REPORT

ACTION PLAN AFTER ACIA

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Support Vietnam in participating in ASEAN Economic Community

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I. Principles of the ASEAN Comprehensive Investment Agreement (the "ACIA")

The ACIA, signed on 29 March 2012, is considered as important advance of countries members of ASEAN in facilitation of friendly relationship and cooperation on development of economic of each country. During the negotiation, drafting and signing of the ACIA, all the countries intend to create an explicit, fair, competitive and free investment atmosphere, therefore, all countries agree to etablishsome basic principles for drafting legal documents, such principles are also the basic principles of the Agreement. There are seven general guiding principles intended for members, accordingly, when performing obligations which are commited by themselves, member states are required to comply with these principles to ensure the feasibility of the Agreement:

1.Provision on Investment liberalization, investment protection, investment promotion and facilitation

It is considered as the most important provision of the Agreement. Basically, investment liberalization and investment protection are inheritted from provisions of AIA and IGA. This Agreement has facilitated investors through the main methods such as creating the necessary environment for whole forms of investments; simplifying the procedures of investments registration and licensing; disffusing information relating to investment (including regulations, principless and policies); establishing one-door office on investments; consolidating database of all investment forms to determine the policies improving internal investment enviroment; consulting with business community on investment issues; and providing consulting services to the business community.

2.Constantly libering investment to achieve the freedom and open investment enviroment in the zone:

Under this provision, ACIA allows investment liberalization in respect of some industries and services in the future based on the consensus of member states. This principle requires member states to have open policies and schedule which consist with the level of development of each member state and whole zone towards the target of liberalization of ASEAN Economic Community.

3.Ensuring the interest of investors and their investment:

It is including investors from ASEAN and foreing investors invested in ASEAN (investors from third countries). Ensuringinterest means fair treatment,

security as well as objective in legal proceedings, administrative procedures or any other policies related to the implementation of the rights, and obligations of the investors.

4.National treatment:

This principle requires the member states to make no less favorable treatment to investors and investment from other member states than what applied to their domestic investors, including but not limited to the reception range, establishment, maintenance, extension, management, operation and making decision of investment. The contents of this principles still remain the same as provisions prescribed in investment encouragement and protection agreements in which Vietnam has participated or signed with other countries, because the application of this principle is considered as national practices to ensure fair competition, including ACIA.

5.No retroactively application on provisions of AIA and IGA:

When AICA takes effect, it shall replace AIA and IGA*;* therefore, the commitments of member states relating to all investment activities stated by AIA and IGA shall not be applied when AICA takes effect. However, this provision excludes the implementation of compensation obligation arising during the implementation of commitments of AIA and IGA.

6.Different and special treatment:

This priciple is considered as the commitment of member states on supporting and ensuring the benefits of the member states having less level of development than others country in the zone (including Cambodia, Laos, Myanmar, and Vietnam), and this principle may also ensure the increase in benefits of the Agreement according to the initial target. Members of ASEAN highly respecte in this policy and ensure it through the technical assistance to improve the capacity relating to investment policies and encouragement, including human resource development, commitments in field which may bring benefits to new member, and recognization the commitments of new member in accordance with the developmemt stage of their country.

7.Expansion of the scope of the Agreement to other fields and industries in the future:

Member states tend to liberalize the investment in some other sectors and industries, therefore, this Agreement shall govern these sectors and industries on the basis of the consent of the member states.

8.Regarding application measures

Under item 1 of Article 3, the measures applied relating to investors and investments by a member state shall be in governing scope of ACIA (An investor means a person or legal entity of a member state which are investing or has invested in the territory of another memeber state. An investment means all assets owned or controlled by the investor, such as valuable papers, financial rights,etc.). The measures referred in this provision include laws, regulations, rules, procedures, decisions and administrative activities or common practices which are applied by central, regional, local government and non-profit organizations (which are authorized by the central government, regional, local). AICA shall replace AIA and IGA, therefore, AICA shall govern investments existing prior to the effective time of the Agreement, and alsoinvestments made after the effective time of ACIA.

Regarding investment liberalization, ACIA remains unchange the provisions of AIA on economy and does not govern liberalization of indirect investment; accordingly it only governs industry, agriculture, fisheries, forestry, mining and quarrying manufacture sector and related services of such sector. In addition, the Agreement also allows on liberalization for any sector agreed by member states, this provision aims for liberalization of some other sectors and services which may arise in the future.

Regarding investment protection, ACIA inheritting the provisions of IGA protects all investment sectors, forms and only protects investment after its establishment, except for the measures affect commercial services in the scope of ASEAN Framework Agreement on Services (AFAS) which is applied by member states. For the purpose of investment protection relating to supplying services by commercial presence, the provision of investment treatment, compensation when unstableness, transfer, foreclosure and compensation, subrogation and the provisions of dispute settlement between investors and member states will be applied. In each case, these provisions may be adjust in accordance with the situation as agreed by the parties, but not exceed the obligations which are committed under the Agreement.

