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A Guidebook to the ASEAN Comprehensive Investment Agreement

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Acronyms

ACIA	ASEAN Comprehensive Investment Agreement
AEC	ASEAN Economic Community
AIA	Framework Agreement on the ASEAN Investment Area
ASEAN	Association of Southeast Asian Nations
ASEAN IGA	ASEAN Investment Guarantee Agreement
BIT	Bilateral Investment Treaty
BOT	Build-Operate-Transfer
FIA	
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
MFN	Most-Favoured-Nation Treatment
MPI	Ministry of Planning and Investment
NAFTA	North American Free Trade Agreement
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
TRIMS	Trade Related Investment Measures
TRIPs	Trade-Related Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

1. Foreword

The ASEAN Comprehensive Investment Agreement (ACIA) is a binding legal instrument to which Viet Nam is a party. It is a new agreement that was signed on 26 February 2009 and entered into force on 29 March 2012. ACIA, which replaced its precursor agreements, the ASEAN Investment Agreement (AIA) and the ASEAN Investment Guarantee Agreement (IGA), is among the very few plurilateral investment treaties of the world after NAFTA Chapter 11 and the Energy Charter Treaty. In the absence of own jurisprudence and a multilaterally agreed investment framework similar to what exists for international trade, the interpretation by Vietnamese authorities of the provisions of ACIA and their transposition into national law, are not straightforward exercises.

In view of these challenges, the Foreign Investment Agency of MPI requested MUTRAP's support for the precise interpretation of ACIA in the form of a Guidebook that will help MPI and other governmental bodies assess the impact of ACIA on the national legal framework and implement its provisions as appropriate.

The present Guidebook, which has been prepared as part of MUTRAP's support to Vietnam's participation in the ASEAN Economic Community, is intended to be used primarily by the Ministry of Planning and Investment, the provincial Departments of Planning and Investment as well as the investment licensing authorities, namely the provincial People's Committees and the Management Boards of industrial and export processing zones. Hopefully it will also contribute to a better understanding by a larger public – including businesses, the academia and other stakeholders – of the ACIA and the challenges of, and opportunities for, completing by Viet Nam the Final Phase of the progressive reduction/elimination of investment restrictions and impediments according to the Strategic Schedule of the ASEAN Economic Community Blueprint.

Chapter 1

2. Introduction

This Guidebook has been prepared at the request of the Foreign Investment Agency of the Ministry of Planning and Investment (MPI) of Viet Nam to help Vietnamese authorities implement the obligations under the ASEAN Comprehensive Investment Agreement. The purpose is to offer to Vietnamese authorities an analytical tool that would guide them in interpreting ACIA's provisions in order to translate such interpretations into implementing actions.

While ACIA has introduced some major changes in the ASEAN investment framework, many of its provisions are not new and therefore should not pose challenges of interpretation and domestic implementation.

This Guidebook aims to provide a tool to implement ACIA. However, ACIA is just one element in the already large network of IIAs that Vietnam is a party to. Vietnam had 60 BITs in force on 1 June 2013, and has treaty obligations on investment under the Vietnam-US BTA, the GATS, as well as with China, Korea and Australia-New Zealand under the ACFTA, AKFTA and AANZFTA. Some of these agreements have overlapping scopes with diverging or identical provisions and some of them call for the extension of other treaty benefits to third contracting parties by virtue of the Most-Favoured Treatment obligation. All this highlights the challenges of dealing with multiple investment-related treaties. The relationships between Vietnam's various IIAs need to be carefully analysed and assessed in order to implement ACIA in a coherent manner with other IIAs. This task remained outside the scope of the present Guidebook

3. Background to the ACIA

3.1.1 The Precursor Agreements: ASEAN IGA and AIA

One of the first aims of the Association of Southeast Asian Nations (ASEAN) was to expand trade between its Members, which has been progressively extended to encouraging and increasing investment within the ASEAN region, and between the ASEAN region and third countries.

Starting with the ASEAN Industrial Joint Venture (AIJV) in 1983, ASEAN's efforts to promote intra-region investments have been marked over the last two decades by a proliferation of initiatives, which have produced a host of investment agreements, but most of them have failed to fulfil their stated aims.[1] However, two of those initiatives merit particular attention, as they are the direct predecessors of ACIA: investment protection was accorded under the 1987 ASEAN Agreement for the Promotion and Protection of Investment also known as the

[1] Bhaskaran (2013)

ASEAN Investment Guarantee Agreement (AAPPI or IGA)[2], while ASEAN state-to state investment cooperation was implemented through a separate agreement, the 1998 Framework Agreement on the ASEAN Investment Area (AIA). Basically, the 1987 IGA focused on protecting established investments, while the 1998 AIA focused on eliminating barriers to new investments.

Adopted in 1987, the ASEAN IGA was ASEAN's first attempt to enhance investment cooperation, concluded with the aim to create favourable conditions for investments by natural and juridical persons of any ASEAN member state. Despite its foundational importance, AAPPI lacked the ambition of meaningful mutual opening of the investment markets of ASEAN Member States. The agreement did not grant investors a right of entry to member states, as it was to be applied only to "investments brought into, derived from or directly connected with investments brought into the territory of any Contracting Party by nationals or companies of any other Contracting Party, and which are specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of [the] Agreement"[3]. Thus host countries retained full discretionary power over allowing foreign investors and setting the conditions for their market entry, and ASEAN Members were not even bound by a non-discrimination obligation. ASEAN IGA addressed some post-entry standards of treatment, applicable once the host country has given approval for the investment. The set of minimum standards of treatment of ASEAN nationals applied to post-entry investment was actually limited to a "fair and equitable" treatment that could not be less than that granted to (foreign) investors enjoying most favoured nation (MFN) status.[4] This excluded any obligation to treat domestic and foreign (ASEAN) investors and investment on equal footing with domestic ones. Thus the agreement also preserved national discretionary autonomy in post-entry treatment of ASEAN investors and investments, allowing ASEAN States to withhold or confer national treatment on an ad hoc basis. The agreement thus essentially preserved national autonomy in respect of both pre- and post-entry investment policy and investor treatment, allowing autonomous national screening processes, leaving untouched discretionary requirements for investors to obtain written host-government approval or to impose registration and renewal requirements on foreign investment. In short, under the IGA ASEAN Members did not commit to meaningful obligations regarding market entry for ASEAN investors and investments, and even allowed them to impose (post-entry) operating conditions on investments or to discriminate between investments if it was deemed to be beneficial to the host country.[5] Most- favoured nation (MFN) treatment obligation of host countries was limited to matters of compensation and restitution for investors suffering damages resulting from outbreak of hostilities, or a state of national emergency.[6]

The subsequently concluded AIA has been the most comprehensive ASEAN agreement on investment liberalisation and regulation prior to ACIA. The objectives of the AIA Agreement were[7]:

[2] Full title: "Agreement among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments".
[3] Article II(1)
[4] Jarvis
[5] Jarvis
[6] IGA Article IV(3)
[7] AIA Article 3

(i) To establish a competitive ASEAN Investment Area with a more liberal and transparent investment environment among Member States to increase FDI inflows into ASEAN;
(ii) To jointly promote ASEAN as the most attractive investment area, strengthen and increase the competitiveness of ASEAN's economic sectors;
(iii) To reduce or eliminate regulations and conditions which impede investment flows and the operation of investment projects in ASEAN; and
(iv) To contribute towards free flow of investment by 2020.

The AIA agreement embodied a series of schemes, action plans, and specific programs that defined the contemporary contours of ASEAN's investment regime. It established the "ASEAN Investment Area" as a distinct market for capital inflows from ASEAN and non-ASEAN sources, intended to coordinate ASEAN's regional investment program, to open all industries for investment to ASEAN investors by 2010 and to all investors by 2020, subject to specified exceptions, and generally extending national treatment to all ASEAN investors by 2010 and to all other investors by 2020, unless otherwise specified in the AIA Agreement.[8]

Its coverage extended to various forms of FDI, excluding portfolio investment or investment pertaining to matters falling under the ASEAN Agreement on Services.[9] The scope of the AIA Agreement in terms of liberalisation commitments covered manufacturing, agriculture, fishery, forestry, mining and quarrying and services incidental to these five sectors. It adopted a two-track approach of the Temporary Exclusion List (TEL), which was to be phased out by 2010/2015, and the Sensitive List (SL) in which certain sectors remained closed to both ASEAN and non-ASEAN investment but was subject to a review with the possibility of elimination from the list or a transfer to the TEL.[10]

AIA's key instruments covered four main areas. The first aimed at an immediate liberalisation of all "industries for investments by ASEAN investors", except for sectors listed on the TEL or the SL, which specified the industries or sectors that would not be opened up to investment or for which the ASEAN Member State would not confer National Treatment. The AIA National Treatment obligation applied to "all industries and measures affecting investment … the admission, establishment, acquisition, expansion, management, operation and disposition of investments". The third pillar specified the procedural mechanisms in respect of sector/industry nomination for the inclusion of sectors on the TEL and SL. AIA also set in place a schedule for the phase-out of the TEL with the general deadline being 2010, except for Laos and Viet Nam (2013) and Myanmar (2015). The agreement also introduced procedures for the regular review of the TEL and SL at the ministerial-level AIA Council responsible for oversight, coordination and implementation of the AIA agreement among member states. The AIA agreement provided the first tangible set of provisions for improving investment transparency among member states, stipulating procedural mechanisms and reporting requirements for signatories concerning the rules, regulations and ordinances governing investment provisions and which impact AIA. These also extended to bilateral investment agreements entered into by member states with a requirement to disclose "promptly and at least annually" changes to the regulatory provisions governing investment. The amendment to AIA in 2001 accelerated the phase-out of the TEL for the manufacturing sector to 2003 (except for Cambodia, Lao PDR and Vietnam [2010]). On the other hand the amendment somewhat backtracked insofar as it reduced the agreement's coverage: whilst the original AIA applied to "all" industries, the amended protocol defined

[8] Desierto
[9] Jarvis
[10] AIA Article 7(2) - (4)

the sectoral coverage as limited to direct investments and services incidental to: (a) manufacturing, (b) agriculture, (c) fishery, (d) forestry, and (e) mining and quarrying.[11] Despite the liberalization commitments incorporated in the agreement, the AIA Agreement contained numerous limitations to its applicability, and also introduced escape clauses, largely mirroring the exception articles of the WTO. In comparison with ASEAN IGA, the scope of investments and investors qualifying for treaty protection was narrower: they had to meet the strict definition of an "ASEAN investor", i.e. be a national or juridical person of any ASEAN Member State, who makes "an investment in another Member State, the effective ASEAN equity of which taken cumulatively with all other ASEAN equities fulfils at least the minimum percentage required to meet equity requirements of domestic laws and published national policies, if any, of the host country in respect of that investment." The applicability of the protections provided by the AIA Agreement to qualified investors thus was *de facto* subject to national law instead of treaty provisions. The AIA Agreement has not taken on board the ASEAN IGA standards of "fair and equitable treatment," "full protection of investment," and the host State's duty to comply with elements of a lawful expropriation, such as public purpose and compensation.[12]

3.1.2 The ASEAN Economic Community and ACIA

With the signing at the 13th ASEAN Summit in Singapore in 2007 of the Charter of the Association of Southeast Asian Nations (ASEAN Charter) and the Declaration of the AEC Blueprint, the ASEAN Member States made a significant step toward achieving the goal of a single economic market. As reflected in the ASEAN Charter, ASEAN States decided to create, amongst others, the ASEAN Economic Community (AEC) being "… a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment". The five core elements of the AEC are: the free flow of goods, services, investment, and labour, and the freer flow of capital. The subsequently adopted Blueprint for the AEC set the year of 2015 by when it should be completed.

The same year, at the 39th ASEAN Economic Ministers Meeting it was decided to review ASEAN IGA and AIA and to draft an ASEAN Comprehensive Investment Agreement (ACIA) with the objectives to create a free, open, transparent and integrated investment regime for domestic and international investors throughout the ASEAN member states that supports the economic integration of the region before and after the AEC integration in 2015.

In accordance with the AEC Blueprint,[13] ACIA was designed so as to supersede both the ASEAN IGA and the AIA Agreement and not only to consolidate and replace the terms of the two then existing investment agreements, but also to be a thoroughly modern treaty, forward looking, establishing new principles of investment liberalisation and protection, thus facilitating the free flow of investment in (and into) the ASEAN region. In order to achieve this ambition, the drafters of ACIA drew on "international best practices" with comparable provisions on liberalization and investor protection[14] which included the 2004 US Model BIT, NAFTA Chapter 11, the OECD Guidelines for Multinational Enterprises and UNCTAD's assessment on international investment agreements, as well as investment provisions

[11] Jarvis
[12] Desierto
[13] Blueprint Section A3: "Free flow of investment"
[14] ACIA Fact Sheet, 30 April 2013

contained in the ASEAN FTAs negotiated with China, Korea and Australia-New Zealand, which were also being drafted at that time.[15]

The resulting ASEAN Comprehensive Investment Agreement was signed in 2009 and entered into force on 1 March 2012. Before the ACIA entered into force, its predecessor agreements - the ASEAN IGA and the AIA Agreement - had operative legal effect. Following the entry into force of the ACIA, investors may exercise the option, to choose to apply the provisions of the ASEAN IGA or the AIA Agreement in their entirety, within three years from the termination of the latter Agreements.

ACIA's definition of "investment" is much wider than previous IGA and AIA, and covers all possible forms of investment, including direct and portfolio investments.

ACIA has four pillars, bringing together Investment Protection, Facilitation and Cooperation, Promotion and Awareness, and Liberalisation measures under a single comprehensive agreement.

In terms of protection, many of the provisions of ACIA provide staple protections for investors in the Member States, as commonly encountered in bilateral and multilateral investment treaties, such as national treatment, most-favoured-nation treatment, fair and equitable treatment, full protection and security, and protection in case of expropriation and compensation. The Treaty provides that investor-state disputes are to be resolved by arbitration, either before the International Centre for Settlement of Investment Disputes ("ICSID") or by ad hoc arbitration.[16] Compared to the former AIA Agreement, ACIA's ISDS mechanism is a more comprehensive one, which includes conciliation, consultation, and negotiation mechanisms as a complement to the already existing dispute settlement mechanisms. The facilitation pillar aims to provide more user-friendly services to investors.

Under ACIA Member States undertakes progressive liberalisation of their investment regimes in five goods sectors, namely manufacturing; agriculture; fishery; forestry; and mining and quarrying, and the related "incidental to" services sectors. Investment liberalisation is to be achieved by 2015 subject to reservations made by ASEAN Members. The agreement gives flexibility to ASEAN Member States to modify their commitments, i.e. the entries in their reservation lists, with a compensatory negotiating mechanism to ensure the preservation of the balance of benefits.

While the liberalisation obligations are confined to the five goods sectors mentioned above, the protection provisions of ACIA apply to all sectors.

4. ACIA and International Investment Law

Although International Investment Law (IIL) has a long tradition, it is in many ways different from international trade law. The international legal framework governing foreign investment consists of a vast network of international investment agreements (IIAs) supplemented by the general rules of international law. For most part of the post-World War II period IIAs were mainly standalone Bilateral Investment Treaties (BITs) recently

[15] Bath and Nottage
[16] Baker and McKenzie

supplements by bilateral and regional free trade agreements that include foreign investment obligations, such as the North American Free Trade Agreement (NAFTA), and sectoral treaties, such as the Energy Charter Treaty (ECT). Unlike the multilateral trading system of the GATT and the WTO, which has developed clear and universally accepted standards and a strong and coherent jurisprudence over the last 60 years, IIL has never been codifies under a single global legal system.

Despite broad common understandings and converging jurisprudence of IIAs, most of the legal provisions contained in investment treaties are the result of ad hoc tribunals that have to rule on individual investor-State disputes, the details of some remain forever confidential. In many instances different *ad hoc* investment tribunals give different interpretations to similar legal provisions.

Against this background, and in the absence of an ASEAN case law on investment, the interpretations provided in this Guidebook should not be considered as authoritative and should not serve as legal advice. The Guidebook is simply the result of the best effort possible with available resources to shed light on the basic IIL concepts included in ACIA, highlighting how the main ACIA provisions have been interpreted in other treaty contexts.

Chapter 2

5. Overview of the Structure of ACIA

ACIA consists of 49 articles, 2 annexes and a single reservation list for each ASEAN Member State (the Schedule).

According to Article 1, the objective of ACIA is to create a free and open investment regime in ASEAN in order to achieve the end goal of economic integration under the AEC in accordance with the AEC Blueprint. To achieve this goal, through progressive liberalisation of the investment regimes of Member States; enhanced protection to investors of and their investments; improvement of transparency and predictability of national investment regimes; joint promotional measures; and cooperation of Member States to create favourable conditions for investment in each other's territories.

Article 2 (a) defines the four pillars of ACIA, namely protection of investors and investment, liberalisation of existing pre-entry and post-entry investment restricting measures, facilitation and promotion of investments within and into the ASEAN area.

According to Article 2, ACIA's aim to create "a liberal, facilitative, transparent and competitive investment environment in ASEAN" will be achieved by adhering to the following principles:

1. Provide for investment liberalisation, protection, promotion and facilitation (the fours Pillars of ACIA);
2. Promote the progressive liberalisation of investment with a view towards achieving a free and open investment environment in the region;
3. Benefit investors and their investments based in ASEAN (hereinafter referred to as "ASEAN Investors");
4. Maintain and accord preferential treatment among ASEAN Member States;

5. Preserve the commitments made under the Framework Agreement on the ASEAN Investment Area (AIA Agreement) and the ASEAN Investment Guarantee Agreement (ASEAN IGA);
6. Grant special and differential treatment and other flexibilities to ASEAN Member States depending on their level of development and sectoral sensitivities;
7. Afford reciprocal treatment in the enjoyment of concessions among ASEAN Member States, where appropriate; and
8. Accommodate the expansion of the scope of ACIA to cover other sectors in the future.

The Four Pillars of ACIA

Source: ASEAN Secretariat (2013)

ACIA defines the obligations of ASEAN Members with respect to the protection of ASEAN investors and their investments in relative and absolute terms. Governments' obligations determined in relative terms are found in Article 5 (National Treatment) and Article 6 (Most Favoured Nation Treatment). Obligations defined in absolute terms are Article 7 (Prohibition of Performance Requirements); Article 8 (Senior Management and Board of Directors); Articles 11 to 15 containing the minimum standards of treatment of ASEAN investors and their investments; and Article 22 (Entry, Temporary Stay and Work of Investors and Key Personnel).

Provisions relating to liberalisation are to be found in Article 3:3 (Scope of Application), Article 9 (Reservations), Article 10 (Modification of Commitments), and Schedule.

Articles 24 and 25 deal respectively with promotion and facilitation of investments.

The structure of ACIA with short description of its Articles is the following:

Article	Title	Content
SECTION A		
Article 1	Objectives	
Article 2	Guiding Principles	
Article 3	Scope of Application	Identifies the areas where ACIA applies and stipulates the measures to which ACIA does not apply
Article 4	Definitions	Describes the precise meaning of the terms used in ACIA
Article 5	National Treatment	Defines the scope of the obligation of non-discriminatory treatment of foreign investors and investments by governments in comparison with domestic ones
Article 6	Most Favoured Nation Treatment	Defines the scope of the obligation of non-discriminatory treatment of foreign investors and investments by governments in comparison with each other
Article 7	Prohibition of Performance Requirements	Incorporates the WTO TRIMS Agreement and provides for further obligations
Article 8	Senior Management and Board of Directors	Prohibits certain nationality and residency requirements imposed by governments
Article 9	Reservations	Exemptions for measures not conforming to Articles 5 (National Treatment) and 8 (Senior Management and Board of Directors) listed in the Member States' reservation lists (specified in the Schedule). Procedures for submission, amendment or modification, and reduction or elimination of reservations.
Article 10	Modification of Commitments	Conditions for modification of reservations and procedures of compensatory negotiations
Article 11	Treatment of investment	Content of Minimum Standards of Treatment of ASEAN investors and investments
Article 12	Compensation in Case of Strife	
Article 13	Transfers	Prohibition of restrictions on international transfers of funds
Article 14 and Annex 2	Expropriation and Compensation	Standard of treatment in case of expropriation and compensation payable upon expropriation
Article 15	Subrogation	Allows an insurer who has paid a claim under a foreign investment policy to take up an investor's treaty claim

Article	Title	Content
Article 16	Measures to Safeguard the Balance-of-Payments	Exceptions to the prohibition of restrictions on payments or transfers related to investments in case of serious balance-of-payments and external financial difficulties or threat thereof.
Article 17	General Exceptions	Allows to take measures that violate rules of ACIA if necessary to achieve non-economic objectives, subject to a necessity test
Article 18	Security Exceptions	Allows to take measures that violate a rule of ACIA if necessary to protect national security
Article 19	Denial of Benefits	Prevents treaty shopping by investors who merely create shell companies without substantive business operations in an ASEAN Member State
Article 20	Special Formalities and Disclosure of Information	Preserves the right of Member States to prescribe special formalities in connection with investments and collect information concerning investments solely for informational or statistical purposes
Article 21	Transparency	Member States' obligations to notify the AIA Council of IIAs, changes in laws, regulations, or administrative guidelines, publish laws, regulations, or administrative guidelines, and establish an enquiry point.
Article 22	Entry, Temporary Stay and Work of Investors and Key Personnel	Member States' obligations to grant entry, temporary stay and authorisation to work to investors, executives, managers and members of the board of directors.
Article 23	Special and Differential Treatment for the Newer ASEAN Member States	Provides for the possibility of better treatment of the three new MS, in terms of technical assistance and commitments.
Article 24	Promotion of Investment	Awareness raising cooperation of MS
Article 25	Facilitation of Investment	Soft law commitments to cooperate in the facilitation of investments
Article 26	Enhancing ASEAN Integration	Soft law commitments to fostering economic integration through various initiatives
Article 27	Disputes Between or Among Member States	
SECTION B Investment Dispute Between an Investor and a Member State		
Articles 28 to 41		Provide rules for the settlement of investor-State disputes.
SECTION C		
Article 42	Institutional Arrangements	Rules relating to the relevant overseeing and implementing ASEAN bodies
Article 43	Consultations by Member States	Obligation to consult upon request by another MS
Article 44	Relation to Other Agreements	Non-derogation to MS' existing other international treaty obligations

Article	Title	Content
Article 45	Annexes, Schedule and Future Instruments	Final and transitional clauses
Article 46	Amendments	
Article 47	Transitional Arrangements Relating to the ASEAN IGA and the AIA Agreement	
Article 48	Entry into Force	
Article 49	Depositary	

6. Scope of Application of ACIA

6.1 Articles 3 and 4: Scope of Application and Definitions

ACIA is an intergovernmental agreement, which imposes obligations on signatory ASEAN States with respect to their deeds affecting investors of other ASEAN States and their investments in the host country. Therefore the first important provisions are those, which delineate the limits of governmental deeds (or lack of) falling within the scope of ACIA, as well as the objects of such deeds (measures), i.e. the covered investments and investors.

These relevant provisions are contained in Article 3 (Scope) and Article 4 (Definitions).

6.1.1 Covered measures

Article 3, paragraph 1 states that ACIA applies to *measures* of a Member State *relating to:*

(a) investors of any other Member State; and

(b) investments, in its territory, of investors of any other Member State.

