POSITION PAPER OF INVESTMENT AND TRADE WORKING GROUP

Prepared by
Investment & Trade Working Group
Vietnam Business Forum

1. The EV FTA, Comprehensive and Progressive Trans-Pacific Partnership, and other important Trade Agreements

As mentioned in the previous forum, the Investment and Trade Working Group takes note of the fact that the EU–Vietnam Free Trade Agreement will be on the Agenda of the EU Parliament by mid-2018 and when that happens, we hope that the 750 Members of the European Parliament will give their approval in a plenary session, just as we hope the National Assembly will do for Vietnam. We have seen an increasing questioning from the public in general of the benefits of trade liberalization. In this context, the Investment and Trade Working Group expects the European Parliament members to raise questions on regulations that the Vietnamese Government has recently adopted. All these issues will be extremely important and we need to anticipate and actively address the concerns the Members of the European Parliament and national constituencies.

In addition to the EU-Vietnam FTA, the Investment and Trade Working Group supports Vietnam's early ratification of the Comprehensive and Progressive Trans-Pacific Partnership ("CPTPP"). We believe that this landmark agreement between 11 of the 12 "TPP" countries will create growth, jobs and sustainable economic and social development right through the region. Last year, we encouraged the Vietnamese government to push forward with a number of other important trade pacts, including Regional Comprehensive Economic Partnership and other important agreements. Our position on these agreements has not changed. Each offers opportunities, and together they offer even greater opportunities.

2. Supply Chain Obstacles

2.1 Issues related to Foreign Investment Conditions in Vietnam

Issue 1

One persistent administrative procededure challenge related to services which have not been committed or provided in WTO Commitment or international treaties to which Vietnam is a member and other international treaties on investment, of which investment conditions for foreign investor are not provided by Vietnamese law, investment registration authorities seek opinions from the ministries to consider and decide (Article 10.2.dd, Decree No. 118/2015/ND-CP dated 12/11/2015).

In this respect, for example, the Department of Planning and Investment of Ho Chi Minh City ("**HCMC DPI**") seeks opinion from the ministries and grants a license for the services only when an approval letter from the Ministries provides for the word “approved/approval”. In practice, any opinion such as “request the DPI to consider and grant the licenses” is not considered an “approval”.

Suggestion

When there is no objection from the ministries, DPI should grant the license. As long as the letter indicates consent, even when the word “approval” is not literally stated, DPI shall also grant the license.

Issue 2

Under Decree No. 118 implementing the Investment Law, in the case the foreign investors have been granted a license to invest in the sectors / services provided by Article 10.2.dd, the investment registration authorities consider [and] decide the same sectors/services for another foreign investor without seeking opinions from the ministries (*Article 10.2.e, Decree No. 118/2015/ND-CP dated 12/11/2015*).

In this respect, for example, HCMC DPI seeks approval opinion from the ministries for every single case regardless there are already precedents that the proposed activities have been approved for foreign investors before.

Suggestion

DPI shall save time and resources by following precedents in accordance with these regulations.

Issue 3

Pursuant to Article 5, Section 6 Decree No. 09/2018/ND-CP, "a business entity having retail outlet(s) in Vietnam shall, upon receipt of capital contribution to become a foreign-invested business entity or a business entity prescribed in Points b and c Clause 1 Article 23 of the Law on Investment, apply for both trading license and license for establishment of retail outlet.

Documentation and procedures for trading license shall comply with Articles 12 and 13 of this Decree.

Documentation and procedure for license for establishment of retail outlet are prescribed in Article 38 of this Decree."

As such, any domestic enterprise receiving even just 1% of foreign capital, is subject to Trading license and license for establishment of retail outlet for each and every retail stores under its ownership. Pursuant to Article 38, timeline for the MOIT and DOIT consideration and approval is 65 days, excluding time for back and forth correspondence delivery between the MOIT and DOIT. The MOIT and DOIT are entitled to allow or reject such retail stores to continue their operation by granting the license for establishment of retail outlet. To that end, the business operation and benefits of labors working in such stores are on the brink of instability and at risk.

Suggestion

We request that the requirement for re-licensing of existing retail stores be eliminated. The re-licensing may apply if foreign investors account for at least 51% of the charter capital.

2.2 National Technical Regulations on the content of formaldehyde and certain aromatic amines derived from azo colorants in textile products

Recently, Circular No. 07/2018/TT-BCT of the MOIT has extended the effective date of Circular 21 from 1 May to 1 January 2019. However, some serious issues of Circular No. 21 still loom over the sector:

Issues

The Scope of Circular No. 21

Pursuant to Annex No. 1 of the National Technical Regulations on the content of formaldehyde and certain aromatic amines derived from azo colorants in textile products promulgated with Circular No. 21, the List of textile products subject to the application scope of Circular No. 21 includes goods bearing HS Code No. 9619 - *"Sanitary towels (pads) and tampons, napkins and napkin liners for babies and similar articles, of any material"*.

According to Appendix I promulgated with Circular No. 65/2017/TT-BTC dated 27 June 2017 of the Ministry of Finance promulgating the List of Vietnam's imports and exports, we understand that the HS Code 9619 covers a wide range of products, including but not limited to tapes, towels and diapers - which are made from all materials. Among others products listed under HS Codes No. 9619, the HS codes No. 9619.00.11, 9619.00.91 are directly related to textile products. Other HS codes such as 9619.00.12, 9619.00.13, 9619.00.19 covers products made from other materials that are not related / not likely to be considered textile products, such as paper, pulp, etc. Therefore, we are of the view that the inclusion of all goods bearing HS Code 9619 in the application scope of The Circular 21 is not reasonable. Particularly, this would be an irrelevant and redundant testing on non-textile products under HS 9619 due to the fact that the chemicals controlled by Circular No. 21 are used in dying process of textile industry. Non-textile products are definitely not undergone such dying process. Moreover, a further confirmation for the irrelevant application of Circular No. 21 on non-textile diaper is that the Ministry of Science and Technology ("MOST") promulgated TCVN 10585:2014 for sanitary napkins, tampons, and TCVN 10584:2014 for children diapers. As TCVN is applied on voluntary basis, it is widely understood that TCVN establishes a high quality standard for products circulated in the market. Notably, despite that fact, these TCVN chemical standards do not set forth any requirements relating to formaldehyde and aromatic amines.

Testing Method 7 is impractical for Products that are already circulated in the Market

Further, we note that testing methods as regulated under Circular No. 21 only include Method 5 and Method 7. While Method 5 only requires the testing of a typical sample, which allows enterprises to re-use a testing result on multiple product lots for conformity announcement purpose, Method 5 costs a lot to apply to imported products because it requires the supervision of the offshore manufacturing process.

Importers, wholesalers or retailers of imported products should apply Method 7, which requires testing on each product lot, and the testing result of a previous product lot is not applicable to subsequent lots.

Method 7 may be executed if sufficient planning for the products testing onshore or offshore is done ahead of time prior to importation although it’s costly. However, for the products that have been displayed in stores before the effective date, the responsible enterprises would have to spend a considerable amount of time, human resources, and costs to collect the displayed products from different locations, organizing sampling, testing, and certification by testing agencies, affixing the CR labels, and re-distributing to the stores. This represents a significant waste and cost, which affects not only business health of each enterprise and costs for the consumers, but also interrupts the continuity of its business operation as the stores must be closed until products are re-distributed.

