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The U.S.- Vietnam Bilateral Trade Agreement (BTA): Trading Rights and Distribution Services

★ **What are trading rights?**

When a company is granted trading rights, it is given the right to directly import and export goods, without having to go through a state-owned or local trading company. Restrictions on trading rights are typically inconsistent with:

- GATT Article III (National Treatment) as such restrictions usually limit the ability of foreign entities or individuals to import/export a like product
- GATT Article XI (Quotas) as such restrictions prevent the import/export of products from another WTO member.

Trading rights permit the import and export of goods only and do not cover the ability to distribute goods once they are imported. The distribution of goods is subject to GATS distribution services commitments, or in the case of the BTA, Annex G.

★ **What has Vietnam committed to in the area of trading rights under the BTA?**

Under the BTA, Vietnam has committed to grant trading rights to U.S. entities according to the following schedule, subject to Annexes B, C, and D:

Upon entry into force (December 2001): Vietnamese enterprises may trade in all products, subject to exceptions under Annexes B and C. U.S. invested enterprises may import and export products used in, or in connection with, their production or export activities.

Three years upon entry into force (December 2004): U.S. invested enterprises in the production and manufacturing sectors only may import and export all products, subject to exceptions listed in Annexes B, C, and D. U.S. joint ventures with Vietnamese enterprises may engage in import and export activities in all products, subject to exceptions listed in Annexes B, C and D. U.S. equity in such joint ventures is limited to 49%.

Six years upon entry into force (December 2007): U.S. joint ventures with Vietnamese enterprises may engage in import and export activities in all products, subject to exceptions as listed in Annexes B, C and D. U.S. equity in such joint ventures is limited to 51%.

Seven years upon entry into force (December 2008): U.S. companies will be permitted to establish 100% owned enterprises to engage in import and export activities in all products, subject to exceptions as listed in Annexes B, C, and D.

Annex B: Annex B sets out the quantitative restrictions that Vietnam is permitted to maintain and their phase out period. These range from 3-10 years on import quantitative restrictions for some agricultural products; 2-7 years on import quantitative restrictions for some industrial products; and "unbound" (i.e. no commitment made) for export quantitative restrictions for semi-milled and broken rice. Annex B also lists prohibitions on certain imports (e.g., cigarettes) and exports (e.g., certain timber products).

Annex C: Annex C lists those imports and exports restricted to state trading companies and, where applicable, their phase out schedule. These range from 5 years to "unbound" on the import of some products; and "unbound" on the export of products including rice, petroleum, natural gas, diamonds, precious stones, silver & gold.

Annex D: Annex D lists phase out periods for restrictions on trading and distribution rights for specific industrial and agricultural products, ranging from 0 years to "unbound" on import trading rights for some agricultural products; and 0 to 6 years on import trading rights for some industrial products. No commitments have been made for some products (marked "unbound") while others are restricted to state trading companies only (marked "C"). Annex D also lists restrictions on export trading rights, with phase-out periods ranging from 3 years to "unbound" for key agricultural and industrial products. For the purposes of Annex D, all phase-out periods begin on the date on which U.S. joint ventures in companies engaging in import and export activities are first permitted (3 years upon entry into force, or December 2004). For example, a phase-out period 5 years means that trading rights are permitted for this product only 8 (5+3) years from entry into force of the BTA, or December 2009.

★ **What are distribution rights?**

The distribution of goods (sale within a country) is addressed in a country's commitments on distribution services and governs the ability of companies to engage in the distribution of goods once they have been imported.

Distribution services include the following:

- Commission Agents' Services - Commission Agents' Services consist of sales on a fee or contract basis by an agent, broker or auctioneer or other wholesalers of goods/merchandise and related subordinated services.
- Wholesale Trade Services – Wholesaling consist of the sale of goods/merchandise to retailers to industrial, commercial, institutional, or other professional business users, or to other wholesalers and related subordinated services. Wholesale services can either be supplied from a fixed location or away from a fixed location.
- Retail Services – Retailing services consist of the sale of goods/merchandise for personal or household consumption either from a fixed location (e.g., store, kiosk, etc.) or away from a fixed location (e.g. direct selling) and related subordinated services.
- Franchise Services Franchising services consist of the sale of the use of a product, trade name or particular business format system in exchange for fees or royalties. Product and trade name franchising involves the use of a trade name in exchange for fees or royalties and may include an obligation for exclusive sale of trade name products. Business format franchising involves the use of an entire business concept in exchange for fees and royalties, and may include the use of a trade name, business plan, and training materials and related subordinated services.

★ **What has Vietnam committed to in the area of distribution services under the BTA?**

Under Annex G of the BTA, Vietnam has made commitments for Wholesale & Retail Services, Agent Services, and Franchising Services, subject to the following limitations:

Cross Border Distribution (from the United States into Vietnam): Vietnam has not undertaken any commitments to permit cross-border services. In other words, Vietnam has provided no legally binding guarantee that a U.S. company can provide distribution services from abroad.

Local Distribution (within Vietnam):

Three years upon entry into force (December 2004): Joint ventures with Vietnamese companies in the distribution services sector may be established. U.S. equity in such joint ventures is limited to 49%.

Six years upon entry into force (December 2007): Joint ventures with Vietnamese companies in the distribution service sector may be established, at which time there will be no limitations on U.S. equity.

