

CHAPTER IV

DEVELOPMENT OF INVESTMENT RELATIONS

Article 1 Definitions

For the purpose of this Chapter, Annex H, the exchanged letters on Investment Licensing Regime, and, with respect to a covered investment, Articles 1 and 4 of Chapter VII:

1. "investment" means every kind of investment in the territory of a Party owned or controlled directly or indirectly by nationals or companies of the other Party, and includes investment consisting or taking the form of:
 - A. a company or enterprise;
 - B. shares, stock, and other forms of equity participation, and bonds, debentures, and other forms of debt interests, in a company;
 - C. contractual rights, such as under turnkey, construction or management contracts, production or revenue sharing contracts, concessions, or other similar contracts;
 - D. tangible property, including real property, and intangible property, including rights, such as leases, mortgages, liens and pledges;
 - E. intellectual property, including copyrights and related rights, trademarks, patents, layout designs (topographies) of integrated circuits, encrypted program-carrying satellite signals, confidential information (trade secrets), industrial designs and rights in plant varieties; and
 - F. rights conferred pursuant to law, such as licenses and permits;
2. "company" means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association, or other organization;
3. "company of a Party" means a company constituted or organized under the laws of that Party;
4. "covered investment" means an investment of a national or company of a Party in the territory of the other Party;

5. "state enterprise" means a company owned, or controlled through ownership interests, by a Party;
6. "investment authorization" means an authorization granted by the foreign investment authority of a Party to a covered investment or a national or company of the other Party;
7. "investment agreement" means a written agreement between the national authorities of a Party and a covered investment or a national or company of the other Party that (i) grants rights with respect to natural resources or other assets controlled by the national authorities and (ii) the investment, national or company relies upon in establishing or acquiring a covered investment;
8. "UNCITRAL Arbitration Rules" means the arbitration rules of the United Nations Commission on International Trade Law;
9. "national" of a Party means a natural person who is a national of a Party under its applicable law;
10. an "investment dispute" is a dispute between a Party and a national or company of the other Party arising out of or relating to an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognized by this Chapter, Annex H, the exchanged letters on Investment Licensing Regime, and Articles 1 and 4 of Chapter VII with respect to a covered investment;
11. "non-discriminatory" treatment means treatment that is at least as favorable as the better of national treatment or most favored nation treatment;
12. "ICSID Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, March 18, 1965; and
13. "Centre" means the International Centre for Settlement of Investment Disputes Established by the ICSID Convention.

Article 2

National Treatment and Most-Favored Nation Treatment

1. With respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each Party shall accord treatment no less favorable than that it accords, in like situations, to investments in its territory of its own nationals or companies (hereinafter "national treatment") or to investments in its territory of nationals or companies of a third country (hereinafter "most favored nation treatment"), whichever is most favorable (hereinafter "national and most favored nation treatment").

Each Party shall ensure that its state enterprises, in the provision of their goods or services, accord national and most favored nation treatment to covered investments, subject to the provisions of paragraph 4.3 of Annex H.

2. A. A Party may adopt or maintain exceptions to the obligations of paragraph 1 in the sectors or with respect to the matters specified in Annex H to this Agreement. In adopting such an exception, a Party may not require the divestment, in whole or in part, of covered investments existing at the time the exception becomes effective.
- B. The obligations of paragraph 1 do not apply to procedures provided in multilateral agreements concluded under the auspices of the World Intellectual Property Organization relating to the acquisition or maintenance of intellectual property rights.

Article 3 General Standard of Treatment

1. Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by applicable rules of customary international law.
2. Each Party shall in no way impair by unreasonable and discriminatory measures the management, conduct, operation and sale or other disposition of covered investments.

Article 4 Dispute Settlement

1. Each Party shall provide companies and nationals of the other Party with an effective means of asserting claims and enforcing rights with respect to covered investments.
2. In the event of an investment dispute, the parties to the dispute should attempt to resolve the dispute through consultation and negotiation, which may include the use of non-binding third-party procedures. Subject to paragraph 3 of this Article, if the dispute has not been resolved through consultation and negotiations, a national or company of one Party that is a party to an investment dispute may submit the dispute for resolution under one of the following alternatives:
 - A. to the competent courts or administrative tribunals of the Party in the territory of which the covered investment has been made; or