Suggestions

Given aforementioned reasons, we hope that the MOIT will consider a solution to both address the public health concern, and help ease the time and costs demand on the responsible enterprises.

In particular:

- We suggest the MOIT remove the HS codes related to paper nappy/ sanitary napkin in the group code 9619 out of scope of Circular 21 (in particular, to remove / exclude paper nappy, sanitary napkin products from Annex No. 1 of the National Technical Regulations on the content of formaldehyde and certain aromatic amines derived from azo colorants in textile products promulgated with Circular No. 21). We are aware that the Department of Science and Technology - MOIT is drafting technical standards for diapers, sanitary napkin. To ensure uniformity of management, avoiding the overlapping of various management documents for a product category, we would like to request the MOIT to consider and evaluate the safety risk and issue its own technical regulation for paper diapers, sanitary napkins.
- With an aim to avoid damage / profit loss that may occur to enterprises due to the implementation of Circular No. 21, we kindly request the MOIT to consider not to apply the provisions / technical standards of Circular No. 21 to products already manufactured and put into circulation in the market before the effect date of Circular No. 21 (as amended by Circular No. 07) (i.e., 1 January 2019).
- In addition, we would like to request the MOIT to streamline the administrative procedures for the announcement of conformity and marking the conformity label. Specifically:
  - Enterprises only need to announce the conformity for each product variant only once, still ensure the conformity assessment and conformity certification for production batches (locally-made products) and for each bill of lading (imported goods).
  - The labelling of conformity is encouraged, depending on the reality/capability of the consumer goods sector and the enterprise. In all cases, enterprises can provide certification of conformity for products being circulated on the market.

Last but not least, under the latest List of potentially harmful products issued by MOIT (Document No. 13/VBHN-BCT dated February 22nd, 2018), textile and sanitary paper products are not listed.

Following the Law of Good Quality and all related decrees and circulars guiding the implementation of the Law, only products under Group 2 (potentially harmful products) should be monitored by mandatory national technical standards. Therefore, the MOIT should not issue mandatory national standard for textile and sanitary paper products, which is against the Law.

2.3 Life Insurance - Draft Decision of the Prime Minister for amendments to Decision No. 35/2015/QD-TTg on the list of essential goods and services for which contract forms and general transaction terms must be registered with the Ministry of Industry and Trade under the Law on Consumer Protection[1]

"Life Insurance" should be removed from the list of essential goods and services for which contract forms and general transaction terms are required to be registered with the MOIT under

[1] Decision No. 35/2015/QD-TTg of the Prime Minister dated on 20 August 2015 amending and supplementing Decision No. 02/2012/QD-TTg of the Prime Minister dated 13 January 2012, on the list of essential goods and services for which contract forms and general transaction terms must be registered ("**Decision No. 35**").

Decision No. 35. The life insurers should only be required to conduct the procedure for approval of life insurance products with the Ministry of Finance under the Law on Insurance Business.

Issues

- Effective 15 October 2015, Decision No. 35 adds life insurance to the list of essential goods and services subject to the registration requirement with the Ministry of Industry and Trade ("**MOIT**") under the Law on Consumer Protection. As a result, the life insurers must register their standard insurance policies of life insurance products with the Ministry of Industry and Trade before selling such life insurance products (in addition to the procedure for approval for life insurance products under the Law on Insurance Business). The requirements cause unnecessary administrative procedure burdens on the life insurers and prolonged timelines for the two procedures with the Ministry of Finance and the MOIT.

- On 1 July 2016, the Government adopted Decree No. 73/2016/ND-CP[2], under which the Ministry of Finance is proposed as the agency to receive application dossiers for both procedures and requires the MOF to discuss and agree with the MOIT on insurance products required to be registered for standard contract forms and general trading terms & conditions in accordance with the Law on Consumer Protection.

- On 31 March 2017, the MOIT and the MOF jointly issued Regulation No. 4330[3], which details the coordinated process between the MOIT and the MOF in handling the approval of life insurance products under the Law on Insurance Business and the registration of life insurance policy templates and terms & conditions under the Law on Consumer Protection.

- In October 2017, the MOIT proposed to the Prime Minister a draft Decision amending Decision No. 35 (the "**Draft Decision**"). In relation to onshore banks, this Draft Decision proposes relaxing these requirements for onshore banks by removing the retail banking services from the list. In relation to life insurers, however, the Draft Decision does not offer a similar concession.

- Currently, the requirements still cause unnecessary administrative procedure burdens on the life insurers and prolonged timelines for the two procedures with the MOIT and the MOF, delaying the process of life insurance products' development and sales to the market.

Recommendation

To reduce the overlapping regulations and simplify the administrative procedures, as well as reduce costs to the life insurers, we recommend that the Draft Decision should include removal of "Life Insurance" from the list of essential goods and services for which contract forms and general transaction terms under Decision No. 35.

2.4 Concerns regarding the proposed amendment to the Law on Tax Administration addressing taxation of travel agencies in e-commerce

a. Proposed amendments to Law on Tax Administration with respect to e-commerce activities

2 Decree No. 73/2016/ND-CP dated 01 July 2016 of the Government providing detailed regulations on the implementation of Law on Insurance Business and amended Law on Insurance Business ("**Decree No. 73**").

[3] Coordination Regulation No. 4330/QCPH/BTC-BCT of the Ministry of Industry and Trade and the Ministry of Finance dated 31 March 2017 regarding their coordination in the approval of life insurance products and registration of contract templates and terms & conditions for life insurance ("**Regulation No. 4330**").

We understand that the Ministry of Finance ("**MOF**") has circulated a draft proposal for amendments to the Law on Tax Administration ("**Draft Proposal**") to address the taxation of e-commerce, among other issues. Based on the Draft Proposal, we understand that the MOF has proposed the inclusion of a new section in the Law on Tax Administration ("**LTA**") governing e-commerce. The key features of the Draft Proposal for this purpose are as follows:

- The Draft Proposal seeks to shift the requirement to file and pay value added tax ("**VAT**") and corporate income tax ("**CIT**") from Vietnamese businesses to offshore suppliers of online services.
- The Draft Proposal considers requiring offshore entities supplying services to Vietnamese customers to appoint a representative office in Vietnam for tax declaration and payment.

Travel and tourism is one of Vietnam's most important industries in terms of sustainable economic and social development. According to the World Travel & Tourism Council, travel and tourism accounted for[4] 5.9% of total GDP in 2017 and this number is forecast to rise to 6.7% in 2018; 2,467,500 jobs in 2017 (4.6% of total employment); and visitor exports accounting for 4.0% of total exports in 2017. According to the Vietnam National Administration of Tourism, Vietnam welcomed 12.9 million international visitors in 2017[5] and 4.2 million in the first three months of 2018[6] while this number in 2015 was 7.9 million[7]. In addition, 102 million domestic travelers made visits to Vietnam's travel destinations in 2015.[8] Another marker of the industry's growing contribution to the national economy is the increase in the number of hotel rooms from 92,500 in 2002 to 420,000 in 2016.[9] These statistics show that travel and tourism economy is not only large - it is growing fast.

We are concerned that the Draft Proposal, if turned into law, would have a negative impact on the continued success of this important sector.

b. Analysis

At present, according to Circular 103/2014/TT-BTC and Official Letter 848/BTC-TCT dated 18 January 2017 of the MOF ("**OL 848**"), foreign online travel agencies ("**OTA**")'s commission is subject to withholding of 5% VAT and 5% CIT in Vietnam. OL 848 further requires that hotels in Vietnam, as entities paying income, are responsible for withholding, declaring and paying VAT and CIT arising from payment of foreign OTAs' commission.

