

**DIALOGUE BETWEEN MINISTRY OF PLANNING & INVESTMENT AND
RELEVANT MINISTRIES/AGENCIES AND VBF***14:00 – 17:00, May 17th, 2016**MPI Premises, 6B Hoang Dieu Street, Hanoi**List of Participants: Appendix 1***MEETING MINUTES****INVESTMENT LAW AND DECREE 118***Prepared by Vietnam Business Forum***Updates on the development of investment and business environment in Vietnam****Mr. Tran Hao Hung – Director General, Department of Legislation, MPI**

The transfer from the former government to the new one does not cause disruption. The new government continues to strongly deploy the political determination of the former one in improving business & investment environment.

After the first meeting on difficulties in implementing Enterprise Law and Investment Law, the Government issued Notice No. 66, dated April 27th, assigning tasks to Ministries to further implement Enterprise Law and Investment Law, including 2 key measures:

1. Ministries are requested to urgently finalize documents on investment and business conditions, including investment conditions for foreign investors. From July 1st, all Circulars and Decisions of the Prime Minister (PM) on investment and business conditions, which are not in line with authority as prescribed in Investment Law, will not be used. Therefore, the Government requests Ministries to urgently prepare to upgrade all these documents into Decrees of the Government. Those needs to be submitted to the Government before May 30th to enable their effectiveness from July 1st.
2. Ministries are requested to urgently submit the Government to issue Decrees on investment and business conditions for some conditional business lines - which are prescribed in Investment Law but under no regulations of any document.

After one year of implementation of the Enterprise Law and Investment Law, many problems have arisen. The Government has assigned Ministry of Justice in collaboration with MPI to review all the problems related to conflicts between the Enterprise Law/Investment Law and all the related laws, especially Land Law, Construction Law, Law on Housing, Law on Real-estate Business, Law on Environmental Protection, and all other laws on investment activity management in specific sectors. Basing on that direction, MPI offered 2 solutions:

1. For problems under the Government's authority, the Government will issue a "scanning" Decree, which means using a Decree to correct all Decrees related to business and investment activities to resolve all problems. This Decree must be submitted to the Government within October, 2016. VBF is expected to support MPI and other Ministries to review all mentioned problems, especially the relation between Investment Law/Enterprise Law and other relevant laws to explore conflicts for further resolution.
 - VBF Secretariat is suggested to include this point in the VBF working agenda as one of the main focuses from now until Oct, 2016.

2. Up on the result of reviewing process, for problems out of the Government's authority, the Government will submit to the National Assembly to issue a law to correct all the laws that currently conflict with the Investment Law/ Enterprise Law.

After the PM's meeting with enterprises, the Government has issued a resolution on the development of Vietnamese enterprises, which reaffirms its determination to implement 5 essential measures: administrative reform; creating favorable environment for startups; ensuring business rights and equality in accessing business resources and opportunities; reducing business costs; and protecting legal rights and obligations of enterprises.

MPI is currently drafting a Circular guiding the implementation of a coordination scheme for handling business and investment registration procedures.

VCCI's survey on Investment Law and Decree 118

Mr. Tran Hao Hung - Director General, Department of Legislation, MPI

According to the result of a survey on nearly ten thousand enterprises, there are 5 good points and no bad points about Investment Law and Decree 118. However, in MPI's opinion, even 5 good points still need further improvement.

VBF comments on Investment Law and Decree 118 is quite incomplete. Department of Legislation and other related units have gathered much more comments, which reflects that MPI highly appreciates comments/recommendations for further improving Investment Law.

5 groups of important issues of VBF's concerns

Responses by Mr. Tran Hao Hung - Director General, Department of Legislation, MPI

1. *Conflicts in the regulation scope between Investment Law and Law on Securities*

As prescribed in Investment Law, in case of difference in procedures of implementing investment activities under the securities legislation, securities legislation will be adopted. However, there exist many different ways of understanding in reality.

During the drafting process, MPI did not intend to use Investment Law to intervene in the securities investment activities, but clarified the implementation procedures for securities investment activities and for securities legislation.

MPI needs detailed comments from VBF on the feasibility and impacts when Law on Securities is applied for all the procedures of securities investment activities.

2. *Conditional investment lines for foreign investors are both redundant and insufficient*

VBF is requested to further explain on the redundancy and insufficiency.

