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THE FREE TRADE AGREEMENT AND INVESTMENT DISPUTE SETTLEMENT BETWEEN THE EUROPEAN UNION AND VIETNAM: A CRITICAL ASSESSMENT

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Abstract

The European Union (EU) is an open market economy, and against the rise of protectionism globally, the 'Global Europe: Competing in the world' communication of European Commission in 2006 reflected the EU perspective that Free Trade Agreements as alternatives can go further and faster in promoting openness and integration, by tackling issues which are not readily available for multilateral negotiations and by preparing the stepping stones for the next level of multilateral liberalization.

After the prolonged negotiations and the EU's legislative processes, the European Parliament gave its consent to both agreements of European Union – Vietnam Free Trade Agreement and Investment Protection Agreement on 12 February 2020. Those bilateral instruments promote enhanced transparency and regulatory best practices that are consistent with existing international norms or standards, also an important stepping stone and a show-case for the EU's longer-term goal of a region-to-region (EU - Southeast Asia) trade deal.

Those agreements have established a new two-level judicial structure with the strong judicial character (Investment Tribunal System – ITS) which Vietnam has accepted via legally binding commitments. It is important for Vietnam to follow the good governance standards and the rule of law principles. If the ITS works well, it will provide additional safeguards and guarantees to investors whereby FDI flows to Vietnam are likely to increase. Finally, the ITS regime provides a powerful incentive or a catalyst to review and modernize the domestic legal system of Vietnam not only to improve the investment eco-system in Vietnam but to pave the way for optimization of its economic potential and competitive power in the region (i.e. in the ASEAN).

Keywords: *EVIPA, ASEAN, free trade agreement, investment tribunal system*

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1. Introduction

There has been a growing number of trade and investment agreements across the world[1] which include bilateral, international and/or regional trade agreements.[2] While some of these are specifically designed to increase volume of trade and promote investment only, others such as the trade agreements which the EU enters into, aim also to instill effective dispute settlement mechanisms, sustainable development, good governance standards and the rule of law principles as core provisions therein. Currently, the EU has the greatest number of bilateral trade agreements (BITs) in the world[3] and by these BITs the EU endeavors to externalize such core principles on which the EU Single Market is founded.

These principles which promote good governance and the rule-of-law-based approach to international trade, investment and dispute settlement include inter alia that:

- All laws should be prospective, open and clear (transparency);

- Laws should be relatively stable (stability);

- The making of specific legal provisions should be guided by open, stable, clear and general rules (predictability);

- The independence of judiciary must be guaranteed;

- The principles of natural justice must be observed;

- The courts should have review powers over implementation of other other principles;

- The courts should be easily accessible;

- The discretion of the crime-preventing agencies should not be allowed to pervert the law or justice.[4]

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1 There are more than 2,000 BITs globally and an increasing number of trade agreements contain investment protection chapters. Trade Justice Movement. Retrieved from https://www.tjm.org.uk/trade-deals/bilateral-investment-treaties [accessed 30 January 2021]

2 By the end of 2020, there were 306 regional trade agreements in force. World Trade Organisation, Regional Trade Agreements. Retrieved from https://www.wto.org/english/tratop_e/region_e/region_e.htm [accessed 30 January 2021]

3 Buchholz K. (2019), 'Which Countries Have the Most Trade Agreements?', *Free Trade - Statista*, 12 August 2019. Retrieved from https://www.statista.com/chart/18991/countries-with-most-trade-agreements/ [accessed 30 January 2021]

4 Sattorova M. (2018), *The Impact of Investment Treaty Law on Host States*, Hart, p. 22 citing Raz J., 'The Rule of Law and Its Virtue' in Raz J. (1979), *The Authority of Law: Essays on Law and Morality,* Clarendon.

By the inclusion of such standards in BITs and/or FTAs, the cardinal aim is to ensure host states' compliance with reasonableness, security of property/assets and contract, transparency and due process. Furthermore, these elements of the rule of law and good governance inform and underpin the arbitral interpretations of investment treaty standards/provisions whereby tribunals in numerous disputes held that host states shall guarantee stability, predictability, consistency, and effectiveness of legal environment for investment.[5]

The article firstly provides the background against which the recent EU – Vietnam trade and investment agreements were concluded. Secondly, it critically examines if and to what extent the current free trade agreement between the EU and Vietnam is likely to offer benefits. In doing so, the article also provides not only an overview of the key procedural steps but also a critique of this dispute settlement framework against the aforementioned benchmarks of good governance and the rule of law principles. In addition, the article identifies key areas in which reform and/or improvements are needed. Finally, the article conveys the main conclusions that can be reached based on the critical analysis under these thematic areas.