ACIA does not contain an exhaustive list of covered measures, but defines them very broadly. What might constitute "measures" is defined in Article 4, paragraph (f):

> "*measures" means any measure of a Member State, whether in the form of laws, regulations, rules, procedures, decisions, and administrative actions or practice, adopted or maintained by:*
>
> *(i) central, regional or local government or authorities; or*
>
> *(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.*"

According to this definition, ACIA covers virtually all levels of government activity be they central, regional or local as well as non-governmental bodies that have powers delegated to them by governments.

Furthermore, the definition of in Article 4 does not give a precise meaning to the phrase "*measure of a Member State"* relating to investors or investment. It only provides a non-exhaustive list of possible types of measures that will be considered as coming within the meaning of that phrase. The phrase "*or practice*" makes it clear that this definition gives

some examples of the types of measures that would come within the scope of ACIA, but it is not an exclusive list.

As a result, the obligations and disciplines of ACIA apply to all forms of intervention by central, regional and local governments or authorities as well as non-governmental bodies with delegated powers of such bodies or authorities. A "measure" thus would include laws, regulations, rules and decisions of courts and administrative authorities, but it also covers practices and actions of governments or non-governmental bodies with delegated governmental powers. The covered measures can be either of general application or individual measure applied to a particular investment or investor. Examples of measures would include legislation of a Member, by-laws of a municipal authority, and rules adopted by professional bodies in respect of professional qualifications and licensing, or a performance requirement included in an investor-host State agreement, would qualify as "measure".

Furthermore, the definition does not provide any indication of the possible content of the covered measures. This is not surprising given the almost unlimited spectrum of possible regulatory measures of host States imposed on investors and investments. The only certainty – in terms of the objects of measures – that ACIA does not apply to those measures, which are explicitly excluded from the scope of ACIA. These measures are listed in Article 3, paragraph 4:

> "*4. This Agreement shall not apply to:*
> *(a) any taxation measures, except for Articles 13 (Transfers) and 14 (Expropriation and Compensation);*
> *(b) subsidies or grants provided by a Member State;*
> *(c) government procurement;*
> *(d) services supplied in the exercise of governmental authority by the relevant body or authority of a Member State. For the purposes of this Agreement, a service supplied in the exercise of governmental authority means any service, which is supplied neither on a commercial basis nor in competition with one or more service suppliers; and*
> *(e) measures adopted or maintained by a Member State affecting trade in services under the ASEAN Framework Agreement on Services signed in Bangkok, Thailand on 15 December 1995 ("AFAS").*"

6.1.2 Definition of Investor and Investment in ACIA

The definition of investor and investment are among the key elements determining the scope of application of rights and obligations under an IIA. Only investors and investments made by those investors may benefit from the protection and be eligible to take a claim to dispute settlement under the agreement's provisions, which meet the criteria defined in the IIA. This definition may also be central to the jurisdiction of the arbitral tribunals established pursuant to investment agreements since the scope of application *rationae personae* [17] may

[17] *Ratione personae* is a latin term. It literally means by reason of his person or by reason of the person concerned. In some international cases, a court's jurisdiction depends upon whether a defendant is residing within the territory of the court or whether a defendant is a citizen of the state to which the court belongs. In such cases, jurisdiction of a court is decided by reason of the defendant or *ratione personae*. In international law, *ratione personae* expresses the rule of law that only a state

depend directly on what "investor" means, i.e. being an investor of a state party to the treaty is a necessary condition of eligibility to bring a claim. In addition, the scope of application *rationae materiae*[18] depends on the definition of investment and in particular with respect to the jurisdiction of the International Centre for the Settlement of Investment Disputes (ICSID), as it extends to "any dispute arising out of an investment".

Why is the definition of investor and investment important? From the perspective of a capital exporting country, the definition identifies the group of investors whose foreign investment the country is seeking to protect through the agreement, including, in particular, its system for neutral and depoliticised dispute settlement. From the capital importing country perspective, it identifies the investors and the investments the country wishes to attract; from the investor's perspective, it identifies the way in which the investment might be structured in order to benefit from the agreements' protection. Source: OECD (2008)

6.1.2.1 Covered investors

International investment agreements include a provision specifying the requirements of nationality, location, place of incorporation, etc., of a person or entity making an investment to be protected by, and thus to be able to rely on, the IIA. The purpose of such provisions is to limit the benefits of the agreements to the investors of the other party or parties to the agreement. In this sense, these provisions mirror in a way the preferential rules of origins of preferential trade agreements.

In ACIA, Article 4, paragraph (d) defines who are the "investors" benefiting from the types of protection elsewhere defined in the agreement. It reads as follows:

> "*(d) "investor" means a natural person of a Member State or a juridical person of a Member State that is making, or has made an investment in the territory of any other Member State;*"

The phrases "*that is making, or has made an investment*" means that investors are covered in both the pre-entry and pos-entry phases of their making an investment.

6.1.2.1.1 "a person of a Member State"

As seen above, ACIA defines "investor" broadly, as it can be either a natural person (i.e. a individual) or a juridical person "of a Member State" who makes an investment in the territory of any other Member State.

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that is a party to an international treaty can take part in international dispute resolution process. Source: http://definitions.uslegal.com/r/ratione-personae/

[18] Jurisdiction *ratione materiae*, otherwise known as subject-matter jurisdiction refers to the court's authority to decide a particular case. It is the jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things. Source: http://definitions.uslegal.com/j/jurisdiction-ratione-materiae/

It follows from the phrase "makes an investment in the territory of any other Member State" that an ASEAN investor may only benefit from ACIA when the ASEAN Investor invests in another ASEAN Member State. In other words a natural person or a juridical person cannot be treated as investor under ACIA in his/its own country which implies that such a person cannot claim the benefits of the agreement vis-à-vis home country's measures.[19]

6.1.2.1.2 "a natural person of a Member State"

In turn, Article 4, paragraph (g) defines who is "a natural person of a Member State":

> "*(g) "natural person" means any natural person possessing the nationality or citizenship of, or right of permanent residence in the Member State in accordance with its laws, regulations and national policies;*"

It follows that a host country government is obliged to confer the status of "investor" to anyone who can demonstrate that he/she has the nationality of, or have the right of permanent residence in the other ASEAN country. For example, the host country cannot require that a permanent resident of another ASEAN Member State demonstrate that he/she has actually been residing for a certain period in that Member State if he/she can prove that he/she "possesses the *right of permanent residence*".

Note that under both ASEAN IGA and AIA, only a national of a Contracting Party was considered "investor", which excluded permanent residents. Similarly, under the investment Chapter of the Vie Nam – United States BTA, investors can be only nationals of Vie Nam or the USA.

According to customary international law, the right to grant and withdraw nationality of natural persons remains part of the sovereign domain and this is confirmed by ACIA Article 4, paragraph (g).

International law practice on questions of nationality has developed primarily in the context of diplomatic protection. The question before tribunals has been whether and to what extent a state can refuse to recognise the nationality of a claimant. A much-referred case is the Nottebohm case (Liechtenstein v. Guatemala), Judgment of 6 April 1955. The case concerned a German national who resided in Guatemala since 1905, and who obtained in 1939 Liechtenstein nationality in order to gain the status of a neutral State instead of the one of a belligerent State. He returned to Guatemala in 1940 and remained there until his deportation to the US in 1943. He then tried to rely on his Liechtenstein nationality to seek diplomatic protection against Guatemala. The ICJ held that even though a state may decide on its own accord and in terms of its own legislation whether to grant nationality to a specific person, there must be a real connection between the state and the national. The Court stated: "Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national."

[19] Note that this is also confirmed – at least with respect to natural persons – by Article 29, paragraph 2, which excludes the possibility that a natural person possessing the nationality or citizenship of a Member State makes a claim against his/her country under ACIA ISDS mechanism.

However, in today's circumstances of the modern world it would be very difficult to demonstrate effective nationality following the Nottebohm considerations, i.e. the person's attachment to the state through tradition, interests, activities or family ties. The International Law Commission's (ILC) Report on Diplomatic Protection recognised the limitations presented by the Nottebohm ruling in the context of modern economic relations: "[…] it is necessary to be mindful of the fact that if the genuine link requirement proposed by Nottebohm was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalisation and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection."

6.1.2.1.3 "a juridical person of a Member State"

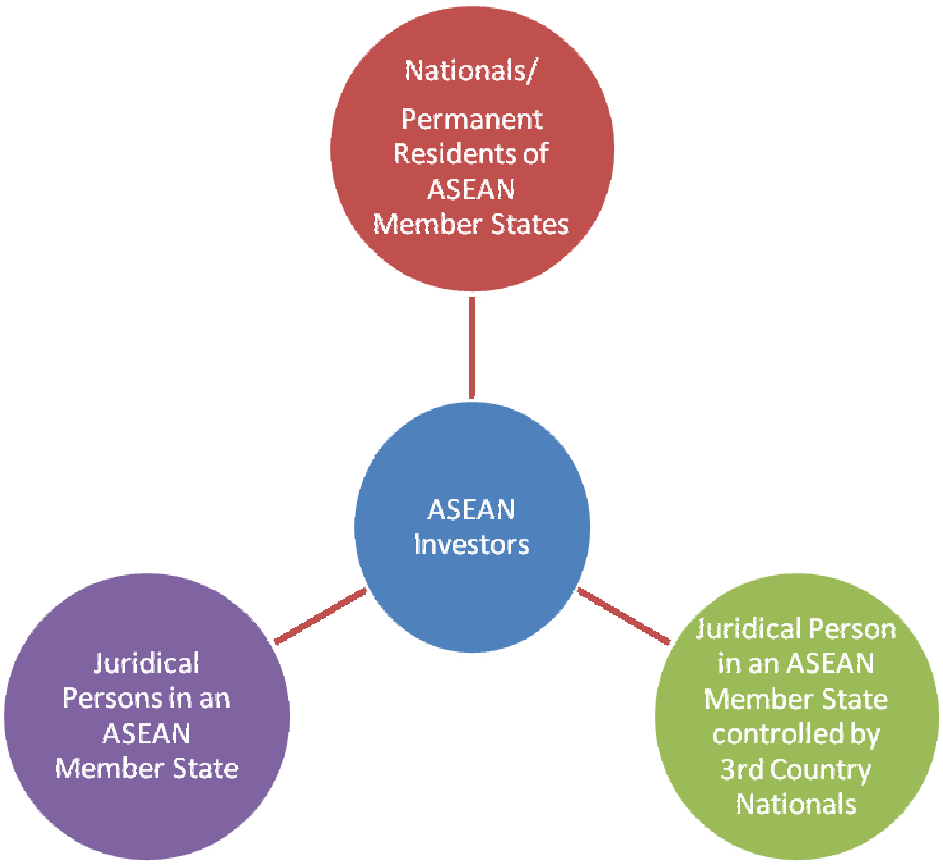
ACIA'S definition of "juridical person" encompasses any legal entity duly constituted under the applicable law of a Member State. According to Article 4, paragraph (e):

> « *"juridical person" means any legal entity duly constituted or otherwise organised under the applicable law of a Member State, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any enterprise, corporation, trust, partnership, joint venture, sole proprietorship, association, or organisation;* »

The phrase "juridical person" expressly includes government-owned entities. This raises the question whether, in the event of a dispute, such an entity would be able to invoke the jurisdiction of the ICSID Convention since claims before ICSID must be brought by "nationals" of contracting parties. In determining that question, an ICSID tribunal asked to address this question will no doubt be mindful of the award in *Ceskoslovenska Obchodni Banka, AS v Slovak Republic* (ICSID Case No. ARB/97/4, Decision on Jurisdiction) in which the tribunal found that *"for purposes of the Convention a ... government-owned corporation should not be disqualified as a "national of another Contracting State" unless it is acting as an agent for the government or is discharging an essentially governmental function"*
Source: Baker and McKenzie

A host country Member State cannot distinguish between the "juridical persons" of other Member States in terms of the nationality/residence or country of origin which own or control them, since the only requirement to become an ASEAN investor is that the "juridical person" be "duly constituted or otherwise organised under the applicable law of the other Member State". By this formulation, ACIA actually extends the benefits of the agreement to third country nationals and juridical persons, which may become ASEAN Investor by setting up a juridical person in an ASEAN Member State. In this case that investor can claim the "investor" status in any other ASEAN Member State. In order gain ASEAN Investor status, the third-country national or legal entity must own or control (i.e. have the power to name a majority of its directors or legally direct the actions of) the ASEAN Juridical Person. The latter must also carry out substantive business operations in the ASEAN Member State where it was first established, otherwise the benefits of ACIA can be denied by the host country by virtue of ACIA Article 19 (see Section 14.6).

ACIA's Definition of an Investor



Source: Source: ASEAN Secretariat (2013)

Note that Article 19 (Denial of Benefits) provides ASEAN Member States with the right to (but does not oblige them to) exclude certain investors and their investments from the benefits of ACIA to prevent so-called "treaty shopping", in other words deny the benefit of treaty protection to so-called "shell companies", which are purposefully structured (or even constituted) with the sole objective to benefit from the provisions of ACIA but without real economic connection with one or the other Member State. In particular, Article 19 provides that a Member State may deny the benefits of the Treaty afforded an otherwise qualifying juridical person under the Treaty where an investor of a non-Member State owns or controls the juridical person in question and that person has no substantive business operations in the territory where it is constituted. See more in detail the discussion of "Denial of Benefits" in Section 14.6.

6.1.2.2 Covered investments

ACIA Article 4(a) provides the definition of an investment "covered" by, i.e. to be protected under the agreement. This paragraph and its footnote read as follows:

> "*(a) "covered investment" means, with respect to a Member State, an investment in its territory of an investor of any other Member State in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and has been admitted according to its laws, regulations, and national policies, and where applicable, specifically approved in writing[1] by the competent authority of a Member State;*
>
> ---
> [1] *For the purpose of protection, the procedures relating to specific approval in writing shall be as specified in Annex 1 (Approval in Writing).*"

This provision contains several conditions that an investment must meet simultaneously in order to qualify for protection under the ACIA.

1. The investment should be that "of an investor" of other ASEAN country;
2. The investment should have been in existence when ACIA entered into force (i.e. on 29 March 2012), or "established, acquired or expanded" after that date; and
3. The investment should have been "admitted" according to the host ASEAN country's laws, regulations, and national policies, which may also include the requirement of written approval procedures.

The first condition that the investment should meet in order to qualify under ACIA is that a qualified investor should make it; the relationship between an investor and its ASEAN Investment is explained in sub-Section 6.1.2 above.

The second condition, i.e. that the investment be "established, acquired or expanded" implies that not only the first investment of an ASEAN investor is a "covered investment", but any kind of asset obtained e.g. by merger with, or acquisition of an existing investment of the host country, or through expansion of the first investment into a new line of business.

The third condition is that the investment should be "admitted" in conformity with the host country's prevailing laws, regulations, and national policies. This in practice implies that the host country can refuse the admission of an investment in its territory by an otherwise qualified ASEAN investor if its laws, regulations, and national policies so permit.

A fourth condition for an investment to be "covered" is that it should be "*where applicable, specifically approved in writing by the competent authority of a Member State*". (See in sub-section 6.1.2.2.2.)

ACIA has clarified two aspects relating to investments that potentially did not qualify for protection under its predecessor, the ASEAN IGA:

The first issue related to wording of the 1987 Treaty which provided that an investment had to be "approved" by the host state in order to qualify for protection. In *Yaung Chi Oo Trading Pte Ltd. v. Myanmar*, a Singapore investor brought ad hoc arbitration proceedings against Myanmar arising out of Myanmar's cancellation of the investor's licence to operate a brewery. Myanmar argued that the wording of the ASEAN IGA provided that only investments expressly approved by the host state would attract protections under that agreement. The tribunal in that case rejected the argument and found that lawful investments in a host state would be treated as "approved" unless a host state in question published specific prerequisites in order for investments to be protected by the treaty.

The drafting of the ACIA Article 4(a) arguably recognises the decision of the Tribunal in the *Yaung Chi Oo Trading* case. The phrase "covered investment" is defined as one that is "admitted according to [the host state's] laws, regulations and national policies, and where applicable, specifically approved in writing by the competent authority of a Member State". The footnote makes further express provision for a Member State to adopt proper approval procedures.

The second issue that had arisen in the context of ASEAN IGA was the question whether an investment was "brought into" a host state by the national of another Member state (Article II:1 of ASEAN IGA). An argument that had gained currency among some host states was that the phrase "brought into" required that an investment originate with a national of a Member State, thus excluding investments made by an investor outside the ASEAN Member States but then sold to a Member State national. ACIA has not adopted the "brought into" language from ASEAN IGA, now rendering such arguments groundless.

Source: Baker and McKenzie

6.1.2.2.1 "admitted according to its laws, regulations, and national policies"

As seen above, one of the conditions for an investment to qualify as "covered investment" pursuant to Article 4(a) is that it should be "admitted" according to the laws, regulations, and national policies of the host State. The effect of this is provision is to provide an additional screening mechanism for investments, thus allowing for the imposition of restrictions notwithstanding the grant of national treatment or MFN benefits for the admission and establishment of investments.[20] Making the admission subject to the laws, regulations, and national policies of the ASEAN host States actually preserves their regulatory sovereignty and limit their pre-establishment NT obligation (see NT in Section 8), and affect the extent to which rights of entry and establishment are accorded to ASEAN investors. Ultimately, this provision allows an ASEAN State to deny entry rights of otherwise qualified ASEAN investors and investments.

In sum, even though ACIA provides for pre-establishment rights, it fully preserves host countries' right to control entry and establishment of ASEAN investors.

[20] Bath and Nottage ()

Italy v Cuba, ad hoc tribunal: What is an investment?

In 2003 Italy initiated a State-to-State arbitration on the basis of the 1993 Italy-Cuba BIT. It espoused the claims of sixteen Italian investors operating in various sectors, from aluminium to pasta sauce production. Italy claimed that through the actions of different entities, such as the Cuban Central Bank and the Cuban Chamber of Commerce, Cuba discriminated against Italian investors, including by denying them fair and equitable treatment, national treatment and full protection and security. Italy also sought from Cuba a symbolic compensation of one Euro for the violation of the letter and spirit of the BIT. Cuba, in turn, requested a public apology for the moral damage caused by the initiation of the arbitral proceeding.

Cuba raised several preliminary objections, among which maintained that none of the claims espoused by Italy could be considered as relating to investments. It was Cuba's argument that, since the definition contained in the BIT referred to investments made in conformity with local laws, a unique concept of investment could not be said to exist. Rather, the definition of investment contained in the BIT had to be subordinated to the notion of investment contained in Cuban law.

The tribunal rejected Cuba's argument regarding the definition of investment. It stated that the object and purpose of the BIT would be frustrated if the notion of investment could vary together with the laws of each contracting State. The majority also considered that the requirement of conformity with local laws did not concern the notion, but rather the legality, of the making of the investment. The tribunal concluded that there are three elements that characterize an investment: contribution, duration and risk. The final decision on whether the dispute regarded protected investments was deferred to the merits stage.

At the merits stage, Italy withdrew ten claims and proceeded on behalf of six companies, one of which related to *Caribe and Figurella Project s.r.l*. The *Caribe and Figurella Project* concluded a contract with a Cuban hotel for the creation of a beauty center. Two years later, Cuban authorities revoked the center's operating licence after finding that it was providing unauthorized tattooing services. When the licence was re-established, the Cuban hotel failed to notify *Caribe and Figurella Project* and dismantled the area occupied by the Italian company. Italy claimed that Cuba violated its obligation to encourage Italian investments, discriminated against them and failed to grant fair and equitable treatment. The tribunal found that *Caribe and Figurella Project*'s contract did constitute an investment in accordance with the criteria of contribution, duration and risk established in the award on jurisdiction.

6.1.2.2.2 "specifically approved in writing"

As mentioned above, the fourth condition to be met in order for an investment to come within the scope of ACIA is that the investment should be "*where applicable, specifically approved in writing by the competent authority of a Member State*".

The phrase "*where applicable"* seems to indicate that not all admissions should necessarily be supplemented by specific written approval. It also tends to indicate, however that if the

host State's laws, regulations, or national policies so require, such a "specific" written approval must be obtained in addition to the admission.

The phrase "*where applicable"* constitutes a progress towards relaxed investment admission conditions in comparison with the 1987 ASEAN IGA, which provided that "[t]his Agreement shall apply only to investments brought into, derived from or directly connected with investments brought into the territory of any Contracting Party by nationals or companies of any other Contracting Party and which are specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement.". Therefore, in order for an investment to be protected by the 1987 Agreement, it had to be "approved in writing".

While ACIA retains the requisite "approval in writing", it also provides that

> "*[f]or the purpose of protection, the procedures relating to specific approval in writing shall be as specified in Annex 1 (Approval in Writing).*"

Annex 1 outlining the "approval in writing" prerequisite is a major advance relative to previous ASEAN IIAs as Annex 1 compels Member States to have more transparent procedures than under ASEAN IGA.

In particular, Annex 1 of the ACIA obliges each Member State

> "*[w]here specific approval in writing is required for covered investments by a Member State's domestic laws, regulations and national policies, that Member State shall:*
>
> > *(a) inform all the other Member States through the ASEAN Secretariat of the contact details of its competent authority responsible for granting such approval;*
> > *(b) in the case of an incomplete application, identify and notify the applicant in writing within 1 month from the date of receipt of such application of all the additional information that is required;*
> > *(c) inform the applicant in writing that the investment has been specifically approved or denied within 4 months from the date of receipt of complete application by the competent authority; and*
> > *(d) in the case an application is denied, inform the applicant in writing of the reasons for such denial. The applicant shall have the opportunity of submitting, at that applicant's discretion, a new application.*"

With respect to the approval process, the ASEAN host State must at the very least provide the investor with these procedural protections. The terms "inform", "identify and notify" and require "reasons for such denial" are clear actions that the host State must undertake; a State's failure to do so could result in judicial or administrative review or international arbitration. The host State will have to comply with the transparency obligation and justify any denial.[21]

[21] Ewing-Chow and Fischer (2011)

Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar

Annex 1 of ACIA elucidating the conditions of written approval is particularly important in light of the *Yaung Chi Oo Trading PTE v. Gov't of Union of Myanmar* (hereinafter "YCO") decision, the only investment arbitration that dealt with prior ASEAN investment agreements. With the inclusion of Annex 1, ACIA now provides a certain level of discipline and transparency, to the authorization process as negatively demonstrated by this pre-ACIA case.

The Claimant, Yaung Chi Oo Trading Pte. Ltd, a company incorporated in Singapore brought a case against the Union of Myanmar under the ASEAN IGA and the AIA Agreement. The dispute, which was conducted under the ICSID Additional Facility Arbitration Rules, concerned a dispute arising from an interim seizure and a judicial winding up order of a joint venture company in Myanmar. Young Chi Oo concluded a joint venture agreement on 45:55 basis with a Myanmar State-owned corporation, Myanmar Foodstuff Industries, to operate a brewery in Mandalay and to market the products. It was later alleged that armed agents of Myanmar occupied the brewery on two occasions and Myanmar unlawfully frozen the directors' accounts. Upon the expiry of the agreement, Myanmar undertook a winding up order despite the opposition by Yaung Chi Oo, and Yaung Chi Oo appealed to the Supreme Court, which was unsuccessful.

Among others, the YCO tribunal found that:

1. Although there was a substantial inward direct investment into Myanmar because Yaung Chi Oo made capital contributions and paid for the machinery, the YCO tribunal held that it did not have jurisdiction, because the investor could not provide evidence that an existing investment had been officially approved in writing even though Myanmar never specified a requirement of a specific process for approval.