ACIA does not govern all tax measures (except for the provisions of Article 13 (on money transfer) and Article 14 (on foreclosure and compensation) of the Agreement); subsidies from the Government; procurement of the Government; providing services of state agencies including agencies and organizations authorized by the State (including all types of services for the purpose of making profits or

competition), and the measures of member states affecting to trade in services under the AFAS.

II. Research result of Experts No. 1 & No. 2 on the impact of ACIA to the legal system of Vietnam.

The Experts No. 1 & No. 2 have done a research on the impact of ACIA to the legal system of Vietnam, which includes the following specific contents:

(i) National treatment;

(ii) Most – Favored – Nation Treatment;

(iii) Requirements on investment relating to commerce;

(iv) Scope of application of ACIA;

(v) Investment liberalization; investment protection; investment promotion;

(vi) Regulations on money transfer;

(vii) Regulations on entry and exit, temporary residence and employment of investors and key personnels;

(viii) Dispute resolution on investment;

(ix) Management on investment of the Government;

(x) Merger & Acquisition;

(xi) Access into market of investment projects in restriction sectors;

(xii) Requirement on minimum investment capital; and

(xiii) Regulations on reform of administrative management;

III. Some recommendations regarding the performance of ACIA

Based on the research of PMU – Experts No. 1 & No. 2 on the impact of the ACIA on the legal system of Vietnam, the report of Expert No. 3 shall includes some recommendations to improve the systems of investment law in order to ensure its compatibility with the ACIA as follows:

A. Consolidation of Vietnam Investment Law:

1. National treatment

Article 2 on applicable entities of the Laws on Investment (LOI) 2014 stipulates that: *Investors and organizations or individuals involved in business investment activities are subject to this law*. Items 13 of Article 3 on Interpretation of terms provides that: Investor means individual, organization performing business investment activities, including domestic investors, foreign investors and enterprises with foreign owned capital.

To compare with the ACIA (Article 5), the new LOI is applied to all investors and ensures the principles of non-discrimination (national treatment) between domestic investors and foreign investors (including ASEAN investors).

2. The Most-favored-nation

Item 4 Article 5 of the LOI 2014 is compatible with Article 6 of ACIA in respect of the principle on Most-favored-nation. Accordingly, "*the State makes sure equal treatment to investors from any country*". However, the item 5 of Article 5 stipulates that: International agreement related to business investment of which Vietnam is a member shall be respected and implemented. Therefore, besides complying with Most-favored-nation (MFN) under the provision of the LOI, Vietnam shall comply with this principle under the multi-lateral agreements and bilateral agreements (for example, the Bilateral Trade Agreements (*BTA*) between Vietnam and USA, Japan, the Freedom Trade Agreements (FTA) with EU, Korea, and other states, etc). Thus, Vietnam must comply with ACIA under both the LOI and multilateral agreements of which Vietnam is a member.

3. Requirements on investment relating to trade

Article 10 on guarantees of investment activities of the LOI is compatible with Article 7 of the ACIA on cancellation of the provisions and measures, which violate the TRIMs Agreement on investment relating to business. In detail:

The State shall not force investors:

(a) To give priority to the purchase or use of domestic goods or services; or to purchase compulsorily goods from a domestic producer or services from a domestic service provider;

(b) To export goods or services at a fixed percentage; to restrict the quantity, value or type of goods or services which may be exported or of goods which may be produced domestically or services which may be provided domestically;

(c) To import goods at the same quantity and value as goods exported, or to compulsorily self balance foreign currency from sources obtained from exported goods in order to satisfy their import requirements;

(d) To achieve localization ratios in goods domestically produced;

(dd) To achieve a stipulated level or value in their research and development activities in Vietnam;

(e) To supply goods or provide services in a particular location, whether in Vietnam or overseas;

(g) To establish the head office at a location upon request of the State body

To detail the provisions of LOI, the Ministry of Industry and Trade is required to draft Decree submitted to the Government to approve, in which are clearly specified the commercial activities which investors are allowed to perform (except prohibited investment sectors) as well as sectors which investors do not have to perform when conducting investment activities.

4.Investment liberalization, promotion and protection:

Investment liberalization is one of the fundamental principles of the ACIA. To grasp this spirit, the LOI (Article 5) provides that: *1. Investors shall be permitted to invest in all sectors, industries and trades which are not prohibited by law. 2. Investors shall have the right to autonomously make decisions on investment activities in accordance with this Law and related provisions, to access to and to use of credit capital, aid funds, land and natural resources in accordance with law. 3. The State shall recognize and protect the ownership of assets, invested capital, revenue and other lawful rights and interests of investors.* Liberalization investment principle must be specified in the legal document guiding the LOI 2014. Accordingly, investors shall be permitted to invest in all sectors which are not prohibited by the law. The conditional investment sectors must be specified by criteria according to the principle of openness and transparency.

