

Vietnamese SMEs and the Digital Economy

Risks and Opportunities

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Agenda

- Growth in Trade
 - Vietnam, a poster child for global trade
 - VN-US Trade after BTA, WTO
 - Global e-commerce market
 - Globalization of supply chains, B2B and
- Key Risks for Exporters
 - Regulatory Non-compliance
 - Contract Disputes
 - Product Liability
- Key Risks in the Digital Economy
 - The Digital Economy in Vietnam
 - Data Management: Crossing Borders – Differing Regulations
 - Cyber-risk – Preventing Fraud



Growth in Trade

Growth in Trade

- Vietnam a Poster Child for Global Trade

- “Big Emerging Economy”

- Economic Reforms, “Integration”
- Strong GDP growth
- 90,000,000 mostly young population

- Keen to integrate:

- ASEAN/AFTA Member 1990’s
- US Bilateral Trade Agreement 2001
- Japan, EU Bilateral Investment Agts.
- WTO Accession 2007, TPP, AEC 2015

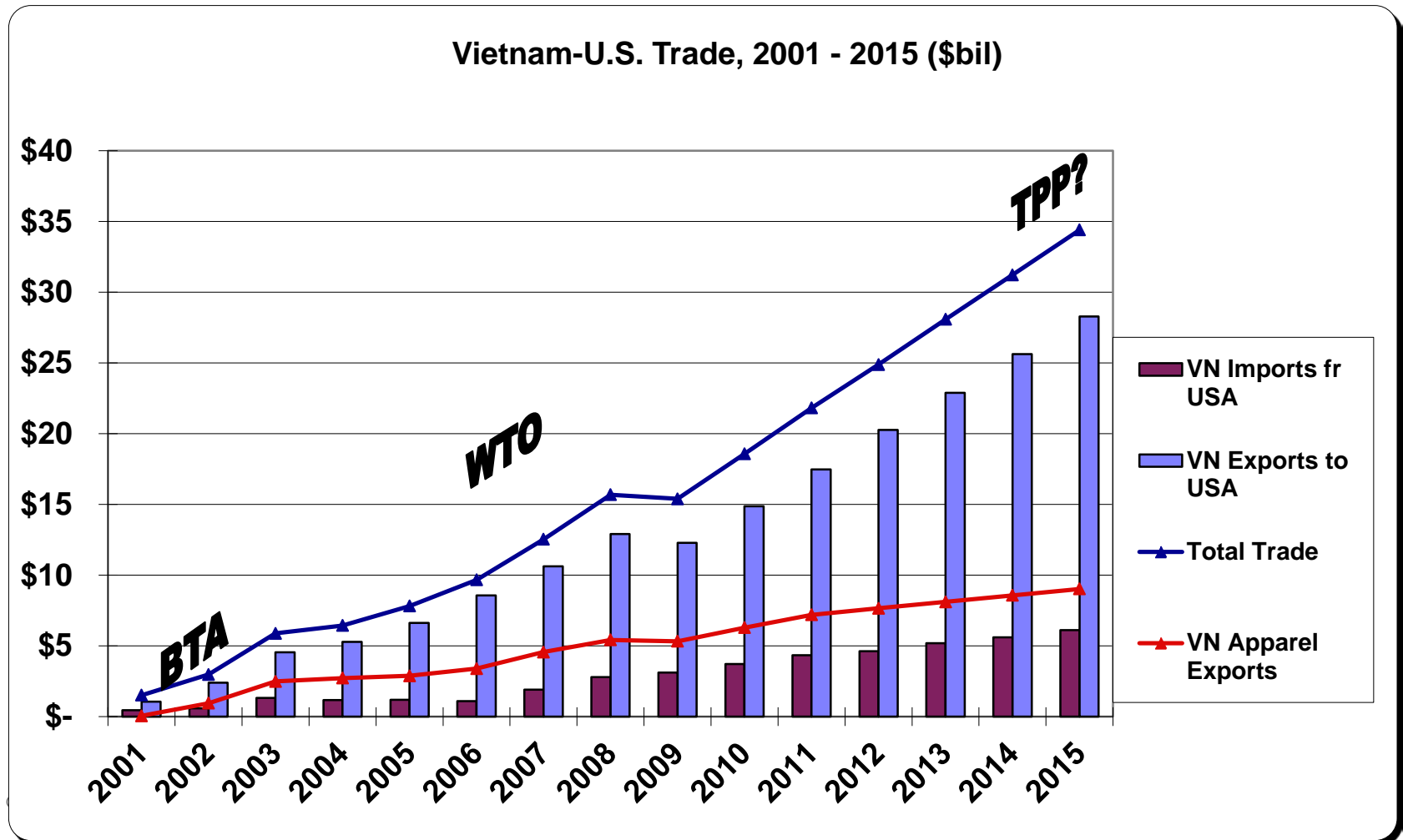
- Key Exports:

- Textiles/Footwear
- Sea products (shrimp, lobster)
- Agriculture (rice, coffee)
- Furniture
- Crude Oil
- Technology (soft and hard)



Growth in Trade

- VN-US Trade after BTA, WTO



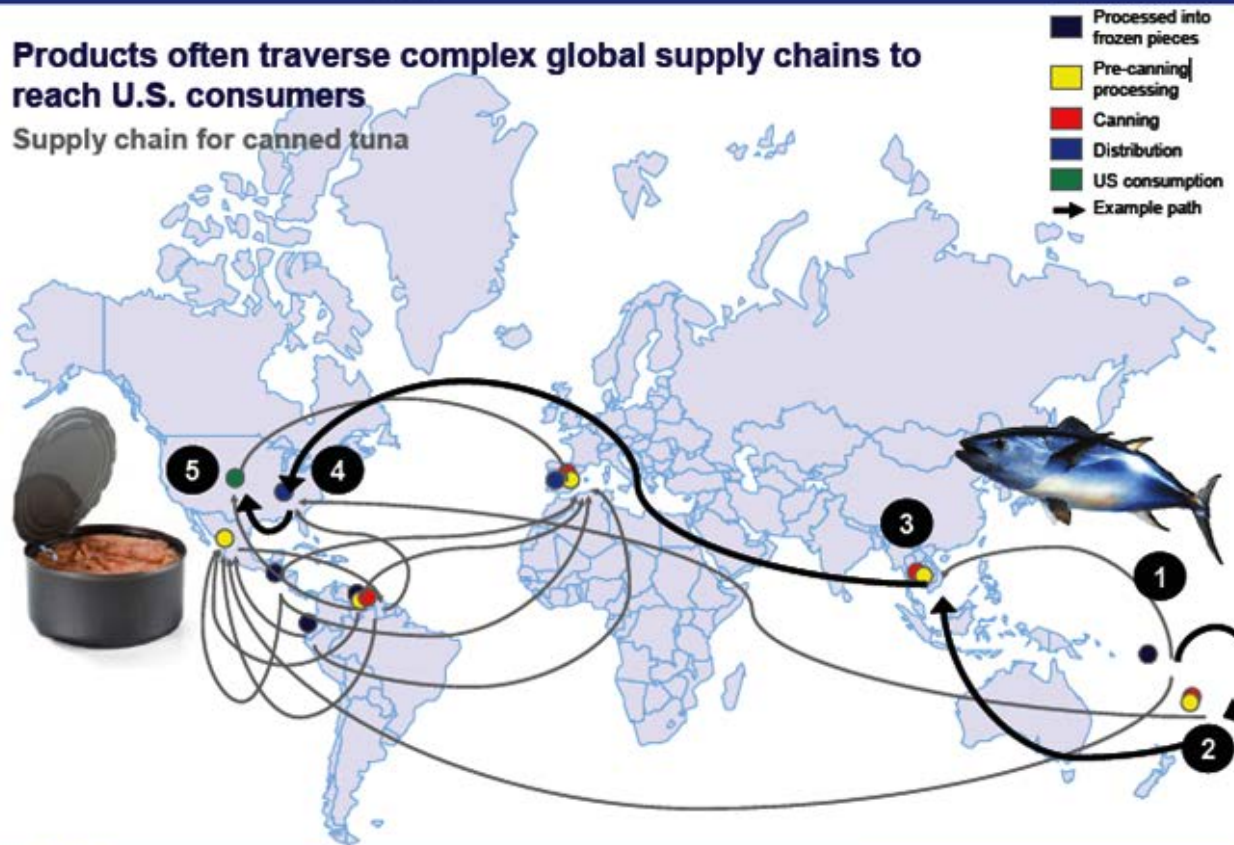
Growth in Trade

- Globalization of supply chains

Exhibit 7 – Illustrative supply chain for canned tuna

Products often traverse complex global supply chains to reach U.S. consumers

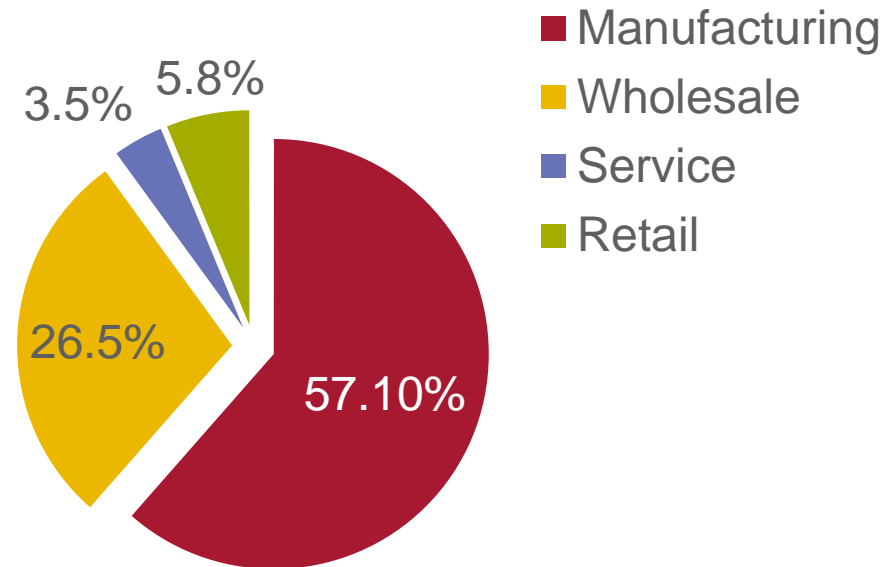
Supply chain for canned tuna



Source: <http://www.ilo.org/public/english/dialogue/sector/techmeet/tmfce07/tmfce-r.pdf>

Growth in Trade

- E-commerce as Percentage of Total Shipments/Sales/Revenues



Source: U.S. Census Bureau, 2013 Annual Survey of Manufactures; 2013 Annual Wholesale Trade Survey; 2013 Service Annual Survey; 2013 Annual Retail Trade

Growth In Trade – E-commerce

| B2C | B2B |
|--|--|
| In 2015 retail products accounted for approximately 7.3% of worldwide e-commerce | Estimated that e-commerce will grow from \$780 billion in 2015 to \$1.13 trillion in 2020 |
| B2C e-commerce sales worldwide increased by nearly 16% in 2015 | 74% of B2B buyers research at least one-half of their work purchases online |
| In 2015, Asia-Pacific was the leading region for e-commerce sales - 33.4% of the total, compared to 31.7% for North America and 24.6% for Western Europe | 30% of today's B2B buyers complete at least half of their work purchases online <ul style="list-style-type: none">○ Estimated to reach 56% by 2017 |
| Asia-Pacific cross-border B2C is expected to top \$113 billion by 2020 | B2B sellers will see a significant volume of offline business move online in the next few years |

Key Risks for Exporters