List of 267 conditional investment lines as prescribed in Investment Law is not applied to foreign investors at the time of establishing their enterprises to perform investment activities in Vietnam, but to all individuals and enterprises in all sectors doing conditional business lines.

3. *Capital account set-up and payment in the capital contribution through shares purchase*

MPI well notes the comments and will not mention this matter again as it was discussed thoroughly at the meeting in HCM city taken place before MPI's completion of Decree 118 to submit to the Government.

Current regulations, especially those on banks and foreign exchange management, bear significant impacts on payment transactions for capital contribution through foreign shares purchase.

MPI commits to discuss with the SBV for further revision of relevant documents. In case that the scope for amendment is beyond SBV's authority, MPI will include them in the Decree for revision in the coming time.

4. *What is the relation between investment registration and business registration; between investment registration procedures and relevant registration ones? When business lines are adjusted, how will the investment registration affect the investment project? On the contrary, what if investment registration is not adjusted? In case of contributing capital through shares purchase, how will investment and business registration be adjusted?*

In the coming time, MPI will provide the initial guidance as there is still no Decree revising these Decrees. MPI has already had many documents explaining the relation between investment and business registration.

MPI gathered lots of difficulties/obstacles and is well aware of the need to have a clearer guidance document. Therefore, MPI assumes that no further discussion on this issue is needed.

MPI agrees to VBF's comment that difficulties on procedures of contributing capital through shares purchase might be due to misunderstanding or inconsistency among local business/investment registration agencies or intentionally making difficulties for enterprises. In addition to unclear provisions of Decree 118, there is inappropriate behavior of the local investment registration agencies; the Law is new but working manner of the local agencies remains old.

5. *Drawbacks in implementing provisions on compulsory requirement of capital contribution within 90 days*

Decree 118 prescribes the investment capital is not necessarily equal to the charter capital; enterprises and investors may contribute investment capital up on schedules. However, there're still feedbacks on the unclear implementation of this provision.

Circular guiding the implementation of Decree 15 on PPP investment has the following provision. MPI would like to consult enterprises that: the solution prescribed in the Circular can be applied to all types of projects of enterprises if it is feasible.

Article 20.4, Draft Circular guiding the implementation of Decree 15: *contribution of investors' equity follows the schedule agreed in the project contract; at the time of project enterprise establishment registration, investors decide the asset value of their own equity to contribute appropriate charter capital in accordance with regulations on enterprises. In case that the value of the project enterprise's charter capital is lower than the equity as prescribed in Decree 15, investors shall commit to increase the charter capital during of the project implementation, to ensure an adequate equity contribution as prescribed in the project contract.*

Regarding the comment by Head of VBF Investment & Trade Working Group that Decree 118 is more obsolete than Investment Law

Responses by Mr Tran Hao Hung - Director General, Department of Legislation, MPI

Which point the Decree 118 is more obsolete than Investment Law? The Law and Decree 118 are synchronized and share consistent regulations.

Decree 118 has not only solved many difficulties in the implementation of business activities in Vietnam, but provided more flexible solutions than the Investment Law. Some provisions of Investment Law are too strict and irrelevant to the reality.

Mr. Fred Burke – Head of VBF Investment & Trade WG

Firstly, Article 10 of Decree 118 prescribes that only investment activities in the service (sub) sector – that are stipulated in the Vietnam’s commitment in WTO – will be approved.

The second thing is the 15-day deadline. The Law states that DoITs must consult the relevant Ministries. That general statement would make it impossible for DoITs to meet the deadline within 15 days. This is because DoITs have to send the documents to many other authorities, such as MOIT. MOIT then decides relevant Ministries for particular service line and then send it around. These Ministries has no incentive to take risks to approve these documents. Therefore, a lot of controlling work is needed to circulate the documents through the system. It is requested this key issue to be solved in the new Decree.

Ms. Nguyen Lan Phuong – Partner, Baker & McKenzie

First of all, according to Article 6 or 7 of Investment Law, foreign invested enterprises are allowed to establish unlimited number of enterprises, except for the restrictions committed in international treaties of which Vietnam is a member; Secondly, the specific restrictions in the Law on Securities; Thirdly, the specific restrictions in the equitization regulations of state enterprises. Foreign investors have to check if these restrictions are applied to them when they access the market. Beyond these restrictions, Article 6 or 7, Investment Law allows them to completely access market.