5. Assurance of interests and ownership of asset of investors

The assurance of interests and ownership of asset of investors under ACIA Agreement is stipulated in Article 9 of the LOI 2014 as follows: *1. The lawful asset of the investors shall not be* nationalized *or confiscated by administrative measures. 2. Where an asset is bought or commandeered by the State of reasons of national defense and security, national interests, state of emergency, prevention or recovery of natural disaster, the investor shall be reimbursed or compensated in accordance with*

regulations of law on property commandeering and relevant regulations of law. Accordingly, the investor should be compensated or paid damages at the market prices at the time of such compulsory acquisition or requisition.

6. Money transfers

Regulations on money transfers (including capital, profits, assets ...) after fulfill financial obligations toward the State is defined in the LOI 2005 (Article 9) and the LOI 2014 (Article 11) as follows: ”*After a foreign investor has discharged fully its financial obligations to the State of Vietnam, it shall be permitted to remit abroad the following: (1) Invested capital and proceeds from the liquidation of investments; (2) Its profits derived from investment business activities; (3) Other sums of money and assets lawfully owned by the investor.”* In order to make this rule feasible, the State Bank of Vietnam (”SBV”) need to issue a circular specifying and guidelining on record, sequence, procedure of transferring money abroad.

7. Right of exit, entry, temporary residence and employment of investors and their senior personnels

Article 44 of the LOI 2005 provides that *investors carrying out investment activities and experts and technicians being foreign individuals who work regularly for an investment project in Vietnam and their family members shall be issued with multiple entry and exit visas. The maximum term of a visa shall be five years on each occasion of issuance of a visa*. Article 14.3 of this law also provides that Investors may: *recruit domestic employees; recruit foreign employees to fulfill management tasks, to provide technical labor and to provide expertise in accordance with production and business requirements, unless otherwise provided in an international treaty of which the Socialist Republic of Vietnam is a member in which case such international treaty shall apply*.

However, the LOI 2014 does not specify the rights on entry, exit, temporary residence and employment. It provides only a very generic provision in Article 5.2 as follows: *Investors are autonomous to decide their investment business under this Law and other provisions of relevant laws; they may access to and use of credit funds, funds, land use and other resources in accordance with the law*. Accordingly and clearly, the invertors has huge rights relating to investing activities (including the right on employement, immigration and temporary residence of the investor and their senior personnels). In order to facilitate investors (including investors from ASEAN) in the implementation of investment projects, the Government, the ministries and the local authorities should issue and guideline the investment provisions on right of

entry, temporary residence, employment, appointment of experts and senior personnels to work in Vietnam as well as provisions of records, sequence and procedures for implementing these rights.

8. Investment dispute resolution

Article 12 of the LOI 2005 and Article 14 of the LOI 2014 both detail on the procedure for resolving disputes in investment activities and the authorities (Arbitration, Court) taking responsibility of dispute settlement. Accordingly, *any dispute as between domestic investors or as between a domestic investor and a State administrative body of Vietnam relating to investment activities in the territory of Vietnam shall be resolved at a Vietnamese court or arbitration body. Any disputes where at least one disputing party is a foreign investor or an enterprise with foreign owned capital shall be resolved by one of the following tribunals and organizations: (a) A Vietnamese court; (b) A Vietnamese arbitration body; (c) A foreign arbitration body; (d) An international arbitration body; (dd) An arbitration tribunal established in accordance with the agreement of the disputing parties. Any dispute between a foreign investor and State administrative body of Vietnam relating to investment activities in the territory of Vietnam shall be resolved by a Vietnamese court or arbitration body, unless otherwise provided in contract or in an international treaty of which the Socialist Republic of Vietnam is a member.*

Compared to the ACIA, the provisions of these articles are almost compatible with articles 28-41 of the ACIA. However, in respect of disputes between investors of which at least one disputing party is an enterprise of which a foreign investor or an enterprise with foreign owned capital own less than 51% of capital , the law should add, beside application of Vietnamese court and Vietnamese Arbitration body, the application of foreign arbitrations because as prescribed by the LOI 2014, *an enterprise of which a foreign investor or an enterprise with foreign owned capital own less than 51% of capital will be treated as a domestic investor*, irrespective of the procedure or investment incentives, i.e. this enterprise has the same rights as domestic investors and it may only resolve disputes in aVietnamese court or arbitration body. If the enterprise wants to use foreign arbitration, itsshareholders or members could not raise the suit under the name of the enterprise but under their names, i.e. under their foreign legal status. Thus, to ensure the freedom of investment, the decree guiding the implementation of LOI 2014should clarifythat an enterprise of which a foreign investor or an enterprise with foreign owned capital own less than 51% of capital (including investors from ASEAN) may choose domestic Court, domestic or foreign Arbitration when a dispute araise.