Key Risks for Exporters

- **Regulatory Non-compliance**

- **Consumer Product Safety Commission:** Acts based on its own research (including statistical studies of hospital emergency room incidents) or consumer reports, banning unsafe products and issuing recalls for those in the market.
 - Many recalls of Vietnamese consumer goods
 - The “year of recalls,” issued 473 recalls in 2007
- **Federal Trade Commission:** Enforces US anti-trust (competition) law by investigating reports from consumers and businesses, pre-merger notification filings, congressional inquiries, and reports in the media.
 - Enforces “country of origin” rules, active against talapia exporters from Vietnam
- **Food and Drug Administration:** Establishes standards for foods and conducts limited monitoring programs; regulates virtually all aspects of drugs and medical devices.
 - Responsible for cosmetic standards and labeling generally

Key Risks for Exporters

- **Regulatory Non-compliance**
 - **Department of Agriculture:** Responsible for developing and executing federal government policy on farming, agriculture, forestry, and food.
 - The “Farm Bill” (enacted on 7 February 2014) gave the Department of Agriculture exclusive authority to regulate and inspect all farm-raised catfish sold in the US
 - It is expected that all imported catfish will be subject to the same regulatory requirements as foreign-raised meat, including significantly stricter requirements on production, packaging, and safety
 - **US Customs & Border Protection:** Regulate and facilitate international trade, collect import duties, and enforce US regulations, including trade, customs and immigration

Know the laws and the regulators!