VBF supports Vietnam's continued effort in reforming and improving its tax system in order to create an efficient and convenient business environment and to achieve the tax collection target of the Government. However, the Draft Proposal if being implemented in its current form will create undue tax compliance burdens, an uncommon and impractical tax collection mechanism, increase unnecessary operation cost for foreign OTAs and drive travel and tourism business to other destinations. We do not believe that all related issues have been assessed and accounted for in full.

As an intermediary between travelers and hotels, OTAs play a important role in development of the travel and tourism market and they make a positive contribution to the growth of this

[4] https://www.wttc.org/-/media/files/reports/economic-impact-research/countries-2018/vietnam2018.pdf
[5] http://vietnamtourism.gov.vn/index.php/items/25583
[6] http://vietnamtourism.gov.vn/index.php/items/26184
[7] http://vietnamtourism.gov.vn/index.php/items/19659
[8] http://www.gso.gov.vn/default.aspx?tabid=720
[9] http://vietnamtourism.gov.vn/index.php/items/13461

industry in Vietnam. OTAs make it convenient for travelers to arrange their accommodation in Vietnam in the fastest way, contributing to the attraction of tourists to Vietnam as well as development of hotel industry. Asian Trade Center published a research in October 2017 to explain how OTA industry works, clarify its benefits, and provide advice on how regulators can work with the industry to ensure the best outcomes for all. [10]

We appreciate the Government and MOF's concerns regarding the taxation of e-commerce activities. However, these concerns should not be relevant to foreign OTAs. While the Draft Proposal does not clearly define the targeted foreign e-commerce operators, we do have reasons, as discussed below, to believe that the Draft Proposal does not seek to cover foreign OTAs.

c. OTAs' online booking service is neither virtual nor unverifiable

The MOF expresses its concern in the Draft Proposal that e-commerce transactions are virtual and hardly verifiable. As such, the Draft Proposal suggests new mechanisms, purportedly to account for them and to increase tax collection.

However, in fact these concerns do not apply to OTA businesses. In a typical online hotel booking transaction, hotel services are provided by hotels to guests. An OTA only connects hotels and guests to facilitate the transaction between the two. It is not the OTA but the hotel that is providing lodging services to hotel guests. An OTA's service, though provided on an electronic platform, results in hotels providing lodging services locally and physically to guests. As a result, the lodging services are being provided by properly licensed hotels and consumed fully in Vietnam and therefore it is not virtual in any way. Online hotel booking transactions can also be verified at the level of hotels where guests take the lodging services. Therefore, it is entirely practical to require local businesses to withhold and pay the tax in OTA related transactions, unlike in some other areas of e-commerce that cater to individual customers.

d. Current tax withholding mechanism already accounts fully for offshore OTAs' tax liability on Vietnam sourced income

The Draft Proposal would result in double taxation if it is applied in addition to the current withholding taxes. According to Circular 103/2014/TT-BTC, an organization established and/or operating under Vietnamese law that buys services and makes payments to a foreign organization on the basis of a contract, will have to withhold and pay VAT and CIT on behalf of that foreign organization. On this basis, the MOF has issued OL 848 to request that local hotels which are established and operating under Vietnamese law to withhold, declare and pay 5% VAT and 5% CIT on a foreign OTA's commission payable by local hotels.

As mentioned above, an OTA is not a party providing lodging services to guests, so an OTA would not be the beneficiary of the payments made by guests to hotels for their hotel stay. This means that an OTA's income derived in Vietnam is not paid by guests who may be individuals based outside of Vietnam or local individuals. An OTA is only the beneficiary of the payment of commission made by hotels to that OTA. Since hotels must be a legal entity having proper licenses for providing lodging service as provided under the Law on Tourism, the tax withholding mechanism by hotels should fairly ensure that the tax authorities can hold licensed business entities such as hotels liable for collecting the proper amount of tax arising from their payment of commission to an OTA, which is an offshore company, while the Vietnamese

[10] https://static1.squarespace.com/static/5393d501e4b0643446abd228/t/59ed90808c56a88ac98cc755/1508741301259/OTA+Whitepaper+Oct+2017.pdf

government can still achieve its tax collection target with respect to online hotel booking services from duly licensed local business entities like hotels.

e. Current withholding tax mechanism in line with tax practice of other countries

Normal tax practice of other countries for dealing with cross border supply of goods or services is to apply reverse charge mechanism for VAT purpose whereby buyers/customers rather than sellers are responsible for accounting for and paying VAT. Some countries in the Asia Pacific region that apply reverse charge or indirect tax withholding mechanism include Australia, Indonesia, Korea, Malaysia, Thailand, Taiwan, China and the Philippines. Vietnam's current foreign contractor withholding tax is similar to the reverse charge adopted in other countries. The reverse charge and withholding mechanisms facilitate the tax declaration and payment process because buyers/customers which are properly established local entities have sufficient resources for tax compliance tasks. Tax authorities can also collect tax more sufficiently and more cost efficiently at the level of local companies rather than they have to administer tax compliance of offshore companies. As such, it would be more practical for Vietnam to maintain the current tax withholding mechanism as the common tax practice to tax transactions related to OTA business and enhance tax compliance issues by local companies rather than trying suddenly to switch to a new tax collection method and passing tax compliance obligations to offshore companies.

VBF recommends improvements without resorting to disproportionate or unnecessary measures where we believe that the current measures under the existing tested laws have not been deployed yet. In support of a long-standing tax rule that has its comparables in the region as explained above, VBF encourages a review of extra measures under the current law to achieve more tax compliance and collection, such as education, information campaigns, additional specific controls.

f. Unnecessary additional cost for foreign OTAs to comply with tax filing obligation

Foreign OTAs would have to set up presence in Vietnam or engage local service providers to comply with tax filing obligations in accordance with the Draft Proposal. This would incur significant and unnecessary cost including non-creditable input VAT cost for OTAs. These costs would affect competitiveness of travel and tourism industry of the country.

g. Local hotels are better placed to declare and pay taxes arising from commission payments to foreign OTAs as they need to claim expense and input VAT credit

Local hotels are required to issue legal invoices to guests and declare their revenue for tax purposes based on the full room rate paid by guests before deducting the commission payable to OTAs. This guideline is provided in Official Letter 2978/TCT-CS dated 6 July 2017. It is therefore the tax benefit of hotels to withhold taxes on commission payments to foreign OTAs because hotels can claim deduction of commission expense and input VAT credit only if they properly withhold, declare and pay taxes on commission payment on behalf of foreign OTAs. Therefore, the current tax withholding mechanism also supports the proper tax compliance practices for local hotels.

h. It is practically impossible for offshore OTAs to claim tax treaty protection in Vietnam

Preliminary feedback from the drafters suggests that they expect tax treaties to prevent any double taxation arising out of the change in law. Though Vietnam has a wide network of tax treaties, the current requirements for claiming tax treaty protection are unduly burdensome for some types of business especially offshore companies, making it impractical to obtain treaty

protection in most cases. Therefore, the harm done by shifting the tax filing obligation to offshore companies would not in any way be mitigated by the application of a tax treaty.

i. Vietnam's WTO Commitments do not require a foreign OTA to set up a local presence in Vietnam to provide travel agency service on a cross-border basis

Requiring foreign OTAs to set up an office in Vietnam is also apparently inconsistent with Vietnam's WTO commitments. Under Vietnam's WTO Commitments,[11] the services classified under CPC 7471- Travel agencies and tour operator services - can be provided on a cross-border basis without limitation on market access. As such, it would give rise to questions about the implementation of WTO Commitments if a foreign OTA were to be required to set up a representative office or appoint a local representative to comply with tax declaration and payment requirements as contemplated in the Draft Proposal.

j. Our recommendations and request for consideration

In light of our comments and analysis above, we respectfully request that the MOF thoroughly considers the Draft Proposal in relation to the taxation of e-commerce, leave the current tax withholding mechanism unchanged as provided under Circular 103/2014/TT-BTC and OL 848/BTC-TCT with respect to foreign OTAs' business in Vietnam, continue to let Vietnamese taxpayers collect and pay Vietnamese taxes, and not try to pass this duty off to foreign services suppliers abroad. We believe that improving the long-standing approach is better than trying to introduce a completely new system with all of its potential unforeseen complications. This would enable foreign OTAs to continue to contribute to the development of Vietnam's tourism industry and consumption of products and services in Vietnam all together.