9. State Administration of investment

Regarding LOI 2005, in principle, there is no distinction between management of domestic investment and foreign investment, but in respect of the procedures (project registration, project appraisal, issuing investment certificate), there is a distinction between domestic investment and foreign investment. Therefore, each province, city, industrial park has its own management boards in respect of foreign investment. The LOI 2014 repeales regulations on management procedures for foreign investment. The law only mentionnes the management principles. Accordingly, Article 68 of the LOI 2014 provides that the Government unified state management of investment activities in Vietnam and offshore investment from Vietnam. Ministry of Planning and Investment support the Government to unify state management of investment activities in Vietnam and offshore investment from Vietnam. The ministries and local authorities, within the scope of its respective duties and powers, are responsible to coordinate with the Ministry of Planning and Investment, the ministries, the ministerial equivalent bodies, the provinces, the cities in the formulation of laws and policies related to investments; examination of investment projects; chaired the issuance, amendment, revocation of Investment Certificates and state management for investment projects according to the law. On the basis of this provision, the cities, provinces, the management board of industrial parks, economic zones do not establish an organizations to manageand monitor foreign investment projects but of all of these projects are under the control of an unified authority being the Department of Planning and Investment in the provinces and cities and Investment Department in the management board of industrial parks and economic zones.

10. Merger and acquisition (M & A) and barriers related to antitrust

The Article 25 of LOI 2005 stipulated that investors are entitled to a M & A of company and branch. However, the conditions of merger, acquisition of company and branch provided by the Enterprise Law and Competition Law become barriers to foreign investors. According to research of Expert 1 & 2, if the partio of investors participating in M & A (number or value of share) accounted from 30 to 50%, they must notify the agency of competition before realizing the M & A transaction. In case if such ratio equal to or greater than 50% of the relevant market, such M&A transaction is prohibited. Regarding M & A process, foreign investors are also discriminated and receive less favorable conditions than domestic investors. The LOI 2014 (Article 23) has defined enterprises with foreign owned capital as any enterprise having: a) foreign investors holding 51% of the charter capital or a majority of the

shareholders being individuals in respect with enterprise which is a partnership; b) enterprise specified in (a) holding more than 51% of the charter capital; c) foreign investor and enterprise specified in (a) holding more than 51% of the charter capital. Thus, if enterprise has foreign investor owning less than 51% of the charter capital then the enterprise will be considered as domestic enterprise and it will be title of application of investment procedures, including procedures for M & A, reserved for domestic enterprises. However, regarding the provisions of the Law on Competition, should be canceled the provision on prohibition for cases where the total ratio of the parties in a M & A transaction equal to or greater than 50% of the relevant market. It will create new opportunities for investors, including ASEAN investors and create a new wave of M & A in Vietnam.

11. Market access for restrictions investment project

According to Commitments ***Schedule*** on ***Services of Vietnam*** toward WTO Vietnam, there still remain 11 sectors which are limited on market access and national treatment. Regarding goods purchase, the Circular No. 34/2013 / TT-BCT dated December 24, 2013 of the Ministry of Industry and Trade announced Roadmap (by category) to perform commodity trading activities and activities directly related to the purchase and sale of goods of enterprises with foreign owned capital in Vietnam. Pursuant to Article 5 and Article 8 of the ACIA, up until now, certain services and goods (under HS code) have hinderred activities of investors, inhibitted the development of the economy and created discrimination of treatment between domestic investment and foreign investment.

Therefore, I would like to recommend the Government of Vietnam to *allow foreign investors to invest in the service sectors which Vietnam has committed to the WTO and lifte certain services and goods committed toward WTO as follows:*

(i) Intermediary trade services CPC 621, 61 111, 6113, 6121: to allow establishment of commercial presence;

(ii) Machinery rental service CPC 83 109: to allow establishment of commercial presence;

(iii) Film production service CPC 96 112 (excluding production of video): to cancel restrictions on the form of investment;

(iv) Film distribution service 96 113 CPC : to cancel restrictions on the form of investment;

(v) Film service 96 121 CPC : to cancel restrictions on the form of investment

(vi) Entertainment service CPC 9619: to cancel restrictions on the form of investment;

(vii) Unloading containers service CPC 7411: to cancel restrictions on the form of investment;

(viii) Railway transport services CPC 7111 & 7112: to cancel restrictions on the form of investment; and

(ix) Trucking services CPC 7121, 7112, 7123: to cancel restrictions on the form of investment.

Regarding imported, exported and distributed goods under HS code as specified in Circular No. 34/2013 / TT-BCT dated December 24, 2013 of the Ministry of Industry and Trade announced Roadmap (by category) to perform commodity trading activities and activities directly related to the purchase and sale of goods of enterprises with foreign owned capital in Vietnam, the Ministry of Industry and Trade should submit to the Government proposal allowing enterprises with foreign owned capital to invest (import, export, distribution) the goods having HS code as following:

(i) Oil and grease HS 2710.19;

(ii) Light oils and preparations HS 2710.12; and

(iii) Sugar from materials which are not cane nor beet.