Key Risks for Exporters

- **Contract Disputes**

- To help avoid disputes, export contracts should specify:
 - the goods, purchase price, payment terms, inspection and delivery
 - where transfer of title to the goods takes place
 - warranty and/or maintenance terms and conditions
 - who is responsible for import or export licences, taxes
 - security requirements (e.g., bank letters of guarantee) and default provisions
 - mediation or arbitration clause with appropriate governing law
 - IP rights (if applicable)
 - governing law and dispute resolution
- The International Chamber of Commerce has developed a set of uniform terms for export contracts that help to avoid misunderstanding and disputes. "Incoterms" available at: www.iccwbo.org/incoterms

Key Risks for Exporters

- **Product Liability – What Is It?**
 - “**Product Liability**” is frequently defined as the liability of a manufacturer, seller or other entity in the chain of product’s distribution, for personal injury, property damage or economic loss caused by the sale or use of a product.
 - The term “product” is not confined to the finished product alone. Ancillary items that affect consumer expectations or product safety may be considered part of the product.
 - Product liability is not confined to manufacturers of final products, but rather affects all entities within the chain of manufacture and distribution. A product liability lawsuit can be brought against not only the manufacturers of products and their component parts, but various entities involved with the marketing, distribution and application of the product.
 - ✓ For example, distributors, dealers, representatives and retailers.

Key Risks for Exporters

U.S. Consumer Product Safety Commission Recall Statistics by Country of Origin

Source: US Consumer Product Safety Commission

| Number of Product Recalls by Country of Origin in 2013 | |
|--|-----------|
| China | 2,124 |
| United States | 685 |
| Taiwan | 299 |
| Mexico | 106 |
| Hong Kong | 91 |
| Japan | 70 |
| Thailand | 64 |
| India | 61 |
| Korea | 57 |
| Vietnam | 53 |
| Singapore | 6 |

Key Risks for Exporters

- Troubles Faced by Vietnamese Manufacturers and Exporters

- Recent recalls of Vietnamese-manufactured goods:

- Wardrobes - Tip-Over, Impact, Suffocation
- Patio Chairs - Fall Hazard
- ATVs - Violation of the Federal ATV Standards
- Children's Swings - Fall Hazard



- Recalls routinely generate product liability and other lawsuits and contribute to findings of liability - often leading to unfavorable settlements for manufacturers/exporters.
- Product liability claims and lawsuits can generate reports to government authorities that may lead to recalls.

Key Risks for Exporters

- Key Facts to Note About Product Liability Litigation

Product Liability litigation can affect all industries and all manufacturers – whether working in the consumer goods or business to business sectors.

Average product liability case in the U.S. ends up costing about US\$5 million dollars between defence costs, settlements and/or judgments.

60% of the U.S. jury awards involve judgements in excess of US\$1 million dollars. Recently, similar trends in claims frequency and severity are being observed in Europe.

A single lost case could: (i) trash a company's reputation; (ii) invite waves of similar cases to be filed; (iii) create precedent that an entire product line is defective; and (iv) make entire product line uninsurable.

In complex product liability cases as those found in the U.S. and Europe, exporters can save time and money by relying on an insurer with a network of experienced claims professionals familiar with product-liability litigation.

Choosing the right defence, finding the right experts and lawyers, knowing when to settle, and for how much are critical to the outcome of the case.

Key Risks for Exporters

- U.S. Product Liability Laws: The Judicial System
 - America is a Federal System of government
 - 50 states with their own laws and the Federal Government and its laws
 - Federal law supersedes state law where the two (2) are in conflict (Supremacy Clause (Article VI, clause 2) of the United States Constitution)
 - However, there is no federal product liability law in the United States
 - Business difficulties are caused by 50 states, 50 different bodies of product liability laws
 - ✓ While differences do exist, the vast majority of the states have adopted laws that are similar and that share common principles.

Key Risks for Exporters

- **Jurisdiction of the Courts**

- **Personal Jurisdiction**

- Personal jurisdiction is the power of a court over a defendant that allows the court to render a judgment binding on that party.
 - Long Arm Statute: All states have enacted so called Long Arm Statute that define the requirements for exercising personal jurisdiction over non-resident defendants.
 - The due process clause of the U.S. Constitution requires that, for exercise of personal jurisdiction to be upheld:
 - ✓ The defendant be found to maintain certain “minimum contacts” with the forum state; and
 - ✓ The exercise of jurisdiction over the foreign defendant does not “offend notions of fair play and substantial justice (i.e., the exercise must be reasonable).”

