POSITION PAPER OF INVESTMENT AND TRADE WORKING GROUP

Prepared by
Investment & Trade Working Group

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 soon be ratified by the current term of the EU Parliament, and look forward to a specific schedule of ratification by the National Assembly.

In addition to the EU-Vietnam FTA, the Investment and Trade Working Group appreciate Vietnam's ratification of the Comprehensive and Progressive Trans-Pacific Partnership ("CPTPP") on 12 November 2018. 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. Specific Issues and Solutions

The Investment and Trade Working Group has had a busy and productive six months since the last Forum. Eight issues have been the subject of high level Working Group consultations and workshops, and a number of significant practical issues require further high level consideration. Specifically, we would like to highlight the following twelve points.

2.1 Amendments to the Enterprise Law and Investment Law

a. Lack of prescriptive definition regarding certain key terms used the Investment Law

The concepts of “business lines subject to conditions”, “business lines subject to conditions for foreign investors”, “business investment conditions” and “business investment conditions applied to foreign investors” are not defined under the current Investment Law. In particular, for foreign investors, to “do business” is synonymous with “to invest”; as a result, they are confused as to why there are different terms being used under the current Investment Law.

In addition, the term 'capital contribution for project implementation' has been used throughout the Investment Law but is undefined, leading to confusion with the term 'charter capital'.
Suggestion: Provide clarification of the difference between the above terms.

b. No unified investment registration procedure for certain cases under the Investment Law

Under Article 26 of the Investment Law, foreign investors must carry out registration procedures for capital contribution, and purchase of shares/equity interest (**M&A approval**) when either (i) the business line of the target company falls under the business lines subject to conditions for foreign investors, or (ii) the transaction will result in 51% or more of foreign ownership. However, it is unclear as to whether which lists of conditions for foreign investors that are being referred to, and whether the M&A Approval would be required when the foreign ownership ratio

of the target company does not change after the transaction, or when foreign investors purchase shares / equity interest in a public company.

Suggestion: Provide a definitive list of transactions which will have to obtain M&A approval for consistency in the application of the law.

c. Some proposed reforms in licensing procedures

The Draft amendment to the Investment Law proposes to transfer outbound investment activities to the oversight of the SBV. It is unclear what purpose the above suggestion would accomplish and how outbound investment activities will be actually dealt with by the SBV.

Suggestion: Ensure that any administrative reforms will not create any undue administrative burdens for Investors, and to ensure coordination between the MPI, and the SBV in case of the transfer of outbound investment activities to the oversight of the SBV.

d. Whether a limited liability company with 2 or more members can set a voting rate to be lower than 65-75% under the Enterprise Law

Currently, under the Enterprise Law, it is unclear as to whether a limited liability company with 2 or more members can set a voting rate to be lower than 65 or 75%.

Suggestion: The Enterprise Law should provide clarification as to whether 65% / 75% voting rate is set as the minimum, or whether limited liability companies with 2 or more members are allowed to set the voting rate to be lower than 65-75%.

e. Forcing enterprises to register the enterprise electronically

Under the Law, enterprises may choose to carry out procedures for enterprise registration electronically, or in person. However, many departments require business to solely submit online applications for processing, and enterprises find this burdensome due to technical problems of the online system.

Suggestion: We suggest that the amendments to the Enterprise Law emphasises that businesses have the option of registering their business either online or in person, and that it is up to the business to decide which method to undertake.

f. Lack of clarity regarding the date of effect of changes in business registration certificate

The Enterprise Law does not specify whether the validity of the amendment of enterprise information and legal representative is effective from (i) date of internal decision of such change, or (ii) date of amendment to the enterprise registration certificate of such change. In practice, most state agencies and other organisations only recognise that amendments are only effective if such change has been reflected in the enterprises' enterprise registration certificate.

Suggestion: The Draft amendment needs to clarify the date of effect of changes in business information.