12. Requirement on minimum investment capital for foreign investment projects

The LOI 2005 and LOI 2014 do not specify any requirement of minimum capital for foreign investment projects. However, regarding land use projects, Article 42 of the LOI 2014 provides that: *1. The investor must deposit to ensure the implementation of the project to which the State allocates, leases land or allows conversion of land use purpose. 2. The amount of deposit to ensure project implementation is from 1% to 3% of investment capital of project and based on the size, nature and progress of each specific project. 3. The deposit to ensure the implementation of investment projects is repaid to investor under the progress of implementation of investment projects, unless otherwise cases where no refund could be made.* The new Investment Law does not stipulate a minimum capital requirement for investment projects (excluding investment projects in order to establish financial leasing companies, multy-level markerting companies which must have minimum capital as prescribed by law), but it impose the deposit requirements in order to

ensure the feasibility of the project as well as the financial capacity of the investor, and to limit the "purchase and sale" of investment project.

13. Provisions on management and reform of administrative procedure on investment

The LOI 2014 clearly defines the dossier and sequence of decision on investment policy of the National Assembly, the Prime Minister, and the People's Committee of the cities and provinces and procedures of issuing, adjustment and withdrawal of investment certificate. The timeline is 5 days for projects with investment policy decisions and 15 days for the project which is not subject to the investment policy decisions. In addition, the LOI 2014 also provides for a national information system on investment for monitoring, evaluating and analysing the status of investment in the country in order to serve the state management and to support investors in the implementation of investment business activities.

14. Other legal issues

(i) Guidance of the LOI 2014: The LOI 2014 will officially take effect from the1st July 2015, the Decrees of the Government and the Circulars guiding the LOI 2014 of the ministries concerned must also be effective at that time in order to ensure the synchrony of enforcement of the law and prevent that the LOI 2014 is effective but the legal documents guiding the law do not take effect and it cause difficulties in enforcement of the law.

(ii) Guidance of civil law on recognizing and enforcement foreign arbitral awards:

Currently, in addition to the provisions of the Code of Civil Procedure, in Vietnam there are no sub-law documents guiding the recognition and enforcement of foreign arbitral awards under the Convention of New York 1958. Initially, the Ministry of Justice should review and draw on the experience of recognition and enforcement of foreign arbitral awards under the Convention of New York 1958 at Vietnamese courts and issue guiding of such provisions. In fact, recently, many of foreign arbitral awards are canceled by Vietnamese courts due to the main cause being that there is no legal documents guiding related provisions. The guidance of the Supreme People's Court is made into administrative docments, so its application by Vietnamese courts is still arbitrary, inconsistent and does not ensure a legal basis for the recognition and enforcement of foreign arbitral awards.

B. **Improving the Law on Enterprises and related Laws**

1. National treatment principle:

The Law on Investment (the "**LOI**") 2014 and the Law on Enterprises (the "**LOE**") 2014 are generally consistent in non-discrimination treatment between domestic and foreign investors. In comparison with ACIA Agreement (Article 5), the scope of the LOE (as amended) meets the principle of non-discrimination (national treatment) between domestic and foreign investors (including ASEAN investors): "this Law provides for the establishment, organization and management, reorganization, dissolution and related activities of the enterprise, including limited liability company, joint stock companies, partnerships and private enterprises; provisions for groups of companies: (Article 1). The LOE (as revised) also indicated the Subjects to the Law as "Enterprises" without discrimination between Vietnamese enterprises and enterprises engaged with foreign elements (Article 2).

However, it can be said that in the current legislations, there is no consistency in the regulations of terms related to foreign investors in general and foreign investors from ASEAN, as follows:

- Article 4 Enterprises Law (as revised 2014) on the interpretation of terms defined in paragraph 1 is "Foreign individual is the people who does not have Vietnamese nationality", paragraph 20 provides "Foreign investor is the organization, individual that are considered as foreign investors as defined in the LOI" which are in compliance with the provisions of the LOI 2014. Nevertheless, it provides no terms as "foreign invested enterprises". Meanwhile, Article 5.7 of the The LOL (revised 2013) provides on definition of land users as: "Enterprises with foreign owner capital includes 100% enterprises with foreign owner capital, joint venture enterprises, Vietnamese enterprises in which the foreign investors buy shares, merge, repurchase in accordance with Investment legislation". We suppose that the unified understanding under the LOE and the LOI 2014 is appropriate.
- On the other hand, the Law on Land (the "**LOL**") (amended in 2013) provides two distinguished definitions between domestic and foreign enterprises as "foreign invested enterprises" and "economic organization". Particularly, Article 5.7 of the Law provides definitions on land users as: "Foreign invested enterprises, including 100% foreign invested enterprises, joint ventures, Vietnamese enterprises in which the foreign investors buy shares, merge, and repurchase in accordance with investment legislation". Meanwhile, Article 3.27 provides terms interpretation as: "Economic organizations include enterprises, cooperatives and other economic organizations as prescribed by civil legislation, excluding the foreign invested

enterprises". Thus, this is inconsistent content of the law that should be amended in order to unify and non-discriminate (at least in term of the text) between domestic and foreign enterprises with foreign-related enterprises. However, Article 3.27 of the Law providing on the meaning of terms provides that: "*Economic organizations includes enterprises, cooperatives and other economic organizations as prescribed by the civil law, except the enterprises with foreign owned capital*".

