

Since the Law on Corporate Income Tax No 32 took effect (01/01/2014), The Enterprises are entitled to tax incentives for projects expansion. In additions, the Law 32 also provides the criteria of enterprises with large-scale investment as being entitled to tax incentives. Accordingly, is one of the important criteria to determine tax incentives entitlement is total investment capital.

Tax law, investment law and prevailing regulations are yet to provide any regulations/guidance on the measure of total capital to determine tax incentives entitlement. According to Investment Law, when the Enterprise applies for license of the projects it must be registered for total investment capital which is determined on the basis: Total investment capital = Working capital + fixed capital. As we have observed in practice a number of licensing authorities has stated in the IC that the Total investment capital of the Enterprise includes fixed capital and working capital. This is also the measure of the investment scale of the Enterprise.

Meanwhile, corporate income tax law and legislations have not given clear provisions in this regard. We have observed different tax authorities have different views on the determination of total investment capital, and is often evaluated on data of fixed capital, while working capital is also an important and essential part for production and business activities of the Enterprises. Therefore, when data on fixed capital is lower than the registered capital on the license, tax authorities might not accept the Enterprises' eligibility for tax incentives.

Comment
The current inconsistency of the definition of total investment capital between licensing and tax authorities is causing major difficulties for the Enterprises with investment projects. VBF propose the Government/ the Ministry of Finance to provide clear, specific and consistent regulations among the authorities on the determination of total capital investment for the Enterprises with potential investment to easily implement.

3.3.Support traders to comply with Customs regulations

Issue
Currently, the Enterprises (including enterprise with domestic capital and enterprises with foreign capital) wants to be able to self-assess their Customs compliance level, but lack the basis to do so. At the same time, the Customs authorities maintain their own system of risk management criteria to access the compliance level of the Enterprises which is not publicly published. Such risk management criteria of customs authority is not used to support the compliance activities of the Enterprises but rather used to detect failure in compliance of the Enterprises. The Enterprises themselves are not aware of these compliance criteria that they should adhere to until post clearance audit and discover the many compliance failures that they have made. The failures in compliance can be avoided if the Enterprises are fully aware of their compliance level and the compliance basis of customs authorities.

Comment
In order to support the Enterprises in customs compliance, VBF propose for transparency of customs compliance criteria by (building) and publicly publishing a risk management criteria system of customs compliance and documentation of compliance assessment for the Enterprises to be able to acknowledge their current compliance level and implement to their best standard, and avoid violations in the post clearance audits.

3.4.Support the Enterprises on Customs Valuation in the Post-Clearance Audits

Issue
In recent years, the customs inspection and supervision has had significant improvements in facilitation for the Enterprises, which reflects by the Post-clearance audit ("PCA") activity replacing prior inspection as before. The orientation of PCA activity is to create facilitation for the Enterprises conducting import/export and investment activities which is consistent with the trend of simplification, harmonization and modernization of the Customs procedures in the

global economic integration process. However in reality there shows a gap between the authority's orientation and actual PCA implementation for the Enterprises. In which, Customs valuation is the most significant issue that the Enterprises are facing during the PCA process. The Customs Authority often subjectively concludes that the related-party relationship among the companies in the same group impacts the Customs valuation of import goods, without providing any reasonable doubts. When requesting the Enterprises to prove the transparency and accuracy of the transaction value in the related-party relationship, the customs authority does not provide any requests regarding the specific for information/documents for submission. Nonetheless, the Customs authority often does not accept the explanations from the Enterprises and reject the declared value and use the Deductive logic method to impose the Customs valuation without showing any specific, clear, objective data as the basis for calculating the imposed Customs valuation.

Comment

Currently, the World Customs Organization (WCO) has issued a specific guidance for the nexus between Customs Valuation and Transfer Pricing (WCO guide to Customs Valuation and Transfer Pricing) as a reference for countries to the solution for determining the transparency of customs valuation. Thus, in order to help the PCA activity reflects the true orientation of facilitation for the Enterprises, VBF recommends the General Department of Customs to set up and provide detailed and specific basis of objective, transparent, quantifiable criteria on for the Enterprise to easily comply and to be consistent with the global trend.

4. CROSS BORDER LOANS- RESTRICTION UNDER HOUSING LAW

One of the areas where domestic enterprises, including SMEs, have developed most strongly is in the area of real estate development, especially sorely needed residential housing. However, they and their foreign invested counterparts have recently become subject to a new ban on foreign debt funding for residential projects.