Key Risks for Exporters

- Jurisdiction of the Courts

- Personal Jurisdiction

- Minimum contacts: A company has "continuous and systematic contacts" with the forum state, or is "doing business" there. Factors suggesting minimum contacts include having the following in the state:
 - ✓ Business, employees or offices
 - ✓ Advertising
 - ✓ Property or bank accounts
 - ✓ Allowed its products to be sold and/or distributed
- Reasonableness: The court considers the following as elements of reasonableness:
 - ✓ The burden on the defendant
 - ✓ The forum state's interest in adjudicating the dispute
 - ✓ The plaintiff's interest in obtaining convenient and effective relief
 - ✓ The interstate judicial systems' interest in obtaining the an efficient resolution
 - ✓ The shared interest of the states in furthering fundamental substantive social policies

Key Risks for Exporters

- Theories of Liability

- Generally, there are four (4) theories (i.e., types of claims) upon which recovery can be sought in the United States:
 1. Negligence
 2. Strict Liability
 3. Breach of Warranty
 4. Misrepresentation

Key Risks for Exporters

- Theories of Liability

- **Negligence**

- Negligence is the oldest theory of product liability and the most common action.
 - In order to recover under a negligence theory, a plaintiff must prove (4) elements:
 - (i) duty;
 - (ii) breach of duty;
 - (iii) proximate cause; and
 - (iv) injury.
 - The plaintiff will have to prove that the exporter failed to take proper care in relation to its products, by not marketing a safer product and/or by failing to issue adequate warning for use.

Key Risks for Exporters

- Theories of Liability

- **Strict Liability**

- Strict liability in tort involves the imposition of liability without fault upon manufacturers or sellers of defective products.
 - If a "*defective*" product causes foreseeable injury or damage, a manufacturer (and any in "chain of distribution") will be liable without proof of fault.
 - Strict liability focuses on product defect rather than a manufacture's conduct.

Key Risks for Exporters

- Theories of Liability

- **Strict Liability (continued)**

- In every claim based on strict liability, the claimant must establish that the product was defective.
 - There are three (3) types of product defects:
 1. Manufacturing Defect;
 2. Design Defect; or
 3. Warning Defect.

Key Risks for Exporters

- Theories of Liability

- **Strict Liability: Types of Product Defects (continued)**

- Manufacturing Defect: Product is not manufactured or assembled per its design specifications.
 - Design Defect: The intrinsic design of the product is unsafe, making the entire product line unreasonably dangerous.
 - Warning Defect: A warning defect exists when the product's manual, instruction booklet, packaging or labels fail to provide adequate warnings of possible dangers associated with the product or instructions regarding its safe use.

Key Risks for Exporters

- Theories of Liability

- Breach of Warranty

- Companies can be sued for breaches of express and implied warranties.
 - An express warranty is breached when a consumer relies on an incorrect promise or affirmative statement made in promotional materials.
 - There are two (2) types of implied warranties: (i) merchantability; and (ii) fitness for a particular purpose. Under a breach of implied warranty, the plaintiff must prove that the merchant sold the goods while they were not merchantable or fit for their purpose and the plaintiff's injury was caused by the defect.

Key Risks for Exporters

- Theories of Liability

- **Misrepresentation**

- Relatively rare ground for recovery.
 - When public advertising or labeling misrepresents a material fact about the product's quality or character.
 - An action lies in intentional concealment of potential hazards or in negligent misrepresentation.

Key Risks for Exporters

- Product Liability Risk Multipliers
- Risks specific to foreign manufacturers:
 - Damages
 - Class action
 - Attorneys' Fees and Costs

Key Risks for Exporters

- Product Liability Risk Multipliers

- Damages:

- Companies that violate U.S. product liability laws may be subject to compensatory damages as well as punitive damages (exposure greatest where company knew or suspected defect but: (i) failed to timely investigate or (ii) failed to correct the defect or recall the product).

- ✓ Compensatory Damages: Aimed at compensating the plaintiff for the injuries or damages suffered (e.g., economic damages such as medical costs, lost wages, and property damages, as well as for non-economic damages such as pain and suffering and emotional distress)

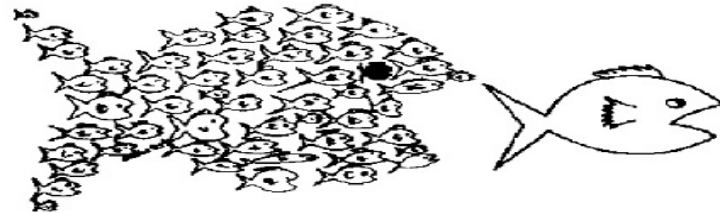
- ✓ Punitive Damages: Aimed at punishing a defendant for misconduct and deterring future repetition of the conduct

Key Risks for Exporters

- Product Liability Risk Multipliers

CLASS ACTION

- Class Action:



- Brought by one or more representative plaintiffs on behalf of a larger group of similarly situated plaintiffs.
- It is very common for product liability cases to be brought by way of a class action.
- The threat: Aggregation of huge number of claims in single action can put enormous financial pressure on the defendant to settle, even where claims are meritless, or individual claims are small.