2. The road to the EU – Vietnam trade and investment agreements

2.1. The EU external trading policy

The European Union (EU) is an open market economy whereby external trade accounts for nearly 35% of the EU's GDP in 2018 and had the world's largest trading power, with the share of 17.8% of the global trade in goods and services in 2018.[6] As of 05 February 2021, foreign trade not only promotes EU welfare, jobs and economic growth prospects but also provides EU firms with access to and competitiveness in the marketplace by improving productivity and efficiency. That in turn gives EU consumers the ability to buy a wide variety and high

[5] Some of the most cited cases include *Metalcad v Mexico*, Award, 25 August 2000, ICSID Case No ARB(AF)/97/1, (2001) 40 ILM 36; *Tecnicas Medioambeintales Tecmed SA v Mexico*, Award, 29 May 2003, ARB(AF)/00/2, 10 ICSID Rep 130; *Occidental Exploration and Production Company v Ecuador*, Award, 1 July 2004, LCIA Case No UN 3467; *Saluka Investments BV v Czech Republic* (PCA-UNCITRAL, Partial Award, 17 March 2006); *Merrill and Ring Forestry L.P. v. Canada*, Award, 31 March 2010, UNCITRAL-ICSID Case No. UNCT/07/1.

[6] Eurostat (2019), 'Word Trade in Goods and Services - 2019: An Overview'. Retrieved from https://ec.europa.eu/eurostat/statistics-explained/index.php/World_trade_in_goods_and_services_-_an_overview [accessed 05 June 2020]

quality of goods and services.[7]

The EU's Common Commercial Policy (CCP) allows the region to speak with one voice on matters of international trade policy and to leverage the single market to improve access to foreign markets for EU companies through the negotiation of trade and investment agreements. The Lisbon Treaty,[8] which came in force in late 2009, brought important changes to the EU's trade policy process.

Firstly, the trade policy was brought under the EU core principles inter alia democracy, rule of law and human rights and natural resources sustainability.[9] Thus the EU trade policy encompasses not only market liberalisation, but is also designed to help EU to export high standards for food safety, workers' rights, the environment and consumer rights far beyond its borders.[10]

Secondly, according to Article 207(1) Treaty on the Functioning of the European Union (TFEU), all aspects of external trade, including services, commercial aspects of intellectual property and foreign direct investment, are under exclusive EU competence.[11] The division of competences between the EU and its Member States in the area of CCP has been finally clarified by Opinion 2/15 of the Court of Justice of the European Union (CJEU), concerning the EU-Singapore Free Trade Agreement (EUSFTA).[12] As such provisions on labour rights

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7 Hoekman B. & Puccio L. (2019), 'EU Trade Policy: Challenges and Opportunities', *Robert Schuman Centre for Advanced Studies (RSCAS) Policy Papers,* 2019/06, p. 01. Retrieved from https://cadmus.eui.eu/bitstream/handle/1814/61589/RSCAS%20PP%202019_06.pdf?sequence=1&isAllowed=y [accessed 21 May 2020]

8 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306 (17 Dec 2007).

9 *Ibid*., Art. 10A(2) of Chapter 1 – General Provisions on the Union's external action: "(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;"

10 European Commission (12 Sep 2018), 'President Jean Claude Junker's State of the Union'. Retrieved from https://europa.eu/rapid/press-release_SPEECH-18-5808_en.htm [accessed 21 May 2020]

11 Consolidated version of the Treaty on the Functioning of the European Union, Part Five: External Action by the Union, Title II: Common Commercial Policy, Art. 207 (ex Art. 133 TEC) OJ 115, 09 May 2008, p. 0140-41: "1. The common commercial policy shall be based on uniform principles, particularly with regard to […] the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment…"

12 Opinion 2/15 of the Court, 16 May 2017, (ECLI:EU:C:2017:376). Retrieved from http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN [accessed 06 June 2020]

and environmental protection under the trade agreement fall under the EU's exclusive competence while portfolio investment and investor-State dispute settlement (ISDS) procedures stated in such agreements are subject to ratification by the EU Member States.[13]

Thirdly, the Lisbon Treaty enhanced the European Parliament (EP)'s role by sharing responsibility with the Council for developing regulations and extending power over bilateral trade agreements and unilateral EU trade policy.[14] Particularly, 751 Members of European Parliament (MEPs) were given the right to veto and stop the controversial international deals that would stifle fundamental freedoms.[15] In fact, the EP had exercised its Lisbon Treaty powers for the first time in July 2012 by rejecting an international agreement namely the Anti-Counterfeiting Trade Agreement (ACTA). The ACTA was negotiated by the EU and its Member States with the US, Australia, Canada, Japan, Mexico, Morocco, New Zealand, Singapore, South Korea and Switzerland to improve the enforcement of anti-counterfeiting law internationally. However, when it was submitted to the EP for approval and subsequently rejected, it could not enter into force in the EU.[16]