Another issue is that the revised Draft Law on Tax Administration ("draft law") introduced by the Ministry of Finance on 10 November 2017 proposed the mandatory routing of cross-border transactions to one single payment gateway, i.e. the National Payment Corporation of Vietnam (NAPAS) for the purposes of tax collection or otherwise.

We are concerned that this will weaken security, constrain innovation, reduce positive consumer experience, and reduce competition in the e-commerce market. The consequence is, Vietnam's e-commerce market which is currently valued at US$2.5 billion, will be negatively influenced.

Specifically,

- The mandatory routing of all e-commerce transactions into one payment gateway establishes a single point of contact where all digital transactions pass through. This gateway will be a tempting target for all cyber-attacks, and this establishes a single point of failure in the payment system.

- With NAPAS as the central point of interface, developments in the payments space will only be as fast as the pace with which NAPAS can move.

- A poor consumer experience in payments (usually right before they make a purchase on e-commerce websites), will negatively impact the brand and reputation of e-commerce and start-ups that depend on online payments.

[11] http://trungtamwto.vn/sites/default/files/schedule_of_specific_commitments_in_services.pdf (page 44)

- Forcing all e-commerce players to route transactions into one gateway means e-commerce players cannot choose a payment gateway that is most commercially viable and technologically suitable to their needs.
- It does not seem to be feasible for NAPAS to execute such tremendous task due to lack of technical expertise and infrastructure readiness.

- Last but not least, there is no international precedent of forcing cross-border transactions to be routed via a single payment gateway. As a matter of fact, other countries in the region want online technology giants to pay their fair share of tax. However, they are trying to do so without snuffing out future growth. Specifically, Thailand's Revenue Department is now holding a public hearing on a set of proposals relating to online transactions. If the proposals go through, a foreign company based overseas providing services that are used in Thailand would have to pay VAT - currently set at 7 per cent - if the income it gets from providing these services exceeds 1.8 million baht (S$75,120) a year. In November 2017, the Singaporean government stated that e-commerce would likely come under the local tax regime soon, to diversify Singapore's tax base while ensuring a more level playing field between bricks-and-mortar and online businesses. Some observers have speculated that the Goods and Services tax (GST) will be raised in this year's Budget. However, none of the countries in the region are looking at requiring those transactions to pass through a gateway.

2.5 Other Supply Chain Obstacles

a. Decree 09/2018/ND-CP - "Trading License"

Issues

Decree 23/2007 has been superseded by Decree 09/2018/ND-CP ("**Decree No. 09**") on 15 January 2018. However, some issues remain from our last Forum:

Under Decree No. 09, "trading license" requirement still apply to foreign-invested enterprises.

Further, Decree No. 09 appears to support administrative reform by decentralizing the approval power to provincial Department of Industry and Trade. However, in fact, among 9 business sectors subject to trading license, there are 8 business sectors subject to consultation with the MOIT before approval.

As raised in the Annual VBF 2017, though there are legal timelines for this consultation process, in practice, the MOIT does not strictly follow these timelines, which results in delayed approval process.

Decree No. 09 also expands the administrative burden to enterprises by regulating that Trading License no longer serves as the Retail Establishment License for the first retail store. As such, for enterprises that open only 1 retail store, they still need to apply for Retail Establishment License, a step that they were not required to follow under the previous Decree No. 23.

Suggestion

The consultation process with the MOIT should be limited to a restricted number of sensitive business sectors only, as this consultation process seems to be redundant due to clear WTO commitments.

b. "Economic Needs Test"

Decree No. 09 continues to apply the ENT, and further, expand the scope of retail stores subject to ENT.
While we constantly bring this issue into VBF discussion, situation has not been improved, but worsened.

We have questioned the need for the so-called "Economic Needs Test" ("ENT") many times and have never received a satisfactory answer as to why it is necessary. There are no objective criteria for its application and all it does is present in another handicap to foreign retailers seeking to develop the market. The ENT would have been eliminated in five years under the CPTPP and the EU-VN FTA, recognizing its uselessness. Why not accelerated this reasonable measure and help the many retail construction projects looking for good tenants around the country by giving full play to the spirit of the WTO commitments to open the market to foreign important distribution services?

Issues

Under Vietnam's WTO Commitments, "*the establishment of outlets for retail services (beyond the first one) shall be allowed on the basis of an Economic Needs Test (ENT). Applications to establish more than one outlet shall be subject to pre-established publicly available procedures, and approval shall be based on objective criteria. The main criteria of the ENT include the number of existing service suppliers in a particular geographic area, the stability of market and geographic scale.*"

Accordingly, foreign invested enterprise is subject to ENT if it establishes second retail store and onward, if the store is from 500sqm and/or is not in a retail zoning area, such as a mall or department store.

The ENT councils are established at the province/city level, including representatives of DPI, DOIT, and relevant District, to review and give their opinion on each store, based on the ENT criteria provided under Decree No. 09.

The problem that enterprises in this sector are facing now is that MOIT does not accept the results of ENT review of the ENT council at its discretion, even when the ENT council has issued its supportive opinions. MOIT has requested applying enterprises to provide the following data: (i) Quantity of retail stores, (ii) stability of market, (iii) residential density and (iv) scale of district-level localities where are expected for the setting up of retail establishments , so that ENT council can specifically re-confirm that relevant enterprise meets each and every one of such criteria.

This request from MOIT is not in compliance with Decree No. 09, under which the ENT council's opinion is required only 1 time. Furthermore, an enterprise does not have either the obligation or the resources to obtain the macro-economic and zoning data in order to give to the authorities to support each of its retail store applications. This has caused and will cause tremendous unofficial fees for the enterprises.

Furthermore, there is currently no regulatory timeframe for the ENT council or the MOIT to respond to a retail store application/ENT case. In practice, MOIT has taken many months to issue the approval even upon issuance of ENT approval by ENT council.

Suggestion

The procedures, timeline, obligations of each of the authorities involving in this ENT should be clearly provided in order to reduce time cost and unofficial cost for enterprises. The ENT should apply for the 2nd physical store onward only. In all other respect, the principle of National Treatment should be respected.

2.6 Banking Issues - From the Enterprises' Perspective

Circular 32 on Current Account Opening:

Circular No. 02/2018/TT-NHNN extends the timeline for conversion or closure of non-legal entities to another year (i.e., to March 2019).