Key Risks for Exporters

- **Product Liability Risk Multipliers**
 - **Attorneys' Fees and Costs:**
 - Contingency fee arrangement, where an attorney acts on a "*no win, no fee*" basis, recovering a percentage of the damages won (contrast to the usual situation in Vietnam, whereby the plaintiff will reimburse their attorneys for legal costs on an ongoing basis).
 - There is no costs penalty awarded, so the losing party does not have to pay the winner's costs.
 - ✓ These factors make it easier and more attractive for the plaintiff's of moderate means to bring actions, even where their claims are not well-founded.

Key Risks for Exporters

- What precautionary measures can be implemented to minimize product liability exposure?
 - Strictly comply with all applicable laws, regulations, and industry standards.
 - Provide clear, concise warnings and labels (after having it reviewed from both a legal and technical perspective).
 - Implement meaningful, rigorous quality assurance programs to ensure product safety and document them well (a good quality control system coupled with adequate record keeping is essential in the defense of any product liability lawsuit).
 - Appoint a risk manager and/or safety committee to review internal safety compliance issues.
 - Develop recall and crisis-management plan (e.g., a detailed recall action plan, a step-by-step checklist of actions to take).
 - Consider risk of exposure to product liability claims and ensure that comprehensive insurance cover has been obtained.

The Digital Economy in Vietnam

- E-commerce
- Digital marketing
- Payment solutions
- Ride sharing
- E-health
- Data management
- Social media
- Content
- Online games
- OTT services
- Online booking