While the mechanisms for democratic decision making in the EU has been enhanced by Lisbon Treaty,[17] EU trade policy faces major challenges, both internally and externally. Although the recent

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13 Opinion 2/15 of the Court (Full Court) 16 May 2017: "The Free Trade Agreement between the European Union and the Republic of Singapore falls within the exclusive competence of the European Union, with the exception of the following provisions, which fall within a competence shared between the European Union and the Member States:
- the provisions of Section A (Investment Protection) of Chapter 9 (Investment) of that agreement, […];
- the provisions of Section B (Investor-State Dispute Settlement) of Chapter 9; and
- […]"

14 Article 218 (3,a);(10) of the TFEU: "…the Council shall adopt the decision concluding the agreement:
(a) after obtaining the consent of the European Parliament…
10. The European Parliament shall be immediately and fully informed at all stages of the procedure"

15 European Parliament, 'EP after the Lisbon treaty: Bigger role in shaping Europe'. Retrieved from https://www.europarl.europa.eu/about-parliament/en/powers-and-procedures/the-lisbon-treaty [accessed 22 May 2020]

16 European Parliament (04 July 2012), 'European Parliament rejects ACTA', Press Release. Retrieved from https://www.europarl.europa.eu/news/en/press-room/20120703IPR48247/european-parliament-rejects-acta [accessed 2 June 2020]

17 European Commission (2009), 'Explaining the Treaty of Lisbon', MEMO/09/531. Retrieved from https://ec.europa.eu/commission/presscorner/detail/fr/MEMO_09_531 [accessed 06 June 2020]

statistics have shown that over 70% of European Union citizens support the CCP and consider free trade to be positive, many critics have paid attention on a threat to employment and a source of rising inequalities.[18] The exit of the UK from the Union (Brexit)[19] has posed yet another challenge to the CCP whereby it took parties years to agree on a post/Brexit trade rules in the confines of the EU-UK Trade and Cooperation Agreement (TCA). TCA came into force on 01 January 2021 and provides preferential arrangements in areas such as trade in goods and in services, digital trade, intellectual property, public procurement, aviation and road transport, energy, fisheries, social security coordination, law enforcement and judicial cooperation in criminal matters, thematic cooperation and participation in Union programmes.[20] While the UK is no longer able to benefit fully from what the EU Single Market offers, the TCA goes beyond traditional free trade agreements[21] and provides a solid basis for preserving decades of cooperation based on leveled playing field, rule of law and fundamental rights.

On the other hand, external challenges are comprised of the need to respond to other big forces in international trade: the US administration's shift towards protectionism, the competitive pressures arising from the rapid growth of China (the US and China are the biggest trading partners of the EU) and the guarantee for jobs creation and growth in the EU. The EU leadership in international trade area has urged to reverse global trends towards protectionism, prevent a collapse of the multilateral trading system and build a framework of rules that addresses the sources of current trade conflicts. Nonetheless, the US has expressed it will not be interested; nor will China.[22] Despite of this, the EU is pressing ahead with its international trade strategy based on its fundamental principles and values which are informed by

18 Hoekman, B. & Puccio L., *supra* note 7, p. 2.

19 Following the referendum of 2016, the UK has decided to leave the EU. Retrieved from https://www.gov.uk/government/topical-events/eu-referendum [accessed 30 January 2021]

20 See, EU-UK Trade and Cooperation Agreement: protecting European interests, ensuring fair competition, and continued cooperation in areas of mutual interest. Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2531 accessed 30 January 2021; also see, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948093/TCA_SUMMARY_PDF.pdf [accessed 30 January 2021]

21 For example, TCA is the first trade agreement that the EU has ever reached allowing zero tariffs and zero quotas.

22 Hoekman, B. & Puccio L., *supra* note 7, p. 3.

inter alia the rule of law, human rights and sustainability.[23]

Furthermore, in the context of the 21st century globalized trade driven by revolutionary technologies and increased flows of investment, goods and services, trade issues have prompted countries to engage in increasingly complex interactions, creating the need for a platform to facilitate and regulate trade relations. Firstly, international trade moved beyond the exchange of tangible goods to include services and ideas.[24] Particularly, owing to the significant progress of technology, services account for approximately 70% of EU GDP and employment and the value of exported services have doubled for 10 years up to €728 billion in 2014[25] and up to €15.3 trillion in 2017 (bigger than the GDP of US).[26] The second key phenomenon affecting trade has been the globalization of firms' value chains whereby intermediate rather than final goods and services are also traded internationally.[27] Finally, the goods and services in digital rather than physical form are sweeping aside barriers of geography and distance with more shares in terms of global trade volume and value.[28] A global e-commerce market, estimated to be worth over €12 trillion,