2. Nevertheless, the Tribunal agreed with Myanmar that the investment had not been specifically approved and registered in writing after the ASEAN IGA came into force in Myanmar in 1997 and did not qualify as such under the Agreement. Even though the investment had been approved under domestic law before 1997 under Article II(3), an express subsequent act amounting to written approval and registration would be required to make the investment protected under the ASEAN IGA.

6.1.2.3 Forms of investment covered by ACIA

There is no single definition of what constitutes investment. The absence of a common legal definition is due to the fact that the meaning of the term investment varies according to the object and purpose of different investment instruments, which contain it. [22]

[22] OECD (2008)

Traditionally, investments have been categorised as either direct or portfolio investments. This reflected the historical forms of foreign properties. During the 19th and the early years of the 20th century, the predominant form of foreign investment was portfolio investment. The post-WWII period was characterised by the growing expansion of multinational corporations setting up wholly or majority owned subsidiaries with the consequent change in the form of foreign investments, which became predominantly direct in character. The increase of direct investment in several sectors led to the steady evolution of new forms of investment, when the investor enters a country and markets a product or service but does not own the asset. A great variety of assets are included today in the definition of investment and broad definitions appeared in national investment codes and international instruments.
Source: OECD (2008)

ACIA adopts an "asset-based", the most comprehensive possible definition of "investment". Article 4(c) defines "investment" as any kind of asset, owned or controlled, by an investor. A footnote to the definition provides *some* guidance as to the nature of an asset that constitutes investment: "Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk."

With small variations, definitions similar to ACIA Article 4(c), bringing into the scope of treaties almost all possible forms of investment are found in most IIAs. These definitions cover direct, as well as indirect, investments and modern contractual and other transactions having economic value. This is confirmed by decisions of tribunals in IIA arbitrations. In *Fedax N.V. v. Venezuela*, for example, the tribunal found that promissory notes issued by Venezuela, and acquired by the claimant from the original holder in the secondary market by way of endorsement, were an investment under Netherlands-Venezuela (1991). The tribunal engaged in an extensive analysis of the notion of investment under IIAs, which it refused to limit to the classic forms of direct investment, i.e., "the laying out of money or property in business ventures, so that it may produce a revenue or income," as argued by the respondent state. Further, another ICSID tribunal has found that transactions that, taken into isolation might not qualify as investments, may nevertheless be so considered if the overall operation of which they are part, or to which they are connected, constitutes an investment.
Source: Newcombe and Paradell (2009)

The ACIA definition of "investment" is followed by a <u>non-exhaustive</u> list of <u>examples</u>:

(i) Movable and immovable property and other property rights such as mortgages, liens or pledges;

Examples[23]: Machinery, factory building, leases, liens, mortgages, charges.

[23] These examples are from AEAN Secretariat: ACIA Guidebook for Businesses and Investors

(ii) Shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights or interest derived therefrom;

Examples: Shares, bonds held in a company or corporation.

(iii) Intellectual property rights which are conferred pursuant to the laws and regulations of each Member State;

Examples: Patents, registered trademarks, geographical indications, trade secrets, industrial designs, copyrights.

(iv) Claims to money or to any contractual performance related to a business and having financial value;

Examples: Profit sharing agreement, partnership agreement.

(v) Rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;

Examples: Turnkey construction agreement, project management, production sharing agreement

(vi) Business concessions required conducting economic activities and having financial value conferred by law or under a contract, including any concessions to search, cultivate, extract or exploit natural resources.

Examples: Build-Operate-Transfer contracts, including the right to collect tolls, mining contracts.

Most of the above forms of investment are self-explanatory. With respect to business concessions mentioned in point (vi), it is worth to note that the term "concession" denotes a wide variety of situations. One common feature is that generally a "concession" entails the granting of a privilege or a right to someone by a public authority, usually to provide some kind of infrastructural facility and/or service. A somewhat narrower usage of the term "concession" focuses on arrangements for the supply of infrastructural facilities and/or services by commercial undertakings that would otherwise be supplied by the government and where the bulk of the revenue earned by the concessionaire comes from charging users for use of the infrastructural facility and/or other services rendered.

Discussions in the WTO[24] on the notion of concessions and Build-Operate-Transfer contracts have shown a variety of cases where the term "concessions" are used. The following is a non-exhaustive list of cases:

1. A natural resource concession, involving a contract between a government entity and a commercial enterprise for the purpose of exploring for and developing natural resources.
2. A contract between a government entity and a commercial enterprise for the purpose of constructing and/or developing, and managing infrastructure, such as

[24] This part is quoted from WTO Secretariat Note n° JOB(00)/5657 dated 20 September 2000

public highways, railways, public water systems, etc. In such cases, the concessionaire is generally expected to obtain the totality or the bulk of its revenue from charging users for the service or goods being supplied.

3. A contract between a public undertaking and a commercial enterprise for the supply of a good or service to the former which is resold to the public or used in the production of goods or services for resale to the public. An example would be a "concession" to build and operate a power station, the electricity generated by which is bought by a publicly owned power distribution authority.
4. A contract between a government entity and a commercial enterprise for the supply of a service that is consumed by the public but is paid for by the government entity. Garbage collection would be an example.
5. A contract between a government entity and a commercial enterprise to provide goods or services which are to be consumed by that or another government entity, for example training or educational programmes or office cleaning.

There is a range of legal forms that concessions can take, particularly of the sort referred to in case 2 above, of which BOT contracts are one kind:

1. Leases: Under a lease concession, the lessee may be granted custody, control and management of State property in exchange for the payment of a lease fee. The lessee would be entitled to use the property, provided that such use is in accordance with the terms and conditions imposed by the government lessor and is in the public interest.
2. Management contracts with incentive payments: Under a management contract, the government may hire a private organization to manage one or more government tasks or services for a specified period. The private sector entity may be required to meet performance standards in providing the designated service(s) and could be paid according to the level of its performance.
3. BOT contracts: Under a BOT arrangement, private investors may be required to build an infrastructure facility, operate it on a commercial basis for a certain period and then turn the facility over to the government according to pre-agreed terms. During the term of the BOT contract, the builder-operator may be responsible for maintenance of the facility (although the government may perform an oversight function) and would be entitled to a financial return such as user fees, in addition to the fee paid by the government for the works and services provided by the builder-operator.
4. Divestitures with revocable licences to operate: A divestiture involves the transfer of ownership of a public asset to the private sector. The private entity to which ownership is transferred may have responsibility for future expansion and upkeep of the asset and may be bound to meet obligations specified in its licence, which may be revoked in the event of default.

ACIA's all-inclusive definition of investment reflects ASEAN's policy to provide full protection of investors with respect to all possible forms of their investments. This broad definition is a major advancement relative AIA, which had expressly excluded portfolio investments (AIA Article 2).

An additional advantage of this comprehensive, broad definition vs. exhaustive listing of covered forms of investment is that emerging, new forms of investment are automatically covered by the term "investment".

Chapter 3

7. Admission and Establishment and Post-establishment treatment

The issue of admission and establishment of foreign investors and investment into host countries is a corner stone of international investment agreements.

In international investment law, the term admission refers to the right of foreign investors and investments to enter into a host state. Admission or entry rights without corresponding rights of establishment may be sufficient for economic activities that simply require a short-term presence, such as negotiating a contract or transferring investment funds into a host state bank account. However, if the economic activity in question requires regular interaction between the foreign investor and the host state economy, then the foreign investor may need to establish a more permanent economic presence in the host state. In such a case, the foreign investor may also require a right of establishment. This entails not only a right to carry out business transactions in the host country, but also the right to set up a permanent business presence.[25]

Under customary international law, international investment is a matter of State sovereignty. States have sovereign right to control the admission of foreign investors and investments into their respective territories, in other words, nothing obliges them to allow foreign investors and investments to enter their countries or if they allow, they can set the conditions of commercial activities as they deem appropriate. International investment agreements like BITs, the GATS, new generation FTAs, and regional investment treaties such as ACIA aim precisely to create international frameworks that commit States to allow foreigners to make investments and engage in commercial activities in their territories and to treat foreign investors and investments in accordance with local laws and the customary international law minimum standard of treatment.

In terms of scope and depth of obligations undertaken by States, there exist two main categories of IIAs: post-entry and pre-entry. Those IIAs, which contain no obligations to admit foreign investors or their establishment (investment) are called post-entry IIA, because they provide protection only in the “post-entry” phase of the investment (i.e. once the investment was “admitted” or “established”), while those IIAs, which provide Most-favoured Nation treatment (MFN) and National Treatment (NT) with respect to admission and establishment in both “pre-entry” and “post-entry” phases. Most IIAs fall under the first category: they provide protections only after foreign investors or investments have been admitted into the host state in accordance with local law (post-entry obligations). Pre-entry IIAs provide admission and establishment rights that allow market access for foreign investors and investment. Pre-entry IIAs, therefore, move beyond investment promotion and protection, and contain obligations with respect to the liberalization of host state regulatory controls over foreign investment.

ACIA falls in the latter category, as it provides National Treatment (see in Section 8) and MFN treatment (see in Section 9) for both pre-entry and post-entry phases of ASEAN investments. However, the extent to which rights of entry and establishment are accorded to ASEAN

[25] Newcombe and Paradell (2009)

investors is affected by the definition of "admission" of investment in Article 4(a). (See above in subsection 6.1.2.2.)

Whilst pre-entry IIAs typically grant NT and MFN treatment with respect to admission and establishment, they do so by subjecting them to a series of enumerated exceptions. In ACIA, one such limitation is provided in the definition of "covered investments" (see above).

Usually, where NT and MFN treatment are granted with respect to admission and establishment, the international practice is to annex a list of exceptions or reservations to these obligations. In the ACIA such reservations are possible pursuant to Article 6 with respect to NT obligation and the obligation to accord freedom to appoint Senior Management and Boards of Directors, deviations from the MFN treatment is not allowed under ACIA.

8. Non-Discrimination Obligations

One of the main objectives of international economic law is to prevent origin-based discriminatory governmental measures. The two main principles that ensure non-discrimination are the Most-Favoured Nation Treatment (MFN) and National Treatment (NT). MFN prevents discrimination between foreign goods, investments, persons, etc, and NT forbids discrimination between domestic/national subjects and their foreign counterparts. These provisions have long been a pivotal component of multilateral trade agreements and are the cornerstones of the WTO system, whereas their importance in investment agreements is fairly recent.

Under ACIA, both NT and MFN treatment obligations extend to all phases of the investment cycle: admission, establishment, acquisition, expansion, management, conduct, operation or other disposition of covered investments in an ASEAN Member State. This means that both treatments are granted at pre-establishment and post-establishment stages, subject to notable reservations in the case of National Treatment.

National Treatment and MFN Treatment provisions normally relate to discrimination found in a country's laws (*de jure* discrimination)[26] or discrimination due to a country's practices (*de facto* discrimination).[27]

At the pre-establishment stage, the principle of non-discrimination guarantees ASEAN Investors the level of market access that the relevant ASEAN Member States have committed in their respective Schedules. As such, ASEAN Investors, domestic investors, as well as other foreign investors, have equal opportunity to invest in the ASEAN region.

The principle of non-discrimination in the post-establishment stage ensures that an ASEAN Member State will not treat ASEAN Investors less favourably than it treats its domestic investors or any other foreign investors with regard to any treatment or protection that will

[26] Discrimination '*de jure*' exists when the measure formally targets the covered foreign investor, and the discrimination is clearly mentioned in the relevant law or regulation.

[27] Discrimination '*de facto*' exists when the measure only affects the covered foreign investor although it appears to be of general application to all investors.

be granted to their investments after the investments have been fully established in the relevant Member State.

8.1 National Treatment[28]

The broad and fundamental purpose of the national treatment principle in both international trade and investment law is to avoid protectionism in the application of "behind the border" regulatory measures in order to ensure that internal measures do not distort the equality of competitive conditions for imported products in relation to domestic products. The economic rationale for prohibiting domestic protectionism through origin-based internal measure is that discrimination creates inefficiencies. Products are produced and sold not because they are made well or cheaply, but because of where they are made.

The WTO allows protection of domestic production against imports but only "up to the border", i.e. in the form of import tariffs, but does not allow protection once the imported goods have been cleared through customs. Hence, if a WTO member wants to be protectionist, the preferred policy instrument under trade law is a tariff at the border, not discriminatory internal measures. The GATT (Article III) thus imposes a general prohibition on discriminatory internal measures.

The national treatment standard is also the single most important standard of treatment enshrined in IIAs. At the same time, it is perhaps the most difficult standard to achieve, as it touches upon economically (and politically) sensitive issues. In fact, no single country has so far seen itself in a position to grant national treatment without qualifications, especially when it comes to the establishment of an investment.

The National Treatment provision of ACIA is similar to those that can be found in many recently drafted IIAs. Article 5 reads as follows:

> "*1. Each Member State shall accord to investors of any other Member State treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.*
>
> *2. Each Member State shall accord to investments of investors of any other Member State treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.*"

Unlike an absolute or minimum standard of treatment provision (e.g., expropriation and fair and equitable treatment), the NT standard does not have any intrinsic substantive content. The required standard of treatment depends on the treatment of the applicable treaty defined comparator. The comparator in ACIA is the relative treatment of domestic and foreign investors/investments in "*in like circumstances*". (In GATT, the comparator is between "*like products*".)

[28] This sub-section heavily draws on Newcombe and Paradell (2009)

Therefore the interpretation of the NT obligation and the assessment of its breach in individual cases are more complicated in the context of IIAs than in trade law. Trade lawyers and scholars have been sorting through the legal implications of this obligation for over 60 years in the context of the GATT and other legal agreements that underlie the WTO. Not only international investment law is less elaborated in this regard than GATT/WTO jurisprudence, but also NT in international investment law is more complicated to interpret. First, unlike in trade law, whose NT obligation remains limited to the treatment of particular goods (i.e. the relative treatment of "like products" in relation to a particular governmental measure), national treatment in IIAs covers the entire life cycle of an investment. It also covers the entire gamut of laws, rules, and regulations that may affect any aspect of an investor's business. The legal analysis in particular investment dispute involves a comparison between the host state's treatment of domestic and foreign investors or domestic and foreign investments in "*in like circumstances*" (as referred to in ACIA Article 5) or "*in like situations*".

Investment tribunals applying national treatment provisions have formulated sometimes conflicting, tests, but in general have addressed two central questions: (1) which domestic investments should be compared to the foreign investment, and (2) what constitutes "less favourable treatment" of a foreign investment in violation of the provision.

Tribunals in the major investment disputes have also decided that, pursuant to the "in like circumstances" test, only foreign and domestic investments that raise similar public policy concerns should be compared. This approach was first offered by the Organisation for Economic Co-operation and Development (OECD) which stated that the key to determining whether a discriminatory measure applied to foreign-controlled enterprises constitutes a deviation from National Treatment is to ascertain whether the discrimination is motivated, at least in part, by the fact that the enterprises concerned are under foreign control. The tribunal in the NAFTA in vestment dispute *Pope & Talbot Inc. v. Canada* later expressed the same idea more clearly by stating that, in essence, "Article 1 102 prohibits treatment that discriminates on the basis of the foreign investment's nationality." It does not prohibit differential treatment based on some other reason.

Best treatment or average treatment?

References to 'no less favourable' treatment in IIAs do not clarify whether the investor is entitled to the best treatment afforded to any other investor, national or foreign, or the average treatment afforded to a group of like investors. In Feldman, the tribunal noted that the national treatment provision in the NAFTA is:

> … on its face unclear as to whether the foreign investor must be treated in the most favourable manner provided for any domestic investor, or only with regard to the treatment generally accorded to domestic investors, or even the least favourably treated domestic investor. There is no 'most-favored investor' provision in Chapter 11, parallel to the most favored nation provision in Article 1103, that suggests that a foreign investor must be treated no less favorably than the most favorably treated national investor, if there are other national investors that are treated less favorably, that is, in the same manner as the foreign investor. At the same time, there is no language in Article 1102 that states that the foreign investor must receive treatment equal to that provided to the most favorably treated domestic investor, if there are multiple domestic investors receiving differing treatment by the respondent government.

The *Pope & Talbot* tribunal, relying in part on GATT jurisprudence, concluded that the national treatment obligation in the NAFTA provides for the best treatment afforded to any one national. If a national investor in like circumstances is provided preferential treatment (i.e., better than other nationals), the foreigner is entitled to no less favourable treatment, even if other similarly situated national investors are not provided comparable treatment. This approach means that a state cannot aggregate the favourable and non-favourable treatment that it accords to national investors and then compare the average treatment afforded to nationals with the treatment afforded to foreign investors. Nor would the state be able to pick a national champion and provide it super-preferential treatment, while according less favourable treatment to domestic and foreign investors. This approach is consistent with the purpose of protecting the individual foreign investor or investment from injury caused by nationality-based discrimination. Unlike international trade law where the focus is to ensure non-discrimination between foreign and domestic products as a whole, non-discrimination in IIAs protects the individual investor that may have a significant and immobile investment from targeted action that disrupts equality of competitive opportunities.

Determining the proper comparator for the purposes of national treatment is highly fact-specific and context-dependent. The application of national treatment requires an evaluation of the entire fact setting and of all the relevant circumstances. A number of factors are relevant to whether investments or investors are in like circumstances. They include the economic sector involved and the existence of a competitive relationship, the existence of protectionist intent or motive (however in itself a positive evidence of such intent does not prove breach of NT) and whether legitimate policy reasons exist for having the distinction in question. Relevant factors in comparing investors and investments include:

1. The economic sector and the existence of the competitive relationship

National treatment issues most often arise where the domestic and foreign investments are in the same economic sector and the foreign investment has received less favourable treatment than the domestic investment. When investments are in the same economic sector, there will usually be some degree of competitive relationship between them. As a result, the foreign investor will claim to be at a competitive disadvantage as a result of host state measures. In assessing whether investments are in like circumstances, an analysis of the competitive relationship is often critical. The existence of a competitive relationship or that the investments are in the same sector (narrowly or broadly defined), however, does not mean they are necessarily in like circumstances for the purposes of applying national treatment. Two investments might be in the same sector or in a competitive relationship yet not be in like circumstances.

2. Regulatory purpose of the measure

An assessment of the regulatory purpose of a challenged measure or measures is fundamental to a like circumstances analysis. Regulatory purpose is relevant in determining the appropriate comparators and in assessing whether there are legitimate, non-protectionist rationales to justify differences in treatment (when the host state has the burden of proof). Whether any two investors or investments are in like circumstances will necessarily change in light of the regulatory purpose of the measure. As discussed in the previous section, even if firms are in a competitive relationship and are in the same business or economic sector, they may not be in like circumstances because of a legitimate policy basis for distinguishing between them.

A claim of protection at post-establishment stage does not require demonstration of the host state's discriminatory intent

S.D. Myers, Inc. v. Government of Canada
NAFTA, Partial Award, 13 November 2003

The S.D. Myers Inc. claim was launched in 1998. A tribunal was constituted in 1999 and a number of hearings were held. As of June 2000, the Tribunal had issued 16 preliminary awards. On 13 November 2000, the Tribunal rendered a Merits Award in favour of the investor. On 21 October 2002, the NAFTA Tribunal issued a damages award for approximately $6.5 million plus interest. The Federal Court of Canada upheld this award on 13 January 2004 and dismissed Canada's application to have the award set aside.
The Tribunal found that Canada violated two NAFTA investment chapter obligations when it wrongfully closed the border to the export of polychlorinated biphenyls (PCB) wastes from Canada to the United States in 1995 only to protect the market share of Canadian competitors from US-based competition. The NAFTA Tribunal found that Canada had discriminated against S.D. Myers, Inc. as well as finding the Canadian actions unfair, and falling below international law minimum standards of treatment.

In evaluating whether discrimination exists, some tribunals have questioned whether the difference in treatment has been justified by a rational policy objective

Pope & Talbot Inc. v. Canada
NAFTA, Award on the Merits of Phase 2, 10 April 2001

The investors claim that it had been denied national treatment under NAFTA Article 1102 paragraph 2. The Tribunal held that the language of the provision was to make clear that the obligation of the state or a province was to provide investment of foreign investors with the best treatment it accords any investment of its country, not just the best treatment it accords to investments of its investors. The Tribunal further held that if the measure were *de jure* discriminatory, it would violate Article 1102. If the measure is *prima facie* neutral, the question becomes whether behind the neutrality, the measure disadvantages the foreign owned investment.

8.2. Most-Favoured-Nation Treatment

As mentioned above, the second principle that ensures non-discrimination in international economic law is the Most-Favoured-Nation Treatment. MFN treatment provisions in IIAs prohibit host states from discriminating between amongst foreign investors or foreign investment of different nationalities.

MFN treatment obligations require that state conduct does not discriminate between similarly situated persons, entities, goods, services or investments of different foreign nationalities. As with national treatment, MFN treatment is a relative standard: the required standard of treatment in international investment agreements (IIAs) depends on the treatment of similarly situated foreign investors or investments.

Paragraphs 1 and 2 of the MFN clause contained in Article 6 provide that

> "*1. Each Member State shall accord to investors of another Member State treatment no less favourable than that it accords, in like circumstances, to investors of any other Member State or a non-Member State with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.*
>
> *2. Each Member State shall accord to investments of investors of another Member State treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Member State or a non-Member State with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.*"

Paragraph 3 ensures that the MFN treatment does not oblige Member States to extend the treatment of any sub-regional arrangements such as the ASEAN Mekong Basin Development Cooperation ("AMBDC") and the 1966 Treaty of Amity and Economic Relations between Thailand and the United States.

MFN clauses may operate for both substantive and procedural provision at the post-establishment stage such as by the incorporation of a standard of treatment that is more favourable than that contained in the ACIA. Footnote 4 makes it clear "for greater certainty" that the MFN treatment does not extend to investor-State dispute settlement procedures; this means that an ASEAN investor cannot claim the application of better ISDS procedures deriving from e.g. a BIT concluded by the host ASEAN State with another State.

On the other hand the same footnote confirms that Article 6 does apply to preferential treatment accorded under existing and future arrangements by a Member State to any country.

8.3 Scope of post-establishment application of non-discrimination clauses

Both the NT and the MFN treatment obligations apply both to the pre-entry and the post-entry phases of investment. The pre-entry application was discussed in Section 7. This sub-section addresses NT issues in the post-entry phase.

It should be recalled that both the NT and the MFN obligations apply to "admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments". This list is a comprehensive one, which covers all activities of investors and their investments for the pre- and post-establishment phases.

Whilst in the pre-establishment phase the host State have the latitude to set conditions for the admission of a foreign investor and its investment, which deviates from the NT standard (see sub-section 6.1.2.2.1), such discrimination is not possible in the post-establishment phase. This implies that a foreign originating investment should be treated no less favourably than an own investment with respect to any activity that is part of its operation.

Obviously it is not possible to list all possible activities of an investment. However, it is clear from the inclusion of "operation" of investors and their investments in the NT clause, that *de jure* and *de facto* equal treatment should be ensured by the host State with respect to all laws, regulations, administrative practices and policies affecting foreign investors and their investment. This requirement extends beyond strict investment regulations and applies to any policy areas.