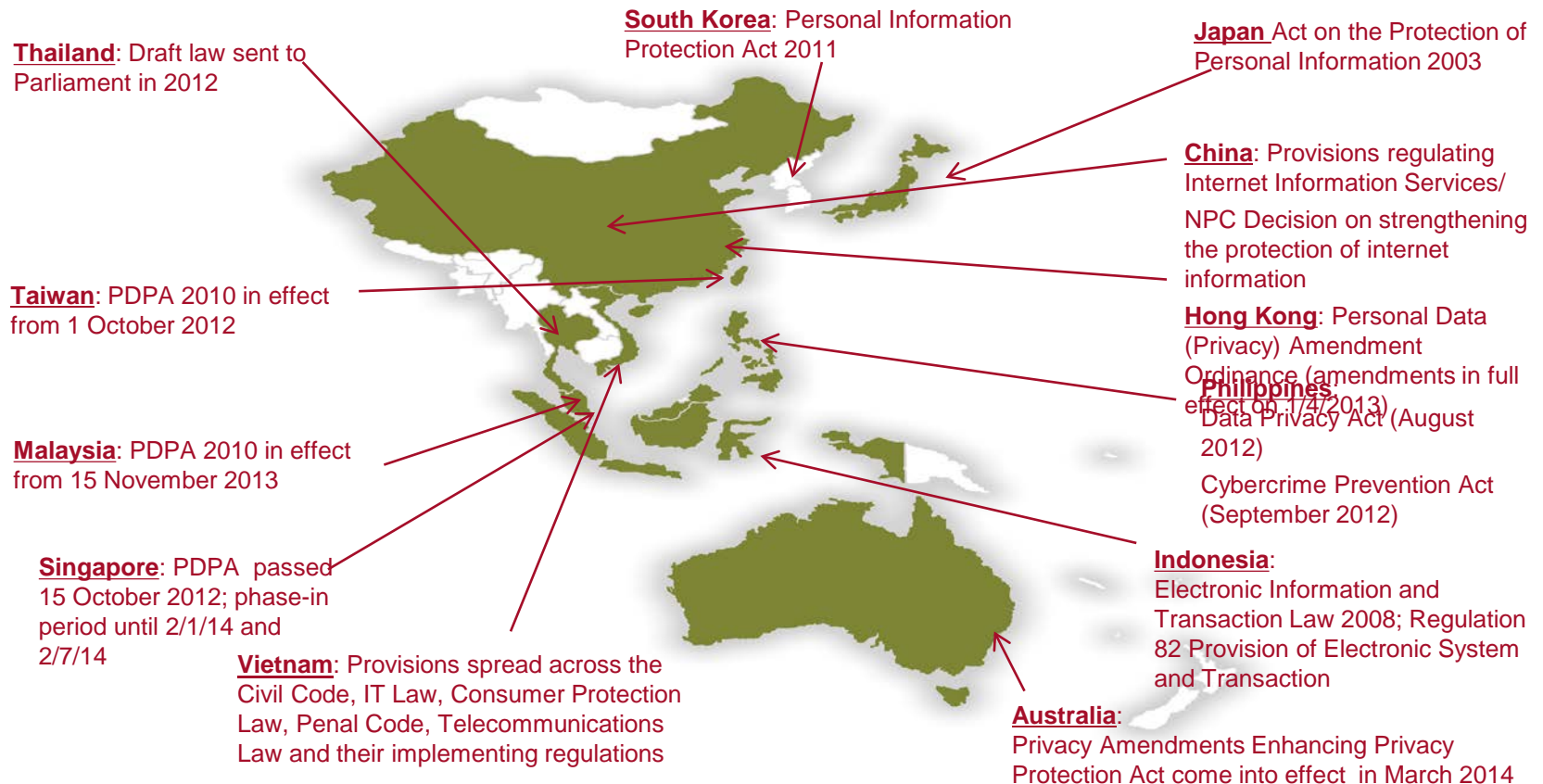


Key Risks in the Digital Economy

- Data Management: Crossing Borders – Differing Regulations
 - Diverse policy and regulatory landscape – open vs restrictive
 - Content – politics / religion / abortion clinics / sex toys
 - Licensing and approvals – is HQ- managed website sensitive to local formalities?
 - Competition laws – unfair competition – bad reviews
 - Online provision of services – Vietnam’s Decree 181 re online advertising (need to use local agent)
 - Industry specific rules – pharma – off-label use, restrictions on advertising, adverse effect reporting

Key Risks in the Digital Economy

- Data Management: Emerging Regulations



Key Risks in the Digital Economy

- Data Management: Emerging Regulations Continued

| | Australia | China | Hong Kong | India | Indonesia | Japan | Malaysia | Philippines | Singapore | South Korea | Taiwan | Thailand | Vietnam |
|---|-----------|-------|----------------|-----------------------|-----------|-----------------------|--|-------------|----------------|-------------|----------------------------|---------------------------|-----------------------|
| Mandatory breach notification | | | | ✓ (if so required) | ✓ | ✓ | | ✓ | | ✓ | ✓ | ✓ (certain industries) | ✓ |
| Cross-border data transfer specifically regulated | ✓ | ✓ | ✓ [^] | ✓ | ✓ | ✓ | ✓ (to jurisdictions specified by the Minister only) | ✓ | ✓ [^] | ✓ | ✓ | ✓ (certain industries) | ✓ (banking sector) |
| Data Protection Officer required | | | | ✓ | | ✓ (if so required) | | ✓ | ✓ [^] | ✓ | ✓ (public institutions) | | |

[^] Provision has been enacted but is not yet in force

Key Risks in the Digital Economy

- Data Management: Data Breach Notification Obligations

| | Australia | China | Hong Kong | India | Indonesia | Japan | Malaysia | Philippines | Singapore | South Korea | Taiwan | Thailand | Vietnam |
|---|-----------|-------|-----------|-------|-----------|----------------|----------|-------------|----------------|-------------|--------|----------------|----------------|
| Statutory obligation to notify data subject | | 5 | | | | | | ✓ | | ✓ | ✓ | ✓ ₃ | |
| Statutory obligation to notify regulator | | | | | | | | | | | | | ✓ |
| Sector specific obligation to notify | | | | | | | | | ✓ ₂ | | | | ✓ |
| Non-binding Guidelines | ✓ | | ✓ | | | ✓ ₁ | ✓ | | | | | | ✓ ₄ |

- Sector specific guidelines for financial services and banking industries create strong incentive to notify government authorities
- Monetary Authority of Singapore regulations require notification
- Telecommunications Business Act relating to subscriber's right
- Credit Information Protection Committee
- No. However in context of consumer transaction consumers and authorities must be informed

Key Risks in the Digital Economy

- Cyber Risks – Fraud Overview
 - What is Phishing
 - Malware and Ransomware
 - Common Email Scam
 - Criminal Organisations
 - Civil and Criminal Recourse (Response)
 - Preventing Fraud

Key Risks in the Digital Economy

- **Cyber Risks - Phishing**

- One of the common scams: “fishing” for personal information
- Example 1: a personalized “spoofed” e-mail leading to a fraudulent website where the recipient will be asked to:
 - provide personal / account information, or
 - download malicious software
- Example 2: e-mail designed to trick the recipient into opening a link or attachment:
 - Often require “urgent” action
 - Often illicit strong emotional responses (e.g. fear, greed, curiosity)