We are talking about language in the last round of amendments to the Housing Law that seem to allow commercial housing projects to obtain financing from onshore lenders only. We understand this is a new restriction imposed by the Government out of a concern for the volume of foreign debt that may be accumulated, but we suggest there should be more rational means to allow for reasonable amounts of foreign debt capital to supplement foreign capital investment into the necessary increase in housing for the Vietnamese people.

4.1.Offshore funding restriction under the New Housing Law

Specifically, Article 69 of the current Housing Law 2015 provides a list of available capital sources funding for commercial housing projects as follows:

- owner's equity;
- capital contribution; investment cooperation; business cooperation; joint venture with other organizations, households and individuals;
- collections from pre-sale; and
- loans from credit or financial institutions which are licensed and operated in Vietnam.

This list does not include the funding from other sources, for example, offshore sources. As a result, it is interpreted not to allow foreign debt capital for residential housing projects.

Please note the old Housing Law allowed commercial housing project to obtain financing from other sources (e.g., offshore shareholder and bank loans). Specifically Article 38.5 of the Old Housing Law included "*capital mobilized from other sources in accordance with the laws*" as part of the available capital funding for commercial housing project.

The current Housing Law, however, has removed the provision of "*capital mobilized from other sources in accordance with the laws*". This removes an important source of funding for the residential housing sector.

4.2. What are the downside risks?

As a result of this change to the Housing Law, we are experiencing obstacles to the mobilization of debt capital from abroad for residential housing project. Specifically:

a. Under the State Bank of Vietnam (**SBV**) regulations, any loans from offshore lenders with the term of more than 1 year must be registered with the SBV. There is a risk that SBV may refuse to register any offshore loan for development of commercial housing projects in light of the language of the amended Housing Law.

b. In addition, assuming that one department within the SBV for some reasons may not check carefully the purpose of offshore loans and thus would approve for such loans, then later on in the repayment process of such offshore loans which is normally reviewed by other departments within the SBV, then such departments may scrutinize the process (including the remittance of capital from onshore accounts to overseas accounts), and may not allow the remittance of such loan amount out of Vietnam given the language of the amended Housing Law as mentioned above.

c. From the perspective of the onshore banks where the project company opens its capital account for development of commercial housing project, the compliance department of such onshore bank may 'red-flag' the facility, utilisation and repayment of the offshore loan amount for development of commercial housing project, given the above-mentioned restriction under the current Housing Law. As the result, the onshore bank may refuse to utilize such amount for the project development.

d. In respect of the possible administrative sanctions under the local laws, we note that the monetary penalty for violation of the regulations on capital mobilization is from VND 100,000,000 to VND 150,000,000, in addition to the remedy of returning any benefit/interest collected or received from the violating acts (as provided under Decree No. 121/2013/ND-CP implementing the old Housing Law). Following the effectiveness of the amended Housing Law, the Government has recently proposed a new draft decree replacing Decree No. 121, which proposes increasing the penalty amount for violation of capital funding for housing projects (i.e., VND 200,000,000 to VND 300,000,000) in addition to the remedy of invalidating such funding arrangements.

4.3. Our recommendation and next steps

Since the new Housing Law has become effective not long ago, and we have not seen many detailed implementations and guidelines by the relevant authorities (i.e., SBV, Ministry of Construction, etc..) for this type of issue. We are concerned that the amended Housing Law will be implemented in such as way as to constitute a ban no foreign debt financing for residential projects, which will drive up the price of housing for Vietnamese house buyers and limit the supply of new construction.

We appreciate that there are issues of foreign exchange and debt management that need to be taken into account, but there are reasonable limitations and conditions on cross border debt financing short of an outright ban that would better serve the needs of the Vietnamese economy. Members of our Land Sub-Working Group are keen to work on this issue as soon as possible with the relevant authorities.

5. New Implementing Rules for Representative Offices

Representative offices of foreign firms serve as a key link between domestic enterprises and international markets. The thousands of representative offices that operate in Vietnam today often serve as a key point of contact for finding local suppliers for global supply chains and eventually investing with local partners. But a recent draft Circular threatens to limit the practical scope of operation of these offices without providing a feasible alternative for their operation. We have already provided a matrix showing the changes proposed so we will not reproduce that here, but we do wish to note it as an issue of particular concern given its relevant to supply chain connectivity.