Extension by Circular No. 02 is only a temporary measure. We request for a complete addressing of the issue.

The Circular 32 restricts the legal entity regarding opening a bank payment account, which stipulates two subjects: (1) individuals, and (2) enterprise established under the Enterprise Law. Since the implementation of Circular 32, specific organizations such as representative offices, non-governmental organizations, business associations and other organizations are considered non-legal entities to open a bank account.

We urge the Government to early review this measure to ensure normal financial operations of all forms of legal business activity.

2.7 Restrictions on foreign ownership of housing in Vietnam

This issue was raised at 2017 Annual VBF, and it has not yet been solved.

Issues

Everyone here is aware that Vietnam has made great progress in creating a hospitable investment environment, in which local and foreign businesspeople and their families can work in an atmosphere that is secure and comfortable. Schools and hospital services have improved dramatically, there are more entertainment, cultural and recreational options. One element that has proven elusive is in the area of home ownership. Although rules have already been issued that allow limited sales of certain types of condominiums and villas to foreign buyers, implementing rules have not been followed in a timely manner and as a result there is much confusion and risk in the market.

The biggest outstanding issue right now is the implementation of the restrictions on foreign ownership of housing in Vietnam, which affect foreign buyers' right to own houses in Vietnam for more than two years. The 2014 Housing Law, which allows foreign buyers to own houses in Vietnam, became effective on 1 July 2015; and Decree No. 99/2015/ND-CP ("**Decree 99**"), which specifies the mechanisms for implementing foreign buyers' right to own houses in Vietnam, became effective on 10 December 2015.

Decree 99 requires the Ministry of Public Security ("**MOPS**") and the Ministry of National Defence ("**MOND**") to identify the areas that are subject to national security and defence and inform the provincial people's committees. According to the MOPS's official dispatch No.

786/BCA-TCAN dated 19 April 2017 and the MOND's official dispatch No. 10328/BQP-TM dated 19 October 2016, we understand that these have been done.

The provincial people's committees must then base on those guidelines of the MOPS and MOND to instruct the provincial departments of construction to identify the commercial housing projects where foreign individuals and organizations are not allowed to own houses. In the particular case of Ho Chi Minh City, based on the public information, we understand that this has been done in July 2017.

Those are good signs that the government is keen to move things forward. The final work of identifying commercial housing projects where foreign individuals and organizations are not allowed to own houses, and publishing those information online is now to be done by the provincial departments of construction.

However, it appears that no progress has been made from the provincial departments of construction's side. Thus, this long delay really concerns foreign individuals and organizations who are interested in buying houses in Vietnam. We hope that the provincial departments of construction will work more actively and closely with other relevant authorities to resolve these issues in accordance with the instruction of the provincial people's committees. This is the final step to finally effect foreigners' right to buy houses in Vietnam, which was supposed to be effective more than two years ago.

Another notable problem is the technical limitations in ownership registration. Foreign ownership of condominiums in a residential tower is limited to 30%, but the Ministry of Construction and its local departments have not yet implemented the necessary system for registering and tracking the number of foreign owned apartments in a given project, so the secondary market has frozen up completely. In most provinces, there seems to be no system for changing the ownership category from local to foreign once a property has been sold to a local buyer. This kind of risk only increases the cost of capital that is needed for building up Vietnam's housing stock. We hope that these issues can be sorted out soon so the market can start to operate normally.

Suggestion

We suggest that the provincial departments of construction should work more proactively with their upper people's committees to resolve the issues soon by publishing the lists of projects where foreigners are not allowed to own houses. This will help the housing market of Vietnam develop more transparently and healthily.

2.8 Labor: Draft Decree on Compulsory Social Insurance for Foreign Employees Working in Vietnam – Concerns over Rising Employment Costs

This issue was raised at 2017 Annual VBF, and it has not yet been solved.

Investors - both foreign and domestic - are concerned that the rapidly rising cost of labor may undermine Vietnam's attractiveness as an investment destination and the Government's ability to continue generating jobs for the young people coming into the labor market will be affected.

On-hold regime - Further guidance to be issued

Section I.7 of Official Dispatch No. 384/BHXH-CSXH of the Vietnam Social Insurance dated 31 January 2018 instructs provincial social insurance agencies to prepare for collection, handling

and payment of compulsory social insurance regimes for foreign employees working in Vietnam as soon as the Government officially issues the guiding Decree. Accordingly, though taking effect from 1 January 2018, compulsory social insurance for foreign employees working in Vietnam still remains on hold until the official decree from the Government is issued.

Further, Vietnam is currently moving towards participation in bilateral agreements with countries to address the concern that the regulation on compulsory social insurance might impose the obligation on foreign employees to contribute to social insurance in two countries at the same time. However, the negotiation process may take a lot of time and effort.

Recent updates from the latest draft:

Scope of application: Compulsory social insurance is applicable to foreign employees who:

- have local labor contracts with a Vietnamese entity with a term of one month or more; and
- has been granted either (i) a work permit, (ii) practicing certificate, or (iii) practicing license.

Applicable regimes: There are 2 options of application, namely:

Option 1: Apply gradually

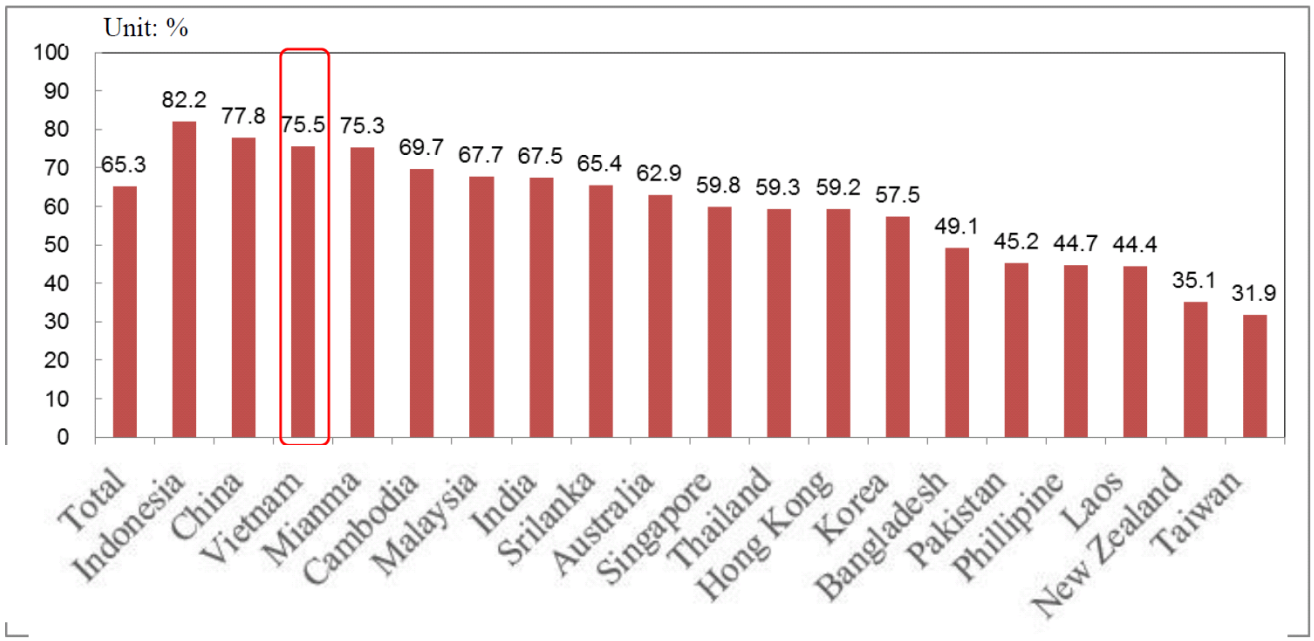
- from 2018: 3 short-term regimes (illness, maternity and labor accidents); and
- from 2020: 5 regimes including 2 long-term regimes (retirement and survivorship allowance).