- B. in accordance with any applicable, previously agreed dispute-settlement procedures;
or
 - C. in accordance with the terms of paragraph 3.
3. A. Provided that the national or company concerned has not submitted the dispute for resolution under sub-paragraph 2.A or B, and that ninety days have elapsed from the date on which the dispute arose, the national or company concerned may submit the dispute for settlement by binding arbitration:
- (i) to the Centre, if both Parties are members of the ICSID Convention and the Centre is available; or
 - (ii) to the Additional Facility of the Centre, if the Additional Facility is available;
or
 - (iii) in accordance with the UNCITRAL Arbitration Rules; or
 - (iv) if agreed by both parties to the dispute, to any other arbitration institution or in accordance with any other arbitration rules.
- B. A national or company, notwithstanding that it may have submitted a dispute to binding arbitration under sub-paragraph 3.A, may seek interim injunctive relief, not involving the payment of damages, before the judicial or administrative tribunals of a Party, prior to the institution of the arbitral proceeding or during the proceeding, for the preservation of rights and interests.
4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice of the national or company under sub-paragraph 3.A(i), (ii), (iii) or the mutual agreement of both parties to the dispute under sub-paragraph 3.A(iv). This consent and the submission of the dispute by a national or company under sub-paragraph 3.A shall satisfy the requirement of:
- A. Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958, for an "agreement in writing;" and
 - B. Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties to the dispute.
5. Any arbitration under sub-paragraph 3.A(ii), (iii) and (iv) shall be held in a state that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958.
6. Any arbitral award rendered pursuant to this Chapter shall be final and binding on the parties to the dispute. Each Party shall carry out without delay the provisions of any such award and provide in its territory for the enforcement of such award. Each Party's

enforcement of an arbitral award issued in its territory shall be governed by its national law.

7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off, or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an insurance or guarantee contract.
8. For the purposes of this Article and of Article 25(2)(b) of the ICSID Convention with respect to a covered investment, a company of a Party that, immediately before the occurrence of the event or events giving rise to an investment dispute, was a covered investment, shall be treated as a company of the other Party.

Article 5 Transparency

Each Party shall ensure that its laws, regulations and administrative procedures of general application that pertain to or affect investments, investment agreements, and investment authorizations are promptly published or otherwise made publicly available.

Article 6 Special Formalities

This Chapter shall not preclude a Party from prescribing special formalities in connection with covered investments, such as a requirement that such investments be legally constituted under the laws and regulations of that Party, or a requirement that transfers of currency or other monetary instruments be reported, provided that such formalities shall not impair the substance of any of the rights set forth in this Chapter, Annex H, the exchanged letters on Investment Licensing Regime, and, with respect to a covered investment, Articles 1 and 4 of Chapter VII.

Article 7 Technology Transfer

Neither Party shall mandate or enforce, as a condition for the establishment, acquisition, expansion, management, conduct or operation of a covered investment, any requirement (including any commitment or undertaking in connection with the receipt of a government permission or authorization) to transfer technology, a production process or other proprietary knowledge except:

1. when applying generally applicable environmental laws that are consistent with the

provisions of this Agreement; or

2. pursuant to an order, commitment or undertaking that is enforced by a court, administrative tribunal or competition authority to remedy an alleged or adjudicated violation of competition laws.

Article 8 **Entry, Sojourn and Employment of Aliens**

1. Each Party shall permit nationals and companies of the other Party to transfer employees of any nationality, subject to the Party's laws relating to the entry and sojourn of aliens, to their operations in the territory of the Party in the event that those employees are executives or managers or possess specialized knowledge relating to those operations.
2. Each Party shall permit nationals and companies of the other Party to engage, within the territory of that Party, top managerial personnel of their choice, regardless of nationality, subject to the Party's laws relating to the entry and sojourn of aliens.
3. The foregoing paragraphs shall not preclude a Party from applying its labor laws, so long as they do not impair the substance of the rights granted under this Article.

Article 9 **Preservation of Rights**

This Chapter, Annex H, the exchanged letters on Investment Licensing Regime, and, with respect to a covered investment, Articles 1 and 4 of Chapter VII, shall not derogate from any of the following that entitle covered investments in like situations to treatment more favorable than that accorded herein:

1. laws, regulations and administrative procedures, or administrative or adjudicatory decisions of a Party;
2. international legal obligations; or,
3. obligations assumed by a Party, including those contained in an investment agreement or investment authorization.

Article 10

Expropriations and Compensation for War Damages

1. Neither Party shall expropriate or nationalize investments either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article 3. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation. The fair market value shall not reflect any change in value occurring because the expropriatory action had become known before the date of expropriation.
2. Each Party shall accord national and most favored nation treatment to covered investments as regards any measure relating to losses that investments suffer in its territory owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance, or similar events.
3. Each Party shall accord restitution, or pay compensation in accordance with paragraph 1, in the event that covered investments suffer from losses in its territory, owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance, or similar events, that result from:
 - A. requisitioning of all or part of such investments by the Party's forces or authorities, or
 - B. destruction of all or part of such investments by the Party's forces or authorities that was not required by the necessity of the situation.