23 European Commission, 'EU Trade Policy at Work: Creating Opportunities, Standing for Europe's Values and Interests – 2019'. Retrieved from https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158400.pdf [accessed 06 June 2020]

24 Baldwin R. and Rigo D. (2018), 'The Changing Paradigm of Trade in the 21st Century', *Global Challenges*, The Graduate Institute Geneva, No. 3. Retrieved from https://globalchallenges.ch/issue/3/the-changing-paradigm-of-trade-in-the-21st-century/ [accessed 06 June 2020]

25 European Commission (2014), *Trade for all: Towards a more responsible trade and investment policy*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM/2015/0497 final, p. 10. Retrieved from https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf [accessed 21 May 2020]. Also see, the World Bank Data. Retrieved from https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=EU [accessed 06 June 2020]

26 European Union, The Economy. Retrieved from https://europa.eu/european-union/about-eu/figures/economy_en [accessed 06 June 2020]. The projection of the EU GDP indicates that it will shrink slightly - because of the impact of COVID-19 on trade – to around €14.6 trillion by 2024. Statista, European Union: share in global gross domestic product based on purchasing-power-parity from 2014 to 2024. Retrieved from https://www.statista.com/statistics/253512/share-of-the-eu-in-the-inflation-adjusted-global-gross-domestic-product/ [accessed 06 June 2020]

27 Sturgeon T. J. (May 2013), *Global Value Chains and Economic Globalization - Towards a New Measurement Framework*, Industrial Performance Center, Massachusetts Institute of Technology. Retrieved from https://ec.europa.eu/eurostat/documents/7828051/8076042/Sturgeon-report-Eurostat.pdf [accessed 2 June 2020]

28 Leblond P. & Viju-Miljusevic C. (2019), 'EU trade policy in the twenty-first century: change, continuity and challenges', *Journal of European Public Policy*, Vol. 26(12), p. 1836. Retrieved from https://www.tandfonline.com/doi/full/10.1080/13501763.2019.1678059 [accessed 21 May 2020]

brings new opportunities for small-and-medium enterprises (SMEs) and consumers, but new types of trade barriers and greater concerns about the protection of consumers and personal data must be addressed.[29]

As a result, since 2001 the WTO's members have been engaged in a broad round of multilateral trade negotiations known as the Doha Development Agenda (DDA), which is based on three pillars: market access for agricultural products, industrial goods (as 'non-agricultural' goods) and services; rules on trade facilitation and anti-dumping; and development,[30] all of which are very relevant and important for Vietnam as a developing country. However, the realisation of any agreement on liberalization modalities became infeasible due to conflict still exists regarding the commitments that both developed and developing countries should make.[31] The potential loss in world trade could be estimated to US$1,064 billion: not only would the failure of the DDA prevent a US$336 billion increase in world trade derived from new tariffs cut, but trends towards protectionism would contract world trade by US$728 billion.[32]

Against this background, the EU remains committed to the WTO covered agreements and trade development agenda, stemming from the view that a strong multilateral trading system is the most effective means of expanding and managing trade for the benefit of all.[33] Additionally, the

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29 European Commission, *supra* note 23, p. 12.

30 Europe Parliament, 'The European Union and the World Trade Organisation', Fact Sheets on the European Union. Retrieved from https://www.europarl.europa.eu/factsheets/en/sheet/161/the-european-union-and-the-world-trade-organisation [accessed 21 May 2020]

31 Bouet, A. & Laborde, D., 'The potential cost of a failed Doha Round', International Food Policy Research Institute Issue Brief 56 (Dec 2008), p.2. Retrieved from https://www.wto.org/english/forums_e/public_forum11_e/doha_to_securemarketaccess.pdf [accessed 21 May 2020]

32 *Ibid*., p.8

33 European Commission, 'Global Europe - Competing in the world - A contribution to the EU's Growth and Jobs Strategy', COM(2006) 567 final, 4 Oct 2006, p. 8. Retrieved from https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0567:FIN:en:PDF [accessed 22 May 2020]. However, note that on 29 October 2020, CJEU Advocate General Saugmandsgaard Øe in Joined Cases C-798/18 and C-799/18 opined that Article 26 Energy Charter Treaty (multilateral treaty on energy) in intra-EU investor-State disputes as inapplicable. Fn. 55: 'In the light of that [Achmea] judgment, it seems to me that, in as much as Article 26 of the Energy Charter, which is headed "Settlement of disputes between an investor and a Contracting Party", provides that such disputes may be resolved by arbitral tribunals, that provision is not applicable to intra-Community disputes. In my view it may even be the case, having regard to the observations made by the Court in that judgment – especially in relation to the particular nature of the law established by the Treaties and the principle of mutual trust between the Member States — that the Energy Charter is entirely inapplicable to such disputes.'