6. Competition Law - Concerns Regarding Proposed Amendments

Vietnam's Competition Law, adopted nearly a decade ago, was greeted at the time of its introduction as an international standard law essential to the proper functioning of the modern Vietnam economy. In recent years, however, issues with the professionalism of the body and the transparency of its proceedings have proliferated. No rules have been passed governing informal or "*ex parte*" contacts with Competition Authority officials involved in proceedings to resolve cases of abuse of market dominance. This has lead to speculation about the impartiality of such proceedings.

We understand that amendments are under consideration, and this would present a good opportunity to fix the problems that have arisen during the first several years of implementation. In order to ensure that the Competition Law plays its proper role in the new economy, it is vital that stakeholders are given sufficient time and opportunity to contribute their ideas and share their experience. We request that the pending drafts be circulated and opportunities for consultation with all relevant stakeholders be provided early in the process.

7. Cybersecurity and the Digital Economy

The global digital economy is becoming increasingly part of the basic infrastructure of the global supply chain. For Vietnamese enterprises to be competitive in the global supply chain, they must have secure access to all of the digital facilities and information available to their competitors from the most successful jurisdictions. With this imperative in mind, recent legislative proposals deserve careful consideration.

On 19 November 2015, the National Assembly adopted the Law on Cyber Information Security ("**LOCIS**"). This Law will have a significant impact on the ability of Vietnamese enterprises to compete in the digital economy, but whether it strikes the right balance between security and access deserves careful consideration in light of some particular issues.

Our detailed comments and suggestions are set out in a separate document that is being shared with the MOIT. We hope that in the implementing rules for this important new law, some of the issues we have identified can be addressed.

8. Domestic Linkages - the automotive industry and its supporting industries:

The Automotive Working Group has expressed its concerns regarding a number of issues affecting the healthy development of the automotive sector and its supporting industries, where SME parts and service suppliers may have significant opportunities.

Due to disadvantages of small production and economic scales, and importing most of CKD parts, manufacturers need to owe the logistics and packaging cost, and import duty. That is why domestic production costs are higher than those assembled in Thailand or Indonesia. This

production cost gap may go up to approx. 20% after 2018 when ASEAN FTA tariff exemption for vehicles.

Consequently, local automotive makers will face a difficult situation to continue domestic production due to inflow of many import cars coming from Thailand and Indonesia, which has strong cost competitiveness.

Production incentive policy mentioned in Article 5-1 of Prime Mister's decision No. 229/QD-TTg dated February 4th 2016, is very important measure for automobile companies. However, the current policy is unclear and difficult for companies to prepare project proposal to enjoy such incentives.

Recommendations

- Eliminating all MFN import duty for automotive parts that Vietnam has not yet produced to improve cost competitiveness for keeping local production.
- Applying stricter control and enforcing transparency on import of CBU vehicles
  - Verify declared value of imported cars with recourse to established international and foreign market standards.
  - Tighten the control of "Used Car" import in a manner consistent with international commitments.
- Clarifying the contents and requirement of production incentives mentioned in PM's decision 229/QD-TTg.

9. Cybersecurity and Participation in the Digital Economy

On 19 November 2015, the National Assembly adopted the Law on Cyber Information Security ("**LOCIS**"). This Law will have a significant impact on the ability of Vietnamese enterprises to compete in the digital economy, but whether it strikes the right balance between security and access deserves careful consideration in light of some particular issues. Our detailed comments and suggestions have been submitted in a separate paper for consideration by the relevant authorities.

IV. CONCLUSION

As mentioned above, this paper is by no means an exhaustive list of issues facing the investment and trade community in Vietnam today. It is not even an exhaustive list of issues undermining linkages with domestic SMEs. But if we can resolve these issues it would give full play to the great potential of Vietnam's private sector, including its SMEs, in the long run. There is a very real chance for Vietnam to become a major player in the global supply chain, creating jobs and better lives for its people as a result, but only if a conductive legal and administrative environment exists encourages that. We know that the new Government is committed to administrative procedure reform and has worked hard to make it happen. We hope that the relevant ministries will play their parts to implement this important strategic policy.