2.2 Technology Transfer Law and Decree 76/2018/ND-CP

a. Registration of Technology Transfer (Article 31.1 of the 2017 Technology Transfer Law)

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 and its implementation guiding documents, including Decree No. 76/2018/ND-CP dated 15 May 2018 of the Government, already provide 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. This registration requirement does not help to eliminate potential risks during the technology transfer process, but poses an administrative and financial burden on the parties involved. It could slow down the transferring process and the execution of the agreement thereof, as well as back-date our legal provisions on technology transfer.

Furthermore, in the registration application, parties are required to submit the technology transfer agreement. 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 and the transactions. 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. As a result, it may discourage the transfer of and investment on high technologies, which have been so successful in Vietnam in recent years.

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. Instead of imposing unnecessarily tight control of technology transfer, the Government should create more favourable conditions for the legal absorption of technology, especially technologies from foreign countries.

Suggestion:

Article 31.1 of the 2017 Technology Transfer Law should be amended to apply the registration requirement only to <u>domestic technology transfer agreements which are using state capitals or state budgets</u>, 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.

b. Definition of "Technology" (Article 2.2 of the 2017 Technology Transfer Law)

Issue:

Under Article 2.2 of the 2017 Technology Transfer Law, the term "***technology***" is currently defined to refer to "*a solution, process or know-how with or without accompanying instruments and facilities to convert resources into products*".

In our opinion, this definition is far too broad, which may include all kinds of solutions, processes and/or know-hows, as long as they convert resources into products. Accordingly, all transfers of technologies, if subject to the requirements under Article 31.1 of the 2017 Technology Transfer Law, must be registered. This will create great and unnecessary burden on both the transferor and the transferee, and as a result, may slow down and discourage the transfer of technologies from and to Vietnam.

Furthermore, under this current definition, "***technology***" may include not only solutions, processes and/or know-hows in manufacturing area, but also in service area. This is due to the reason that solutions in the service field may also convert resources into products (*i.e.*, the service). If that is the case, it seems the transfer of any solution or process would have to be registered with the State management agencies of science and technology.

Suggestion:

The definition of "***technology***" should be specified to determine the most relevant objects which shall be subject to registration requirement.

2.3 Law on Cybersecurity and Draft Decree

a. Issues:

- The Law on Cybersecurity was passed on 12 June 2018 and will take effect 01 January 2019. However, requirements and the implementation of certain articles under the Law on Cybersecurity has not yet been clarified, including the data localization requirement under Article 26 of the Law on Cybersecurity;
- The first official Draft Decree implementing the Law on Cybersecurity was released on 02 November 2018 for public consultation ("**Draft Decree**"). The Draft Decree, together with the Law on Cybersecurity, will take effect on 01 January 2019. The Draft Decree is open for public comments until 31 December 2018.
- Under the Draft Decree, the data localization requirement has been further elaborated under Chapter V, under which, onshore and offshore entities having all of the following parameters must localize data and establish a local branch or representative office in Vietnam:

  (i) Being providers of one of the services on telecommunications networks [and/or] the Internet [and/or] value-added services in cyberspace with the following business activities in Vietnam: Telecommunications services; Services of storing [and/or] sharing data in cyberspace; Providing national or international domain names to service users in Vietnam; E-commerce; Online payment; Payment Intermediary; Services of transportation

connection via cyberspace; Social networks and social media; Online games; Electronic mails;

(ii) Engaging in collecting, exploiting, analyzing [and] processing various types of data specified in Article 24 of the Draft Decree;

(iii) Letting service users conduct the acts stipulated in Clauses 1 [and] Clause 2, Article 8 of the Law on Cybersecurity;

(iv) Violation of the provisions of Clause 4 Article 8, [and/or] Point a or Point b Clause 2 Article 26 of the Law on Cybersecurity.