This implies for example national treatment of foreign investors and their investment with respect to hiring regulations, rules on advertisement, marketing, sales and purchases, right of import and export, mergers and acquisitions, competition rules, etc. to the extent that exceptions have not been taken by an ASEAN Member State in the Schedule for non-nonconforming measures.

8.4 Implementation of the MFN and National Treatment by sub-federal and decentralized administrations

A further standard of treatment issue arises where a subdivision of a state has jurisdiction in setting the treatment of investors and investments, be they "resident" or foreign. In some

states, a subdivision (i.e., a state, province or region) may have regulatory authority over certain economic activities within its territory. A subdivision may provide preferential treatment to its residents' investments. In this case, is the foreign investor entitled to the best treatment afforded to the investor from the subdivision in question, or only to the best treatment accorded to nationals from other subdivisions?

Most national treatment provisions do not address this issue expressly. It may be argued that the foreign investment is entitled to no less favourable treatment than the best treatment of any investment in that subdivision. This is sometimes referred to as "best in-state treatment" because the foreign investment is entitled to the best treatment that the subdivision provides to any other investment (including those of its own residents). Best in-state treatment stands in contrast to best out-of-state treatment, which requires treatment by a subdivision that is no less favourable than that which it accords to national investors from other subdivisions. A best out-of-state treatment provision allows the subdivision to discriminate in favour of residents of the subdivision.

Similar issues may arise in Viet Nam resulting from the decentralised State administrative system. Since national treatment is an obligation undertaken by the State, not the provinces, the NT standard needs to be accorded in a uniform manner across provinces. This highlight the necessity of vertical and horizontal coordination of the implementation of MFN and NT standards, but also Viet Nam's all other obligations under ACIA.

9. Prohibition of Performance Requirements

Article 7 of ACIA prohibits certain performance requirements[29] imposed by host Governments on ASEAN investors, namely those, which are covered by the WTO TRIMS Agreement. It read as follows:

> "*1. The provisions of the Agreement on Trade-Related Investment Measures in Annex 1A to the WTO Agreement (TRIMs), which are not specifically mentioned in or modified by this Agreement, shall apply, mutatis mutandis, to this Agreement.*
>
> *2. Member States shall undertake joint assessment on performance requirements no later than 2 years from the date of entry into force of this Agreement. The aim of such assessment shall include reviewing existing performance requirements and considering the need for additional commitments under this Article.*
>
> *3. Non-WTO Members of ASEAN shall abide by the WTO provisions in accordance with their accession commitments to the WTO.*"

It is interesting to note that the universe of performance requirements imposed on investors and investment extend far beyond the scope of measures prohibited by the TRIMS

[29] Performance requirements are market distorting and discriminatory conditions that a country imposes on foreign firms. Trade economists identify two main types of performance requirements: mandatory performance requirements and incentive-based performance requirements. Mandatory performance requirements are conditions or requirements that are imposed at the pre- and/or post-establishment phases of an investment. Incentive-based performance requirements are conditions that an investor must meet to secure a government subsidy or incentive.

Agreement (TRIMS). TRIMS deals only with "trade related" measures, and only with those, which contravene GATT Article III (national treatment) or Article XI (prohibition of quantitative restrictions on imports and exports). However a host of non-trade related performance measures exist which are not prohibited by ACIA Article 7. Examples include performance measures relating to employment, training, R&D (or technology transfer), equity and, more generally, those applied in service sectors. Nevertheless an investor or investment that believes that a non-trade related performance measure not listed in the reservation list violates the NT obligation of the host State may have recourse to ISDS.

10. Senior Management and Board of Directors

ACIA Article 8 aims to provide foreign investors increased discretion to employ key managerial or professional staff of their choice by prohibiting nationality requirements in the employment of key managerial personnel.

Paragraph 1 prohibits that an ASEAN Member State requires that a juridical person of that Member State appoint to senior management positions, natural persons of any particular nationality. However, an ASEAN Member State can preserve existing nationality restrictions on senior personnel by reserving against these measures in the Schedule. Viet Nam made reservations to Senior Management in a substantive number of sectors, which are contained in Annex 2.

Notwithstanding paragraph 1, paragraph 2 preserves the right of a Member State to require that a majority of the board of directors of an investment hold a particular nationality or have residency status in its territory. This can only be imposed provided it does not materially impair the ability of the investor to exercise control over its investment. There is no definition in ACIA of what is the percentage of the board of directors above which the nationality/residency requirement would constitute a "materially impairment" of the investor's ability to exercise control. However, it is reasonable to believe that such a requirement imposed on close to 100% of the board of directors would not be compatible with paragraph 2. Despite a reservation to "Board of Directors" entered in the ACIA Schedule, an investor may challenge under ACIA's ISDS provisions a particular percentage requirement that it believes constitutes "material impairment". (Without however questioning the right of the Member State to require that a majority of the board of directors of an investment hold a particular nationality or have residency status.)

11. Reservations and Liberalization

With ACIA, ASEAN Members aim to liberalise investment by according NT and MFN treatment to investors and investments from other ASEAN States, including regarding admission and establishment of investments (Articles 5 and 6). The drafters recognised, however, that ASEAN States would not agree to open up these sectors to investment in a totally unrestricted fashion.

Article 9 therefore provides that individual Member States may maintain ("reserve") existing measures applied at central or regional level of governments, which do not conform to their National Treatment (Article 5) and Senior Management and Board of Directors (Article 8)

obligations or their renewal, which are notified to the ASEAN Secretariat. ASEAN Members entered their reservations for non-conforming measures in a single reservation list (the "Schedule")

Given that each ASEAN Member State has its own reservation list, the level of investment liberalisation may differ across the membership. The following list illustrates the kinds of restrictions to National Treatment and Senior Management and Board of Directors that ASEAN Member States can maintain under ACIA. These include:

Scope of Restriction	Category	Example
Restriction to all 5 sectors and services incidental to them	Registration Requirements	National Treatment shall not apply with respect to registration requirements for the establishment of businesses. This means that there may be different registration requirements for foreign investors.
	Licensing Requirements	National Treatment shall not apply to any measure with regard to the duration of a Business License.
	Foreign Equity Limitations	National Treatment and Senior Management and Board of Directors shall not apply to any measure in relation to the retention of a controlling interest by the government in a specific local company and/or its successor body, including but not limited to controls over the appointment and termination of members of the Board of Directors, divestment of equity and dissolution of the Company.
	Restrictions on the use of land, including the use of natural resources associated with land	Foreign investors are not allowed to own land but may lease land or receive grant concessions of land for investment purposes.
	A minimal number of directors to have place of residence in the host country	For a company incorporated in ASEAN Country A, at least two directors must have their principal or only place of residence in ASEAN Country A.
Restrictions in Specific Sectors	Foreign Equity Limitations	For the forestry and services incidental to forestry sectors, foreign equity may be allowed up to 40%, subject to government approval.
	Licensing requirements	No investment license shall be issued to foreign investors in the fresh-water fishing and marine fishing sub-sectors.

Scope of Restriction	Category	Example
	Sectors not open to foreign investment	Foreigners and foreign companies are not allowed to engage in the prospecting, exploration and mining of gemstones.
	National Food Security	National Treatment shall not apply to any measure with respect to activities relating to national food security in the following sectors - agriculture, fisheries, manufacturing and forestry and services incidental to these sectors.

The Schedule containing ASEAN Members' individual reservation lists forms the basis of progressive liberalisation pursuant to Article 9, paragraph 4, which reads as follows:

> "*Each Member State shall reduce or eliminate the reservations specified in the Schedule in accordance with the three phases of the Strategic Schedule of the AEC Blueprint and Article 46 (Amendments).*"

Note that, according to Article 3, paragraph 3, "for the purpose of liberalisation and subject to Article 9 (Reservations)" ACIA currently applies only to the following sectors:

(a) manufacturing;
(b) agriculture;
(c) fishery;
(d) forestry;
(e) mining and quarrying;
(f) services incidental to manufacturing, agriculture, fishery, forestry, mining and quarrying.

A last point of this paragraph provides for the possibility t add any other sectors, as may be agreed upon by all Member States.

12. Minimum Standards of Treatment

12.1 Principle and rationale

International investment agreements provide a series of general and specific minimum standards of treatment. Unlike the national and most-favoured-nation (MFN) obligations discussed above, which are relative standards and which provide a certain treatment that is contingent on the treatment of a comparator, the content of minimum standards are determined in absolute terms. Minimum standards of treatment therefore provide a treaty-defined baseline, a floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner. Minimum standards of treatment serve a key role in promoting and protecting foreign investment by assessing government conduct based on internationally accepted standards of good governance. Standards such as fair and equitable treatment can be viewed as reflecting elements of the rule of law and as serving to restrain abuses of governmental power.[30]

[30] Newcombe and Paradell (2009)

Under ACIA, ASEAN Member States commit to provide protection generally found in IIAs to investors and their investments, with enhanced provisions that adopt international best practices to ensure clarity for investors.

ACIA guarantees the following Minimum Standards of Treatment:

- Fair and Equitable Treatment;
- Full protection and security;
- Compensation in Cases of Strife;
- Freedom of Transfers;
- Protection against Expropriation; and
- Recognition of Subrogation.

12.2 Article 11: Fair and Equitable Treatment

Article 11 of ACIA provides a guarantee of fair and equitable treatment for the covered investments of ASEAN Investors. Article 11 (2) of ACIA further clarifies the guarantee, stating that:

> "...fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process..."

This means that:

1. In the event that a host state takes any decision that prejudices the interests of an investor and its investments, the investor will have access to judicial or administrative tribunals, including the right to review the decisions of the host state; and
2. In the event that any legal action, civil or criminal, is taken by a host state against an investor, the investor shall have the right to defend himself, including the right of access to legal representatives such as lawyers. The investor will also be given the right to appeal any adverse decisions or outcomes.

Damages for Breach of the Fair and Equitable Treatment Standard

In *Swisslion DOO Skopje v. Macedonia* (ICSID Case No. ARB/07/5) the Former Yugoslav Republic of Macedonia was found liable for damages for breach of the Fair and Equitable Treatment standard.

The dispute arose out of a 2006 share sale agreement between Swisslion and Macedonia, which gave the Swiss investor a controlling stake in Agroplod AD Resen, a food production company. The Macedonia Ministry of Economy had concluded that Swisslion breached the agreement, in part by failing to inject sufficient working capital into Agroplod. As a result, the Ministry commenced legal proceedings in 2008 to terminate the agreement.

The Skopje Basic Court ultimately sided with the Ministry, terminating the share sale agreement and ordering the transfer of Swisslion's Agroplod shares to the Ministry without compensation.

In examining whether the government of Macedonia violated the obligation to grant Swisslion fair and equitable treatment, the tribunal refrained from discussing in detail its approach to interpreting the standard. The tribunal deemed "it unnecessary to engage in an extensive discussion of the fair and equitable treatment standard," stating that the "standard basically ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances, and that it is mean to guarantee justice to foreign investors."

Based on this approach it concluded that Macedonia had breached the FET standard, pointing to acts and omissions taken by the Ministry and other state organs prior to the court's determination. The tribunal observed that there was a "series of measures that collectively amounted to a composite act in breach of the FET standard."

In particular, the tribunal frowned on the Ministry's lack of timely response to Swisslion's requests for confirmation that its investments were in compliance with the share sale agreement; certain obstructionist actions taken by the Macedonia Securities and Exchange Commission; and the publication by the Ministry of the Interior of a criminal investigation against Swisslion without a subsequent notice of the prosecutor's decision to drop the investigation.

The tribunal emphasized that while the Ministry and the court were within their rights to determine Swisslion's contractual non-compliance, a state has "a duty to deal fairly with the investor by engaging with it, in particular to advise it of any concerns it may have had the investment might not be in compliance with the investor's contractual obligations."

The FET standard obliges ASEAN Member States not to deny justice in any legal or administrative proceedings in accordance with the principle of due process.

The term denial of justice has been used to identify a wide variety of international wrongs. In IIAs a denial of justice relates to serious inadequacies in the state's judicial or administrative system with respect to the judicial protection of foreigners and their rights. Irrespective of the treatment that a state affords its own nations, foreigners are entitled to a minimum

standard of justice. Denial of justice can arise from procedural irregularities in judicial proceedings, such as undue delays, lack of due process, failure to provide a fair hearing or the non-execution of a judgment.[31]

The case *Robert Azinian, Kenneth Davitian, & Ellen Bacca v. Mexico* was the first NAFTA investment award, and the first IIA award to address denial of justice. The tribunal noted that a denial of justice could be pleaded "if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way."

In addition, the *Azinian* tribunal noted that the fact that the national tribunal made an error of law does not constitute denial of justice. IIA tribunals have stated that refusal of access to the courts, undue delay in court proceedings, serious inadequacies in the administration of justice and clearly improper and discreditable court decisions constitute denials of justice.

States can also be held responsible for gross defects in the substance of judicial decisions. Although state responsibility does not arise for an erroneous judgment, it may arise where a court ruling is manifestly unjust.

The second element of "Fair and Equitable Treatment" in Article 11 is the existence "Due Process". Due process is required in the administration of justice. If a breach of due process is not corrected by the judicial system, a denial of justice will result. The requirement for due process under customary international law applies also to other forms of government decision-making in which host state decisions affect the rights of the investor or investment. For example, a breach of the minimum standard of treatment might occur if there is a complete lack of candour or transparency and unfairness in an administrative process, such as the revocation of a business license without notice and without the possibility for the licensee to be heard. Further, there may be a lack of due process when a decision-maker bases a decision on inappropriate or irrelevant considerations.

12.3 Full protection and security

Article 11 of ACIA requires that Member States provide full protection and security to an ASEAN Investor's covered investment.

This standard imply that that Member States take active measures, as may be reasonably necessary, to protect the investment from adverse effects. Such protection and security shall be provided at all times, including when riots or insurgence occur in the territory of that Member State.

The main idea underlying the adoption of this standard is the need to protect companies against various types of physical violence, including invasion of premises. However, it is generally agreed that the standard does not provide absolute protection. The host state does not have an obligation of strict liability for preventing such violations, but to exercise 'due diligence' and to take reasonable measures to protect ASEAN Investors and their investments.

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12.4 Article 12: Compensation in Cases of Strife

In the event of any losses suffered by an investment as a result of armed conflict, strife, or similar events, a host state is required by Article 12 of ACIA to compensate affected ASEAN Investors. Such compensation or restitution must be made on a non-discriminatory basis.

Examples for compensation in case of strife include the compensation for destruction of shrimp farm by security forces (case *Asian Agricultural Products Ltd. v. Sri Lanka*, ARB/87/3, Final Award, 27 June 1990) and looting by armed forced (case *American Manufacturing and Trading, Inc. v. Zaire*, ARB/93/1, Award, 21 February 1997).

12.5 Article 13: Freedom of Transfers

Freedom to manage capital and funds is essential for any business operation. Article 13 of ACIA ensures that every ASEAN Investor may freely and without delay conduct payments and transfers relating to its investments into and out of the territory of the host state. Such transfers can be made in a freely usable currency, i.e. the currency that is widely used to make payments for international transactions, and widely traded in the main exchange markets, at the market rate of exchange at the time of transfer.

ACIA guarantees ASEAN Investor the freedom to transfer the following funds:

- Contribution to capital;
- Profits, capital gains, dividends, royalties, licence fees or any other fees, interest, or other income from the investment;
- Proceeds from the total or partial sale or liquidation of its investments;
- Payments under a contract, including a loan agreement;
- Payments of compensation in case of strife or lawful expropriation;
- Payments arising from the settlement of an investment dispute; and
- Earnings or other remuneration of personnel employed and allowed to work in relation to the investment in that territory.

The freedom to transfer funds under ACIA is subject to some exceptions. A host state may prevent or delay the transfer of funds through the equitable, non-discriminatory and good faith application of its laws and regulations, with regard to:

- bankruptcy, insolvency or the protection of the rights of creditors;
- trading in securities, futures, options or derivatives;
- criminal or penal offences and the recovery of proceeds of crime;
- financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authority;
- ensuring compliance with orders or judgements in judicial or administrative proceedings;
- taxation;
- social security, retirement, or compulsory saving schemes; and

- severance for employees, and formalities imposed by the Central Bank or other relevant authorities of that ASEAN Member State.

Article 13 (4) of ACIA provides that an ASEAN Member State may impose restrictions on any capital transactions as a temporary measure on a non-discriminatory basis, in the following circumstances:

- at the request of the International Monetary Fund (IMF);
- where the measure is taken to safeguard the balance of payments (under Article 16 of ACIA); or
- in exceptional circumstances where capital movement causes or threatens to cause serious economic or financial disturbance in the ASEAN Member State concerned.

12.6 Article 14: Expropriation and Compensation

Protection against expropriation has been a standard provision of BITs since 1959. Under Article 14 of ACIA, an ASEAN Member State may only directly or indirectly (referred to in ACIA as "measures equivalent to expropriation or nationalisation") expropriate or nationalise an investment if the expropriation by the Member State meets the expropriation is:

- for a public purpose;
- done in a non-discriminatory manner;
- followed by payment of prompt, adequate, and effective compensation; and
- in accordance with due process of law.

Nevertheless, footnote 10 of ACIA specifically provides that any measure relating to expropriation of land and payment of compensation for such expropriation shall be in accordance with the host state's domestic laws and regulations.

Direct expropriation may mean a formal transfer of legal title or the outright seizure of investment of a foreign investor. Indirect expropriation consists of a measure or a series of measures that have similar effect to direct expropriation even without formal transfer or outright seizure of the legal title over the investment. This is decided on a case-by-case basis, and one should also look at Annex 2 of ACIA.

The determination on whether an indirect expropriation occurs is generally more contentious as investment agreements concluded in the past did not elaborate the thresholds for determining this type of expropriation. Such a lack of clarity led to the development of three approaches by international arbitral tribunals in making such determinations:

1. The first approach is known as the *sole effect* approach where interference by the state with an investment and deprivation of the property rights of tan investor would be sufficient to amount to indirect expropriation.
2. The second approach is known as the *proportionality* approach, in which the tribunal would assess the proportionality of the measure with regard to impact on foreign investors. Such an assessment in turn rests on a three-pronged analysis combining:
    (a) the existence of substantial damage of the measure to the investment
    (b) the existence of a public interest (regulatory action of the state); and

(c) a determination of whether there is a reasonable relationship of proportionality between the weight imposed on the foreign investor and the aim sought by the expropriatory measure.

3. The last approach is known as the *right to regulate* approach. According to this approach, a regulatory measure that falls within the right to regulate is non-compensable and should be distinguished from indirect expropriation, although such a measure may be seriously and irreversibly detrimental to an investment. This approach finds that when a State takes a measure for a public purpose in a non-discriminatory manner and in accordance with due process, such a measure shall not be compensable.

Annex 2 of ACIA specifies the various factors that must be assessed on a factual, case-by-case basis to determine whether a governmental measure constitutes an indirect expropriation. Such an assessment addresses:

1. the economic impact of the government action;
2. whether the government action breaches the government's prior binding written commitment to the investor; and
3. the character of the government action, including its objective, and whether it is disproportionate to the public purpose.

ACIA further makes clear that, non-discriminatory measures that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an indirect expropriation. Such a clarification is required to ensure that each ASEAN Member State's sovereign right to regulate investments in its territory is adequately preserved. As such, not all government actions that interfere with foreign investments can be deemed indirect expropriations.

Under Article 14 (2) of ACIA, any compensation for any expropriation or nationalisation must be paid without delay and meet the following criteria:

(a) compensation must be equivalent to the fair market value of the expropriated investment immediately before or at the time when the expropriation was publicly announced or occurred;
(b) it must not reflect any change in the value of an investment because the intended expropriation had become known earlier; and
(c) compensation must be fully realisable and freely transferable between ASEAN Member States.

Exceptions to the general rule against expropriation include:

(a) the right of an ASEAN Member State to expropriate land subject to the investment provided such expropriation and the payment of the compensation meets the requirements of domestic laws; and
(b) the right of the host ASEAN Member State to impose a compulsory licence for intellectual property in accordance with the TRIPs, such as in the case of compulsory licences for drugs treating acquired immunodeficiency syndrome (AIDS) under national intellectual property law.

12.7 Article 15: Subrogation

Under Article 15 of ACIA, if an insurer has covered the losses suffered by an investor in a host state, provided that the host state has duly been informed of the insurance, then the host state will recognise the subrogated right of the insurer to bring the investor's claim. Thus, the insurer will become a direct beneficiary of any compensation from the host state to which the investor would have been entitled if it is proven that the losses arise from the host state's breach of ACIA.

12.8 Article 22: Entry, Temporary Stay and Work of Investors and Key Personnel

Article 22 of ACIA specifically guarantees that ASEAN Member States shall grant entry, temporary stay and authorisation to work to investors, executives, managers and members of the board of directors of an ASEAN Investor, for the purpose of establishing, developing, administering or advising on the operation of an investment. Nevertheless, granting such authorisations will be subject to host state's immigration and labour laws, regulations and national policies, and commitments under the ASEAN Framework Agreement on Trade in Services (AFAS), of each ASEAN Member State.

14. Exceptions

Exceptions are provisions in agreements relating to situations in which a particular principle does not apply, or applies only in part. Thus, they qualify *ab initio* the extent of the obligations undertaken by countries participating in an international agreement.

14.1 Article 17: General Exceptions

ACIA contains a broad General Exceptions clause, drawing on the General Exceptions articles of two WTO Agreements, namely Article XX of the General Agreement on Tariffs and Trade of 1994 (GATT 1994) and Article XIV of the General Agreement on Trade in Services (GATS). The use of General Exceptions clauses modelled on GATT Article XX, or GATS Article XIV, is not common in IIAs, and ACIA, together with some other recently concluded Asian FTAs and IIAs are among the few.

The purpose of the General Exceptions clauses in both trade and investment agreements, is to protect a State's right to regulate in important non-investment policy areas, such as to protect the environment, public health, public morals, etc. This provision was first incorporated in ASEAN in the 1998 the AIA Agreement. Although traditionally viewed as a provision to carve out broad regulatory policy space, one can also consider the exception as providing general guidance to the host State. This General Exception clause shows the State how to regulate by focusing on the valid justification for such regulations, and the processes for introducing such regulatory measures.

Article 17 provides that:

"1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member States or their investors where like conditions prevail, or a disguised restriction on investors of any other Member State and their investments, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures:

(a) necessary to protect public morals or to maintain public order;12
(b) necessary to protect human, animal or plant life or health;
(c) necessary to secure compliance with laws or regulations which are not inconsistent with this Agreement, including those relating to:
    (i) the prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract;
    (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
    (iii) safety;
(d) aimed at ensuring the equitable or effective13 imposition or collection of direct taxes in respect of investments or investors of any Member State;
(e) imposed for the protection of national treasures of artistic, historic or archaeological value;
(f) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

2. Insofar as measures affecting the supply of financial services are concerned, paragraph 2 (Domestic Regulation) of the Annex on Financial Services of the General Agreement on Trade in Services in Annex 1B to the WTO Agreement ("GATS") shall be incorporated into and form an integral part of this Agreement, mutatis mutandis."

The General Exceptions provisions aim at allowing Member States to take certain measures that are necessary to pursue broad societal objectives and which would not be possible without breaching ACIA provisions. However, in order to limit abuses, certain conditions should be met:

1. The measure is necessary to pursue the given policy objective, in other words there no alternative measure;
2. The measure is not done in an arbitrary or unjustifiable discriminatory manner, where like conditions prevail,
3. The measure is not a disguised restriction on investors or covered investments.