ATTACHMENT

CYBERSECURITY AND PARTICIPATION IN THE DIGITAL ECONOMY

On 19 November 2015, the National Assembly adopted the Law on Cyber Information Security ("**LOCIS**"). This Law will have a significant impact on the ability of Vietnamese enterprises to compete in the digital economy, but whether it strikes the right balance between security and access deserves careful consideration in light of some particular issues.

The LOCIS identifies the following as Cyber Information Security Products ("**CIS Products**") subject to its scope:

- Civil encryption products ("**CEPs**")
- Products for cyber information security testing and evaluation;
- Products for cyber information security surveillance;
- Anti-attack and anti-hacking products; and
- Other CIS Products to be promulgated by the Government (currently not yet available)

It also identifies specific types of cyber information security services ("**CIS Services**")
The LOCIS tasks the Government's Cypher Committee ("**GCC**"), a government agency under the Ministry of National Defense, with regulating CEPs and civil encryption services ("**CES**"). All other types of CIS Products and CIS Services are subject to the competent authority of the Ministry of Information and Communications ("**MIC**").

On 1 July 2016, the Government promulgated Decree No. 58/2016/ND-CP detailing the trading of CEPs and CEP Services and the export and import of CEPs ("**Decree No. 58**"), and Decree No. 108/2016/ND-CP detailing the conditions for trading in cyber information security products and services ("**Decree No. 108**").

Recommendations
We understand that Vietnam intends to become a leading nation in information technology and communications. We applaud the Vietnamese Government's initiative to invest in such areas, particularly in empowering and facilitating the development of Vietnamese small to medium enterprises ("**SMEs**"), to strengthen the country's competitiveness in the industry's global supply and production chain. In order to fully realize these objectives, the law applicable to SMEs' operation must be clear and predictable. Likewise, unnecessary and burdensome administrative procedures should be eliminated in order to decrease costs for SMEs that run on lean budgets. Specific to the cyber information security area, an SME, as any other enterprise, needs strong information security technology and a secure environment in order to safely integrate into the Internet as well as the global supply chain. Easy access to high quality cyber information security products and services is necessary for SMEs' efficient application of the most advanced technologies into their daily operation, which contributes to enhance SMEs' competitiveness in Vietnam as well as in the regional and global supply chain. In line with these objectives, we therefore respectfully request the Vietnamese Government to issue a legal document confirming the following interpretations concerning the LOCIS, Decree No. 58 and Decree No. 108:

1. Businesses, including in particular SMEs that have limited resources, should be given a sufficient grace period to familiarize themselves with the relevant legislation and ensure compliance.

Both Decree No. 58 and Decree No. 108 were adopted and became effective on 1 July 2016. The full draft version of Decree No. 58 was not made publicly available for comment.

Businesses thus did not have sufficient time to understand the new legislation before it became effective. This is likely inconsistent with Vietnam's commitments on transparency under the WTO legal framework as well as various free trade agreements to which Vietnam is a party. Businesses' lack of opportunity to comment and prepare to comply with the legislation creates unpredictability in the market and may negatively impact the trade and investment climate in Vietnam. Even Multinational Corporations ("**MNC**"s) have faced difficulties implementing the relevant regulations. SMEs, with much more limited resources, may have found compliance all the more challenging.

2. A business license should not be required when activities involving CEPs, CESs, other CIS Products or CIS services are not for the purpose of trading these products and services. This is particularly important for SMEs that import /procure these products and services to support their own internal business operations.

   According to Articles 31.1, 40.2 and 41.2(dd) of the LOCIS, only companies would be required to get a business license from the MIC or the GCC if they engage in the **trade of CEPs or other CIS Products**, e.g., importing CEP or CIS Products for wholesale or retail in the Vietnamese market. Where a company imports a CEP or CIS Product to support its production, investment or business activities in Vietnam, e.g., a factory in Vietnam imports a CEP or another CIS Product for installation in its assembly to support its production of cars, such activity should not be treated as a "trading activity" by the company. Thus, the import of a CEP or another CIS Product for non-trading purposes in such case would not require a GCC/MIC Business License.

   In line with the above interpretation, "trading" of CEPs / other CIS Products should not include a situation in which (i) CEPs / other CIS Products are temporarily exported overseas for repair and maintenance and then re-imported into Vietnam.; or (ii) intercompany exchange of CEPs and other CIS Products for internal use.