- While the Draft Decree has provided further clarification and guidance on how the Law on Cybersecurity will be implemented, certain issues remain unclear. Our comments focus on the vague and broad scope of the type of data that are subject to the data localization requirement, the broad criteria triggering the data localization and local office requirements, and the issues of transparency in implementing those requirements. Please refer to our detailed comments from VBF members regarding the Draft Decree.

b. Impact:

- Having a broad scope of the types of enterprises and data subject to the data localization requirement would burden companies with costs related to data storage (e.g., planning of, identifying location of, and constructing of data centers) and replicating user data across data centers situated in different regions.
- The Law on Cybersecurity and the Draft Decree have raised many concerns among offshore entities doing business in Vietnam. An unclear cybersecurity legal framework would slow down offshore investment in IT and related fields in Vietnam.

c. Suggestions:

- In the short term, the Ministry of Public Security should address the concerns of the industry regarding the implementation of the Draft Decree by ensuring the following:

    - The 60 days period for commenting on the Draft Decree should be strictly adhered to. Given that the commenting period would be due on 31 December, having the Law on Cybersecurity and the Draft Decree take effect on 1 January 2019 is impractical. If necessary, the Government and the National Assembly should push back the date which the Law on Cybersecurity and the Draft Decree take effect, given that the implementing Decree has not yet been released prior to the Law on Cybersecurity taking effect.
    - After the Decree implementing the Law on Cybersecurity is issued, there should be around 60 days between the issuance date and the date which the Decree takes effect for enterprises to study the Decree and prepare for compliance with the Decree.

- In the long term, the Government should consider removing the data localization and local office requirements under the Cybersecurity Law and replace them with other mechanisms that can ensure the protection of cybersecurity while simultaneously create a healthy legal framework for offshore companies doing business in Vietnam.

2.4 Labor: New Decree 143 on Compulsory Social Insurance for Foreign Employees Working in Vietnam – Concerns over Rising Employment Costs

The long-awaited Decree No. 143/2018/ND-CP providing detailed guidance on compulsory social insurance applicable to foreign employees working in Vietnam ("**Decree** N**o. 143**") was finally issued on 15 October 2018 and will take effect on 1 December 2018. By the application of Decree

No. 143, 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. Specifically, contribution and entitlement of each benefit regime will come into effect on different dates as summarized below.

a. Scope of application

Compulsory social insurance is applicable to foreign employees who:

- working in Vietnam under indefinite-term labor contracts, or definite-term labor contracts with a term of at least one full year with employers based in Vietnam; and
- have been granted either (i) a work permit, (ii) a practicing certificate, or (iii) a practicing license.

Notwithstanding the above, the following foreign employees are not subject to compulsory social insurance:

- intra-corporate transferees in accordance with Article 3.1 of Decree No. 11/2016/ND-CP detailing regulations of the Labor Code for foreign employees working in Vietnam.; and
- employees who have reached the statutory retirement age, as prescribed under Article 187.1 of the Labor Code, which is 60 years old for males and 55 years old for females.

With respect to foreign employees who have multiple labor contracts with many employers and are subject to compulsory social insurance, contribution is only applied for the first labor contract, except that the contribution for labor accidents and occupational diseases benefits must be made by each employer in each labor contract.

b. Applicable regimes

Decree No. 143 stipulates that foreign employees will be covered for all five compulsory social insurance regimes, which are currently applicable to Vietnamese employees. These include benefit regimes for: (i) illness, (ii) maternity, (iii) labor accidents and occupational diseases, (iv) retirement, and (v) survivorship. However, the application of the five regimes to foreign employees will be phased differently as follows:

- The short-term benefit regimes for (i) illness, (ii) maternity, and (iii) labor accidents and occupational diseases will apply from **1 December 2018**; and
- The long-term benefit regimes for (iv) retirement and (v) survivorship will apply from **1 January 2022**.

c. Contribution rate

The contribution rates imposed on both employers and foreign employees will be the same as those applicable to Vietnamese employees, i.e., 8% from employees and 17.5% from employers, based on the salary used to contribute compulsory social insurance which is capped at 20 times the applicable general minimum salary as provided by the Government.