The list of policy objective is an exhaustive one, i.e. it is not possible to invoke the General Exceptions provisions for other objectives that these mentioned. The host State invoking the General Exception would have the burden of proof, and hence must demonstrate the measure complies with the necessity test.

14.2 Article 18: Security Exceptions

Article 18 of ACIA provides policy space for ASEAN Member States to take measures for security reasons. In particular, ACIA does not:

- require any ASEAN Member State to disclose information that it considers contrary to its essential security interests; or
- prevent any ASEAN Member State from taking any action that it considers necessary for the protection of its essential security interests, including but not limited to:
    - actions relating to fissionable and fusionable materials or the materials from which they derived;
    - actions relating to the trafficking of arms, ammunition, and implementation of war and to trafficking of other goods and materials for the purpose of supplying a military establishment;
    - actions taken in time of war or other emergency in domestic or international relations;
    - actions taken to protect public infrastructure from attempts to disable or degrade them; or
- prevent any ASEAN Member State from taking any action pursuant to its obligations under the United Nations Charter for the maintenance of international peace and security.

14.3 Article 19: Denial of Benefits

A "denial of benefits" clause in an IIA allows parties to deny the benefits of the agreement to entities that are incorporated under the laws of one of the parties but that are controlled or owned by nationals or companies of a non-party. In most cases, this clause can be invoked on the ground of an absence of meaningful business activity carried out by such entities in their place of incorporation. Additional grounds that are sometimes provided as a basis for the invocation of this type of clause are the absence of normal diplomatic relations between a party and the third country in question and the application of economic sanctions by a party to the third country in question.[32]

The "Denial of Benefits" clauses have historically been included in treaties for a variety of reasons. The original purpose was mainly to deny diplomatic protection for "enemy companies", later the clause was imported into the treaties concerning protection of foreign investments. "Denial of Benefits" clauses safeguard against "free riders", i.e. nationals or investments of third countries who would gain rights or interests despite the fact that the contracting states to the treaty did not wish to accord them those benefits. This clause inserted in today's investment treaties seems to pursue two purposes: to maintain reciprocity or asymmetry with regard to the benefits arising out of the protection offered by investment treaties, and to exclude from the protection of the treaties the so-called "shell companies."[33] Under a "Denial of Benefits" clause "the states reserve the right to deny the benefits of the treaty to a company that does not have an economic connection to the state

[32] UNCTAD (2004b)
[33] Mistelis and Baltag (2009)

on whose nationality it relies. The economic connection would consist in control by nationals of the state of nationality or in substantial business activities in that state"[34]

The objective of the "Denial of Benefits" clause contained in Article 19, paragraph 1 is to prevent so-called "treaty shopping", in other words the circumvention by non-covered investors (see "covered investors in sub-section 6.1.2.1) of the provisions limiting ACIA's benefits to ASEAN investors through the creation of special-purpose companies (or shell companies) in the territory of a Member State by persons that would otherwise not fall within the definition of investor or if the investor is of a third country with no diplomatic relations with the denying ASEAN State. Note that the denial of benefit is possible only vis-à-vis investors as juridical persons. ACIA's

Article 19, paragraph 1 reads as follows (emphasis added):

> "*1 A Member State may deny the benefits of this Agreement to:*
> *(a) an investor of another Member State that is a juridical person of such other Member State and to investments of such investor if an investor of a non-Member State owns or controls the juridical person and the juridical person has no substantive business operations in the territory of such other Member State;*
> *(b) an investor of another Member State that is a juridical person of such other Member State and to investments of such investor if an investor of the denying Member State owns or controls the juridical person and the juridical person has no substantive business operations in the territory of such other Member State; and*
> *(c) an investor of another Member State that is a juridical person of such other Member State and to an investment of such investor if investors of a non-Member State own or control the juridical person, and the denying Member State does not maintain diplomatic relations with the non-Member State.*"

The criterion for assessing whether or not the investor of a third country is an empty shell company is the lack of "*substantive business operations*" in the territory of the other ASEAN State (paragraph 1(a)). The fact that an ASEAN State may only deny the benefits of the agreement to an investor that is a juridical person of another ASEAN State but which is owned or controlled by an investor of a non-member State if the investor has no substantial business operations in the home ASEAN State reflects ACIA's liberalisation policy to attract foreign investment from States outside the ASEAN region.

The "*substantive business operations*" criterion is also to be used in case of a suspected empty shell company created in another ASEAN country by an own company (paragraph 1(b)). Presumably the purpose of paragraph 1(b) is to prevent a domestic investor/investment from using ACIA in order to gain a better status at home that is reserved to foreign investors or investments. This may be the case when foreign investments are granted treatment that is better than the national treatment; in such a case, establishing a company in another ASEAN Member without substantive business operation in the latter with the sole objective of obtaining advantages through investment in the home country needs to be avoided. Similarly, domestic investors have no right to have recourse to ACIA's investor-state dispute settlement vis-à-vis their own States; paragraph 1(b) therefore

[34] Rudolph Dolzer & Christoph Schreuer, Principles of International Investment Law 55 (Oxford Univ. Press 2008) quoted by Mistelis and Baltag (2009)

prevents such possibility for investments in the home country through shell companies mounted in another ASEAN State.

The third case where the benefits of ACIA may be denied concerns a political situation; in this case the criterion is simply the ***lack of diplomatic relations*** between the denying ASEAN State and the country where the investor is originating. Note that lack of diplomatic relationship does not equate with lack of mutual recognition of States.

Pac Rim Cayman LLC v. The Republic of El Salvador
ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012

The Claimant, Pac Rim Cayman LLC (PRC), a legal person organized under the laws of Nevada, USA is wholly owned by Pacific Rim Mining Corporation (PMC), a legal person organized under the laws of Canada. The claim was brought under Central American Free Trade Agreement (CAFTA). Since the owner of the claimant is Canada (a non-CAFTA party), the tribunal decided that El Salvador may deny benefits of CAFTA to the claimant, and thus, the tribunal did not have jurisdiction over such claims.

A main question about "denial of benefits" is whether a State can invoke it with respect to any benefit accruing to investors or only with respect to the substantive provisions of an IIA. According to some commentators[35] where an ASEAN Member State can satisfy the criteria for denying benefits as set out in Article 19, the investor is denied all the benefits of ACIA and not merely the protections afforded to investors. This would seem to include the right to arbitrate under Section B of the Treaty, leaving the investor in such circumstances without a remedy under the Treaty. This is the far-reaching effect of denial of benefit clauses also found in some other multilateral investment treaties. By contrast, the denial of benefits clause found (for example) in the Energy Charter Treaty provides that an investor may not benefit from certain protections (importantly not extending to arbitration and other dispute resolution mechanisms in the treaty) in the event that a Member State is entitled to avail itself of that clause.

Article 19 also permit denial of benefits to an investor who has breached the domestic laws of the denying Member State by misrepresenting its ownership in those areas of investment, which are reserved for local investors of the denying Member State. Paragraph 2 reads as follows:

> "*2. Following notification to the Member State of the investor, and without prejudice to paragraph 1, a Member State may deny the benefits of this Agreement to investors of another Member State and to investments of that investor, where it establishes that such investor has made an investment in breach of the domestic laws of the denying Member State by misrepresenting its ownership in those areas of investment which are reserved for natural or juridical persons of the denying Member State.*"

[35] Chuan Thye Tan: ASEAN comprehensive investment treaty, Baker & McKenzie Piblications retrieved at http://www.bakermckenzie.com/RROperatingASEANInvestmentTreatyJul09/

Annex 1: References

ASEAN Comprehensive Investment Agreement (ACIA) – A Guidebook for Business and Investors, Jakarta: ASEAN Secretariat, March 2013

Bath, Vivienne and Nottage, Luke R. (2013): "The ASEAN Comprehensive Investment Agreement and 'ASEAN Plus' – The Australia-New Zealand Free Trade Area (AANZFTA) and the PRC-ASEAN Investment Agreement", Sydney Law School Research Paper No. 13/69. Available at SSRN: http://ssrn.com/abstract=2331714

Bhaskaran, Manu (2013): "*The ASEAN Economic Community: The Investment Climate*" in Das (Sanchita Basu), Jayant Menon, Rodolfo Severino and Omkar Lal Shrestha (editors): "*The ASEAN Economic Community: a work in progress*", Asian Development Bank and Institute of Southeast Asian Studies, Singapore

Desierto, Diane A. (2011): "'For Greater Certainty': Balancing Economic Integration and Investor Protection in the New ASEAN Investment Agreements", Transnational Dispute Management, Vol. 8, issue 5

Desierto , Diane A. (2013): "*Investment treaties: ASEAN*" in Hal Hill, Maria Socorro Gochoco-Bautista (editors): "*Asia Rising: Growth and Resilience in an Uncertain Global Economy*", Edward Elgar Publishing Limited

Ewing-Chow, M., and Fischer, G.R. (2011): "ASEAN IIAs: Conserving Regulatory Sovereignty While Promoting the Rule of Law?" Transnational Dispute Management, Vol. 8, issue 5

Hop Dang (2011): "Legal issues in Vietnam's FDI law Protections under domestic law, bilateral investment treaties and sovereign guarantees" in Bath, Vivienne and Nottage, Luke R. (editors): "Foreign investment and dispute resolution law and practice in Asia", Routledge, New York

Jarvis, Darryl Stuart (2012): "*Foreign direct investment and investment liberalisation in Asia: assessing ASEAN's initiatives*", Australian Journal of International Affairs Vol. 66, No. 2

Kläger, Roland (2011): "'Fair and Equitable Treatment' in International Investment Law", Cambridge University Press

Kurtz, Jürgen (2010): "The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO" in Stephan W. Schill (editor): "International Investment Law and Comparative Public Law", Oxford University Press

Mistelis, Loukas A. and Baltag, Crina Mihaela (2009): "Denial of Benefits and Article 17 of the Energy Charter Treaty", Penn State Law Review, Vol. 113:4

Newcombe, Andrew, and Lluís Paradell (2009): "*Law and Practice of Investment Treaties – Standards of Treatment*", Kluwer Law International, Alphen aan den Rijn

OECD (2008): "International Investment Law: Understanding Concepts and Tracking Innovations", OECD Publishing , Paris

Paparinskis, Martins (2013): "The International Minimum Standard and Fair and Equitable Treatment" Oxford University Press

Shen, Wei (2010): "*Leaning Towards a More Liberal Stance? An Evaluation of Substantive Protection Provisions under the New ASEAN–China Investment Agreement in Light of Chinese BIT Jurisprudence*", Arbitration International, Vol. 26, No. 4

UNCTAD (2004a): "International Investment Agreements: Key Issues", Set of three Volumes, New York and Geneva

UNCTAD (2004b): "Key Terms and Concepts in IIAs: A Glossary", UNCTAD Series on Issues in International Investment Agreements, New York and Geneva

Zhong, Zewei (2011): "*The ASEAN Comprehensive Investment Agreement: Realizing a Regional Community*", Asian Journal of Comparative Law. Volume 6, Issue 1, ISSN (Online) 1932-0205, DOI: 10.2202/1932-0205.1294

Annex 2: Text of the ASEAN Comprehensive Investment Agreement

ASEAN COMPREHENSIVE INVESTMENT AGREEMENT

The Governments of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam, Member States of the Association of Southeast Asian Nations ("ASEAN"), hereinafter collectively referred to as "Member States" or singularly as "Member State";

RECALLING the decisions of the 39th ASEAN Economic Ministers ("AEM") Meeting held in Makati City, Philippines on 23 August 2007 to revise the Framework Agreement on the ASEAN Investment Area signed in Makati City, Philippines on 7 October 1998 ("AIA Agreement"), as amended, into a comprehensive investment agreement which is forward-looking, with improved features and provisions, comparable to international best practices in order to increase intra-ASEAN investments and to enhance ASEAN's competitiveness in attracting inward investments into ASEAN;

RECOGNISING the different levels of development within ASEAN especially the least developed Member States which require some flexibility including special and differential treatment as ASEAN moves towards a more integrated and interdependent future;

REAFFIRMING the need to move forward from the AIA Agreement and the ASEAN Agreement for the Promotion and Protection of Investments signed in Manila, Philippines on 15 December 1987 ("ASEAN IGA"), as amended, in order to further enhance regional integration to realise the vision of the ASEAN Economic Community ("AEC");

CONVINCED that sustained inflows of new investments and reinvestments will promote and ensure dynamic development of ASEAN economies;

RECOGNISING that a conducive investment environment will enhance freer flow of capital, goods and services, technology and human resource and overall economic and social development in ASEAN; and

DETERMINED to further intensify economic cooperation between and among Member States,

HAVE AGREED as follows:

SECTION A

Article 1
Objective

The objective of this Agreement is to create a free and open investment regime in ASEAN in order to achieve the end goal of economic integration under the AEC in accordance with the AEC Blueprint, through the following:

(a) progressive liberalisation of the investment regimes of Member States;

(b) provision of enhanced protection to investors of all Member States and their investments;

(c) improvement of transparency and predictability of investment rules, regulations and procedures conducive to increased investment among Member States;

(d) joint promotion of the region as an integrated investment area; and

(e) cooperation to create favourable conditions for investment by investors of a Member State in the territory of the other Member States.

Article 2
Guiding Principles

This Agreement shall create a liberal, facilitative, transparent and competitive investment environment in ASEAN by adhering to the following principles:

(a) provide for investment liberalisation, protection, investment promotion and facilitation;

(b) progressive liberalisation of investment with a view towards achieving a free and open investment environment in the region;

(c) benefit investors and their investments based in ASEAN;

(d) maintain and accord preferential treatment among Member States;

(e) no back-tracking of commitments made under the AIA Agreement and the ASEAN IGA;

(f) grant special and differential treatment and other flexibilities to Member States depending on their level of development and sectoral sensitivities;

(g) reciprocal treatment in the enjoyment of concessions among Member States, where appropriate; and

(h) accommodate expansion of scope of this Agreement to cover other sectors in the future.

Article 3
Scope of Application

1. This Agreement shall apply to measures adopted or maintained by a Member State relating to:

(a) investors of any other Member State; and

(b) investments, in its territory, of investors of any other Member State.

2. This Agreement shall apply to existing investments as at the date of entry into force of this Agreement as well as to investments made after the entry into force of this Agreement.

3. For the purpose of liberalisation and subject to Article 9 (Reservations), this Agreement shall apply to the following sectors:

(a) manufacturing;

(b) agriculture;

(c) fishery;

(d) forestry;

(e) mining and quarrying;

(f) services incidental to manufacturing, agriculture, fishery, forestry, mining and quarrying; and

(g) any other sectors, as may be agreed upon by all Member States.

4. This Agreement shall not apply to:

(a) any taxation measures, except for Articles 13 (Transfers) and 14 (Expropriation and Compensation);

(b) subsidies or grants provided by a Member State;

(c) government procurement;

(d) services supplied in the exercise of governmental authority by the relevant body or authority of a Member State. For the purposes of this Agreement, a service supplied in the exercise of governmental authority means any service, which is supplied neither on a commercial basis nor in competition with one or more service suppliers; and

(e) measures adopted or maintained by a Member State affecting trade in services under the ASEAN Framework Agreement on Services signed in Bangkok, Thailand on 15 December 1995 ("AFAS").

5. Notwithstanding sub-paragraph 4 (e), for the purpose of protection of investment with respect to the commercial presence mode of service supply, Articles 11 (Treatment of Investment), 12 (Compensation in Cases of Strife), 13 (Transfers), 14 (Expropriation and Compensation) and 15 (Subrogation) and Section B (Investment Disputes Between an Investor and a Member State), shall apply, *mutatis mutandis*, to any measure affecting the supply of a service by a service supplier of a Member State through commercial presence in the territory of any other Member State but only to the extent that they relate to an investment and obligation under this Agreement regardless of whether or not such service sector is scheduled in the Member States' schedule of commitments made under AFAS.

6. Nothing in this Agreement shall affect the rights and obligations of any Member State under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency.

Article 4
Definitions

For the purpose of this Agreement:

(a) "**covered investment**" means, with respect to a Member State, an investment in its territory of an investor of any other Member State in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and has been admitted according to its laws, regulations, and national policies, and where applicable, specifically approved in writing[1] by the competent authority of a Member State;

(b) "**freely usable currency**" means a freely usable currency as determined by the International Monetary Fund ("IMF") under its Articles of Agreement and any amendments thereto;

[1] For the purpose of protection, the procedures relating to specific approval in writing shall be as specified in Annex 1 (Approval in Writing).

(c) "**investment**"[2] means every kind of asset, owned or controlled, by an investor, including but not limited to the following:

(i) movable and immovable property and other property rights such as mortgages, liens or pledges;

(ii) shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights or interest derived therefrom;

(iii) intellectual property rights which are conferred pursuant to the laws and regulations of each Member State;

(iv) claims to money or to any contractual performance related to a business and having financial value;[3]

(v) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; and

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[2] Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk.

[3] For greater certainty, investment does not mean claims to money that arise solely from:
(a) commercial contracts for sale of goods or services; or
(b) the extension of credit in connection with such commercial contracts.

(vi) business concessions required to conduct economic activities and having financial value conferred by law or under a contract, including any concessions to search, cultivate, extract or exploit natural resources.

The term “investment” also includes amounts yielded by investments, in particular, profits, interest, capital gains, dividend, royalties and fees. Any alteration of the form in which assets are invested or reinvested shall not affect their classification as investment;

(d) “**investor**” means a natural person of a Member State or a juridical person of a Member State that is making, or has made an investment in the territory of any other Member State;

(e) “**juridical person**” means any legal entity duly constituted or otherwise organised under the applicable law of a Member State, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any enterprise, corporation, trust, partnership, joint venture, sole proprietorship, association, or organisation;

(f) “**measures**” means any measure of a Member State, whether in the form of laws, regulations, rules, procedures, decisions, and administrative actions or practice, adopted or maintained by:

(i) central, regional or local government or authorities; or

(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

(g) "**natural person**" means any natural person possessing the nationality or citizenship of, or right of permanent residence in the Member State in accordance with its laws, regulations and national policies;

(h) "**newer ASEAN Member States**" means the Kingdom of Cambodia, the Lao People's Democratic Republic, the Union of Myanmar and the Socialist Republic of Viet Nam;

(i) "**WTO**" means the World Trade Organization; and

(j) "**WTO Agreement**" means the Marrakesh Agreement Establishing the World Trade Organization, done at Marrakesh, Morocco on 15 April 1994, as may be amended.

Article 5
National Treatment

1. Each Member State shall accord to investors of any other Member State treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

2. Each Member State shall accord to investments of investors of any other Member State treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

Article 6
Most-Favoured-Nation Treatment[4]

1. Each Member State shall accord to investors of another Member State treatment no less favourable than that it accords, in like circumstances, to investors of any other Member State or a non-Member State with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

2. Each Member State shall accord to investments of investors of another Member State treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Member State or a non-Member State with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

3. Paragraphs 1 and 2 shall not be construed so as to oblige a Member State to extend to investors or investments of other Member States the benefit of any treatment, preference or privilege resulting from:

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[4] For greater certainty:
(a) this Article shall not apply to investor-State dispute settlement procedures that are available in other agreements to which Member States are party; and
(b) in relation to investments falling within the scope of this Agreement, any preferential treatment granted by a Member State to investors of any other Member State or a non-Member State and to their investments, under any existing or future agreements or arrangements to which a Member State is a party shall be extended on a most-favoured-nation basis to all Member States.

(a) any sub-regional arrangements between and among Member States;[5] or

(b) any existing agreement notified by Member States to the AIA Council pursuant to Article 8(3) of the AIA Agreement.[6]

Article 7
Prohibition of Performance Requirements

1. The provisions of the Agreement on Trade-Related Investment Measures in Annex 1A to the WTO Agreement (TRIMs), which are not specifically mentioned in or modified by this Agreement, shall apply, *mutatis mutandis*, to this Agreement.

2. Member States shall undertake joint assessment on performance requirements no later than 2 years from the date of entry into force of this Agreement. The aim of such assessment shall include reviewing existing performance requirements and considering the need for additional commitments under this Article.

3. Non-WTO Members of ASEAN shall abide by the WTO provisions in accordance with their accession commitments to the WTO.

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[5] For greater certainty, sub-regional arrangements between and among Member States shall include but not be limited to Greater Mekong Sub-region ("GMS"), ASEAN Mekong Basin Development Cooperation ("AMBDC"), Indonesia-Malaysia-Thailand Growth Triangle ("IMT-GT"), Indonesia-Malaysia-Singapore Growth Triangle ("IMS-GT"), Brunei-Indonesia-Malaysia-Philippines East ASEAN Growth Area ("BIMP-EAGA").

[6] This sub-paragraph refers to the Treaty of Amity and Economic Relations between the Kingdom of Thailand and the United States of America signed in Bangkok, Thailand on 29 May 1966.

Article 8
Senior Management and Board of Directors

1. A Member State shall not require that a juridical person of that Member State appoint to senior management positions, natural persons of any particular nationality.

2. A Member State may require that a majority of the board of directors of a juridical person of that Member State, be of a particular nationality, or resident in the territory of the Member State, provided that this requirement does not materially impair the ability of the investor to exercise control over its investment.

Article 9
Reservations

1. Articles 5 (National Treatment) and 8 (Senior Management and Board of Directors) shall not apply to:

(a) any existing measure that is maintained by a Member State at:

(i) the central level of government, as set out by that Member State in its reservation list in the Schedule referred to in paragraph 2;

(ii) the regional level of government, as set out by that Member State in its reservation list in the Schedule referred to in paragraph 2; and

(iii) a local level of government;

(b) the continuation or prompt renewal of any reservations referred to sub-paragraph (a).

2. Each Member State shall submit its reservation list to the ASEAN Secretariat for the endorsement of the AIA Council within 6 months after the date of signing of this Agreement. This list shall form a Schedule to this Agreement.

3. Any amendment or modification to any reservations contained in the Schedule referred to in paragraph 2 shall be in accordance with Article 10 (Modification of Commitments).

4. Each Member State shall reduce or eliminate the reservations specified in the Schedule in accordance with the three phases of the Strategic Schedule of the AEC Blueprint and Article 46 (Amendments).

5. Articles 5 (National Treatment) and 6 (Most-Favoured-Nation Treatment) shall not apply to any measure covered by an exception to, or derogation from, the obligations under Articles 3 and 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreement, as may be amended ("TRIPS Agreement"), as specifically provided in those Articles and in Article 5 of the TRIPS Agreement.

Article 10
Modification of Commitments

1. For a period of 12 months after the date of submission of each Member State's reservation list, a Member State may adopt any measures or modify any of its reservations made in the Schedule under Article 9 (Reservations) for prospective applications to investors of any other Member States and their investments, provided that such measures or modification shall not adversely affect any existing investors and investments.

2. After the expiration of the period referred to in paragraph 1, a Member State may, by negotiation and

agreement with any other Member States to which it made commitments under this Agreement, adopt any measure, or modify or withdraw such commitments and reservations, provided that such measure, modification or withdrawal shall not adversely affect any existing investors or investments.[7]

3. In any such negotiations and agreement referred to in paragraph 2, which may include provisions for compensatory adjustments with respect to other sectors, the Member States concerned shall maintain a general level of reciprocal and mutually advantageous commitments and reservations that is not less favourable to investors and investments than that provided for in this Agreement prior to such negotiations and agreements.