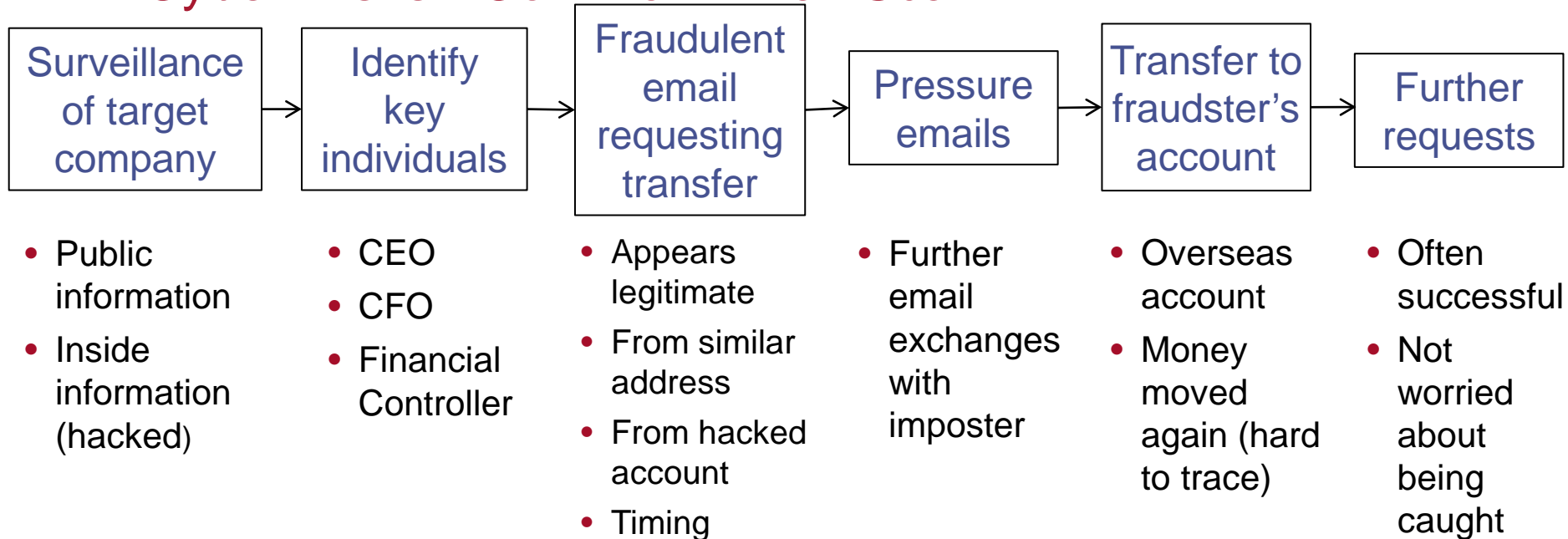


Key Risks in the Digital Economy

- **Cyber Risks - Malware/Ransomware**
 - Malicious links and attachments can install Malware
 - Malware can spy on computer users
 - Theft of personal data
 - Can facilitate deeper penetration of organisation's IT infrastructure
 - Theft of sensitive organisational data
 - Installation of “Ransomware”

Key Risks in the Digital Economy

• Cyber Risks - Common Email Scam



“John, our long-time supplier BestCo is having tax restructuring issues and wants us make this month’s payment to a different account. Can you please arrange urgently. I’m attaching the remittance instructions.”

Key Risks in the Digital Economy

- Cyber Risks - Criminal Organisations
 - Sophisticated organisations
 - Organised crime – can also link to money laundering
 - Recruiting and training hackers
 - Tracking progress and return on investment
 - Developed hacker infrastructure and economy
 - Hacking tools are easily purchased
 - Necessary training readily available
 - Hackers for hire
 - There is a market for the information they steal

Key Risks in the Digital Economy

- Civil and Criminal Recourse (Response)
 - Reporting to Police/Law enforcement agencies
 - Notifying sender and recipient banks as soon as possible
 - Injunctive relief (asset freezing and disclosure orders)
 - Difficult to pursue fraudster
 - The Attribution Problem
 - Jurisdictional issues (service, forum, enforcement)
 - Consult insurers
 - Retain lawyers

Key Risks in the Digital Economy

- Cyber Risks - Preventing Fraud
 - Be suspicious of unusual transfer requests
 - Be suspicious of emails requiring urgent action
 - Check sender's email address
 - Beware emails from personal webmail accounts
 - Protect identities of staff with funds transfer authority
 - Waiting periods for transfers to new accounts

Key Risks in the Digital Economy

- Cyber Risks - Preventing Fraud
 - Alerts for emails sent to external parties
 - Verify requests with phone calls
 - Basic cyber security
 - Regularly updated security software
 - Don't open suspicious attachments
 - Don't visit potentially malicious websites
 - Employee training (!)

Thank you!

Questions?



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