The contribution is implemented as below:

- From **1 December 2018** to **31 December 2021**:

- Employer: 3.5%, including 3% for the fund of illness and maternity; and 0.5% for the fund of labor accidents and occupational diseases;
- Employee: Not applicable;

- From **1 January 2022** onwards:

  - Employer: 17,5%, including 3% for the fund of illness and maternity, 0.5% for the fund of labor accidents and occupational diseases and 14% for the fund of retirement and survivorship;
  - Employee: 8% for the fund of retirement and survivorship;

d. Procedure

The procedures for foreign employees' participation in and benefit settlements under the Vietnamese compulsory social insurance regimes would not be different from the current procedures applicable to Vietnamese employees, except the procedures related to claims of (i) lump-sum pay-out of pension allowances and (ii) lump-sum pay-out of monthly pension allowances and social insurance allowances for foreigners ceasing to reside in Vietnam.

The calculation of these lump-sum allowances 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.

In addition, Decree No. 143 has yet to address the claim dossiers in the above circumstances. For foreigners who are eligible to claim for these lump-sump allowances but not residing in Vietnam at the time of claiming, the issue, that whether they can authorize another person to proceed the claim or receive these allowances, has not been stipulated. This might not be an instant issue at the moment because it will take quite a time from the commencement date of contribution to the day that these issues occur, especially in case of claiming for lump-sump pension allowances. However, the lack of guidance is still there and we recommend this issue soon to be clarified in the guiding documents of Decree No. 143 in the near future.

Furthermore, Decree No. 143 provides that the Ministry of Labor, War Invalids and Social Affairs is responsible for the negotiation and execution of bilateral or multilateral agreements on social insurances. However, at the moment, neither the list of these agreements nor the impact of these agreements on the current regulations on social insurance for foreigners has been provided. Therefore, we are of the opinion that these issues should also be clarified soon in order to guarantee the interests of the foreign employee working in Vietnam.

Financial Impact

To assess the financial impact of Decree No. 143, 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:

Contributors	Employer	Vietnamese employee	Employer	Foreign employee
Social insurance	17.5%	8%	From 1 December 2018 to 31	From 1 December 2018 to 31

			December 2021: 3.5% From 1 January 2022: 17.5%	December 2021: Nil From 1 January 2022: 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 VND27.8 million (approximately US$1,209), being 20 times of the current General Minimum Wage, which is VND1.39 million at present;
- Unemployment insurance is calculated based on actual monthly salary capped at VND55.2 million to 79.6 million (approximately US$2,400 to 3,461), meaning 20 times of the Regional Minimum Wage, which ranges from VND2.76 million to VND3.98 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 compulsory insurances 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 = 23,000 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 3,980,000)	3,980,000	3,980,000	VND 856,000/ USD 37.2	VND 418,000/ USD 18.2	From 1 December 2018 to 31 December 2021: VND 258,700/USD 11.2 From 1 January 2022: VND 816,000/USD 35.5	From 1 December 2018 to 31 December 2021: N/A From 1 January 2022: VND 438,000/USD 19

USD400	9,200,000	9,200,000	VND 1,978,000/ USD 86	VND 966,000/ USD 42	From 1 December 2018 to 31 December 2021: VND 598,000/USD 26 From 1 January 2022: VND 1,886,000/USD 82	From 1 December 2018 to 31 December 2021: N/A From 1 January 2022: VND 874,000/USD 38
USD4,000	27,800,000	79,600,000	VND 6,495,000/ USD 282.4	VND 3,437,000/ USD 149.4	From 1 December 2018 to 31 December 2021: VND 1,807,000/ USD 78.6 From 1 January 2022: VND 5,699,000/USD 247.8	From 1 December 2018 to 31 December 2021: N/A From 1 January 2022: VND 2,641,000/ USD 114.8
USD10,000	27,800,000	79,600,000	VND 6,495,000/ USD 282.4	VND 3,437,000/ USD 149.4	From 1 December 2018 to 31 December 2021: VND 1,807,000/ USD 78.6 From 1 January 2022: VND 5,699,000/USD 247.8	From 1 December 2018 to 31 December 2021: N/A From 1 January 2022: VND 2,641,000/ USD 114.8

The Government seems to have addressed businesses' concerns by taking the phasing application. That said, applying these calculations, from 1 January 2022 onwards, a combined contribution of USD326.6 for an employee with wages of USD4,000 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.