Option 2: 5 regimes are applicable from 1 January 2018.

Contribution rate: The contribution rate remains the same as applicable for Vietnamese employees, specifically 8% from the employees and 17.5% from the employers (due to a 0.5% decrease in contribution rate to the labor accident fund).

The chart below shows that Japanese investors are more concerned about this trend in Vietnam than almost anywhere else.

- *Proportion of Japanese enterprises responses that wages increase causes business concern (According to JETRO investigation in 2016):*



There are a number of causes for the increase labor cost, one of which is the ever rising and expanding application of payroll taxes. Draft Decree detailing and guiding the implementation of the Law on Social Insurance ("Draft Decree") which the Ministry of Labor, Invalids and Social Affairs ("MOLISA") was recently released for public comment. It provides that from January 1 2018, compulsory social insurance will apply to foreign employees working in Vietnam. This requirement will increase the employment costs for companies doing businesses in Vietnam, and we are concerned that it is part of a greater trend towards higher employment costs that will undermine the competitiveness of the overall economy.

According to this Draft Decree foreign employees and their employers will be subject to compulsory social insurance contribution. This include foreign employees who:

- are working in Vietnam under indefinite-term labor contracts, definite-term labor contracts, or seasonal or specific job contracts with durations of more than one (1) full month with employers based in Vietnam, and
- have been granted either (i) a work permit ("giấy phép lao động" in Vietnamese), (ii) practicing certificate ("chứng chỉ hành nghề" in Vietnamese) or (iii) practicing licence ("giấy phép hành nghề" in Vietnamese).

The Draft Decree proposes that foreign employees working in Vietnam will be required to pay into all five regimes of the Vietnamese compulsory social insurance, which are currently applicable only to Vietnamese employees, namely: (i) sickness, (ii) maternity, (iii) labor accident and occupational disease, (iv) retirement and (v) survivorship allowance. The contribution rates imposed on both employers and foreign employees will be the same as applicable for Vietnamese employees; specifically 8% from the employees and 18% from the employers, respectively, based on their actual monthly salaries and benefits, and capped at 20 times of the applicable General Minimum Wage.

According to the Draft Decree, the processes and procedures for foreign employees' participation in the Vietnamese compulsory social insurance regimes would not be different from the current procedures applicable to Vietnamese employees, which are provided for under the 2014 Law on Social Insurance. The Draft Decree provides some details on the contents of dossiers for the foreign employees' participation in the scheme, but there are concerns about how accessible the regime will be when those who pay in need to claim their benefits.

The Draft Decree and the Proposal Statement introducing it, address some of the concerns that will arise. For example, the Proposal Statement provides that the accumulation of periods of social insurance premium contribution is not regulated in this Draft Decree, and this principle will be applicable only to the nationals whose countries have signed bilateral agreements with Vietnam on this matter. This seems to be because of the difficulties of calculating contribution periods when the foreign employees work in many different countries. In addition, foreign employees subject to this Draft Decree would be entitled to a lump-sum social insurance allowance upon their request in case their labor contracts or work permits expire and they do not continue working under the contracts or extend their work permits. The foreign employees are supposed to make their requests within 30 days prior to the expiry date of their contracts or work permits (the earlier date would be applicable), and the insurance authority is supposed to be responsible for settling and paying the allowance to the employees within 10 days upon the date of the receipt of proper requests. The calculation of the lump-sum social insurance allowance applicable to foreign employees would be the same as what is currently applicable to Vietnamese employees according to the Law on Social Insurance. However, any foreign employee who has ever tried to claim benefits under the health insurance scheme will already know that it may well

be practically impossible to realize the benefits he/she has paid for until many unexpected administrative procedures are resolved.
To assess the financial impact of the Draft Decree, below is a table that calculates how much the change would cost a business, using the current applicable General Minimum Wage and Regional Minimum Wage:

Year	2018		2018	
Contributors	Employer	Vietnamese employee	Employer	Foreign employee
Social insurance	18%	8%	18%	8%
Unemployment insurance	1%	1%	[N/A]	[N/A]
Health insurance	3%	1.5%	3%	1.5%

This scenario assumes:

- Social insurance and health insurance are calculated based on actual monthly salary capped at VND24.2 million (approximately US$1,100), being 20 times of the current General Minimum Wage, which is VND1.21 million at present;

- Unemployment insurance is calculated based on actual monthly salary capped at VND52 million to 75 million (approximately US$2,400 to 3,400), meaning 20 times of the Regional Minimum Wage, which ranges from VND2.58 million to VND3.75 million, depending on the regions, at present.

To illustrate, the chart below shows the actual costs of employment in regards to the total contribution to the three social insurance funds at four levels of wages for an employer based in Ho Chi Minh City, which belongs to Region I, using the current applicable General Minimum Wage and Regional Minimum Wage:

Exchange rate: 1 USD = 22,800 VND

Salary range	Salary used to calculate the contribution (VND)		Total Contribution (VND/USD)			
	For Social Insurance and Health Insurance	For Unemployment Insurance	Employer	Vietnamese employee	Employer	Foreign Employee
The current applicable minimum wage (for Region I: VND 3,750,000)	3,750,000	3,750,000	VND 825,000/ USD 36.2	VND 393,750/ USD 17.3	VND 787,500/ USD34.5	VND 356,250/ USD15.6
USD400	9,120,000	9,120,000	VND	VND	VND	VND

			2,006,400/ USD 88	957,600/ USD 42	1,915,200/ USD 84	866,400/ USD 38
USD4,000	24,200,000	75,000,000	VND 5,832,000/ USD 255.8	VND 3,049,000/ USD 133.7	VND 5,082,000/ USD 222.9	VND 2,299,000/ USD 100.8
USD10,000	24,200,000	75,000,000	VND 5,832,000/ USD255.8	VND 3,049,000/ USD133.7	VND 5,082,000/ USD222.9	VND 2,299,000/ USD100.8

Applying these calculations, a combined contribution of USD$ 323.70 for an employee with wages of USD$4,000 per month will be considered burdensome by many, especially if there are any issues with redemption, pay-out and remittance at the end of the contract period.

Moreover, the Draft Decree seems to make mandatory what the Law on Social Insurance had initially held out as an optional benefit. The 2014 Law on Social Insurance provided that from January 1, 2018, to require that foreign employees working in Vietnam under a work permit, practicing certificate, or practicing licence issued by a competent body of Vietnam "will be allowed to" participate in the compulsory social insurance program. However, the Draft Decree makes it sound more like an obligation than a right to pay into the social insurance program.

Adding in this new tax, Vietnam's taxes on workers will be among the highest in the region, taking into account the number of taxes, high rates, and broad bases (which include not only salary but all forms of benefits). Stakeholder comments were only welcome until June 12th, so it may be too late to reconsider, but to ensure the smooth implementation of this change we would encourage the drafters to consider taking more time to introduce this important change in the employment environment.