4. Notwithstanding paragraphs 1 and 2, a Member State shall not, under any measure adopted pursuant to this Article after the entry into force of this Agreement, require an investor of any other Member State, by reason of that investor's nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective, unless otherwise specified in the initial approval by the relevant authorities.

Article 11
Treatment of Investment

1. Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security.

2. For greater certainty:

[7] For the avoidance of doubt, Member States shall not adopt any measures or modify any of its reservation under the Schedule for a period of 6 months after the expiration of the period specified in paragraph 1.

(a) fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process; and

(b) full protection and security requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

Article 12
Compensation in Cases of Strife

Each Member State shall accord to investors of any other Member State, in relation to their covered investments which suffered losses in its territory due to armed conflict or civil strife or state of emergency, non-discriminatory treatment with respect to restitution, compensation or other valuable consideration.

Article 13
Transfers

1. Each Member State shall allow all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

(a) contributions to capital, including the initial contribution;

(b) profits, capital gains, dividends, royalties, license fees, technical assistance and technical and

management fees, interest and other current income accruing from any covered investment;

(c) proceeds from the total or partial sale or liquidation of any covered investment;

(d) payments made under a contract, including a loan agreement;

(e) payments made pursuant to Articles 12 (Compensation in Cases of Strife) and 14 (Expropriation and Compensation);

(f) payments arising out of the settlement of a dispute by any means including adjudication, arbitration or the agreement of the Member States to the dispute; and

(g) earnings and other remuneration of personnel employed and allowed to work in connection with that covered investment in its territory.

2. Each Member State shall allow transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

3. Notwithstanding paragraphs 1 and 2, a Member State may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws and regulations relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading, or dealing in securities, futures, options, or derivatives;

(c) criminal or penal offences and the recovery of the proceeds of crime;

(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;

(e) ensuring compliance with orders or judgments in judicial or administrative proceedings;

(f) taxation;

(g) social security, public retirement, or compulsory savings schemes;

(h) severance entitlements of employees; and

(i) the requirement to register and satisfy other formalities imposed by the Central Bank and other relevant authorities of a Member State.

4. Nothing in this Agreement shall affect the rights and obligations of the Member States as members of the IMF, under the Articles of Agreement of the IMF, including the use of exchange actions which are in conformity with the Articles of Agreement of the IMF, provided that a Member State shall not impose restrictions on any capital transactions inconsistently with its specific commitments under this Agreement regarding such transactions, except:

(a) at the request of the IMF;

(b) under Article 16 (Measures to Safeguard the Balance-of-Payments); or

(c) where, in exceptional circumstances, movements of capital cause, or threaten to cause, serious economic or financial disturbance in the Member State concerned.

5. The measures taken in accordance with sub-paragraph 4(c)[8]:

(a) shall be consistent with the Articles of Agreement of the IMF;

(b) shall not exceed those necessary to deal with the circumstances described in sub-paragraph 4(c);

(c) shall be temporary and shall be eliminated as soon as conditions no longer justify their institution or maintenance**;**

(d) shall promptly be notified to the other Member States;

(e) shall be applied such that any one of the other Member States is treated no less favourably than any other Member State or non-Member State;

(f) shall be applied on a national treatment basis; and

(g) shall avoid unnecessary damage to investors and covered investments, and the commercial, economic and financial interests of the other Member State(s).

[8] For greater certainty, any measures taken to ensure the stability of the exchange rate including to prevent speculative capital flows shall not be adopted or maintained for the purpose of protecting a particular sector.

Article 14
Expropriation and Compensation[9]

1. A Member State shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation ("expropriation"),[10] except:

(a) for a public purpose;

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate, and effective compensation; and

(d) in accordance with due process of law.

2. The compensation referred to in sub-paragraph 1(c) shall:

(a) be paid without delay;[11]

(b) be equivalent to the fair market value of the expropriated investment immediately before or at the time when the expropriation was publicly announced, or when the expropriation occurred, whichever is applicable;

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[9] This Article shall be read with Annex 2 (Expropriation and Compensation).

[10] For the avoidance of doubt, any measure of expropriation relating to land shall be as defined in the Member States' respective existing domestic laws and regulations and any amendments thereto, and shall be for the purposes of and upon payment of compensation in accordance with the aforesaid laws and regulations.

[11] Member States understand that there may be legal and administrative processes that need to be observed before payment can be made.

(c) not reflect any change in value because the intended expropriation had become known earlier; and

(d) be fully realisable and freely transferable in accordance with Article 13 (Transfers) between the territories of the Member States.

3. In the event of delay, the compensation shall include an appropriate interest in accordance with the laws and regulations of the Member State making the expropriation. The compensation, including any accrued interest, shall be payable either in the currency in which the investment was originally made or, if requested by the investor, in a freely usable currency.

4. If an investor requests payment in a freely useable currency, the compensation referred to in sub-paragraph 1(c), including any accrued interest, shall be converted into the currency of payment at the market rate of exchange prevailing on the date of payment.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement.

Article 15
Subrogation

1. If a Member State or an agency of a Member State makes a payment to an investor of that Member State under a guarantee, a contract of insurance or other form of indemnity it has granted on non-commercial risk in respect of an investment, the other Member State shall recognise the subrogation or transfer of any right or title in respect of such investment. The subrogated or transferred right or claim shall not be greater than the original right or claim of the

investor. This, however, does not necessarily imply recognition of the latter Member State of the merits of any case or the amount of any claims arising therefrom.

2. Where a Member State or an agency of a Member State has made a payment to an investor of that Member State and has taken over rights and claims of the investor, that investor shall not, unless authorised to act on behalf of the Member State or the agency of the Member State making the payment, pursue those rights and claims against the other Member State.

3. In the exercise of subrogated rights or claims, a Member State or the agency of the Member State exercising such rights or claims shall disclose the coverage of the claims arrangement with its investors to the relevant Member State.

Article 16
Measures to Safeguard the Balance-of-Payments

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member State may adopt or maintain restrictions on payments or transfers related to investments. It is recognised that particular pressures on the balance-of-payments of a Member State in the process of economic development may necessitate the use of restrictions to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development.

2. The restrictions referred to in paragraph 1 shall:

   (a) be consistent with the Articles of Agreement of the IMF;

(b) avoid unnecessary damage to the commercial, economic and financial interests of another Member State;

(c) not exceed those necessary to deal with the circumstances described in paragraph 1;

(d) be temporary and be phased out progressively as the situation specified in paragraph 1 improves;

(e) be applied such that any one of the other Member States is treated no less favourably than any other Member State or non-Member State.

3. Any restrictions adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the other Member States.

4. To the extent that it does not duplicate the process under WTO, IMF, or any other similar processes, the Member State adopting any restrictions under paragraph 1 shall commence consultations with any other Member State that requests such consultations in order to review the restrictions adopted by it.

Article 17
General Exceptions

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member States or their investors where like conditions prevail, or a disguised restriction on investors of any other Member State and their investments, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures:

(a) necessary to protect public morals or to maintain public order;[12]

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with this Agreement, including those relating to:

(i) the prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety;

(d) aimed at ensuring the equitable or effective[13] imposition or collection of direct taxes in respect of investments or investors of any Member State;

(e) imposed for the protection of national treasures of artistic, historic or archaeological value;

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[12] The public order exception may be invoked by a Member State only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

[13] For the purpose of this sub-paragraph, footnote 6 of Article XIV of the General Agreement on Trade in Services in Annex 1B to the WTO Agreement (GATS) is incorporated into and forms an integral part of this Agreement, *mutatis mutandis*.

(f) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

2. Insofar as measures affecting the supply of financial services are concerned, paragraph 2 (Domestic Regulation) of the Annex on Financial Services of the General Agreement on Trade in Services in Annex 1B to the WTO Agreement ("GATS") shall be incorporated into and form an integral part of this Agreement, *mutatis mutandis*.

Article 18
Security Exceptions

Nothing in this Agreement shall be construed:

(a) to require any Member State to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any Member State from taking any action which it considers necessary for the protection of its essential security interests, including but not limited to:

(i) action relating to fissionable and fusionable materials or the materials from which they derived;

(ii) action relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) action taken in time of war or other emergency in domestic or international relations;

(iv) action taken so as to protect critical public infrastructure, including communication, power and water infrastructures, from deliberate attempts intended to disable or degrade such infrastructure; or

(c) to prevent any Member State from taking any action pursuant to its obligations under the United Nations Charter for the maintenance of international peace and security.

Article 19
Denial of Benefits

1. A Member State may deny the benefits of this Agreement to:

(a) an investor of another Member State that is a juridical person of such other Member State and to investments of such investor if an investor of a non-Member State owns or controls the juridical person and the juridical person has no substantive business operations in the territory of such other Member State;

(b) an investor of another Member State that is a juridical person of such other Member State and to investments of such investor if an investor of the denying Member State owns or controls the juridical person and the juridical person has no substantive business operations in the territory of such other Member State; and

(c) an investor of another Member State that is a juridical person of such other Member State and to an investment of such investor if investors of a non-Member State own or control the juridical person, and the denying Member State does not maintain diplomatic relations with the non-Member State.

2. Following notification to the Member State of the investor, and without prejudice to paragraph 1, a Member State may deny the benefits of this Agreement to investors of another Member State and to investments of that investor, where it establishes that such investor has made an investment in breach of the domestic laws of the denying Member State by misrepresenting its ownership in those areas of investment which are reserved for natural or juridical persons of the denying Member State.

3. A juridical person is:

(a) “owned” by an investor in accordance with the laws, regulations and national policies of each Member States;

(b) “controlled” by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions.

Article 20
Special Formalities and Disclosure of Information

1. Nothing in Articles 5 (National Treatment) or 6 (Most-Favoured-Nation Treatment) shall be construed to prevent a Member State from adopting or maintaining a measure that prescribes special formalities in connection with investments, including a requirement that investments be legally constituted or assume a certain legal form under the laws or regulations of the Member State and compliance with

registration requirements, provided that such formalities do not materially impair the rights afforded by a Member State to investors of another Member State and investments pursuant to this Agreement.

2. Notwithstanding Articles 5 (National Treatment) or 6 (Most-Favoured-Nation Treatment), a Member State may require an investor of another Member State, or a covered investment, to provide information concerning that investment solely for informational or statistical purposes. The Member State shall protect any confidential information from any disclosure that would prejudice legitimate commercial interests or particular juridical persons, public or private or the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Member State from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

Article 21
Transparency

1. In order to achieve the objectives of this Agreement, each Member State shall:

(a) promptly and at least annually inform the AIA Council of any investment-related agreements or arrangements which it has entered into and where preferential treatment was granted;

(b) promptly and at least annually inform the AIA Council of the introduction of any new law or of any changes to existing laws, regulations or administrative guidelines, which significantly affect investments or commitments of a Member State under this Agreement;

(c) make publicly available, all relevant laws, regulations and administrative guidelines of general application that pertain to, or affect investments in the territory of the Member State; and

(d) establish or designate an enquiry point where, upon request of any natural person, juridical person or any other Member State, all information relating to the measures required to be published or made available under sub-paragraphs (b) and (c) may be promptly obtained.

2. Nothing in this Agreement shall require a Member State to furnish or allow access to any confidential information, including information concerning particular investors or investments, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular juridical persons, public or private.

Article 22
Entry, Temporary Stay and Work of Investors and Key Personnel

Subject to its immigration and labour laws, regulations and national policies relating to the entry, temporary stay and authorisation to work, and consistent with its commitments under AFAS, each Member State shall grant entry, temporary stay and authorisation to work to investors, executives, managers and members of the board of directors of a juridical person of any other Member State, for the purpose of establishing, developing, administering or advising on the operation in the territory of the former Member State of an investment to which they, or a juridical person of the other Member States that employs such

executives, managers and members of the board of directors, have committed or are in the process of committing a substantial amount of capital or other resources.

Article 23
Special and Differential Treatment for the Newer ASEAN Member States

In order to increase the benefits of this Agreement for the newer ASEAN Member States, and in accordance with the objectives and principles set out in the Preamble and Articles 1 (Objective) and 2 (Guiding Principles), Member States recognise the importance of according special and differential treatment to the newer ASEAN Member States, through:

(a) technical assistance to strengthen their capacity in relation to investment policies and promotion, including in areas such as human resource development;

(b) commitments in areas of interest to the newer ASEAN Member States; and

(c) recognising that commitments by each newer ASEAN Member State may be made in accordance with its individual stage of development.

Article 24
Promotion of Investment

Member States shall cooperate in increasing awareness of ASEAN as an integrated investment area in order to increase foreign investment into ASEAN and intra-ASEAN investments through, among others:

(a) encouraging the growth and development of ASEAN small and medium enterprises and multi-national enterprises;

(b) enhancing industrial complementation and production networks among multi-national enterprises in ASEAN;

(c) organising investment missions that focus on developing regional clusters and production networks;

(d) organising and supporting the organisation of various briefings and seminars on investment opportunities and on investment laws, regulations and policies; and

(e) conducting exchanges on other issues of mutual concern relating to investment promotion.

Article 25
Facilitation of Investment

Member States shall endeavour to cooperate in the facilitation of investments into and within ASEAN through, among others:

(a) creating the necessary environment for all forms of investments;

(b) streamlining and simplifying procedures for investment applications and approvals;

(c) promoting dissemination of investment information, including investment rules, regulations, policies and procedures;

(d) establishing one-stop investment centres;

(e) strengthening databases on all forms of investments for policy formulation to improve ASEAN's investment environment;

(f) undertaking consultation with the business community on investment matters; and

(g) providing advisory services to the business community of the other Member States.

Article 26
Enhancing ASEAN Integration

Member States recognise the importance of fostering ASEAN economic integration through various initiatives, including the Initiative for ASEAN Integration, Priority Integration Sectors, and AEC, all of which include cooperation on investment. In order to enhance ASEAN economic integration, Member States shall endeavour to, among others:

(a) harmonise, where possible, investment policies and measures to achieve industrial complementation;

(b) build and strengthen capacity of Member States, including human resource development, in the formulation and improvement of investment policies to attract investment;

(c) share information on investment policies and best practices, including promoted activities and industries; and

(d) support investment promotion efforts amongst Member States for mutual benefits.

Article 27
Disputes Between or Among Member States

The ASEAN Protocol on Enhanced Dispute Settlement Mechanism signed in Vientiane, Lao PDR on 29 November 2004, as amended, shall apply to the settlement of disputes concerning the interpretation or application of this Agreement.

SECTION B

Investment Dispute Between an Investor and a Member State

Article 28
Definitions

For the purpose of this Section:

(a) "**Appointing Authority**" means:

(i) in the case of arbitration under Article 33(1)(b) or (c), the Secretary-General of ICSID;

(ii) in the case of arbitration under Article 33(1)(d), the Secretary-General of the Permanent Court of Arbitration; or

(iii) in the case of arbitration under Article 33(1)(e) and (f), the Secretary-General, or a person holding equivalent position, of that arbitration centre or institution;

(b) "**disputing investor**" means an investor of a Member State that makes a claim on its own behalf under this Section, and where relevant, includes an investor of a Member State that makes a claim on behalf of a juridical person of the other Member State that the investor owns or controls;

(c) "**disputing Member State**" means a Member State against which a claim is made under this Section;

(d) "**disputing parties**" means a disputing investor and a disputing Member State;

(e) "**ICSID**" means the International Centre for Settlement of Investment Disputes;

(f) "**ICSID Additional Facility Rules**" means the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes;

(g) "**ICSID Convention**" means the Convention on the Settlement of Investment Disputes between States and National of other States, done at Washington, D.C., United States of America on 18 March 1965;

(h) "**New York Convention**" means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, United States of America on 10 June 1958;

(i) "**non-disputing Member State**" means the Member State of the disputing investor; and

(j) "**UNCITRAL Arbitration Rules**" means the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on 15 December 1976.

Article 29
Scope of Coverage

1. This Section shall apply to an investment dispute between a Member State and an investor of another Member State that has incurred loss or damage by reason of an alleged breach of any rights conferred by this Agreement with respect to the investment of that investor.

2. A natural person possessing the nationality or citizenship of a Member State shall not pursue a claim against that Member State under this Section.

3. This Section shall not apply to claims arising out of events which occurred, or claims which have been raised prior to the entry into force of this Agreement.

4. Nothing in this Section shall be construed so as to prevent a disputing investor from seeking administrative or judicial settlement available within the country of a disputing Member State.

Article 30
Conciliation

1. The disputing parties may at any time agree to conciliation, which may begin at any time and be terminated at the request of the disputing investor at any time.

2. If the disputing parties agree, procedures for conciliation may continue while procedures provided for in Article 33 (Submission of a Claim) are in progress.

3. Proceedings involving conciliation and positions taken by the disputing parties during these proceedings shall be without prejudice to the rights of either disputing parties in any further proceedings under this Section.

Article 31
Consultations

1. In the event of an investment dispute, the disputing parties shall initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures. Such consultations shall be initiated by a written request for consultations delivered by the disputing investor to the disputing Member State.

2. Consultations shall commence within 30 days of receipt by the disputing Member State of the request for consultations, unless the disputing parties otherwise agree.

3. With the objective of resolving an investment dispute through consultations, a disputing investor shall make all reasonable efforts to provide the disputing Member State, prior to the commencement of consultations, with information regarding the legal and factual basis for the investment dispute.

Article 32
Claim by an Investor of a Member State

If an investment dispute has not been resolved within 180 days of the receipt by a disputing Member State of a request for consultations, the disputing investor may, subject to this Section, submit to arbitration a claim:

(a) that the disputing Member State has breached an obligation arising under Articles 5 (National Treatment), 6 (Most-Favoured-Nation Treatment), 8 (Senior Management and Board of Directors), 11 (Treatment of Investment), 12 (Compensation in Cases of Strife), 13 (Transfers) and 14 (Expropriation and Compensation) relating to the management, conduct, operation or sale or other disposition of a covered investment; and

(b) that the disputing investor in relation to its covered investment has incurred loss or damage by reason of or arising out of that breach.

Article 33
Submission of a Claim

1. A disputing investor may submit a claim referred to in Article 32 (Claim by an Investor of a Member State) at the choice of the disputing investor:

(a) to the courts or administrative tribunals of the disputing Member State, provided that such courts or tribunals have jurisdiction over such claims; or

(b) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings,[14] provided that both the disputing Member State and the non-disputing Member State are parties to the ICSID Convention; or

[14] In the case of the Philippines, submission of a claim to ICSID and the ICSID Rules of Procedure for Arbitration Proceedings shall be subject to a written agreement between the disputing parties in the event that an investment dispute arises.

(c) under the ICSID Additional Facility Rules, provided that either of the disputing Member State or the non-disputing Member State is a party to the ICSID Convention; or

(d) under the UNCITRAL Arbitration Rules; or

(e) to the Regional Centre for Arbitration at Kuala Lumpur or any other regional centre for arbitration in ASEAN; or

(f) if the disputing parties agree, to any other arbitration institution,

provided that resort to any arbitration rules or fora under sub-paragraphs (a) to (f) shall exclude resort to the other.

2. A claim shall be deemed submitted to arbitration under this Section when the disputing investor's notice of or request for arbitration ("notice of arbitration") is received under the applicable arbitration rules.

3. The arbitration rules applicable under paragraph 1, as in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.

4. In relation to a specific investment dispute or class of disputes, the applicable arbitration rules may be waived, varied or modified by written agreement between the disputing parties. Such rules shall be binding on the relevant tribunal or tribunals established under this Section, and on individual arbitrators serving on such tribunals.

5. The disputing investor shall provide with the notice of arbitration:

(a) the name of the arbitrator that the disputing investor appoints; or

(b) the disputing investor's written consent for the Appointing Authority to appoint that arbitrator.

Article 34
Conditions and Limitations on Submission of a Claim

1. The dispute shall be submitted to arbitration under Article 33(1)(b) to (f) in accordance with this Section, and shall be conditional upon:

(a) the submission of the investment dispute to such arbitration taking place within 3 years of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation under this Agreement causing loss or damage to the disputing investor or a covered investment; and

(b) the disputing investor providing written notice, which shall be submitted at least 90 days before the claim is submitted, to the disputing Member State of its intent to submit the investment dispute to such arbitration and which briefly summarises the alleged breach of the disputing Member State under this Agreement (including the provisions alleged to have been breached) and the loss or damage allegedly caused to the disputing investor or a covered investment; and

(c) the notice of arbitration under Article 33(2) being accompanied by the disputing investor's written waiver of the disputing investor's right to initiate or continue any proceedings before the courts or administrative tribunals of the disputing Member State, or other dispute settlement procedures, of

any proceeding with respect to any measure alleged to constitute a breach referred to in Article 32 (Claim by an Investor of a Member State).

2. Notwithstanding sub-paragraph 1(c), the disputing investor shall not be prevented from initiating or continuing an action that seeks interim measures of protection for the sole purpose of preserving the disputing investor's rights and interests and does not involve the payment of damages or resolution of the substance of the matter in dispute, before the courts or administrative tribunals of the disputing Member State.

3. A Member State shall not give diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and the other Member State have consented to submit or have submitted to arbitration under this Section, unless such other Member State has failed to abide by and comply with the award rendered in such dispute. Diplomatic protection, for the purposes of this paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

4. A disputing Member State shall not assert, as a defence, counter-claim, right of set-off or otherwise, that the disputing investor in relation to the covered investment has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss.

Article 35
Selection of Arbitrators

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators:

(a) one arbitrator appointed by each of the disputing parties; and

(b) the third arbitrator, who shall be the presiding arbitrator, appointed by agreement of the disputing parties. The third arbitrator shall be a national of a non-Member State which has diplomatic relations with the disputing Member State and non-disputing Member State, and shall not have permanent residence in either the disputing Member State or non-disputing Member State.

2. Any person appointed as an arbitrator shall have expertise or experience in public international law, international trade or international investment rules. An arbitrator shall be chosen strictly on the basis of objectivity, reliability, sound judgment and independence and shall conduct himself or herself on the same basis throughout the course of the arbitral proceedings.

3. Subject to Article 36 (Conduct of the Arbitration), if a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Appointing Authority, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators who have not been appointed.

4. The tribunal shall reach its decisions by a majority of votes and its decisions shall be binding.

5. The parties to the dispute shall bear the cost of their respective arbitrators to the tribunal and share equally the cost of the presiding arbitrator and other relevant costs. In all other respects, the tribunal shall determine its own procedures.

6. The disputing parties may establish rules relating to expenses incurred by the tribunal, including remuneration of the arbitrators.

7. Where any arbitrator appointed as provided for in this Article resigns or becomes unable to act, a successor shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and the successor shall have all the powers and duties of the original arbitrator.

Article 36
Conduct of the Arbitration

1. Where issues relating to jurisdiction or admissibility are raised as preliminary objections, the tribunal shall decide the matter before proceeding to the merits.

2. A disputing Member State may, no later than 30 days after the constitution of the tribunal, file an objection that a claim is manifestly without merit. A disputing Member State may also file an objection that a claim is otherwise outside the jurisdiction or competence of the tribunal. The disputing Member State shall specify as precisely as possible the basis for the objection.

3. The tribunal shall address any such objection as a preliminary question apart from the merits of the claim. The disputing parties shall be given a reasonable opportunity to present their views and observations to the tribunal. If the tribunal decides that the claim is manifestly without merit, or is otherwise not within the jurisdiction or competence of the tribunal, it shall render an award to that effect.