Article 11 Trade -Related Investment Measures

1. Subject to the provisions of paragraph 2, neither Party shall apply any trade-related investment measures (TRIMs) which are inconsistent with the Agreement on Trade-Related Investment Measures of the WTO. The illustrative list of TRIMs set forth in the WTO Agreement on TRIMs ("the List") is contained in Annex I of this Agreement. TRIMs contained on the List will be considered inconsistent with this Article regardless of whether they are imposed in laws, regulations, or as conditions for individual investment contracts or licenses.

2. The Parties agree to eliminate all TRIMs (including those contained in laws, regulations, contracts or licenses) which fall under sub-paragraphs 2(A) (trade balancing requirements) and 2(B) (foreign exchange controls on imports) of the List by the time this Agreement enters into force. Vietnam shall eliminate all other TRIMs no later than five years after the date of entry into force of the Agreement, or the date required under the terms and conditions of Vietnam's accession to the WTO, whichever occurs first.

Article 12
Application to State Enterprises

A Party's obligations shall apply to a state enterprise in the exercise of any regulatory, administrative or other governmental authority delegated to it by that Party.

Article 13
Future Negotiation of Bilateral Investment Treaty

The Parties will endeavor to negotiate a bilateral investment treaty in good faith within a reasonable period of time.

Article 14
Application to Covered Investments

The provisions of this Chapter, Annex H, the exchanged letters on Investment Licensing Regime, and Articles 1 and 4 of Chapter VII shall apply to covered investments existing at the time of entry into force as well as to those established or acquired thereafter.

Article 15
Denial of Benefits

Each Party reserves the right to deny to a company of the other Party the benefits of this Chapter and Chapter V of this Agreement if nationals of a third country own or control the company and

1. the denying Party does not maintain normal economic relations with the third country; or
2. the company has no substantial business activities in the territory of the Party under whose laws it is constituted or organized.

ANNEX H

VIETNAM

In accordance with the provisions in Article 2 of Chapter IV, the Government of the Socialist Republic of Vietnam reserves the right to adopt or maintain exceptions to national treatment in the following sectors and matters:

1. Vietnam may adopt or maintain exceptions to the obligation to accord national treatment to covered investments in the sectors or with respect to the matters specified below:

Broadcasting, television; production, publication and distribution of cultural products; investment in insurance; banking; brokerage, dealership in securities and currency values, and other related services; mineral exploration and exploitation; construction, installation, operation and maintenance of telecommunication facility; construction and operation of inland water, sea and air ports; cargo and passenger transportation by railway, airway, road, sea and inland water-way transportation; fishing and fish catching; real estate business.

2. Sectors in which Vietnam may require that an investment project be in conjunction with the development of local raw material sources:

Processing of paper, vegetable oil, milk, cane sugar, wood processing (except for projects using imported wood).

Such requirements for the development of local raw material sources in the above sectors may be maintained for up to 5 years from the entry into force of this Agreement.

3. Sectors in which Vietnam may require that an investment project export at least 80% of products:

Cement production; paints and construction paints; toiletry tiles and ceramics; PVC and other plastics; footwear; clothing; construction steel; detergent powder; tires and inner tubes for automobile and motor bikes; NPK fertilizer; alcoholic products; tobacco; papers (including printing, and writing paper, photocopy).

Such requirements for exporting at least 80% of products in the above sectors may be maintained for up to 7 years from the entry into force of this Agreement.

4. Except as otherwise provided in this Paragraph (including sub-paragraphs 4.1-4.6), the following exceptions to national treatment shall be applied to a covered investment of a national or company of the United States in all sectors, including but not limited to those sectors listed in paragraphs 1, 2 and 3 of this Annex:

4.1 Requirements on investment capital:

- (a) After the entry into force of this Agreement, nationals or companies of the United States shall be allowed to contribute, increase and reinvest capital in any currency, including Vietnamese currency originating from any lawful activity in Vietnam.
- (b) The following requirements may be maintained for up to 3 years from the entry into force of this Agreement:
 - (i) Nationals or companies of the United States must contribute at least 30% of the legal capital of a joint venture unless a lower contribution is approved by the investment licensing agencies;
 - (ii) The legal capital of a U.S.-owned enterprise shall not be less than 30% of investment capital unless a lower proportion is approved by the investment licensing agencies;
 - (iii) A national or company of the United States that is a party to a joint venture with a Vietnamese national or company shall give a right of first refusal to the Vietnamese party with respect to the transfer of an interest in the joint venture. An enterprise in Vietnam that is 100% owned by U.S. nationals or companies shall give a right of first refusal to Vietnamese nationals or companies with respect to the transfer of any interest in the enterprise. In any such case, the right of first refusal may be exercised only if the offer of the Vietnamese national or company is the same in all material terms with an offer received from any third party, including with respect to purchase price, timing and method of payment. Any such transfer shall require the approval of the investment licensing agencies; and
 - (iv) Nationals or companies of the United States are not yet allowed to establish a joint stock company. An enterprise in Vietnam that is invested or owned by U.S. nationals or companies may not issue bonds or shares to the public in Vietnam.
- (c) Nationals and companies of the United States shall not be permitted to acquire more than 30% of the shares of an equitized State enterprise.

