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THE SINGAPORE-VIETNAM BILATERAL INVESTMENT AGREEMENT 1992[1]

This note deals with the salient features of the Singapore-Vietnam bilateral investment agreement 1992. Recent interest in investment opportunities in Vietnam and the changes in attitude of the Vietnamese government towards foreign investments have resulted in a number of similar arrangements being concluded.

IS it not ironical that within 20 years of the Communists' triumphant march into Saigon (now Ho Chi Minn City) the Vietnamese Government would be assiduously courting western and ASEAN investments and technological know-how, the spin-offs of democratic capitalism, its erstwhile implacable ideological foe?

Vietnam is now undergoing an economic structural transformation with special emphasis given to agricultural development, promotion of exports, and exploitation of oil and other natural resources. The emergent trend of the 1990s is regional economic integration, and Vietnam clearly cannot remain isolationist lest it be denied the fruits of growth and prosperity. As Mr Mai Ky, Vice-Chairman of State Planning Committee, Vietnam, said: "opportunities for an all-round co-operation in the region are unfolding before us. However, opportunities never spring eternal. Time and tide are ripe. The favourable international conjuncture and regional situation are preparing themselves for co-operation. It would be wrong to let opportunities go by without being taken advantage of or with improper action."[2]

As part of its drive to attract foreign investments, Vietnam has in recent years entered into a number of bilateral investment agreements,[3] including one with Singapore. An Agreement between the Government of the Republic of Singapore and the Government of the Socialist Republic of Vietnam on the Promotion and Protection of Investments was signed in Singapore on 29 October 1992 (hereinafter "the Agreement").[4] This note will comment on the principal features of the Agreement.

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1 The views expressed here are entirely in my personal capacity.

2 In "Vietnam Commentary: Report of the Second International Symposium on Interaction for Progress: Modernisation of Vietnam and ASEAN Cooperation", Information and Resource Center, Singapore, No 29, Sep-Oct 1992, 35.

3 With Belgium-Luxembourg on 24 January 1991 and with Australia on 5 March 1991.

4 Government Gazette Treaties Supplement No T3 of 1992.

The preamble, like most preambles in many bilateral investment agreements, expresses the mutual recognition that to spur business activities there must be sufficient protection of investments. Desirous of creating favourable conditions for investments in either country, the Contracting Parties recognised that: "the encouragement and reciprocal protection of such investments will be conducive to stimulating business initiative and increasing prosperity in both States." Interestingly, there is no mention in the preamble of conducting economic relationships on the basis of "internationally accepted principles of mutual respect for sovereignty, equality, mutual benefit, non-discrimination and mutual confidence", as in the Australia-Vietnam Agreement on the Reciprocal Promotion and Protection of Investments.[5] It must not be forgotten that Australian soldiers fought against the North Vietnamese in the Vietnam War. In the case of Singapore, it is simply accepted without question that its economic relationships with Vietnam would be conducted on the basis of mutual respect.

An "investment" means every kind of asset permitted by each Contracting Party in accordance with its laws and regulations (Article 1 paragraph 1). Examples are given of such investments, *ie,* movable and immovable property and property rights such as mortgage, liens or pledges; shares, stocks, debentures and other similar interests; copyright, industrial property rights, know-how, technical processes, trade names and goodwill; business concession conferred by law or under contract to search for, cultivate, extract or exploit natural resources (Article 1 paragraph l(a) to (f)). These examples are not exhaustive.

The Agreement shall apply to investment made by nationals and companies in the territories of both countries provided such investment has been specifically approved by the competent authorities in each State and are subject to any conditions as may be imposed. Thus investors should not only rely on the terms of the Agreement, but should scrutinise any conditions that may be imposed on any investment scheme which can well negate or reduce the scope and extent of the protection afforded by the Agreement.

"Company" in respect of Singapore has a wide meaning: any company, firm, association or body, with or without legal personality, incorporated, established or registered under the laws of Singapore.[6] A more restricted meaning applies in respect of Vietnam: only a company or juridical person incorporated or constituted in its territory in accordance with its laws falls within the definition of "company".

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5 Reproduced in (1991) 30 ILM 1065.

6 The same definition of "company" appears in Art 1 para 4(b) of the Agreement between the Government of the Republic of Singapore and the Government of the People's Republic of China on the Promotion and Protection of Investments, Government Gazette Treaties Supplement No T1of 1986.