4. The tribunal may, if warranted, award the prevailing party reasonable costs and fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claim or the objection was frivolous or manifestly without

merit, and shall provide the disputing parties a reasonable opportunity to comment.

5. Unless the disputing parties otherwise agree, the tribunal shall determine the place of arbitration in accordance with the applicable arbitration rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

6. Where an investment dispute relate to a measure which may be a taxation measure, the disputing Member State and the non-disputing Member State, including representatives of their tax administrations, shall hold consultations to determine whether the measure in question is a taxation measure.

7. Where a disputing investor claims that the disputing Member State has breached Article 14 (Expropriation and Compensation) by the adoption or enforcement of a taxation measure, the disputing Member State and the non-disputing Member State shall, upon request from the disputing Member State, hold consultations with a view to determining whether the taxation measure in question has an effect equivalent to expropriation or nationalisation.

8. Any tribunal that may be established under this Section shall accord serious consideration to the decision of both Member States under paragraphs 6 and 7.

9. If both Member States fail either to initiate such consultations referred to paragraphs 6 and 7, or to make such joint decisions, within the period of 180 days from the date of the receipt of request for consultation referred to in Article 31 (Consultations), the disputing investor shall not be prevented from submitting its claim to arbitration in accordance with this Section.

Article 37
Consolidation

Where two or more claims have been submitted separately to arbitration under Article 32 (Claim by an Investor of a Member State) and the claims have a question of law or fact in common and arise out of the same or similar events or circumstances, all concerned disputing parties may agree to consolidate those claims in any manner they deem appropriate.

Article 38
Expert Reports

Without prejudice to the appointment of other kinds of experts where authorised by the applicable arbitration rules, the tribunal, at the request of the disputing parties, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, public health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

Article 39
Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 3, the disputing Member State may make publicly available all awards, and decisions produced by the tribunal.

2. Any of the disputing parties that intend to use information designated as confidential information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

3. Any information specifically designated as confidential that is submitted to the tribunal or the disputing parties shall be protected from disclosure to the public.

4. A disputing party may disclose to persons directly connected with the arbitral proceedings such confidential information as it considers necessary for the preparation of its case, but it shall require that such confidential information is protected.

5. The tribunal shall not require a Member State to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Member State's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security.

6. The non-disputing Member State shall be entitled, at its cost, to receive from the disputing Member State a copy of the notice of arbitration, no later than 30 days after the date that such document has been delivered to the disputing Member State. The disputing Member State shall notify all other Member States of the receipt of the notice of arbitration within 30 days thereof.

Article 40
Governing Law

1. Subject to paragraphs 2 and 3, when a claim is submitted under Article 33 (Submission of a Claim), the tribunal shall decide the issues in dispute in accordance with this Agreement, any other applicable agreements between the Member States, and the applicable rules of international law and where applicable, any relevant domestic law of the disputing Member State.

2. The tribunal shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute. The Member States shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of the delivery of the request. Without prejudice to paragraph 3, if the Member States fail to issue such a decision within 60 days, any interpretation submitted by a Member State shall be forwarded to the disputing parties and the tribunal, which shall decide the issue on its own account.

3. A joint decision of the Member States, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.

Article 41
Awards

1. The disputing parties may agree on a resolution of the dispute at any time before the tribunal issues its final award.

2. Where a tribunal makes a final award against either of the disputing parties, the tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest; and

(b) restitution of property, in which case the award shall provide that the disputing Member State may pay monetary damages and any applicable interest in lieu of restitution.

3. A tribunal may also award costs and attorney's fees in accordance with this Agreement and the applicable arbitration rules.

4. A tribunal may not award punitive damages.

5. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

6. Subject to paragraph 7 and the applicable review procedure for an interim award, the disputing party shall abide by and comply with an award without delay.[15]

7. The disputing party may not seek enforcement of a final award until:

(a) in the case of a final award under the ICSID Convention:

(i) 120 days has elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or

(ii) revision or annulment proceedings have been completed;

(b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 33(1)(e):

(i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or

[15] The Parties understand that there may be domestic legal and administrative processes that need to be observed before an award can be complied with.

(ii) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.

8. A claim that is submitted for arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article 1 of the New York Convention.

9. Each Member State shall provide for the enforcement of an award in its territory.

SECTION C

Article 42
Institutional Arrangements

1. The AIA Council, as established by the AEM under the AIA Agreement, shall be responsible for the implementation of this Agreement.

2. The ASEAN Coordinating Committee on Investment ("CCI") as established by the AIA Council and comprising senior officials responsible for investment and other senior officials from relevant government agencies, shall assist the AIA Council in the performance of its functions. The CCI shall report to the AIA Council through the Senior Economic Officials Meeting ("SEOM"). The ASEAN Secretariat shall be the secretariat for the AIA Council and the CCI.

3. The functions of the AIA Council shall be to:

(a) provide policy guidance on global and regional investment matters concerning promotion, facilitation, protection, and liberalisation;

(b) oversee, coordinate and review the implementation of this Agreement;

(c) update the AEM on the implementation and operation of this Agreement;

(d) consider and recommend to the AEM any amendments to this Agreement;

(e) facilitate the avoidance and settlement of disputes arising from this Agreement;

(f) supervise and coordinate the work of the CCI;

(g) adopt any necessary decisions; and

(h) carry out any other functions as the AEM may agree.

Article 43
Consultations by Member States

The Member States agree to consult each other at the request of any Member State on any matter relating to investments covered by this Agreement, or otherwise affecting the implementation of this Agreement.

Article 44
Relation to Other Agreements

Nothing in this Agreement shall derogate from the existing rights and obligations of a Member State under any other international agreements to which it is a party.

Article 45
Annexes, Schedule and Future Instruments

This Agreement shall include the Annexes, the Schedule and the contents therein, which shall form an integral part of this Agreement, and all future legal instruments agreed pursuant to this Agreement.

Article 46
Amendments

The provisions of this Agreement may be modified through amendments mutually agreed upon in writing by the Member States.

Article 47
Transitional Arrangements Relating to the ASEAN IGA and the AIA Agreement

1. Upon the entry into force of this Agreement, the ASEAN IGA and the AIA Agreement shall be terminated.

2. Notwithstanding the termination of the AIA Agreement, the Temporary Exclusion List and the Sensitive List to the AIA Agreement shall apply to the liberalisation provisions of the ACIA, *mutatis mutandis*, until such time that the Reservation List of ACIA comes into force.

3. With respect to investments falling within the ambit of this Agreement as well as under the ASEAN IGA, or within the ambit of this Agreement and the AIA Agreement, investors of these investments may choose to apply the provisions, but only in its entirety, of either this Agreement or the ASEAN IGA or the AIA Agreement, as the case may be, for a period of 3 years after the date of termination of the ASEAN IGA and the AIA Agreement.

Article 48
Entry into Force

1. This Agreement shall enter into force after all Member States have notified or, where necessary, deposited instruments of ratification with the Secretary-General of ASEAN, which shall not take more than 180 days after the signing of this Agreement.

2. The Secretary-General of ASEAN shall promptly notify all Member States of the notifications or deposit of each instrument of ratification referred to in paragraph 1.

Article 49
Depositary

This Agreement shall be deposited with the Secretary-General of ASEAN, who shall promptly furnish a certified copy thereof to each Member State.

IN WITNESS WHEREOF, the undersigned, being duly authorised by their respective Governments, have signed this ASEAN Comprehensive Investment Agreement.

DONE at Cha-am, Thailand, this 26th Day of February in the Year Two Thousand and Nine, in a single original copy in the English language.

For Brunei Darussalam:

LIM JOCK SENG
Second Minister of Foreign Affairs and Trade

For the Kingdom of Cambodia:

CHAM PRASIDH
Senior Minister and Minister of Commerce

For the Republic of Indonesia:

MARI ELKA PANGESTU
Minister of Trade

For the Lao People's Democratic Republic:

NAM VIYAKETH
Minister of Industry and Commerce

For Malaysia:

TAN SRI MUHYIDDIN YASSIN
Minister of International Trade and Industry

For the Union of Myanmar:

U SOE THA
Minister for National Planning and Economic Development

For the Republic of the Philippines:

PETER B. FAVILA
Secretary of Trade and Industry

For the Republic of Singapore:

LIM HNG KIANG
Minister for Trade and Industry

For the Kingdom of Thailand:

PORNTIVA NAKASAI
Minister of Commerce

For the Socialist Republic of Viet Nam:

VU HUY HOANG
Minister of Industry and Trade

ANNEX 1
Approval in Writing

Where specific approval in writing is required for covered investments by a Member State's domestic laws, regulations and national policies, that Member State shall:

(a) inform all the other Member States through the ASEAN Secretariat of the contact details of its competent authority responsible for granting such approval;

(b) in the case of an incomplete application, identify and notify the applicant in writing within 1 month from the date of receipt of such application of all the additional information that is required;

(c) inform the applicant in writing that the investment has been specifically approved or denied within 4 months from the date of receipt of complete application by the competent authority; and

(d) in the case an application is denied, inform the applicant in writing of the reasons for such denial. The applicant shall have the opportunity of submitting, at that applicant's discretion, a new application.

ANNEX 2
Expropriation and Compensation

1. An action or a series of related actions by a Member State cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment.

2. Article 14(1) addresses two situations:

(a) the first situation is where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and

(b) the second situation is where an action or series of related actions by a Member State has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

3. The determination of whether an action or series of actions by a Member State, in a specific fact situation, constitutes an expropriation of the type referred to in sub-paragraph 2(b), requires a case-by-case, fact-based inquiry that considers, among other factors:

(a) the economic impact of the government action, although the fact that an action or series of actions by a Member State has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred;

(b) whether the government action breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal document; and

(c) the character of the government action, including, its objective and whether the action is disproportionate to the public purpose referred to in Article 14(1).

4. Non-discriminatory measures of a Member State that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation of the type referred to in sub-paragraph 2(b).

Annex 3: List of Viet Nam's Reservations to ACIA

Schedule to the ASEAN Comprehensive Investment Agreement

HEADNOTE

HEADNOTE
LIST OF RESERVATIONS

1. The Schedule of ASEAN Member States sets out, pursuant to Article 9 (Reservations), Member States' measures that do not conform to the obligations under:

(a) Article 5 (National Treatment); and
(b) Article 8 (Senior Management and Board of Directors).

2. Each reservation sets out the following elements, where applicable:

(a) "Sector(s)" refers to either manufacturing, agriculture, fishery, forestry, mining and quarrying, services incidental to these sectors (Mode 3 (commercial presence) of services incidental to these sectors), all or a combination of these sectors in which a reservation is taken;

(b) "Sub-Sector(s)" refers to specific industries/products/activities in which a reservation is taken;

(c) "Industry Classification" refers to the activities covered by the reservation according to:

- International Standard Industrial Classification (ISIC) Revision 3 for manufacturing, agriculture, fishery, forestry, mining and quarrying or, where applicable, ASEAN Harmonised Tariff Nomenclature (AHTN) codes;

- UN Provisional Central Product Certification (pCPC) 1991 (Series M No. 77) for services incidental to manufacturing, agriculture, fishery, forestry, mining and quarrying sectors (pCPC 881 – 885).

As necessary and appropriate, Member States could specify the exact coverage of the reservations if the reservations do not exactly conform to the classification system.

(d) "Level of Government" specifies the level of government (Central or Regional) maintaining the measure for which a reservation is taken;

(e) "Type of Obligation" refers to the obligation of National Treatment (NT) or/and Senior Management and Board of Directors (SMBD), as the case may be, which do not apply to the listed measure(s);

(f) "Description of Measure" shall refer to measures that do not conform to National Treatment and Senior Management and Board of Directors for which a reservation is taken; and

(g) "Source of Measure" is identified for transparency purposes only, for existing measures that apply to the sector, sub-sector or activities covered by the reservations.

3. Member States' commitments under the GATS shall apply to measures affecting the supply of services under Modes 1, 2 and 4 of services incidental to manufacturing, agriculture, fishery, forestry, mining and quarrying. For this purpose, Member States need not make any reservations on measures that do not conform to Article 5 (National Treatment) and Article 8 (Senior Management and Board of Directors) for these sectors until such time when this Agreement is reviewed and additional commitments agreed. In addition, consistent with Article 3 of the Agreement, measures affecting liberalisation of investment in services sectors, other than services incidental to manufacturing, agriculture, fishery, forestry, mining and quarrying sectors (pCPC 881 – 885), do not fall within the scope of this Agreement. Therefore, the reservation lists attached to this Headnote do not include reservations on such measures.

4. Each Member State reserves the right to make future reservations on measures that do not conform to Article 5 (National Treatment) and Article 8 (Senior Management and Board of Directors) on:

(a) new and emerging sectors, sub-sectors, industries, products, or activities; or
(b) existing sectors, subsectors, industries, products, or activities;

which are unregulated at the time of submission of the reservation lists.

5. In the interpretation of a reservation, all elements of the reservation shall be considered. A reservation shall be interpreted in the light of this Agreement against which the reservation is taken. The "Description of Measure" element shall prevail over all other elements.

6. The ASEAN Member States agree that as soon as possible and in any event no later than 6 months from the date of entry into force of the Agreement, to enter into discussions to seek a mutually agreed solution on the treatment of "permanent residents" of a Member State as an investor. Until such discussions result in a mutually agreed solution, any obligations arising from the recognition of any natural person possessing the right of permanent residence in a Member State as investor under this Agreement shall neither apply to, nor be claimed upon, Cambodia, Indonesia, Myanmar, Philippines, Thailand, and Viet Nam.

7. In the case of Brunei Darussalam where the investor is a "permanent resident" of Brunei Darussalam and also non-national of any country, the other Member State concerned may mutually agree to enter into bilateral consultations, on a case-by-case and non prejudicial basis on the issue of whether to recognise the status of such natural person as an investor of Brunei Darussalam.

8. In the case of Thailand, as stipulated in the Foreign Business Act B.E.2542 (1999), nothing in this Agreement shall apply to an investor of the other Member States which is a juridical person constituted or otherwise organised under the law of a Member State that is not owned and/or controlled by nationals of Member States, and its investment. This provision shall be subject to review by the AIA Council on an annual basis.

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1.

Sector	:	**All Sectors**
Sub-Sector	:	-
Industry Classification	:	-
Level of Government	:	Central
Type of Obligation	:	National Treatment Senior Management and Board of Directors
Description of Measure	:	National Treatment and Senior Management and Board of Directors shall not apply to any measure in relation to the employment of expatriates. Restrictions[1] may be imposed on the number or ratio, minimum wages, duration and type of expatriates employed.
Source of Measure	:	- Law on Labour, 1994 as amended. - Law on Enterprises, 2005. - Decree 111/2008/ND-CP, dated 10/10/2008. - Decree 03/2006/ND-CP dated 06/01/2006. - Decree 34/2008/ND–CP dated 25/03/2008.

∞

[1] For illustrative purpose, the restriction may include but not limited to:
- In the case of managers, executives and specialists, at least 20% of the total number of them shall be Vietnamese nationals. However, a minimum of 3 non-Vietnamese managers, executives and specialists shall be permitted per enterprise;
- The legal representative of an enterprise shall reside permanently in Viet Nam as stipulated in the Law on Enterprise, 2005.

2.

Sector	:	**All Sectors**
Sub-Sector	:	-
Industry Classification	:	-
Level of Government	:	Central
Type of Obligation	:	National Treatment Senior Management and Board of Director
Description of Measure	:	National Treatment and Senior Management and Board of Director shall not apply to any measure in relation to portfolio investment
Source of Measure	:	- Law on Investment, 2005. - Law on Securities (2006) and its implementing regulations. - Circular, Decree, Decision of Prime Minister and Administrative Guidelines.

∞

3.

Sector	**:**	**All Sectors**
Sub-Sector	**:**	-
Industry Classification	**:**	-
Level of Government	**:**	Central
Type of Obligation	**:**	National Treatment
Description of Measure	**:**	NT may not apply to conditions imposed in investment licenses permits/certificates that were issued before the entry into force of this Agreement[2]
Source of Measure	**:**	Decree 101/2006/ND-CP; dated 21/9/2006.

∞

[2] For illustrative purposes, the condition may be the investors' commitment to transferring the invested assets to the Government of Vietnam on a non-compensable basis at the time of termination of their projects.

4.

Sector	**:**	**All Sectors**
Sub-Sector	**:**	-
Industry Classification	**:**	-
Level of Government	**:**	Central
Type of Obligation	**:**	National Treatment Senior Management and Board of Directors
Description of Measure	**:**	National Treatment and Senior Management and Board of Directors may not apply to any measure relating to establishment, acquisition, organization and operation of foreign invested enterprises[3] or foreign invested projects; including but not limited to the issuance of license/permit, legal form, equity participation[4], organization, management and duration of investment[5].
Source of Measure	**:**	- Law on Investments, 2005. - Law on Enterprises, 2005. - Decree 108/2006/ND-CP, dated 22/9/2006. - Decree 139/2007/ND-CP, dated 05/9/2007.

∞

[3] The definition of "Foreign Invested Enterprises" can be found in the Law on Investment, 2005.

[4] In respect of equity participation, this reservation shall apply **u**nless such equity participation is otherwise specified in the other reservations in this reservation list.

[5] For illustrative purpose, the measure may include but not limited to:
- Foreign investors investing in Viet Nam must have an investment project and perform the procedures for investment registration or evaluation of investment at the State administrative body for investment in order to be issued with an investment certificate.
- On legal form, foreign investors cannot establish cooperatives.
- On management, the financial reporting by foreign and local investors is different.
- On duration of investment, maximum duration of a foreign investment projects is 50 years.

5.

Sector	:	**All Sectors**
Sub-Sector	:	-
Industry Classification	:	-
Level of Government	:	Central
Type of Obligation	:	National Treatment Senior Management and Board of Directors
Description of Measure	:	National Treatment and Senior Management and Board of Directors may not apply to any measure relating to State Owned Enterprises[6] and monitoring and management of investment by State funds, including but not limited to privatization, equitization or divestment of assets through transfer or disposal of equity interests or assets of State Owned Enterprises
Source of Measure	:	- Law on Investment, 2005; dated 29/11/2005. - Law on Enterprises, 2005; dated 29/11/2005.

∞

[6] The term "State-owned enterprise" is defined under Article 4 of the Law on Enterprises, 2005 as amended as follows: State-owned enterprise means an enterprise in which the State owns more than 50% of the charter capital.

6.

Sector	:	**All Sectors**
Sub-Sector	:	-
Industry Classification	:	-
Level of Government	:	Central
Type of Obligation	:	National Treatment
Description of Measure	:	National Treatment may not apply in the event where activities restricted to designated enterprises are liberalized to those other than the designated enterprises, or in the event such designated enterprises no longer operate on a non-commercial basis[7].
Source of Measure	:	- Law on Investment, 2005. - Administrative Guidelines.

∞

[7] For illustrative purposes, 'designated enterprises' may include Vinafood 1, Petroleum Processing and Trading Company, etc.

7.

Sector	:	**All Sectors**
Sub-Sector	:	-
Industry Classification	:	-
Level of Government	:	Central
Type of Obligation	:	National Treatment
Description of Measure	:	National Treatment may not apply to any measure affecting land, property and natural resources[8] associated with land, including but not limited to acquisition, ownership[9], lease, policy on the usage of land, land planning, term of land use, rights and obligations of land users.
Source of Measure	:	- Law on Land, 2003 as amended and its implementing regulations. - Law on Real Estate Business, 2006.

∞

[8] Natural resources found in land belong to the Government of Viet Nam.

[9] For illustrative purposes, foreign organizations and individuals cannot own land. They can only lease land in line with the duration of their investment project subject to approval of a competent State body, which shall not exceed 50 years.

8.

Sector	:	**All Sectors**
Sub-Sector	:	-
Industry Classification	:	-
Level of Government	:	Central
Type of Obligation	:	National Treatment Senior Management and Board of Directors
Description of Measure	:	Based on the requirements for socio-economic development[10] in each period and consistent with the undertakings in international treaties of which the Socialist Republic of Vietnam is a member, the Government regulates the list of investments in which investment is conditional, and the conditions applicable to the establishment of economic organizations, the forms of investment, and opening of the market in a number of sectors as applicable to foreign investors Where an enterprise with foreign owned capital invested in a sector in which investment was unconditional but during the course of the investment activity the list of sectors in which investment is conditional was amended with the result that the relevant sector was included, the investor shall be permitted to continue its investment activity in that sector unconditionally.
Source of Measure	:	- Law on Investment, 2005. - Decree 108/2006/ND-CP; dated 22/9/2006.

∞

[10] For illustrative purposes, socio–economic development plans in each period may include the Five-Year Socio-Economic Development Plans.

9.

Sector	:	**All sectors**
Sub-Sector	:	-
Industry Classification	:	-
Level of Government	:	Central
Type of Obligation	:	National Treatment Senior Management and Board of Directors
Description of Measure	:	National Treatment and Senior Management and Board of Directors shall not apply to any measure relating to treatments granted to Small and Medium-sized Enterprises[11]
Source of Measure	:	- Law on Investment, 2005. - Law on Enterprises, 2005. - Decree No 90/2001/ND-CP, dated 23/11/2001. - Decree 56/2009/NĐ-CP, dated 30/6/2009. - Small and Medium-sized Enterprises Development Plan.

∞

[11] The term "small and medium-sized enterprise" is defined under Article 3 of the Decree 56/2009/ND-CP, dated 30/6/2009 of the Government as follows: small and medium-sized enterprise is an enterprise established in accordance with laws which has less than or equal to 300 employees or has total legal capital of less than or equal to 100 billion VND.

10.

Sector : **Manufacturing, Agriculture and Forestry, Fishery Services incidental to Manufacturing, Fishery, Mining and Quarrying**

Sub-Sector : **Manufacturing:**

- Production of firecrackers, including fireworks (ISIC 2927);
- Production of sky-lanterns (ISIC 3150);
- Production of fishing-net (ISIC 1723);
- Production and supply of explosive materials (ISIC 2429);
- Publishing (ISIC 221): All kinds of publishing product.
  - Publishing of books, brochures, musical books and other publications (ISIC 2211);
  - Publishing of newspapers, journals and periodicals (ISIC 2212);
  - Publishing of recorded media (ISIC 2213);
  - Other publishing (ISIC 2219).
- Printing (ISIC 2221):
  - Books (including books for the blind), pictures, maps, posters, leaflets, calendars;
  - Molding and pressing money, value papers, forms with denomination, financial invoices, checks, etc;
  - Journals, Newspapers, Magazines, Periodicals, Counterfeit stamps, Certificates, Passport, National Identity Cards, etc.
- Production of cigarettes and cigars (ISIC 1600);
- Production of alcoholic beverages and soft drink (ISIC 1551);
- Production of tobacco production (ISIC 1600);
- Production of lubrication oil, grease (ISIC 2320);
- Production of NPK fertilizer (ISIC 2412);
- Production of construction glasses (ISIC 2610);
- Production of clay bricks (ISIC 2693);
- Production of vertical shaft cement production equipment and baked earth bricks and tiles (ISIC 2694);
- Production of D6-D32 mm construction steel rods and D15-D114mm seam steel pipe; zinc galvanized and color sheets (ISIC 2710)**;**
- Production of fluorescent tubes and bulbs (ISIC 3150);
- Production of under 10000DWT cargo ships; under 800 TEU container ships; lighters and under 500 seats passenger ships (ISIC 3511)**;**
- Production of oil-well cement, barite and bentonite for drilling fluids (ISIC 2694);
- Production and supply of industrial explosive materials using in oil and gas activities (ISIC 2429);
- Cane sugar production (ISIC 1542).