- Article 34.1 of Minerals Law (2010), providing regulations on mineral exploration organizations and individuals as: "Organizations and individuals registered to do business in mineral exploration are permitted for mineral exploration including: a) enterprises established under the LOE; b) cooperatives and unions of cooperatives established under Cooperatives Law; c) Foreign enterprises have representative offices or branches in Vietnam ". Thus, the Law separates enterprises established under the Enterprises Law and Foreign Enterprises into 2 different objects between paragraph a) and c). Meanwhile, Article 51.1 providing regulations on Organizations and individuals who are permitted to mineral exploration as: *"Organizations and individuals registered to do business in mining are permitted to mineral exploration including: a) enterprises established under LOE; b) cooperatives and unions of cooperatives established under the Law on Cooperatives "*. We suppose that this content of the Mineral Law should be amended to be compliance with the LOE (as amended).

On the other hand, many foreign investors still concern about the discrimination treatment in the implementation of legal documents. Some examples of this problem as follows:

- Under the provisions of the The LOL (2013), foreign investors are not allowed to rent or lease land from individuals and households for producing and doing business; while domestic economic institutions are not subject to this regulation. This can be considered as a discrimination against foreign investors and should be changed. Foreign investors wish to rent or lease land from individuals and households for producing and doing business in the same way as the domestic economy organizations.

- The current LOI and LOE and their regulations guiding the implementation of the two laws are generally applied equally to both domestic and foreign investors. However, the different application in a number of licensing procedures still remains. For example, foreign investors to Vietnam first time establish enterprises in the form of 100% capital foreign invested enterprise or venture capital (excluding holders of foreign shares) will need to apply for an investment certificate and certificate of

business registration. Meanwhile, with the exception of large-size or conditional investment projects, domestic investors only need a certificate of business registration.

- Procedures for issuance of investment certificates when foreign investors contribute capital remains complicated, it takes time for preparation of documents and explanations of additional information. For example, investors are required to explain the source of investment capital, business plan, experience, time of payment for shares, land lease contract. These processes and procedures should be reviewed to limit filing documents, and restrict additional explanation requirements for foreign investors.

- The overdue situation of issuing of investment certificate for foreign investors still remains (although the current Law provides that it must be done in only 30 days for registering projects and 45 days for appraising projects). Time for issuance of certificates may be extended for the consultation process by the Department of Planning and Investment of provinces/cities to the relevant central and local agencies; and the profiles of investors shall be not handled until the Departments receive feedbacks from the agencies. Therefore, it needs to limit the contents and duration for comments from ministries and industries and to clearly identify their time-limit to response to investors. It should be also public and transparent in tracking record statuses on the website of related agencies in order to help the filing applicants can monitor the status of their applications, in the mean time, to avoid waiting time and burden of communication to the public by the staff of related authorities.

- Each of province/ city has a different timeline for approving investment, Hanoi and Ho Chi Minh city have a longest timeline. In addition, there has different timeline for domestic and foreign investors when they apply for investment license. Therefore, it is necessary to have a detail timeline which is fair and public on the website of the related authorities.

- Regarding to application scope of the LOE (amended), it is necessary to define that the application scope of the LOE covers the operations of participation the market, the operations of business process, and taking out of the market. For this purpose, the application scope of LOE should be expanded which is covered investment operations under The LOI as investment is one of operations of business process. The current different provisions of The LOI to the LOE have made many misunderstandings in implementation and application leading to difference for both enterprises and management agencies. The definitions of foreign investors, forbidden field investment and business, procedures of company establishment and investment

etc… should be unified. The LOE consistent governs all business, investment activities of enterprises which is the same with domestic and foreign investors.

- Enterprises with foreign owned capital are only allowed to do business with goods which is determined by specific HS code and investment certificate. This requirement makes enterprise delay responding to demands of the market and also makes discrimination against foreign investors, because domestic investors do not be required to meet this requirement.

- The contents of LOE 2014 and The LOI 2014 need to be consistent and compatible in order to investment activities of enterprises and other investors in the same environment which covered smoothly by The LOI and LOE. For example: "*LOE (amended in 2014) provides that: "If specialized law provides specific management, re-organization, dissolution and activities related to enterprise, this laws will be supplied*". Therefore, this leading to the extensions of exception provisions, thus basic principles under the LOE shall be ineffective due to presence of exceptions of the specialize law. However, The LOI provides that: "If there are different provisions between legal documents…, this law shall be prevailed to apply, but… Law on Securities, Law on Institution Credit, Laws on Insurance Business and Law on Petroleum". Many experts believe that this provision under The LOI should be provided under LOE. Accordingly, LOE shall be prevailed relating to establishment, management, business organizations. Approved exceptions under law on security, credit institutions, insurance, oil and gas are in organization and management model of enterprise. With reference to The LOI, common principle under The LOI is prevailed against specific laws (the profession which is prohibited and business investment with conditions). Because The LOI only refer to the list, and contents of business conditions which are still covered by specific law in all related fields.