2.9 Importation of used/refurbished machinery and equipment - Draft Circular replacing Circular No. 23/2015/TT-BKHCN

This issue was raised at 2017 Annual VBF, and it has not yet been solved.

a. Scope of management (Article 1)

Issue: *The new draft circular on the importation of used equipment is not an improvement on the current, problematic rules. First, the new draft extends restrictions to certain types of temporary imports for re-export*

Under the current Circular No. 23, the restriction only applies to temporary imports for re-export for implementation of toll manufacturing contracts, production or implementation of investment projects.

Nonetheless, the draft extends the age restriction to other types of temporary imports for re-export by only excluding the business of temporary imports for re-export out of the scope of its management. This means that if the draft enters into force, temporary imports for re-export for exhibitions, conferences, training and certain other purposes would be subject to the same restrictions.

Such extension is not consistent with the main principle of this draft, which is to manage used machinery/equipment in production and business operations as set forth in Article 1.1 of the draft.

Further, that the draft imposes such restriction to the aforementioned activities would cause difficulties for enterprises in operating their businesses as enterprises do not need to temporarily import new machinery/equipment for such purposes (i.e. exhibitions, conferences, training). In other words, the Vietnamese government is burdening enterprises' operations by pushing them to arrange more financial resources for activities that do not harm the environment.

Proposal: We suggest keeping the same scope of management as regulated under Circular No. 23 or, better yet, leave the issue to more relevant authorities.

b. Requirements applied to Used Machinery/Equipment in Investment Projects (Article 7)

Issue: *New requirements applied to Used Machinery/Equipment in Investment Projects*

The draft is also a step backward as compared to Circular No. 23 as used machinery/equipment in investment projects no longer receive exemptions from the age requirement as set forth in Circular No. 23.

Given the overall policies to attract foreign investment, and the purpose of environmental protection, we take the view that the new requirements applied to used machinery/equipment in investment projects are not practical as Vietnam has established standards and regulations to manage and supervise the environmental impact of imported machinery/equipment. As such, it is not necessary to impose further barriers to used machinery/equipment in investment projects.

Nonetheless, among three Options as proposed in the draft, we are inclined to favor Option 1 as Option 2 and Option 3 may cause certain difficulties during implementation.

Particularly, for Option 2, given the variety of machinery/equipment, it may be not be consistent to determine which parts are the "main parts" of a given production chain. Also, it may not be applicable to the importation of a single machine. The appraisal to determine the remaining age would burdensome if the criteria and standard to define remaining age are not clear.

For Option 3, the appraisal to determine the remaining value would also prove to be a burdensome process as it depends on the appraisal of each testing agency, and such appraisal may not be consistent if the criteria and standard to define remaining value are not clear.

Also, we propose to extend the age requirement in Option 1 to 25 years, instead of 20 years. Practically, machinery/equipment, especially those with G7 standards, can be designed and maintained to run well despite their 20’s age. Packing, printing, molding, thermoforming machineries are some examples. Regular and good maintenance, good program of upgrade/refurbishment can enable the machines to run at target condition. High sense of equipment ownership together with a rigorous preventive maintenance program enables machines to be cared for in a state that they appear and run as new machines.

c. Importation Procedure for Machinery/Equipment in Investment Projects (Article 10)

Issue: *The two-stage application process is burdensome and risky for enterprises*

While we appreciate the MOST's efforts to facilitate the implementation of exemptions for investment projects, the two-stage application process tends to create uncertainty for applicants.

Particularly, for Stage 1, in order to receive exclusive treatment for used machinery/equipment in investment projects, investors must identify the list of used machinery/equipment at the time of applying for an investment decision/Investment Registration Certificate. Nonetheless, at this stage, the MOST does not make final decisions by providing preliminary comments to the application. While the draft is not clear on this point, we understand that the licensing authority only grants Investment Registration Certificates if the MOST's preliminary comments are positive, which is to say that the importation of used machinery/equipment as listed in an application dossier is accepted.

The final decision is only made during Stage 2, which is 30 days before actual importation when the investors, after receiving an Investment Registration Certificate, submit a subsequent dossier to the MOST. At this stage, the MOST is still able to refuse importation.

Such regulations bring about risks to investors, namely that the MOST may change its mind during Stage 2 by refusing the importation of the used machinery/equipment in question, while the investors must decide to invest in Vietnam on the basis of the MOST's preliminary comments during Stage 1.

In addition, the two-stage process as suggested in the draft is unnecessarily time consuming and costly as, in practice, the MOST may make its final decision during Stage 1 rather than wait until Stage 2 because, in principle, there is almost no difference in application documentation, except for the Appraisal Certificate, which may be submitted during Stage 1.

Proposal: We propose combining Stage 1 and Stage 2 into a single-stage application process, i.e. the MOST will make its final decision before or during the investment decision/Investment Registration Certificate application process. This is critical for investment licensing authority to approve an investment project, also for Investor to decide if it will go with the investment or not.

d. Validity and place of Appraisal Certificate (Article 12.6).

Issue: *The draft only provides a six-month validity period for Appraisal Certificates and requires the Appraisal before importation.*

We propose extending the validity period to 12 months as the appraisal process is complex and time consuming. Also, the packing/transportation of machinery/equipment in international transactions (e.g. by sea) requires a considerable amount of time.

We propose to accept the Appraisal either before the importation or in Vietnam. In case of the later, enterprise can temporarily bring the equipment to its warehouse/plant and supplement the Appraisal within 30 days for customs clearance in accordance with customs clearance procedures.

e. Exceptional approval by MOST in special case (when shelf life is greater than those provided in Art 7 – i.e. 20 years) – Art 15.2:

The draft sets more barriers/conditions vs current Circular No. 23 by proposing situation where the used equipment cannot be considered for import: complicated technology, remaining shelf life less than 10 years. Such conditions are unclear and not feasible to prove. We suggest to remove Article 15.2.

f. Transitional Clause (Article 17)

Issue: *The draft excludes its effect in the event that a "contract is signed and machinery/equipment are on board for shipment before the entry into force of the new Circular," which is the same as the transition clause in the current Circular No. 23 and, therefore, not reasonable*

Particularly, such regulations would give rise to controversy on how to treat the equipment that has been approved by the MOST in accordance with Circular No. 23 before the effect of the new Circular, but the shipment is made after the entry into force of the new Circular.

Proposal: We suggest the transition clause as follows:

"*The Circular shall not be applicable to following cases, unless where it is more favorable for enterprises:*

- *A purchase contract is signed and used machinery/equipment is shipped on board before the effective date of the new Circular; or*
- *Used equipment has been approved by the MOST in accordance with Circular No. 23.*

Unless the procedures under this Circular is more favorable and enterprise choose to go with it, used equipment have been approved by MOST in accordance with Cir 23 shall be continued implementing in accordance with Circular 23".

2.10 Developing the Market for Household / Rooftop Solar Energy

Vietnam's development and geographical circumstances make it well suited to deploy environmentally - friendly household/rooftop solar energy systems, and this is a great opportunity for Vietnamese engineering, installation and service providers. However, even as thousands of households are being constructed or renovated each week, almost all of them are losing this opportunity because of delays in the implementation of the implementing rules, especially as to the official signing of rooftop solar power purchase agreements, as well as the calculation, payment and finalization of the excess energy output generated by developers to the grid system of EVN's power entities under the net-metering scheme because EVN opines that there is a lack of specific guidelines from the Ministry of Finance and the Ministry of Industry and Trade on these issues.