3. The scope of the business license exemptions identified in the second table in Appendix I of Decree No. 58 should be clarified and expanded upon, as follows:
   - Clarify the criteria the GCC will use to assess whether cryptography is the "core function" of a CEP;
   - Allow the "mass market" exemption;
   - Allow exemption with regard to low encryption capability;
   - Allow additional exemptions for: products that employ cryptography for digital signature function; cryptographic products for limited banking use or money transactions; certain types of routers, switches or relays; general purpose computing equipment or servers.

   The above would bring Vietnam encryption control legislation in line with international best practices, particularly those adopted by Wassenaar Arrangement participants and observers. Familiarity with international best practices would also be an asset for SMEs when they enter into the global supply chain.

   More detailed information has been provided in Annex 1, attached.

4. The import and export of products bearing the HS codes listed in Appendix II of Decree No. 58 should not be *prima facie* treated as requiring an import/export permit. Rather, an import/export permit should only be required when such products (i) have cryptographic functions as described in the last column of the Appendix II, (ii) are not exempt under the second table of Appendix I of Decree No. 58 or any future exemption permitted by the Government, AND (iii) are imported or exported for the purposes of trading of CEPs.

   We note that there has been a case in Dong Nai province where an export of a product whose HS code falls within Appendix II of Decree No. 58 faced unnecessarily delays at the border even when the product was claimed to have no cryptographic function. The delay was caused because the customs authority needed to exchange official letters with the GCC to clarify the import permit requirement under Decree No. 58.

   An official confirmation on the above proposed point would facilitate the consistent and smooth application of the import permit requirements applicable to CEPs imports and exports in practice, remove unnecessary delay at the customs check point, and reduce the burden on GCC with regard to case-by-case requests from importers / exporters / and local customs authorities.

5. The conformity certification or announcement requirement should not apply to products that are not circulated in the Vietnamese market, e.g., imported for internal use.

   A confirmation on the above would enable consistent and transparent interpretation and application of the requirements under Articles 34.2(b), 34.2(c), 39.1(a) and (b), and 48.3(b) of the LOCIS.

6. A product that can be classified as either a CEP or a CIS Product (e.g., a CEP can also be an anti-attack and anti-hacking product) should not be subject to duplicative licensing requirements. In addition, importers or exporters of a CEP or CIS Product should be given the flexibility to choose to comply with either the MIC or GCC requirements.

   This approach would ensure predictability and clarity for businesses. It would also align with Vietnam's objectives to simplify administrative procedures in order to facilitate trade and investment in Vietnam.

7. Clarification should be provided regarding the documentation requirement that a business must follow to prove that the CEP or CIS Product does not cause harm to the national defense, security and social discipline and safety of Vietnam e.g., accept an end-user statement ("**EUS**") / end-user certification("**EUC**"). A sample EUS / EUC should be provided for businesses to refer to as a guidance (not as a rigid requirement).

   Such clarification would enable consistent and transparent interpretation and application of the requirements under Articles 34.2(c) and 48.3(c) of the LOCIS.

8. A voluntary disclosure mechanism should be established to encourage companies to voluntarily disclose their errors in exchange for reduced penalties.

   This mechanism would encourage good business practices and may reduce government's policing and investigative burden.

Simplified administrative procedures, transparent requirements, and voluntary disclosure mechanism as proposed in Points 7, 8, and 9 above would help reduce compliance costs for importers and exporters, which is particularly important for SMEs with limited resources.

Annex 1

Clarification and expansion of business license exemptions

We note that the second table in Appendix I of Decree No. 58 identifies nine types of CEPs, the trading of which is not a conditional business sector, and thus does not require a business license.

(a) "Core function" and "generally in use (by the public)"

The second table in Appendix I of Decree No. 58 refers to, *inter alia*:

1. *Operating systems, Internet browsers, software applications that are embedded with encryption (the information security function using encryption is not the core function [of these products]), are generally in use [by the public], and are designed for user to self-install without any support from the supplier.*

2. *Information technology products which are generally in use [by the public], in which the information security function using encryption is not the core function [of the products], which is already embedded in the products and does not require any support from suppliers: notebooks, smart phones, DVD players, digital cameras and other civil electronic products.*

We note that certain countries that maintain controls on the export of items using encryption provide for a "mass market" exemption. For example, Singapore has exemptions for:

a. Goods that meet all of the following:

1. Generally available to the public by being sold, without restriction, from stock at retail selling points by means of any of the following:

a. Over-the-counter transactions;

b. Mail order transactions;

c. Electronic transactions; or

d. Telephone call transactions;

2. The cryptographic functionality cannot easily be changed by the user; and

3. Designed for installation by the user without further substantial support by the supplier.

We recommend that the GCC provide an exemption to the business license requirement for CEPs that meet the same criteria, without any need to assess whether the information security function involving the use of encryption is the "core function." Such approach would be consistent with Vietnam's WTO commitments as discussed below.