Seven years upon entry into force (December 2008): 100% U.S. owned distribution services companies may be established.

In all cases, the distribution of some industrial products is subject to additional limitations contained in Annex D (see above). Moreover, Vietnam has excluded certain products from its distribution commitments (e.g., oil, gas, fertilizer, alcoholic drinks, cigarettes, medicine). The establishment of retail services (beyond the first one) shall be considered on a case by case basis.

★ **Under the BTA, what rights do U.S. companies get beginning in December 2004?**

- ➢ U.S. companies with investment activities in the production and manufacturing sectors only will be able to import and export directly, subject to exceptions as listed in Annexes B, C, and D. For example, beginning in December 2004, a U.S. invested enterprise in the manufacturing sector in Vietnam will be able to import and export any product, provided this product is not listed as an exception in Annexes B, C, and D.
- ➢ U.S. companies will be able to establish joint ventures with Vietnamese companies to engage in import/export activities, subject to exceptions under Annexes B, C and D. U.S. equity in such joint ventures is limited to no more than 49%.
- ➢ U.S. companies will be able to establish joint ventures with Vietnamese enterprises to distribute products, subject to exceptions under Annexes B, C and D. U.S. equity in such joint ventures is limited to no more than 49%.

★ **What is the status of domestic legislation introduced to address Vietnam's BTA obligations on trading and distribution rights?**

Currently, under *Decree 24-2000-ND-CP of the Government dated 31 July 2000*, foreign direct investment in the import and distribution sector is subject to the condition that it must be implemented in accordance with separate regulations issued by the Prime Minister. No such separate regulations have yet been issued. As a result, a legal vacuum confronts investment projects in import and distribution services - they are not prohibited but there is no enabling legislation (as confirmed in *Official Letter 3067-TM-DT of the Ministry of Trade dated 7 August 2002*). This continues to be the case under *Decree 27-2003-ND-CP of the Government dated 19 March 2003 amending Decree 24*.

The Ministry of Trade is currently coordinating with the Ministry of Justice and the Ministry of Planning & Investment on the preparation of specific regulations on import and distribution rights for foreign investors, for submission to the Government. It has proposed the following mechanism to address BTA and WTO obligations and to progress towards less discretionary licensing of foreign participation in the import and distribution sector (*Official Letter 2177-TM-DT dated 5 June 2002*):

- First, the scope of applicability of the *1997 Commercial Law* should be expanded to cover foreign companies not investing in production which establish a commercial presence in Vietnam.
- Second, a Government decree on implementation of the *Commercial Law* with respect to import and distribution business activities of foreign companies should be issued.

Towards this end, the Ministry has prepared a rough sketch of the proposed Government decree regulating foreign companies established in Vietnam to conduct commercial activities, foreign invested enterprises ("FIEs") directly investing in the import services and distribution services sector, and FIEs investing in the manufacturing sector providing import and distribution services.

This *rough sketch decree* does not consider the following FIEs to be operating in the import-distribution sector: FIEs investing in services sector, such as hotels, offices and residential housing for lease, training, auditing, consulting and so forth; export processing enterprises; and investment projects in the form of business co-operation contracts.

According to the *rough sketch*, foreign companies and FIEs investing in the import-distribution sector would be permitted to import goods which are not on the list of prohibited imports and to distribute goods the trading of which is not conditional, subject to compliance with their business registration certificates or investment licenses. FIEs investing in the manufacturing sector which engage in import and distribution would be restricted to the types of goods they manufacture as provided for in their investment licenses.

In the above way, notwithstanding that the procedures for establishment and rights and obligations of FIEs would remain governed by the *Law on Foreign Investment*, the import and distribution activities of foreign companies and FIEs would be regulated pursuant to the *Commercial Law*.

Amendment to the *Commercial Law* itself is currently scheduled for approval by the Government in late 2004 and is not expected to be approved until late 2005.

From the Ministry of Trade's sixth "rough draft" of the revised *Commercial Law* (dated 15 November 2003), it appears that the revised *Commercial Law* will only include a simple provision enabling foreign companies not investing in production to establish a commercial presence in Vietnam for the purpose of conducting activities in the fields of export, import, distribution and other specific commercial services. Details of the trading and distribution rights of foreign companies are still planned to be specified in the *decree*, but this has yet to be drafted beyond the Ministry of Trade *rough sketch decree* referred to above. An *official draft* of the revised *Commercial Law* is expected to be finalized by the Ministry of Trade in April 2004.

★ What is the status of legislation relating to multi-level selling, or direct selling type distribution in Vietnam?

Vietnam's Ministry of Trade has drafted a *Decree on Multilevel Selling* and is currently seeking comments and input from enterprises. This draft *Decree* is pursuant to a new draft *Competition Law* expected to be passed by the National Assembly in November 2004. According to the latest draft *Decree*, enterprises must have a certificate from the Ministry of Trade of satisfaction of business conditions in order to engage in multi-level selling; they must have a plan showing commission structure, and method of calculating commission and other economic benefits for participants, who will have the right to rescind their contract by giving 15 days notice prior to withdrawing from the sales network. When an enterprise refunds money to a participant, the enterprise may reduce the value of the goods but not by more than 10% of their initial value. If a participant causes loss to a consumer then the enterprise must compensate the consumer and thereafter reclaim damages from the participant.