Specifically, under Official Letter No. 1337/EVN-KD of Vietnam Electricity (EVN) dated 21 March 2018 sent to local power corporations regarding temporary guidelines for rooftop solar power projects/systems,

- For excess power output generated by generators to the grid systems of EVN's local power entities, the payment and finalization will be implemented only after the Ministry of Industry and Trade and the Ministry of Finance issues their specific guidelines (Item 3.c); and
- the rooftop solar power purchase agreement (according to the model templates under Circular No. 16/2017/TT-BCT) will be officially signed between the power seller/generator and EVN's relevant power entity after the Ministry of Industry and Trade and the Ministry of Finance issues their specific guidelines (Item 5).

It remains unclear as to when the Ministry of Finance and the Ministry of Industry and Trade will issues their guidelines on these issues.

2.11 Recognition and enforcement of foreign arbitral awards in Vietnam

In practice, the Vietnamese courts have often issued decisions to reject the applications for the recognition and enforcement of foreign arbitral awards in Vietnam for reasons not consistent with the New York Convention.

We would like to recommend ensuring that the 1958 New York Convention is strictly applied by Vietnamese courts, in accordance with the 1958 New York Convention and the 2015 Civil Procedure Code, and that the Vietnamese court should not re-open the merits of the case that has been resolved by foreign arbitration.

2.12 Arbitration in Vietnam

Trade liberalization allows local and foreign companies to undertake long-term and profitable projects and commercial cooperation. Integration of the domestic economy into global chain requires certainty and reliable contractual relationships.

Court intervention during the arbitration proceedings continues to represent a major obstacle for foreign investors in Vietnam. As per our members' report, intervention by Vietnamese courts does not happen only before an award is issued (which results in the termination of arbitration proceedings) but also by setting aside an award once it has been issued by a VIAC tribunal. For example, we are aware of cases in which Vietnamese courts set aside arbitral awards, allegedly due to the conflict with "fundamental principles of Vietnamese law", when in fact the courts reconsidered the merits of the case.

In addition, regarding the procedures of arbitration in Vietnam, even though arbitral tribunals may request the assistance of the courts in the summoning of witnesses or in collection of evidence, in practice the courts do not actively or effectively support arbitration proceedings.

Recommendation: providing better instructions to lower level courts to consistently limit court interventions during arbitration proceedings, and the introduction of the right of appeal to first instance court decisions on jurisdiction or on the validity of an arbitral award.

2.13 Foreign-invested enterprises (FIEs)' import rights under Article 91.10 of Decree No. 54/2017/ND-CP implementing Pharmaceutical Law

Issue

According to Article 91.10 of Decree No, 54, FIEs with import rights, but not distribution rights, are prohibited from conducting "*activities directly related to the distribution of drugs or drug materials in Vietnam*", which include, among other things, drug storage and transportation services.

The Drug Administration of Vietnam (DAV) appears to assert that drug storage and transportation services are considered to be "*activities directly related to the distribution of drugs or drug materials in Vietnam*", and therefore, requested the FIEs (which are licensed, prior to the issuance of Decree No. 54, to provide drug storage and transportation services) to change their current business models to that of an import company (without distribution rights).

In short, Article 91.10 is already adversely impacting the ability of FIEs to provide storage and transportation services to third parties.

Suggestion

We would like to propose that Article 91.10 of Decree No. 54 should be revised so that it no longer adversely impacts the ability of FIEs to import drugs or to provide storage and transportation services to third parties. We suggest the following specific revisions:

- FIEs which are permitted to import drugs must be permitted to transport such imported drugs from the port to their warehouses or from the port/their warehouses to other places as assigned by the local wholesalers in the purchase and sales agreement between parties.

- With respect to FIEs which are licensed to provide drug storage and transportation services, they must be permitted to continue to provide such services to the third parties while still being able to apply for import rights as well.

We believe that implementing these revisions to Article 91.10 of Decree No. 54 would help to attract increased foreign investment in the local healthcare industry as this would demonstrate that foreign investors' rights are being respected and protected by the Government.

2.14 Law on Cyber security

Issues: A number of provisions in the Law on Cyber security – specifically on data residency – will severely impact the current development of Vietnam's digital economy and will halt its growth prematurely. In particular, Article 26.3 of the Law on Cyber security requires that local and foreign enterprises providing services on telecommunications networks, Internet and value-added services on cyberspace in Vietnam who collect, exploit, analyse, process data on personal information, data on relationship of the service users, data created by service users in Vietnam must store those data in Vietnam for a period of time specified by the Government.

Impact: The nature of forced localization limits Vietnamese business' ability to access tools necessary to lower IT costs, innovate, and scale rapidly. Data localization policies are shown to reduce inward investment to the country, due to the added cost for companies to buy local server equipment.

Suggestion: No data residency restrictions is best practice. Many jurisdictions do have exceptions for important national security concerns to be stored locally, and Vietnam can consider adopting such a requirement. However, such requirement should not include anything beyond important national security concerns, which is very limited in scope in other jurisdictions.

With the issuance of the Law on Cyber security, Vietnam becomes the only country in ASEAN with a data residency requirement. The governments of Singapore, Thailand, Malaysia and the Philippines do not have any national data residency restrictions in place. Indonesia is the only country in the region that currently has a national data residency restriction. However, the 2012 policy has been so disruptive to the digital economy and so difficult to enforce that Indonesia drafted amending regulation this year (2018) so that only data related to national security and intelligence must be located onshore. The revised regulation is expected to pass this year.

2.15 Registration of Technology Transfer (Article 31.1 of the 2017 Technology Transfer Law and Decree 76/2018/ND-CP)

Issue

According to Article 31.1 of the 2017 Technology Transfer Law, the following must be registered with the State management agencies of science and technology:

- Technology transfer agreements from abroad to Vietnam;
- Technology transfer agreements from Vietnam to abroad; and
- Domestic technology transfer agreements using state capitals or state budget, except for those which have been granted Certificate of registration of the performing results of science and technology missions.

However, requiring the technology transfer agreements from abroad to Vietnam and vice versa to be registered is unreasonable and unencouraged of technology transfer. The 2017 Technology Transfer Law already provides the lists of technologies which are restricted and/or forbidden to be transferred, together with the licensing process and the procedures to inspect, examine and handles violations in technology transfer. Thus, if another registration requirement is to be applied, it could pose an administrative and financial burden on the parties involved, which could slow down the process of transferring technology and the execution of the agreement thereof.

Furthermore, in the registration application, parties are required to submit the technology transfer agreement which includes the name and subject of the technology to be transferred. This said, there might be a risk to the security and protection of trade secret and/or any other confidential information regarding the transferred technology. Such registration requirement might negatively impact on the investment environment, attract less potential foreign investors/technology owners to come and do business with local companies to improve and develop new technology in Vietnam, as they might be afraid of disclosing their trade secrets and/or confidential information during the registration process.

Moreover, such registration requirement is against all the efforts to reform and simplify administrative procedures, as well as to improve the investment environment in Vietnam, which the Government has been trying to do over the past few years.

Suggestion

Article 31.1 of the 2017 Technology Transfer Law should be amended to apply the registration requirement only to domestic technology transfer agreements which are using state capitals or state budgets, except for those which have been granted Certificate of registration of the performing results of science and technology missions. Registration of such agreements shall help the government to control and monitor the use of state capitals or state budgets in technology transfer activities.

With regards to the technology transfer agreements from abroad to Vietnam and vice versa, such registration requirement should be abolished to encourage and facilitate the process of transferring technology to be more effective.