Another significant feature of the Agreement is that it shall apply to all investments "whether made before or after the coming into force of this Agreement." (Article 2 paragraph 2). In other words, the Agreement has retrospective effect. Although this may appear far-reaching, the number of investors that will benefit from such a move is not large. Singapore may be the largest trading partner[7] of Vietnam in 1992, but direct investment there is not extensive.[8]

Article 16 stipulates that each Contracting Party shall notify the other party of the fulfilment of its internal legal procedures required for bringing the Agreement into force. The Agreement shall enter into force only on the thirtieth day from the date of such notification to the other Party. As far as Singapore is concerned, this is a mere formality as there is no constitutional requirement requiring further ratification of an international agreement. The Agreement has since entered into force for both Parties on 25 December 1992.[9]

The "most-favoured-nation clause" is found in Article 4, and clearly is an important linchpin of the Agreement. Both Contracting Parties agree to grant to each other the best treatment it would give to a third State. The usual exceptions, however, apply. The benefit of any treatment, preference or privilege resulting from a customs, monetary or free trade arrangement, or regional economic, social, labour or industrial development arrangements, is not included. Thus whatever concessions granted by Singapore to ASEAN members under the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme[10] will not apply to Vietnam. Article 5 paragraph 2 explicitly states that taxation is not covered, but is to be the subject of a separate double taxation agreement.[11]

As to the compensation payable upon expropriation by either Contracting Party, the Hull formula of "prompt, adequate and effective" compensation is preserved, although not in those exact words. The original Hull formula was contained in a note dated 22 August 1938 by the then US Secretary of State protesting against Mexico's assertion that prevailing international

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[7] *The Business Times,* 21 January 1993. In 1992, Singapore firms had a 33.7% share of total Vietnamese imports and a 26.7% share of total Vietnamese exports.

[8] Singapore is the 11th largest foreign investor in Vietnam. In 1992, Singaporeans invested about S$176m, mainly in beverage, furniture and textile industries, *The Straits Times, 2* April 1993.

[9] See GN No 4656/92. Singapore gazetted this after Vietnam informed Singapore that Art 16 had been complied with.

[10] See (1992) 31 ILM 513; [1992] SJLS 600 for full text. The CEPT is the main mechanism for the ASEAN Free Trade Area, to be set up within 15 years beginning 1 January 1993. See Art 2 of Framework Agreement on Enhancing Economic Cooperation reproduced in (1992) 31 ILM 506 and [1992] SJLS 595.

[11] Currently under negotiation by the Inland Revenue Authority of Singapore and the Socialist Republic of Vietnam. The last round of talks was in July 1993.

law concerning compensation upon expropriation required only "adequate compensation in accordance with its own domestic laws."[12] Mexico's views were subsequently taken up under the impetus of the New International Economic Order,[13] to find concrete expression in Article 2(2)(c) of the Charter of Economic Rights and Duties of States. This Article states: "Every State has the right ...to nationalise, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent."[14]

In the Agreement, any expropriation measure has to be in accordance with law and on a non-discriminatory basis. The compensation shall be effectively realisable and made without unreasonable delay. Such compensation shall be "the value immediately before the expropriation...." Article 6 therefore requires full rather than adequate compensation. Various formulations concerning compensation have been used in other investment agreements entered into by Singapore. In the Singapore-Federal Government of Germany agreement, compensation shall be "just and equitable" and which represents "the fair market value of the investment expropriated."[15] In the Singapore-United Kingdom agreement, the Hull formula, *ie,* "prompt, adequate and effective compensation" is used, and the measure of such compensation shall be "the market value of the investment expropriated [and] shall include interest."[16] And in the Singapore-France agreement, the payment of compensation upon expropriation "shall represent the commercial value of the assets involved...."[17] In the authoritative *Restatement, Third, Foreign Relations Law of the United States,* just compensation must "[in] the absence of exceptional circumstances, be in the amount equivalent to the value of the property taken and paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by a foreign national."[18] It appears that even the United States is moving away from the traditional Hull formula.

While both the Singapore-China[19] and Singapore-United Kingdom bilateral investment agreements provide an avenue for an affected national or company to have the legality of any measure of expropriation, nationalisation or other measures having effect equivalent to nationalisation or expropriation to be reviewed by a competent court of

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12 (1938) 32 AJIL Supplement, 192.

13 UN General Assembly Resolution 3201 (svi 1974).

14 UN General Assembly Resolution 3281 (xxix), adopted 12 December 1974. See Art 2(2)(c).

15 Government Gazette Treaties Supplement No T4 of 1973. See Art 4.

16 Government Gazette Treaties Supplement No T2 of 1975. See Art 5 para 1.

17 Government Gazette Treaties Supplement No T3 of 1975. See Art 4 para 2.

18 Vol 2, 1987 ed, S 712, 196.

19 Government Gazette Treaties Supplement No Tl of 1986. See Art 6 para 2.

the Contracting Party initiating those measures, such a possibility ofjudicial review is absent in the Agreement.[20]