'Global Europe: Competing in the world' communication[34] highlighted the need to adapt the tools of EU trade policy to new challenges, to engage new partners, to ensure Europe remains open to the world and other markets open to the EU. In this context, on the one hand, Free Trade Agreements as alternatives can go further and faster in promoting openness and integration, by tackling issues which are not readily available for multilateral negotiations and by preparing the stepping stones for the next level of multilateral liberalisation. On the other hand, FTAs may carry risks for the multilateral trading system by complicating trade, eroding the principle of non-discrimination and excluding the weakest economies. The EU also suggested that the new FTAs would need to be 'comprehensive and ambitious in coverage, aiming at the highest possible degree of trade liberalisation, including in services and investment'.[35] Consequently, the EU currently has 79 preferential trade agreements in place (fully and partially), 25 agreed but not yet in force trade agreements and 29 trade agreements being negotiated with other countries.[36] One of these agreements is with Vietnam who is the EU's 17th largest trade in goods partner and the EU's second largest trading partner in the Association of Southeast Asian Nations (ASEAN).[37]

2.2. Prospect from Vietnam

The Association of South East Asian Nations (ASEAN) is a dynamic market with some 640 million consumers and ranks as the eighth economy in the world. The countries as a group are the EU's third largest trading partner outside Europe, after the US and China, with more than €237.3 billion of trade in goods and €85.5 billion of trade in services during 2017-2018. The EU is by far the largest investor in ASEAN countries which its Foreign Direct Investment (FDI) into ASEAN accounted for €337 billion in 2017.[38]

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34 European Commission, *supra* note 33, p. 33.

35 *Ibid*., "[N]ew competitiveness driven FTAs would need to be comprehensive and ambitious in coverage, aiming at the highest possible degree of trade liberalisation including far-reaching liberalisation of trade in services covering all modes of supply...".

36 European Commission, 'Negotiations and agreements'. Retrieved from http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_being-negotiated [accessed 19 May 2020]

37 European Commission, Trade and Policy – Vietnam, 07 May 2020. Retrieved from https://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/index_en.htm [accessed 06 June 2020]

38 European Commission, 'Countries and regions: Association of South East Asian Nations (ASEAN)'. Retrieved from https://ec.europa.eu/trade/policy/countries-and-regions/regions/asean/ [accessed 19 May 2020]

Ensuring better access for businesses to markets, negotiations for a trade and investment agreement between two regions were launched in 2007 and postponed in March 2009 due to the divergent levels of economic, social and political development between the ASEAN Member States. As an alternative, the EU started bilateral negotiations with these countries with a view of signing bilateral FTAs, including Singapore, Malaysia, Vietnam, Thailand, Philippines, Indonesia and Myanmar.[39] The trade and investment agreements with Singapore were signed on 19 October 2018[40] and Vietnam on 30 June 2019[41] so far while the talk with others is currently on hold.

The EU and Vietnam established formal diplomatic relations in October 1990, and Vietnam has eventually become the EU's second-most important trading partner in ASEAN, after Singapore. The main EU exports to Vietnam are high-tech products, including electrical machinery and equipment, aircraft, vehicles and pharmaceutical products while Vietnam's main exports to the EU relies on footwear, textiles and clothing, and agricultural products. In addition, the EU is the fifth-largest foreign investor in Vietnam whereby investors from the EU have invested a cumulative total of almost US$24 billion in Vietnam, spread across 2,133 projects by the end of 2018.[42]

The EU–Vietnam trade negotiation had commenced in June 2012, until the formal conclusion on 02 December 2015 was reached. Following the Opinion 2/15 of CJEU[43] and in a similar approach for the trade deals with Singapore, the result of negotiations was adjusted to create a Free Trade Agreement (EVFTA) and an Investment Protection Agreement (EVIPA). The European Parliament gave its consent to both agreements on 12 February 2020: the EVFTA can be officially concluded by the Council and enter into force on 01 August 2020 while the EVIPA will further need to be ratified by all EU Member States according to their

39 European Commission, 'Overview of FTA and Other Trade Negotiations', Updated February 2020. Retrieved from http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf [accessed 19 May 2020]

40 European Commission, 'Singapore', Countries and Regions. Retrieved from https://ec.europa.eu/trade/policy/countries-and-regions/countries/singapore/ [accessed 22 May 2020]

41 European Commission, 'Countries and regions: Vietnam'. Retrieved from http://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/ [accessed 19 May 2020]

42 Eurocham - Vietnam, 'The EU-Vietnam Free Trade Agreement: Perspective from Vietnam', 2019 EVFTA Report (Dec 2019). Retrieved from https://www.eurochamvn.org/The-EVFTA-Report [accessed 22 May 2020]

43 CJEU, *supra* note 12.

own national procedures before it can enter into force.[44] Only 6 EU countries ratified agreement as of February.