2. Most-Favored Treatments (the "MFN") :

Section 1 of Article 45 of the LOE 2014 is compatible with the Article 6 of ACIA on the principle of MFN treatment. Accordingly, "*the Sate recognizes the long-term presence and development of all types of enterprises which are defined in this Law; and ensure the equality of enterprises before the law, without any discrimination related to form of ownership and economic sectors of the enterprises; recognize the legitimate interests of the business*."

3. Requirements on investment relating to trade

With regard to issues related to real estate and land of foreign investors:

Article 32 of Decree 43/2014 / ND-CP detailing the implementation of some articles of the Law on Land, the investor shall be issued a certificate of land use rights when completing the sale and purchase of real estate to stay and entire buildings. The provisions of the law do not clarify that the certificate of land use rights shall be granted for parts of buildings, such as a part of one floor or whole floor rather than of whole building, exception of individual apartment in condominiums. However, there is not prohibited selling a part of building. This makes the authorities embarrassing to grant the Certificate of land use rights whether grant for above circumstance or not, it is leading to inconsistent application. Therefore, clear provisions on this matter should be provided.

The current Law on housing provides that foreign investors must sign a land lease contract with the State and obtain a certificate of investment before compensating for land user. The procedures make unfavorable for foreign investor with domestic investors. They take more time to obtain an investment certificate and be afraid that land users unlikely wait enterprises to obtain the investment certificate before the compensation. Therefore, the certificate of land use rights should be granted for foreign investors before investment certificate.

4. Investment liberalization, promotion and protection:

Article 7 of the LOE (the "**LOE**") 2014 provides that foreign investors may : "*1. Freely do business in the lines that the law does not prohibit. 2. Autonomously do business and choose of the form of business organization; actively select the lines, geographical, forms of the business; actively adjust the scale and lines of business. 3. Select the form and mode of mobilization, allocation and use of funds. 4. Actively seek markets, customers and enter into the contract. 5. Import and export. 6. Recruit, hire and employ personnel according to business requirements. 7. Actively application of modern science and technology to improve business efficiency and competitiveness. 8. Possess, use and dispose of the assets of the enterprise. 9. Refuse all requirements to provide the resources which are not required by law. 10. Complain and denounce in accordance with the law on complaints and denunciations. 11. Participate in the proceedings under the law. 12. Be entitled of other rights prescribed by law.*" Therefore, foreign investors are guaranteed to have

all rights related to investment liberalization, protection and promotion as any other economic sectors.

For all enterprises with foreign owned capital which are provided of investment certificates by competent authorities, the tax incentives which it have been awarded have been specified in the certificate of investment. However, these incentives are often difficult to meet and are possibly reduced or canceled by local tax authorities despite the fact that all the conditions for the tax incentives have been satisfied. Therefore, should be added the provisions specifying that no state agencies are allowed to change the tax incentives which have been recorded in investment certificates issued to foreign investors if they have ensured all conditions for having such incentives.

However, regarding the mining sector, although Vietnam market is considered to have promising potential which rich natural resources and mineral reserves, foreign investors have not found attractive opportunities to invest in this sector because of natural resources tax (the "**NRT**") rate is extremely high. The foreign investors think that the NRT rate of Vietnam is higher than the world average (for e.g., Vietnam NRT for gold is 15%, while the average of the world for gold is about 1 to 5%). The high NRT, in addition to a substantial fee for "mining rights", will not encourage foreign investors to invest in this field, and it will lead to the increase of the illegal mining activities and the degradation of natural resources of the country due to using of rudimentary and ineffective mining methods. Therefore, a mechanism for taxation which is more attractive to foreign investors and ensure more the interests of the State (revenue for national budget) and investors should be added. Regarding the mining sector, this solution will contribute to facilitate better the management of natural resources of Vietnam by using modern mining methods; to develop of natural resources in the direction of sustainability and environmental protection; to increase revenue for national budget; and to promote the development of infrastructure and services of the industry of mining in remote areas, which are home to many of the country's mineral wealth.

5. To ensure ownership of the property and pay damages:

Paragraph 2 and 3 of Article 5 of the LOE in 2014 clearly provides on the guarantee of property rights and compensation of damages for the enterprise, while confirming do not discriminate between different types of businesses as follow: "*The State recognizes and protects of property rights, investment capital, incomes,*

legitimate rights and interests of enterprises and its owners. Assets and legal capital of the enterprise and its owners are not nationalized or confiscated by administrative measures. Where it is necessary for reasons of national defense and security or for national interests, emergencies, prevention of natural disasters, the State compulsorily purchase or expropriate assets of the enterprise, then the enterprise shall be paid or compensated at market price at the time of the announcement of the purchase or the expropriation. The payment or compensation has to ensure the interests of enterprise and do not discriminate between different types of enterprises."