Also, the Agreement does not provide for the payment of interest from the date the expropriation measures were taken to the date of payment. An example of such a provision may be found in the Australia-Vietnam bilateral investment agreement signed on 5 March 1991. Article 7(3) of that agreement reads: "The compensation shall be paid without undue delay, shall include interest at a commercially reasonable rate from the date the measures were taken to the date of payment and shall be freely transferable between the territories of the Contracting Party. The compensation shall be payable either in the currency in which the investment was originally made or, if requested by the national, in any other freely convertible currency." The Federal Republic of Germany-Poland bilateral investment agreement is even more specific. Article 4 paragraph 2 therein provides that "compensation shall be paid promptly and not later than two months after expropriation; interest at the normal bank rate shall accrue as of the third month until payment."[21]

Free convertibility and transferability of the compensation is to be assured (Article 6). The compensation provision also applies when it is the Contracting Party which expropriates the assets of the company owned by its own nationals to which the nationals of the other Contracting Party have a share.

Article 7 is akin to a "most favoured nation clause", that is to say, in the event of damage by war, insurrection and the like, any restitution, indemnification, compensation or settlement paid to the nationals or companies of an affected Contracting Party shall not be less favourable than that paid to any third State. There is, however, no absolute right to compensation in the event of such damage.

The principle of free transfer of earnings, currency, interests, *etc,* to the investing State is guaranteed under Article 8. Any such transfer, including compensation under Articles 6 and 7, is "to be effected at the prevailing market rate in freely convertible currency on the date of transfer." The official rate shall apply in the absence of such a market rate (Article 9).

Article 12 provides for subrogation, *ie,* the Contracting Party having paid off its own nationals and companies which it has indemnified can pursue its claims against the other Contracting Party. Such a right or claim shall not be greater than the original right or claim of the contracting Party's investors.

Any investment dispute is first to be settled by negotiation, failing which,

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[20] The Singapore-UK bilateral investment agreement also provides for a review "by an independent authority of the Contracting Party making the expropriation," *supra,* note 16, at Art 5 para 1.

[21] See (1990) 29 ILM 333.

six months after the notice to settle the dispute by negotiation has elapsed, the investor and the Contracting Party must refer the dispute to either conciliation or arbitration under the United Nations Commission on International Trade Law Rules (UNCITRAL) of Conciliation 1980[22] or UNCITRAL Arbitration Rules 1976[23] (Article 13). There are twenty articles in the UNCITRAL Conciliation Rules; its structure is less formal than that of the Arbitration Rules. The Rules also contain provisions on the role of conciliators in the event that conciliation fails and there is subsequent litigation or arbitration on the same dispute. The application of UNCITRAL Arbitration Rules in the Agreement is, however, subject to Article 13 paragraph 2(a) and (b). These provisions include, in the case of conciliation proceedings, the appointment of two conciliators, one by each party. In respect of arbitration proceedings, there shall be three arbitrators, one each to be appointed by each party, the third to be appointed by mutual agreement. He has to be a national of a third state which has diplomatic relations with the Governments of the Parties in dispute.

Some element of consistency and certainty in the arbitral awards may perhaps be assured by the requirement that they shall be made in accordance with "the Agreement, the relevant domestic laws including the rules on the conflict of laws of the territory of the Contracting Party in which the investment dispute arises as well as generally recognised principles of international law." There is considerable jurisprudence and academic writing on what constitutes "generally recognised principles of international law."[24] Greater reliance on such principles will boost the confidence of investors, since most of them consider the arbitrary application of law as being worse than the plague.

There is an important difference between these two modes of dispute settlement. Whereas an arbitration award may be enforced by national courts,[25] there is no such power with respect to settlement reached by conciliation.

Any dispute in relation to the interpretation and application of the

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22 See UN publication sales No E81V6 for full text. Under Art 7 of the Rules, the conciliator must act in an independent and impartial manner and is required to adopt the principles of "objectivity, fairness and justice". Art 20 provides that certain materials disclosed during conciliation may not be relied upon in subsequent litigation should the conciliation fail. This is to encourage frank disclosure and to assist settlement during conciliation.

23 UNCITRAL rules were adopted by the UN Commission on International Trade Law on 28 April 1976: see (1976) 15 ILM 701.

24 See generally B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953); H Lauterpacht, *The Development of International Law by the International Court* (1958), 158-72; M Sornarajah, *The Pursuit of Nationalised Property* (1986), especially ch 3 for a discussion of some of the leading nationalisation cases which have gone to arbitration; H Bokor - Szego, "General Principles of Law" in *International Law: Achievements and Prospects* (M Bedjaoui ed, 1991), 213-220.