The EU trade and investment agreements with Vietnam are arguably the most ambitious free trade deal ever concluded with a developing country and are strategically important to both parties. For the EU, the deal achieves two aims at once:

Firstly, the bilateral measures and provisions promote enhanced transparency and regulatory best practices that are consistent with existing international norms or standards.[45] These measures include:

- Nearly completed removal of tariff barriers: eliminating over 99% of customs duties on exports in both directions;

- Dismantling of customs barriers and trade facilitation;

- EU access to Vietnamese public procurement and vice-versa;

- Improved access to Vietnamese service markets: for instance, easier access for EU companies to operate in the Vietnamese postal, banking, insurance, environmental and other service sectors;

- Promoting sustainable development according to international regulations and standards; and

- Investment access and protection; particularly the EVIPA establishes new Investment Tribunal System (ITS) to resolve disputes between investors and state authorities (which is further analysed in next section of this paper).[46]

Secondly, the agreements are also an important stepping stone and a show-case for the EU's longer-term goal of a region-to-region (EU - Southeast Asia) trade deal.[47]

The EVFTA and EVIPA are the catalyst that can push Vietnam's development in a positive way, becoming a global player at the

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44 European Commission, *supra* note 37.

45 Woolcock S. (2007), 'European Union policy towards Free Trade Agreements', *ECIPE Working Paper* No. 03, p.11. Retrieved from http://www.felixpena.com.ar/contenido/negociaciones/anexos/2010-09-european-union-policy-towards-free-trade-agreements.pdf [accessed 22 May 2020]

46 European Parliament, 'EU-Vietnam Free Trade Agreement (EVFTA)', Legislative Train Schedule - A Balanced and Progressive Trade Policy to harness Globalisation. Retrieved from https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-vietnam-fta [accessed 22 May 2020]

47 *Ibid*.

highest level of the world's economies and exploiting its comparative advantages in a smart and responsible manner. The European Trade Policy and Investment Support Project (MUTRAP) has predicted that, over the implementation period, Vietnam's economic growth will be around 7-8% higher than would have been the case without such agreements. Furthermore, Vietnam's exports to the EU are set to be 50 percent higher, with imports also seeing significant growth.[48] These deals make Vietnam the most promising business destination for international companies, not only because of its own undeniable potential, but also as a future hub for businesses in the ASEAN region.

More importantly, the implementation of the new-generation trade and investment agreements will promote institutional reform and improve the domestic legal framework with more transparent rules in Vietnam. In particular, the EVIPA brings forth innovative dispute resolution and investment protection mechanisms to all EU and other foreign investors. This in turn will significantly raise their confidence and Vietnam's profile as a safe investment eco-system.[49] While it is not possible to evaluate the end-result of these agreements with empirical evidence yet, it is timely to comment on what will be the pros and cons of the legal provisions of and commitments under these agreements when they are ratified and fully enforced in Vietnam.

3. Investment dispute settlement in EVIPA (Investment Tribunal System – ITS)

Both the EVFTA and EVIPA contain provisions for dispute settlement. Chapter 15 of EVFTA[50] and Chapter 3 of EVIPA[51] provide a number of procedures to avoid and settle disputes between the Parties pertaining to the interpretation and application of these Agreements with a view to arriving at a mutually agreed solution. This section examines the ITS under EVIPA[52] as it provides intriguing and different features which are designed to avoid long and expensive processes of traditional Investor-State Dispute Settlement (ISDS). The details of dispute settlement under the ITS regime is examined below.

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48 Eurocham – Vietnam, *supra* note 42, p. 21.