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 other forms of benefits).

2.5 Labor: Comments and Requests on the draft revised Labor Code

We welcome the Vietnamese Government's efforts to review and revise the Labor Code, the most important legislation to govern employment and labor issues in Vietnam. The review and revision of the Labor Code is critical considering Vietnam has ratified various international treaties including the CPTPP and EVFTA which provide Vietnam's commitment to reform the Vietnam labor and employment regulations.

We however express our concerns that the final draft of the revised Labor Code has not been released, at the time of this paper, for public consultation. The delay in releasing the draft for public consultation will shorten the time for stakeholders' comments and impact the formulation and smooth implementation of this important legislation, ahead the ambitious intention of the Government to present it to the National Assembly for debate in April / May 2019.

While waiting for the final draft of the revised Labor Code to be formally released, we want to take this opportunity to raise a particular concern and request to the Vietnamese Government and drafters of this law: That is the revised Labor Code must provide a better and stronger mechanism and more effective tools for employers to enforce the implementation of code of conduct, labor disciplines and general order at workplace. Vietnam Labor Code is among the most rigid and strictest laws in the region for employers to conduct dismissal for cause. The dismissal grounds are limited and the process to dismiss an employee for misconduct is too onerous on the employer. Meanwhile, enterprises are operating in the ever increasingly regulated business environment. Vietnam has also enacted more laws to combat anti-corruption in both public and private sectors, more regulations in financial industry, etc. All of the regulations which require enterprises to operate with higher compliance standards will not be effective unless enterprises have effective tools and mechanism to enforce and sanction employees who breach the regulations and / or cause enterprises to breach the regulations.

In particular, we note that order and lawfulness in a society are maintained and reinforced by the values the society sets through its laws and norms of accepted behavior. Requiring companies to undergo protracted procedures for dismissing employees who violate the most basic societal norms, such as theft, violence or fraud suggests such behavior is acceptable when done at the expense of the employer. This not only risks sending the wrong messages to employees about acceptable behavior, but also sends the wrong message to employers and investors regarding their status in Vietnamese society. The revised Labor Code should ensure that such fundamental violations of societal norms (i.e. fraud, theft, violence, etc.) provide the employer with grounds for immediate dismissal, without having to have the Internal Labor Regulations registered, proving damages to the employer nor having to go through the protracted disciplinary process.

2.6 Issues related to Foreign Investment Conditions in Vietnam

This issue was raised in 2018 Mid-term VBF Position paper, and it has not yet been solved.

a. Issue 1

One persistent administrative procedure 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:

The Ministries, especially the Ministry of Planning and Investment should clearly indicate if it approves for DPI to grant the license to the investors. When there is no objection from the ministries, DPI should grant the license. As long as the letter indicates a consent, even when the word "approval" is not literally stated, DPI shall also grant the license.

b. 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.

c. 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.

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

This issue was raised in 2018 Mid-term VBF Position paper, and it has not yet been solved.

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

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[1] 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[2] and 4.2 million in the first three months of 2018[3] while this number in 2015 was 7.9 million[4]. In addition, 102 million domestic travelers made visits to Vietnam's travel destinations in 2015.[5] 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.[6] 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

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

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 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. [7]

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

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

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 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,[8] 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.

2.8 Decree 09/2018/ND-CP - "Trading License"

This issue was raised in 2018 Mid-term VBF Position paper, and it has not yet been solved.

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:

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

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.

2.9 Banking Issues - From the Enterprises' Perspective

Circular 32 on Current Account Opening:
This issue was raised in 2018 Mid-term VBF Position paper, and it has not yet been solved.

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.

2.10 Restrictions on foreign ownership of housing in Vietnam
This issue was raised in 2018 Mid-term VBF Position paper, 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.

2.11 Recognition and enforcement of foreign arbitral awards in Vietnam

This issue was raised in 2018 Mid-term VBF Position paper, and it has not yet been solved.

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

This issue was raised in 2018 Mid-term VBF Position paper, and it has not yet been solved.

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.