25 See Arbitration (Foreign Awards) Act (Cap 10A, 1985 Rev Ed). This Act implemented the

Agreement is, however, to be resolved under Article 14. It provides for the use of diplomatic channels. If a dispute cannot be settled, it shall upon the request of either Contracting Party be submitted to arbitration. The arbitration procedure here is different from that in Article 13. Three arbitrators shall be appointed, one appointed by each Party, the third who shall be a Chairman appointed by agreement of the Parties. Within two months of the receipt of the request for arbitration, each Party shall appoint its arbitrator; the third arbitrator is to be appointed another two months later. If this fails, the President of the International Court of Justice[26] shall be asked to appoint those arbitrators not yet appointed. The Arbitral Tribunal shall decide by majority vote, and its decision is final.

The Agreement is to last for ten years from the date of its coming into force (Article 16). After the initial ten-year period, the Agreement will remain in force unless either Contracting Party gives notice in writing of its intention to terminate the Agreement, in which case the Agreement will cease to be effective one year after the date of such notice (Article 16 paragraph 2). In the case of an investment made immediately prior to the date of notification of intended termination of the Agreement, the provisions of the Agreement will continue to run for a further 10 years from that investment.

Article 11 which deals with prohibitions and restrictions, may appear innocuous but depending on how it is applied in practice, it may have the effect of emasculating much of the provisions in the Agreement. Thus prohibitions, restrictions or actions may be applied by either Contracting Party provided they are directed to the protection of its essential security interests (not just military but economic), the protection of public health, and the prevention of diseases and pests in animals or plants. These exceptions are similar to the general exceptions enumerated in Article XX of the General Agreement on Tariffs and Trade,[27] *viz,* measures to protect public morals, or human, animal, plant life or health.

In July 1992 Vietnam signed ASEAN's Treaty of Amity and Co-operation 1976,[28] which required signatories to respect each other's territorial integrity, renounce the use of force, settle disputes peaceably and not to interfere in each other's internal affairs. Clearly, Vietnam is plugging itself into the economic grid of ASEAN and has made a political commitment to co-operate and not merely co-exist with its neighbours. With a war mentality fostered

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New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

26 Singapore accepted the Charter of the United Nations and the Statute of the International Court of Justice on 21 September 65. Vietnam did likewise on 20 September 1977. The Democratic Republic of Vietnam and the Republic of South Vietnam united on 2 July 1976 to constitute the Socialist Republic of Vietnam.

27 55 UNTS 187.

28 See 1025 UNTS 312; reprinted in (1988) 27 ILM 610.

over many decades, such a change in attitude by Vietnam is most welcome. Another promising development is the launch of the Vietnam-Singapore Commission for Co-operation on 5 May 1993. Comprising five representatives from each country, the Commission will identify investment opportunities and facilitate the implementation of projects.[29]

The Agreement will go a long way in bolstering investor confidence. However, businessmen with an eye for profits know full well that it may be relatively easy to build a factory, but without infrastructure support in key areas like transportation, communications and energy, the factory simply cannot operate.[30] The lack of such support is appalling, and an estimated US$20 billion is required from now to the year 2000 to put the basic infrastructure in place.[31] Such a colossal sum is unlikely to come from businessmen, but may perhaps with luck be cajoled from the World Bank,[32] the International Monetary Fund,[33] or other such international aid agencies.

Any potential Singapore investor wishing to invest in Vietnam should also acquaint himself with the Vietnam Decree Regulating in Detail the Implementation of the Law on Foreign Investment[34] of 6 February 1991. This Decree implements the Law of Foreign Investment in Vietnam, and Chapter II (headed "Forms of Investment") would be of particular relevance to businessmen.[35] Aspiring investors need to familiarise themselves with this document, but will have to bear with the spelling errors and some rather infelicitous expressions used in the English text.

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29 To be co-chaired by Mr Philip Yeo, Chairman of the Economic Development Board and Mr Dau Ngoc Xuan, Chairman of Vietnam's State Committee for Co-operation and Investment. The Commission will meet twice a year.

30 According to Mr Dao Xuan Lam, Director of the Transport Engineering Design, at least US$3b is needed to prevent deterioration of existing roads, and another US$4b to cope with demand by the year 2000.

31 *Supra,* note 7. The Vietnamese Prime Minister, Mr Vo Van Kiet, estimated at least US$40b of investments are needed to double the size of the economy by the year 2000 compared to the year 1990. *The Economist,* 20 March 1993.

32 The World Bank and the UN Development Programme are scheduled to meet aid donors to Vietnam later this year. From January to November 1992, Vietnam received US$300m in aid from UN agencies and other donors.

33 Board members of the IMF met in April 1993but could not agree to resume aid to Vietnam.

34 (1991) 30 ILM 942. While the law is liberal, only US$3b of investments have been garnered, but mostly pledged rather than actual. *The Economist,* 20 March 1993. Some changes were made to the Decree in December 1992.

35 Including contractual business co-operation, joint-venture and 100% foreign invested capital.

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