49 *Ibid*., p. 34

50 Retrieved from https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157375.pdf [accessed 06 June 2020]

51 Retrieved from https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157394.pdf [accessed 06 June 2020]

52 Sub-section 4 of EVIPA provides the provisions for ITS.

3.1. The Investment Tribunal System (ITS) under EU FTAs

As it is well known, the traditional ISDS mechanisms, for example ICSID Convention arbitration and ICSID Additional Facility arbitration under the ICSID Convention,[53] has been criticised by certain sections of the civil society, and by the EU itself in the submission to Working Group III of UNCITRAL on the ISDS Reform. The most of these concerns encompassed the lack of consistency, coherence, predictability and correctness of arbitral decisions; no mechanism under the current system to address inconsistent and incorrectness of decisions; lack of diversity, independence and impartiality of decision makers in ISDS.[54]

In order to address these criticisms, the EU's approach has attempted to institutionalise the resolution of investment disputes in the FTAs through the inclusion of an Investment Tribunal System (ITS). As a result, in the new generation of FTAs fostered by the EU, such as the Comprehensive Economic and Trade Agreement with Canada (CETA), the EU-Singapore Investment Protection Agreement, and the EU-Vietnam Investment Protection Agreement, an ITS mechanism is now a core component of such agreements.[55]

This approach has given rise to debates in the framework of the conclusion of this treaty. On 7 September 2017, Belgium requested the CJEU to render an opinion on the compatibility of the CETA's ITS with EU law, in particular with the exclusive competence of the CJEU to provide the definitive interpretation of EU law, the general principle of equality, the requirement that EU law is effective, and the right to an independent and impartial judiciary.[56]

Shortly after Belgium's request, on 13 September 2017, the European Commission issued a recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment

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53 The ICSID Convention is a treaty ratified by 154 Contracting States, which entered into force on 14 October 1966.

54 Submission of the European Union and its Member States to UNCITRAL Working Group III (18 Jan 2019). Retrieved from https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157632.pdf [accessed 8 Jun 2020]

55 Croisant G. (29 Jan 2019), 'CJEU Opinion 1/17 – AG Bot Concludes that CETA's Investment Court System is Compatible with EU Law', *Kluwer Arbitration Blog*. Retrieved from http://arbitrationblog.kluwerarbitration.com/2019/01/29/cjeu-opinion-117-ag-bot-concludes-that-cetas-investment-court-system-is-compatible-with-eu-law/?doing_wp_cron=1591579574.1992878913879394531250 [accessed 8 Jun 2020]

56 CJEU Opinion 1/17 (30 Apr 2019), p. 01

disputes, with the aim of setting up a framework for the resolution of international investment disputes rather than one bilateral investment court for each FTA.[57] The European Council then gave its agreement on 20 March 2018 through the possibility of replacing the various ITS already provided by recent EU FTAs by a single multilateral investment court (MIC).[58] The idea was also proposed to the Working Group III of UNCITRAL that identified the setting up of MIC as an option for reform of ISDS.[59]

Notably, in Slovak Republic v. Achmea B.V case,[60] the CJEU ruled that:

"[…] according to settled case-law of the Court, an international agreement providing for *the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law*. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected."[61]

Against this background, Attorney General Bot opined in CJEU Opinion 1/17 that a process of disputes resolution between investors and States by first instance and appellate tribunals may be compatible with EU law only if it has no adverse effect on the autonomy of the

57 European Commission, Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, COM (2017) 493 final (Brussels, 13 Sep 2017): 'The multilateral investment court initiative aims at setting up a framework for the resolution of international investment disputes'. Retrieved from https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52017PC0493 [accessed 8 Jun 2020]

58 European Council (20 Mar 2018), 'Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes' 12981/17 ADD 1 DCL 1, Brussels, p.8: "*The principal mechanism of the Convention should be that the jurisdiction of the multilateral court extends to a bilateral agreement when both Parties to the agreement have agreed to submit disputes arising under the agreement to the jurisdiction of the multilateral court*". Retrieved from http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf [accessed 8 Jun 2020]

59 Croisant G., *supra* note 55.

60 CJEU Judgment (Grand Chamber) (Case C-284/16 of 5 March 2018). Retrieved from http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1492350 [accessed 8 Jun 2020]

61 *Ibid*., p. 57.

EU legal order.[62] That autonomy, which exists with respect both to the law of the Member States and to international law, stems from the essential characteristics of the European Union and its law. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the European Union and its Member States reciprocally as well as binding its Member States to each other.[63] In addition, that autonomy accordingly resides in the European Union constitutional framework, which encompasses the values set out in Article 2 of the Treaty on European Union (TEU): 'the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'.[64]

Therefore, the ITS provided in EU FTAs is fully compatible with EU law, provided that it complies with the principle of autonomy of EU law and the exclusive jurisdiction of the CJEU for the interpretation of EU law, the principle of equal treatment and of the requirement of effectiveness, the EU Charter of Fundamental Rights, 2000 in particular of the right of access to a court and right to an independent and impartial tribunal.[65]

3.2. Organizational structure and functions of ITS

3.2.1 The Tribunal of First Instance (the Tribunal) and the Appeal Tribunal

The ITS in EVIPA has established a two-level judicial structure, the Tribunal of First Instance (the Tribunal) and the Appeal Tribunal.[66] The lack of an effective judicial review of arbitral decisions has been one of the most criticised shortcomings of traditional ISDS mechanisms. The ITS provides for the possibility to appeal against an award rendered by the Tribunal where it is alleged to have erred in the interpretation or application of the applicable law, or manifestly erred in the appreciation of the facts. The Appeal Tribunal shall, in case the appeal is well founded, decide to modify or reverse the legal findings and conclusions in the provisional award in whole or part.[67]

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62 CJEU Opinion 1/17 (30 Apr 2019), p. 108.