As part of its accession to the WTO, Vietnam confirmed that import prohibitions would not apply to "general, commonly traded goods equipped with encryption technology, which are destined for mass consumptions, such as all products covered by the WTO Information Technology Agreement ("**ITA**")," (paragraph 218, Working Party Report, effective 11 January 2007). We therefore suggest that Vietnam recognize the "mass market" exemption above as an independent exemption category, regardless of whether the cryptographic function in the CEP is a "core function". This would bring Vietnam's regulations on cryptographic product controls in line with international best practices, as well as with Vietnam's WTO commitments.

Further, where a CEP has been exempt from import / export control requirement in a country that applies a comparable "market access" exemption, the trading in, import, and export of the same products should also be exempt from the business license, import / export permit requirement in Vietnam. Please also clarify whether the "generally in use (by the public)" concept referred to in

the second table of Appendix I of Decree No. 58 corresponds with the "generally available to the public by being sold, without restriction from stock at retail selling points" as mentioned above.
Allowing the trade of general, commonly traded goods destined for mass consumption, regardless of whether the encryption function is a core function, would enable Vietnam to easily access important technologies, facilitating the application of technology in investment and production in the country, thus bringing Vietnam closer to its objective of becoming a leading nation in information technology and communications.

If the Government insists that a "core function" assessment is required to determine whether the trading of a CEP requires a business license, we would suggest that the GCC provide such a requirement as a separate exemption category. In such a case, please also provide the specific criteria that would be used to determine whether the information security function using encryption is a "core function." Examples should be provided in this regard to ensure that businesses have sufficient information to comply with the law. Please confirm whether a supplier may satisfy this requirement by documenting their self-conducted assessment of the product based on technical characteristics and essential commercial considerations for the purchase of the product.

(b) "Low encryption capability" exemption

CEPs are currently described in Appendix I as "systems, equipment, modules and integrated circuits, software applications specially designed for information security by encryption techniques using "asymmetric algorithms" or "symmetric algorithms"."
We would like to note that participants and observers to the Wassenaar Arrangement do not control products with low encryption capability. In particular, controls only apply when *(i) the symmetric algorithm involved employs a key length in excess of 56 bits; or (ii) the security of the asymmetric algorithm involved is based on any of the following:*

> *1. Factorisation of integers in excess of 512 bits (e.g. RSA);*
> *2. Computation of discrete logarithms in a multiplicative group of a finite field of size greater than 512 bits (e.g. Diffie-Hellman over Z/pZ); or*
> *3. Discrete logarithms in a group other than mentioned in Category Code 5A002.a.1.b.2. in excess of 112 bits (e.g. Diffie-Hellman over an elliptic curve).*

We recommend that Vietnam adopt the same approach: CEPs that do not involve symmetric or asymmetric algorithms within the specific technical parameters described above should be exempt from the business license and import / export permit requirement.

(c) Additional exemptions

We understand that the GCC has adopted certain exemptions similar to those under the Wassenaar Dual-Use List. Please consider adding other exemptions provided under the Wassenaar Dual-Use List (http://www.wassenaar.org/wp-content/uploads/2015/08/WA-LIST-15-1-2015-List-of-DU-Goods-and-Technologies-and-Munitions-List.pdf). For example,

1. Products that use cryptography to perform the digital signature function.
2. Cryptographic equipment specially designed and limited for banking use or 'money transactions';
   'Money transactions' includes the collection and settlement of fares or credit functions.
3. Routers, switches or relays, where the "information security" functionality is limited to the task of "Operations, Administration or Maintenance" ("OAM") implementing only published or commercial cryptographic standards; or

4. General purpose computing equipment or servers, where the "information security" functionality meets all of the following:
1. Uses only published or commercial cryptographic standards; and
2. Is any of the following:
   a. Integral to a CPU that meets the provisions of Note 3 in Category 5 – Part 2;
   b. Integral to an operating system that is not specified by 5.D.2.; or
   c. Limited to the "OAM" of the equipment.