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Agriculture and Forestry including:

- Cultivating, producing or processing rare or precious plants, breeding or husbandry of precious or rare wild animal and processing of those plants or animals (including both living animals and processed matter taken from animals)[12].

Services Incidental to Manufacturing including:

- Services related to producing of industrial gas such as oxy, nitro, CO2 (solid or liquid) (CPC 88460/ISIC 2411);
- Services related to producing of caustic soda NaOH (liquid) (CPC 88460/ISIC 2411);
- Services incidental to producing of common used insecticides (Foreign investment is allowed in producing of input materials (toxin) only) (CPC 88460/ISIC 2421);
- Services related to producing of common used paints (CPC 88460/ISIC 2422)
- Services related to dairy processing (CPC 88120);
- Services related to cane sugar production and sugar processing industry
- Services related to processing of beer and beverages (CPC 88411/ISIC 1551);
- Services related to processing of tobacco products such as cigarette, cigar, pipe tobacco, chewing tobacco, farmer cut tobacco based on contracts or a fee:
  - Processing of reconstituted tobacco based on contracts or a fee (CPC 88412/ISIC 1600)
  - Processing of hookah based on contracts or a fee (CPC 8412)
- Services related to processing of manufactured tobacco for production of cigarette based on contract or a fee (CPC 88412);
- Services on distributing acid-sulphuric used in producing other products (CPC 88460/ISIC 2411);
- Services related to production of fluorescent tubes and incandescent bulb (CPC 88480);

Fishery:

- Fresh-water fishing, marine fishing (ISIC 0500)
- Coral and natural pearl exploitation.(ISIC 0500)

Service Incidental to Fishery, including:

- Services related to production of fishing net and twine for fishery sector (CPC 88200)

[12] List of rare or precious plants and animals can be found in website: www.kiemlam.org.vn

- Services on repairing and maintaining of fishing boats (CPC 88200)
- Services related to exploiting of fresh-water fisheries (CPC 88200)
- Services related to quarantine, quality control of aquaculture and processing products (CPC 88200)
- Services related to processing and preservation of aquatic products (CPC 8841)
- Services on canning aquatic products (CPC 8841).

Services Incidental to Mining and Quarrying (CPC 88300; ISIC 1120):

- Services related to application of science and technology to production, including:
  - Completion of production technology and process for heat-insulation material for covering pipes (CPC 88520);
  - Preparation for the following services:
    - Production of aromatic chemicals for gas industry (CPC 88300);
    - Discharged water treatment on platform and drilling mud supply (CPC 88300);
    - Study on waste oil collection and treatment (CPC 88300);
    - Covering reinforced concrete and anti-corrosive paint for oil and gas pipeline (CPC 88300);
    - Producing gas tanks, gas fired cooker and gas equipment (CPC 88300);
    - Issuing quality certification for gas equipment and facilities (CPC 88300).
- Services related to testing, adjusting, repairing and maintaining industrial measure and control equipment for oil and gas sector (CPC 88300);
- Oil and gas warehouse services (CPC 88300);
- Oil and gas supply base services (CPC 88300);
- Catering and allied services including food and foodstuff, clean-water and vegetable to off-shore construction facilities (CPC 88300);
- Manpower supply services including professional manpower, skills and foreign language training for manpower supplied to foreign countries, signing manpower supply contracts with foreign companies (CPC 88300);
- Services related to gas processing: separating Bupro, Condensate (CPC 88300);
- Leasing services related to other machines and equipment including specialized equipment in oil and gas industry (CPC 88300);
- Services related to database for oil and gas study (CPC 88300);
- Services related to database for geological study and seismic survey for oil and gas industry (CPC 88300);

- Services related to geological and exploration drilling (CPC 88300);
- Risk assessment, including field-survey, data collection, using special software on impact assessment of frequency and sensitiveness, proposing mitigation measures (CPC 88300);
- Services on Environment Protection and Management, including:
  - Environmental background study (CPC 88300);
  - Establishing oil-spill response plan, including environmental sampling and analysis (sediment samples, biology, soil, water, air), measuring water and air quality, obtaining on-site spectrum, collecting and assessing data on nature (such as environmental climatic, and hydrographic data), socio-economic data, etc, making reports on environmental background study, environmental impact assessment, oil-spill response plan (CPC 88300);
  - Proposing environmental management plan in oil and gas activities, particularly for offshore environment and sensitive coastline areas (CPC 88300).

Industry Classification : See above

Level of Government : Central

Type of Obligation : National Treatment
Senior Management and Board of Directors

Description of Measure : No investment license shall be issued to foreign investors[13] in these sectors and sub-sectors

Source of Measure : AIA commitments.
Law on Investment, 2005.
Law on Environment Protection, 1993.
Decree 108/2006/ND-CP, dated 22/9/2006.
Decree 59/2006/ND-CP, dated 12/6/2006.
Decision 95/2009/QD-TTg, dated 17/7/2009.
Resolution 12/2000/NQCP; dated 14/8/2000.
Decision 38/2007/QĐ-TTg; dated 20/3/2007.
Decree 119/2007/ND-CP dated 18/07/2007.
Decision 28/2002/QD-TTg dated 06/2/2002.
Decision 58/2003/QD-TTg dated 17/4/2003
Decision 18/2007/QD-BCN dated 08/5/2007.
Decision 26/2007/QD-TTg dated 15/2/2007.
Circular 14/2008/TT-BCT, dated 25/11/2008.
Decision 32/2000/QD-BCN, dated 04/5/2000.
Decision 121/2008/QD-TTg, dated 29/8/2008.
Decree 105/2007/ND-CP, dated 21/6/2007.

[13] For the purpose of this reservation, the term "Foreign investor" can be found in the Law on Investment, 2005

Law on Oil & Gas; 1993.
Decree 19/2000/ND-CP dated 08/6/2000.
Law on Fishery, 2003.
Decree 59/2005/ND-CP dated 04/5/2005.
Circular 02/2005/TT-BTS dated 04/5/2005.
Circular 62/2008/TT-BNN dated 20/5/2008.
Law on Technical Standard and Criteria dated 29/06/2006.
Ordinance 12/2003/PL-UBTVQH dated 26/07/2003.
Ordinance on Veterinary dated 29/04/2004.
Decree 59/2005/ND-CP dated 04/5/2005.
Decree 123/2006/ND-CP dated 27/10/2006.
Decree 191/2004/ND-CP dated 18/11/2004.
Decision 10/2007/QD-TTg dated 11/1/2006.
Decision 117/2008/QD-BNN dated 11/12/2008.
Decision 118/2008/QD-BNN dated 11/12/2008.
Decision 116/2008/QD-BNN dated 03/12/2008.
Circular 02/2005/TT-BTS dated 04/5/2005.
Circular 62/2008/TT-BNN dated 20/5/2008.
Decree 32/2006/ND-CP dated 30/03/2006.
Law on Environmental protection.
Decision 328/2005/QD-TTg.
Direction 21/2004/CT-TTg.
Decree 25/2009/ND-CP.
Decision 88/2007/QD-TTg dated 13/6/2007

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11.

Sector	:	**All sectors**
Sub-Sector	:	-
Industry Classification	:	-
Level of Government	:	Central
Type of Obligation	:	National Treatment Senior Management and Board of Directors
Description of Measure	:	National Treatment and Senior Management and Board of Directors shall not apply to any measures in relation to maintaining food security[14]
Source of Measure	:	- Decree 12/2006/ND-CP dated 23/01/2006. - Policy on national food security

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[14] For illustrative purpose, Foreign owned enterprises shall not be allowed to export rice and paddy until Jan 1st 2011.

12.

Sector	**:**	**Manufacturing**
Sub-Sector	**:**	- **Production of industrial explosive devices (ISIC 2429)** - **Cement production (ISIC 2694)** - **Production of ready mixed concrete, stone crushing (ISIC 2695)** - **Automobile assembly and manufacture (ISIC 3410)** - **Motorcycle assembly and manufacture (ISIC 3591)**
Industry Classification	**:**	ISIC 2429, 2694, 2695, 3410, 3591
Level of Government	**:**	Central
Type of Obligation	**:**	National Treatment
Description of Measure	**:**	Investment in these sub-sectors shall be subject to planning of the Government which may give preferences to local investors[15]
Source of Measure	**:**	- Law on Mineral 2005 and its guiding legal documents. - Decision No 150/2007/QĐ-TTg, dated 10/9/2007. - Decree No 39/2009/ND-CP dated 23 April 2009. - Decision 121/2008/QD-TTg, dated 29/8/2008. - Decision 02/2007/QD-BCT, dated 29/8/2007.

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[15] For illustrative purpose, local manufacturer of motorcycles may be given privileges in terms of production quantity to meet the demand of domestic market and location preferences.

13.

Sector	**:**	**Manufacturing**
Sub-Sector	**:**	- Processing of aqua-product and canned seafood (shall be in joint venture form, subject to materials, technology requirements) (ISIC 1512) - Vegetable oil production and processing (in conjunction with development of local raw materials resources) (ISIC 1514) - Dairy processing (in conjunction with development of local raw materials resources) (ISIC 1520) - Leather tanning (in conjunction with development of local raw materials resources and subject to environmental protection requirement) (ISIC 1911) - Paper production (in conjunction with development of local raw materials resources) (ISIC 2101) - Production of automobile tires and tubes up to 450mm (subject to quality requirement) (ISIC 2511) - Production of rubber gloves, labour sanitary boots (subject to quality requirements) (ISIC 2520) - Assembly of marine engines (subject to technology requirements) (ISIC 2911) - Production of electro-mechanical and refrigeration equipment (subject to technology requirement) (ISIC 2919) - Manufacturing of cultivation, processing, reaping machines, insecticide pumps, spare parts of agricultural machines and engines (subject to technology and quality requirements) (ISIC 2921) - Production of household electric appliances (subject to technology requirement) (ISIC 2930) - Production of electrical fans (manufacturing new types of products and subject to quality requirements) (ISIC 2930) - Production of bicycle manufacture (Manufacturing new types of products and subject to quality requirements) (ISIC 3592) - Production of sanitary ceramics, porcelain and tiles (Subject to technology requirement) (ISIC 2691) - Manufacturing and assembling of transport vehicles (ISIC 3410)
Industry Classification	**:**	See above.
Level of Government	**:**	Central
Type of Obligation	**:**	National Treatment

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Description of Measure : Manufacturing projects/investments in these sectors shall comply with specific requirements on local raw material resources[16], technology and/or environment and/or quality which may be inconsistent with National Treatment article under ACIA

Source of Measure :
- Decision No 17/2004/QD-BCN dated 08/3/2004.
- Decision No 22/2005/QD-BCN dated 26/4/2005
- Decision No 36/2007/QD-BCN dated 06/8/2007.
- Decision No 07/2007/QD-BCN dated 30/01/2007.
- Decision No 177/2004/QD-TTg dated 05/10/2004.
- Decision 147/QD-TTg dated 04/09/2007.
- Decision 36/2007/QD-BCN dated 06/08/2007.
- Decision 249/QD-TTg dated 10/10/2005.
- Decree 80/2006/ND-CP dated 09/8/2006
- Decree 12/2006/ND-CP dated 23/01/2006

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[16] For greater clarity, the requirement on local raw material resources is not local content requirement.

14.

Sector	:	**Services incidental to Manufacturing**
Sub-Sector	:	1 **Services related to manufacturing of water pumps used in agriculture (CPC 88530/ISIC 12912)** 2 **Services related to producing of plastic packing (CPC 88470)** 3 **Services related to producing of PP packing (CPC 88492)**
Industry Classification	:	CPC 884 – CPC 885
Level of Government	:	Central
Type of Obligation	:	National Treatment
Description of Measure	:	Sub-sector 1: Foreign investment is restricted and subject to foreign equity requirement of maximum of 30%. Sub-sectors 2 and 3: Foreign investment is restricted.
Source of Measure	:	Law on Investment, 2005 and its guiding documents.

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15.

Sector : **Services Incidental to Manufacturing**

Sub-Sector :
- Services related to producing of electronic scales for postal operation (CPC 88560/ISIC 32)
- Services related to producing of small capacity microwave equipment, main distribution frame component (MDF), subscriber local loop equipment, terminal boxes of different size, wiring cables (CPC 88550)
- Services related to producing of small capacity telephone switching systems (CPC 88560)
- Services related to producing of optical fiber terminals (CPC 88560)
- Services related to producing of telephone sets (CPC 88560)
- Services related to producing of H3PO4 and HCl acids (CPC 88460/ISIC 2411)
- Services related to producing of chemical products such as phosphor, silicate-natri, tripolyphotphat, aluminium hydroxide, light powder, calcium chloride, active coal and black carbon (CPC 88460/ISIC 2429)
- Services related to manufacturing of products from structure metal (CPC 88520/ISIC 2811)
- Services related to manufacturing of barrels, tanks and metal containers (CPC 88460/ISIC 2812)
- Services related to processing of vegetable oil (In conjunction with development of local raw materials resources requirement) (CPC 88110/ISIC 0112)
- Services related to manufacturing of lifting and loading equipment and machinery (CPC 88530/ISIC 2915)
- Services related to manufacturing of other common used machinery (CPC 88530/ISIC 2919)
- Services related to testing and control of computer's quality (With the commitment to investment supports, training and technology transfer) (CPC 88540)
- Services related to packaging integrated circuits (IC) (Subject to technology transfer requirements) (CPC 88560)
- Services related to assembling of electronics components, electronic and telecommunication products based on contracts or a fee (Subject to technology transfer requirements) (CPC 88550)
- Services related to designing of machinery and equipment by computer (computer-aid-design CAD) (Subject to technology transfer requirements) (CPC 88540)
- Other services (Subject to planning of the Government)
- Services related to processing of alcohol (Subject to brand, quality requirements) (CPC 88411)

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Industry Classification	:	CPC 884 – CPC 885
Level of Government	:	Central
Type of Obligation	:	National Treatment
Description of Measure	:	Investment in these services sub-sectors shall be subject to technology and quality requirements which may be inconsistent with National Treatment Article under ACIA.[17]
Source of Measure	:	Law on Technical Standard and Criteria, 2006. Decree 40/2008/ND-CP dated 07/4/2008

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[17] For illustrative purpose, requirements on quality of services provided by foreign invested enterprises may be higher than those applied to local enterprises.

16.

Sector	:	**Mining & Quarrying**
Sub-Sector	:	**Oil and gas**
Industry Classification	:	ISIC 111, ISIC 112
Level of Government	:	Central
Type of Obligation	:	National Treatment Senior Management and Board of Directors
Description of Measure	:	National Treatment and Senior Management and Board of Directors shall not apply to any measure relating to oil and gas activities carried out within Viet Nam. Investment in oil and gas activities shall be subject to approval by the Government of Viet Nam.
Source of Measure	:	- Law on Investment, 2005. - Law on Minerals, 2005. - Decree 160/2005/ND-CP; dated 27/12/2005. - Decree 07/2009/ND-CP dated 22/01/2009

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17.

Sector	:	**Mining & Quarrying, except Oil and Gas**
Sub-Sector	:	-
Industry Classification	:	ISIC1310, 1320, 1410
Level of Government	:	Central
Type of Obligation	:	National Treatment Senior Management and Board of Directors
Description of Measure	:	National Treatment and Senior Management and Board of Directors may not apply to any measure in relation to mining & quarrying investment, including but not limited to the following sectors: - Survey, exploration and exploitation of minerals - Exploitation, processing of rare and precious minerals, raw materials - Exploitation, processing of rare and precious minerals, rare metals, raw materials; exploitation of clay for production of construction materials; exploitation of high-quality sand for production of construction and technical glasses - Projects in exploitation of precious or rare mineral shall be subject to approval by the Government of Vietnam - Mineral activities related to the special, toxic, rare and precious minerals including basic geological investigation, prospecting, exploration, exploitation and processing
Source of Measure	:	- Decree 108/2006/ND-CP dated 22/9/2006. - Law on Minerals, 2005. - Decree 160/2005/ND-CP dated 27/12/2005. - Decree 07/2009/ND-CP dated 22/01/2009

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18.

Sector	:	**Services Incidental to Mining and Quarrying**
Sub-Sector	:	-
Industry Classification	:	CPC 883
Level of Government	:	Central
Type of Obligation	:	National Treatment
Description of Measure	:	Foreign equity participation in joint ventures shall not exceed 49%. From 11 January 2010, the foreign equity participation in joint ventures may be 51%. From 11 January 2012, 100% foreign-invested enterprises may be permitted. National Treatment shall not apply to any measure relating to the services incidental to mining and quarrying activities. Investment in the oil and gas related activities carried out within Viet Nam shall be subject to law, regulations and procedures of Viet Nam.
Source of Measure	:	Law on Investment, 2005.

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19.

Sector	:	**Fishery**
Sub-Sector	:	-
Industry Classification	:	-
Level of Government	:	Central
Type of Obligation	:	National Treatment
Description of Measure	:	National Treatment shall not apply to any measure relating to fishery activities within Viet Nam sovereignty and jurisdiction waters as defined in accordance with the1982 UNCLOS.
Source of Measure	:	- Law on Fishery, 2003. - Decree 108/2006/ND-CP, dated 22/09/2006. - Decree 49/1998/ ND-CP dated 13/7/1998. - Decree 86/2001/ND-CP dated 16/11/2001. - Decree 191/2004/ND-CP dated 18/11/2004. - Decree 59/2005/ND-CP dated 04/5/2005. - Decision 10/2007/QD-TTg dated 11/1/2006. - Circular 02/2005/TT-BTS dated 04/5/2005. - Circular 62/2008/TT-BNN dated 20/5/2008.

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20.

Sector	:	**Service Incidental to Fishery**
Sub-Sector	:	**Fry production and aquaculture operation**
Industry Classification	:	CPC 88200
Level of Government	:	Central
Type of Obligation	:	National Treatment
Description of Measure	:	Requirements on technology, fry quality of foreign invested enterprises must be higher than those that apply to local enterprises
Source of Measure	:	- Law on Technical Standard and Criteria, 2006. - Law on Fishery, dated 26/11/2003. - Decree 59/2005/ND-CP dated 04/5/2005. - Circular 02/2005/TT-BTS dated 04/5/2005. - Circular 62/2008/TT-BNN dated 20/5/2008.

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21.

Sector	**:**	**Service Incidental to Fishery**
Sub-Sector	**:**	**1. Services related to sending vessels for buying sea-products (CPC 88200)** **2. Services related to hiring of fishing boats and employees (CPC 88200)** **3. Services related to processing on board for fish (CPC 88200) crustaceans and mollusks and other related services** **4. Services related to exploiting of sea-products (CPC 88200)**
Industry Classification	**:**	**5. Services on collecting and buying aquatic products (CPC 8820)**
Level of Government	**:**	CPC 88200
Type of Obligation	**:**	Central
Description of Measure	**:**	National Treatment
Source of Measure	**:**	Sub-sectors 1 and 2: Foreign investment is restricted and subject to foreign equity requirement of maximum of 30%. Sub-sectors 3 and 4: Foreign investment is restricted and subject to foreign equity requirement of maximum of 40%. Decree 33/2010/ND – CP dated 31/03/2010 - Decree 32/2010/ND-CP dated 30/03/2010 - Decree 59/2005/ND – CP dated 04/5/2005 - Decree 14/2009/ND-CP dated 13/2/2009 - Decree 27/2005/ND-CP dated 08/03/2005 - Administrative Guidelines

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22.

Sector	**:**	**Forestry**
Sub-Sector	**:**	-
Industry Classification	**:**	ISIC 0200
Level of Government	**:**	Central
Type of Obligation	**:**	National Treatment
Description of Measure	**:**	National Treatment shall not apply to any measure relating to investment in forestry activities, including but not limited to the following: - Not to grant license to exploit natural forest to foreign investors - To provide rights and obligations of foreign individuals and organizations different from those of Vietnamese individuals and organizations
Source of Measure	**:**	- Law on Protection and Development of Forest, 2004. - Decree 23/2006/QD-TTg dated 3/3/2006. - WTO's commitments.

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23.

Sector	:	**Services Incidental to Agriculture, Hunting and Forestry**
Sub-Sector	:	**Services relating to investigation, evaluation and exploitation for natural forest, including exploitation of woods and wild, rare and precious animals, hunting, trapping, aerial seed planting and aerial chemicals spraying and dusting, microbial plant, animal genetic resource in agriculture.**
Industry Classification	:	CPC 8812
Level of Government	:	Central
Type of Obligation	:	National Treatment
Description of Measure	:	No investment license will be issued for foreign investors in those sub-sectors.
Source of Measure	:	Law on Investment, 2005. Law on Protection and Development of Forest, 2004.

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24.

Sector	:	**Services Incidental to Agriculture, Hunting and Forestry**
Sub-Sector	:	**Services incidental to agriculture, hunting and forestry**, **other than** services relating to investigation, evaluation and exploitation for natural forest, including exploitation of woods and wild, rare and precious animals hunting and trapping, aerial seed planting and aerial chemicals spraying and dusting, micro-bial plant, animal genetic resource in agriculture.
Industry Classification	:	CPC 881
Level of Government	:	Central
Type of Obligation	:	National Treatment Senior Management and Board of Directors
Description of Measure	:	Foreign investors are only permitted to invest in the form of joint-venture or business co-operation contract. Foreign equity shall not exceed 51% of the legal capital[18] of joint venture. Foreign investments in these sectors are restricted to certain geographical areas[19] as may be approved on a case-by-case basis.
Source of Measure	:	- Law on Investment dated 29/11/2005 - Law on Protection and Development of Forest dated 03/12/2004

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[18] "Legal capital" means, as defined by the Law on Enterprises 2005, article 4, provision 7, the minimum level of capital as stipulated by law to form an enterprise.

[19] The certain geographical areas may include, but not limited to natural reserves.

25.

Sector	:	**Manufacturing**
Sub-Sector	:	**Aircraft Manufacture Industry**
Industry Classification	:	CPC 88590 (ISIC 353)
Level of Government	:	Central
Type of Obligation	:	National Treatment
Description of Measure	:	The foreign equity participation shall not exceed 49% of the legal capital[20] of the Joint-venture companies operating in air-plane manufacture
Source of Measure	:	Decision No 38/2007/QD-TTg dated 20/3/ 2007

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[20] "Legal capital" means, as defined by the Law on Enterprises 2005, article 4, provision 7, the minimum level of capital as stipulated by law to form an enterprise.

26.

Sector	**:**	**Manufacturing and Services Incidental to Manufacturing**
Sub-Sector	**:**	- Manufacture of railway rolling stock, spare parts, wagon and coach - Services related to manufacturing of railway rolling stock, spare
	:	parts, wagon and coach Manufacture of railway rolling stock, spare parts, wagon and coach
Industry Classification	**:**	CPC 88590 (ISIC 352)
Level of Government	**:**	Central
Type of Obligation	**:**	National Treatment
Description of Measure	**:**	Joint-venture form is only permitted and foreign equity participation shall not exceed 49% of the legal capital[21] of the Joint venture.
Source of Measure	**:**	Decision 1686/QĐ-TTg dated 20/11/2008.

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[21] "Legal capital" means, as defined by the Law on Enterprises 2005, article 4, provision 7, the minimum level of capital as stipulated by law to form an enterprise.