The backward step is, Article 10 or 11, Decree 118 does not completely “open” as the direction of Investment Law, but follows the old direction of the former one. It means the division into cases up on Vietnam’s commitment on “open market” levels. Accordingly, local licensing authorities will decide on granting licenses.

For unclear cases, the licensing history must be referred. Accordingly, projects that are similar with the licensed ones before will be granted license. Otherwise, it will be consulted with relevant Ministries/authorities on opening the market for the projects – which is the old approach of the former Investment Law. Meanwhile, Article 6 and 7 of current Investment Law are very flexible/open.

Responses by Mr. Tran Hao Hung - Director General, Department of Legislation, MPI

There is misunderstanding between provisions of Investment Law and their corresponding ones of Decree 118, causing the conclusion that Decree 118 is narrower than or inconsistent with Article 6 and 7, Investment Law.

Article 6 and 7, Investment Law do not mention specific conditions for foreign investors to approach market but mainly focus on business conditions for 267 business lines attached in the Appendix 4 - Investment Law. Conditions for foreign investors are mainly applied in accordance with Vietnam’s commitments in the international treaties.

Article 6 & 7 follow “select – ban” (*chọn – bỏ*) approach. However, Vietnam’s commitments under the WTO framework is more about “select – permit” (*chọn – cho*) one. Therefore, many business lines, which have not been prescribed in the Vietnam’s commitments under the WTO framework, must consult Ministries. This regulation is extremely necessary. Business lines excluded in the Vietnam’s commitments are under the authority of the Vietnamese Government on the extents of permission.

However, the implementation of this regulation at the local levels is inconsistent. Some even ask the central authorities and MPI for comments on the entire project, causing time-consuming. Therefore, this is about the problem of law enforcement, not the Law itself. It is important to distinguish between problems of the law implementation and the law itself.

Regarding the short timeline (15 days) for investment procedures, MPI will have further consideration and clarification, especially the MPI's role in advising which issues and the deadline for response.

Ms. Nguyen Lan Phuong – Partner, Baker & McKenzie

Article 22.3, Investment Law: Despite its international commitments, Vietnam always requires more demanding investment conditions than its commitments:

Foreign investors are allowed to own an indefinite amount of charter capital in economic entities, except for the following cases: a) The holdings of foreign investors at listed companies, public companies, securities-trading company, and securities investment funds are in line with regulations of the Law on Securities Investment; b) The holdings of foreign investors at the equitized or converted State-owned companies comply with regulations of law on equitization and conversion of State-owned companies; c) With regard to holdings of the foreign investors in other cases than those mentioned in Point a and Point b of this Clause, relevant regulations of law and the international agreements to which the Socialist Republic of Vietnam is a signatory shall apply. It means, except for these restrictions, foreign investors are allowed to own an indefinite amount of charter capital. This is the direction of Investment Law.

Responses by Mr. Tran Hao Hung - Director General, Department of Legislation, MPI

Percentage of ownership is just only one of many contents of investment conditions applied specifically to foreign investors. MPI does not find any relation between Article 22 and the mentioned problem.

Other issues

Mr. Pham Manh Dung – Head of Hanoi Branch, Rajah & Tann Law Firm

Ways of explanation on business conditions in the Circular is rather different. Some Ministries explained that these are techniques to follow. But these techniques themselves are the barriers to the market access. Some are prescribed as techniques but other Ministries disagree.

Regarding conditional investment issue, there are problems on procedures and unclear language usage. In the commenting process from MPI and relevant Ministries, how long the responses could be available?

In case of conflicts between MPI and other Ministries, which Ministry's opinion is valid? MPI should have specific guidance on this issue. E.g.: An investment project on hairdressing should be addressed to the Ministry of Culture or Ministry of Environment?

Article 11, Decree 118: What the procedures will be if the business line is not listed in commitments, but very beneficial for the socio-economic development? There should be a provision that MPI will gather opinions from provinces/locality on which business lines should be open and make public every 3 or 6 months.

There are many problems relating to administrative procedures during the implementation of Investment Law and Enterprise Law, which requires MPI's further improvements.