However, Paragraph 6 of Article 75 of the LOL 2013 providing on the conditions of land compensation when the State expropriates land for the purpose of national defense and security and of public interest specifies that: "*Enterprises, overseas Vietnamese and enterprises with foreign owned capital that are allocated by the State land with land use levy to implement investment projects for construction of houses for sale or for a combination of sale and rent, or are leased land by State with full one-off rental payment for the entire lease period, having a certificate or being eligible to be granted a certificate of land use rights and ownership of houses and other land-attached assets under this Law but not being granted that certificate yet.*"Accordingly, if foreign investors pay an annual rent or is entitle to a rent exemption, they may be disadvantaged when the State recovers the land without compensation. Therefore, the content of the revised The LOL should be changed in compatible with the provisions of the LOE 2014.

6. Provision on transfer of money

Transfer of money is stipulated in Article 13 of the ACIA under which, member States are obliged to allow the implementation of the money transfer activities related to investment conducted freely inside and outside of its national territory. These amounts include the followings: financial contributions including initial contributions; profits and other income arising from investments; income from the sale or liquidation of all or a part of the investment; the amount of compensation in case of conflict; paid amount arising from the settlement of disputes; salaries and other remuneration of employees recruited and working on investment in its territory. This provision of the ACIA expand the freedom to transfer money from investors inside and outside the territory of the member State, thus it ensures maximum benefit of investors, thereby encourages further investment of investors. However, the fact

that investors can freely transfer money inside and outside of the territory of the member States may cause potential risks of transnational criminals, especially money laundering offenses; economic criminals, knowing that the ways and means of money laundering are increasingly more sophisticated, diversified, developed and that ASEAN countries in particular are faced with transnational crime.

- Regarding the financial contribution, Paragraph 2 and 3 of Article 74 of the LOE 2014 providing on capital contribution of enterprises provides as follows: "*The owners have to contribute enough and exactly kind of property as promised when registering establishment of business within 90 days from the date of issuance of the certificate of registration of business. If they do not contribute enough charter capital for a period of 90 days specified in paragraph 2 of this Article, the owner has to register the adjustment of its charter capital to the value of the real contributed capital within 30 days from the day on which the charter capital is fully contributed*". However, the term of 90 days for capital contribution for foreign investors as prescribed by the LOE 2014 is not reasonable for the project of which investment capital is large. In addition, the creation of bank accounts and procedures related to capital contributions spend a lot of time. The law should mentions different time frames for projects which have different values of capital.

-The provisions on using capital account to transfer contributed assets provided in the LOE 2014 and in the Circular No. 19/2014 /TT- NHNN on management of foreign exchange in respect of foreign investment in Vietnam is not compatible. Paragraph 3 of Article 36 of the LOE 2014 on the Transfer of ownership of contributed assets specifies as follows: "*Payments of all activities of sale, purchase, transfer of shares and contributed capital and reception of dividends of foreign investors have to be made through the capital account of the investor opened in a Vietnamese bank, unless payment in assets*". However, paragraph 1 of article 6 of the Circular No 19 of the State Bank providing on open of capital account in respect of foreign direct investments in foreign currencies and Vietnam Dong only stipulates as follow: "*To perform foreign direct investment activities in Vietnam, enterprises with foreign owned capital and foreign investors who participate in joint venture contract may open capital account in respect of foreign direct investments in foreign currencies and Vietnam Dong at 01 (a) bank which is allowed to perform transactions of collection or payment defined in Article 7 and 8 of this Circular.*" Accordingly, the Circular of the State Bank does not require capital account of foreign investors to open a bank in Vietnam as the provisions of the LOE 2014 and it

only requires such open in a bank allowed. There may need a clear and unified provision related to this matter.

REFERENCES

1. Law on Investment No. 59/2005/QH11 dated November 29, 2005 of the National Assembly;
2. Law on Investment No. 67/2014/QH13 dated November 26, 2014 of the National Assembly;
3. Law on Enterprises No. 60/2005/QH11 dated November 29, 2005 of the National Assembly;
4. Law on Enterprises No. 68/2014/QH13 dated November 26, 2014 of the National Assembly;
5. Law on Commerce No. 36/2005/QH11 dated April 16, 2005 of the National Assembly;
6. Law on Land No. 45/2013/QH13 dated November 29, 2013 of the National Assembly;
7. Law on Housing No. 65/2014/QH13 dated November 25, 2014 of the National Assembly;
8. Minerals Law No. 60/2010/QH12 dated November 27, 2014 of the National Assembly;
9. Decree 43/2014 / ND-CP detailing the implementation of some articles of the Law on Land;
10. Circular No. 19/2014 /TT- NHNN on management of foreign exchange in respect of foreign investment in Vietnam;
11. Other relevant documents of Vietnamese laws;
12. ASEAN Comprehensive Investment Agreement (ACIA);
13. Commitments *Schedule* on *Services of Vietnam* to WTO;
14. Agreement on Trade Relation between Viet Nam and United States of America;
15. Agreement on Trade-Related Investment Measures (TRIMs); and
16. United Nations *Convention* on the Recognition and Enforcement of Foreign Arbitral Awards (*New York*, 10 June *1958*)