4.2 Organization and management of joint ventures:

Vietnam may maintain the following requirements for up to 3 years from the entry into force of this Agreement:

- (a) The General Director or First Deputy General Director must be Vietnamese citizens; and
- (b) A limited number of the most important matters which relate to the organization and operation of the enterprise, comprising the appointment or dismissal of General Director, First Deputy General Director, Chief Accountant; amendments of and additions to the charter of the enterprise; approval of final annual financial statements and financial statement of capital construction; and loan for investment shall be decided on the basis of consensus.

4.3 Prices and fees of some goods and services under the State's control:

Vietnam is in the process of reforming its pricing system in order to develop a uniform set of fees and prices. With a view to creating a more attractive, non-discriminatory business environment, Vietnam shall:

- (a) upon the entry into force of this Agreement, (i) refrain from imposing new or more onerous discriminatory prices and fees; and (ii) eliminate, discriminatory prices and fees for the installation of telephones, telecommunications services (other than the subscription charge for local telephone service), water, and tourist services;
- (b) within two (2) years of the entry into force of this Agreement, eliminate, progressively, discriminatory prices and fees for registration of motor vehicles, international port charges, and for the subscription charge for local telephone service; and
- (c) within four (4) years of the entry into force of this Agreement, eliminate, progressively, discriminatory prices and fees for all other goods and services including, without limitation, electricity and air transport.

4.4 Government subsidies and supports:

Government subsidies and supports granted to domestic enterprises, which include land allocation for investment projects, preferential credits, research and development and education assistance programs and other forms of Government supports, may not be made available to nationals or companies of the United States.

4.5 Ownership, use of land and residences:

- (a) Nationals and companies of the United States are not allowed to own land and residences. U.S. investors are allowed only to lease land for investment purposes.

(b) U.S. enterprises are not yet allowed either to mortgage land use rights at foreign credit institutions operating in Vietnam or to transfer land use rights except for the case of transfers of invested assets associated with the land within the land lease period.

4.6 Notwithstanding the above reservations to national treatment for the ownership and use of land and residences, Vietnam shall create favorable conditions in exercising the mortgage and transfer of land use rights relating to covered investments including the elimination, within 3 years from the entry into force of this Agreement, of the restrictions on mortgage and transfer of land use rights mentioned in sub-paragraph 4.5(b).

ANNEX H

UNITED STATES

1. The Government of the United States of America may adopt or maintain exceptions to the obligation to accord national treatment⁸ to covered investments in the sectors or with respect to the matters specified below:

atomic energy; customhouse brokers; licenses for broadcast, common carrier, or aeronautical radio stations; COMSAT; subsidies or grants, including government-supported loans, guarantees and insurance; landing of submarine cables; and state and local measures as to which the United States may adopt or maintain exceptions to national treatment under any of its bilateral investment treaties signed between 1 January 1995, and the date of entry into force of this Agreement.

Most favored nation treatment shall be accorded in the sectors and matters indicated above.

2. The Government of the United States of America may adopt or maintain exceptions to the obligation to accord national and most favored nation treatment to covered investments in the sectors or with respect to the matters specified below:

fisheries; air and maritime transport, and related activities; banking, insurance, securities, and other financial services; leasing of minerals and pipeline rights-of-way on government lands; and one-way satellite transmissions of direct-to-home (DTH) and direct broadcast satellite (DBS) television services and of digital audio services.

⁸With respect to the treatment accorded by a State, Territory or Possession of the United States, national treatment means treatment no less favorable than the treatment accorded thereby, in like situations, to investments of nationals of the United States resident in, and companies legally constituted under the laws and regulations of other States, Territories or Possessions of the United States.

ANNEX I

TRIMs -- Illustrative List

1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:
 - A. the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of local products, or in terms of a proportion of volume or value of its local production; or
 - B. that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.

2. TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:
 - A. the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;
 - B. the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or
 - C. the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.