63 *Ibid*., p. 109.

64 *Ibid*., p. 110.

65 European Commission (30 Apr 2019), 'Trade: European Court of Justice confirms compatibility of Investment Court System with EU Treaties', Press Release. Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2334 [accessed 8 Jun 2020]

66 The EVIPA, Art.3.38, 3.39.

67 *Ibid*., Art.3.54, p. 3.

In other words, the Appeal Tribunal shall apply its own legal findings and conclusions to the facts and render a final decision. But if that is not possible, it shall refer the matter back to the Tribunal.[68]

3.2.2. Tribunal members

The ITS has provided for a break from the *ad hoc* arbitration system to a permanent and institutionalised court, whose nine members of the Tribunal, respective six members of the Appeals Tribunal are appointed in advance by the States parties to the treaty instead of being appointed on a case-by-case basis by the investor and the responding State.[69]

Firstly, members of the Tribunal, as well as the Appeal Tribunals are categorised evenly in accordance with their affiliation to the Contracting Parties. As for the Tribunal of First Instance, three members are nationals of Vietnam, three members are nationals of EU Member States, and the remaining three members are third country nationals.[70] Respectively, the number of members on the Appeal Tribunals encompasses two EU nationals and two nationals of Vietnam, and two third country nationals.[71] Accordingly, national members of Vietnam on the Tribunal or Appeal Tribunal are not required to have the nationality of Vietnam.[72] Secondly, the appointment of members to individual panels is the responsibility of the President of the Tribunal, herself selected by lot from the pool of third country members.[73] Finally, to guarantee the independence and availability of Tribunals'' members, the Trade Committee will determine the remuneration for the retainer and for their activity on panels.[74]

It is also noteworthy that the appointment of members of the Tribunal and Appeal Tribunal is left to the respective Contracting Parties, but the selection of all members in Tribunals is assigned to

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68 *Ibid*., Art.3.54, p. 4.

69 *Ibid*., Art.3.23.

70 *Ibid*., Art.3.23, p. 01: "The Committee shall, no later than six months after the date of entry into force of this Agreement, establish a list of at least 15 individuals who are willing and able to serve as arbitrators. The list shall be composed of three sub-lists:
(a) one sub-list for Viet Nam;
(b) one sub-list for the Union and its Member States; and
(c) one sub-list of individuals who are not nationals of either Party and do not have permanent residence in either Party and who shall act as chairperson of the arbitration panel."

71 *Ibid*., Art.3.39, p. 2.

72 *Ibid*., *supra* note 25 & 26.

73 *Ibid*., Art. 3.38, p. 5.

74 *Ibid*., Art.3.38, p. 14 and Art.3.39, p. 14.

the Trade Committee established under the Agreement.[75] The Trade Committee is composed, on the one hand, of the Minister for Trade and Industry of Vietnam, and, on the other hand, the EU Trade Commissioner.[76] Although many structural and procedural details of the Committee still need to be worked out, the composition of the ITS appears more akin to a politically negotiated compromise than an appointment by the respective Contracting Parties.[77] Thus, although ITS has addressed the frequent criticism over the influence of disputing parties on the appointment of a particular panel, it inserts a significant element of political influence on investor-state dispute resolution – counteracting the objective of depoliticisation that ISDS was designed to achieve.[78]

3.2.3. Ethical requirements

To guarantee the independence of the tribunal, the Agreement contains stringent requirements regarding tribunal members' qualifications and impartiality, rules on ethics and conflicts of interests, and necessary flexibilities to adapt to an evolving membership.[79] The members of aforementioned Tribunals shall fulfil the requirements in their respective countries for appointment to judicial office, or be jurists of recognised competence.[80] To that extent, members of both, the Tribunal and Appeal Tribunal, shall have demonstrated expertise in public international law and, ideally, in international investment law, international trade law, and international dispute resolution. Additionally, members must not only be independent but also clearly appear to be free of any direct or indirect conflict of interest pertaining to a particular dispute. The EVIPA provided that 'upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness' in any dispute.[81]

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75 *Ibid*., Art. 3.7, p. 3.

76 *Ibid*., Art. X.1 of the Chapter on Institutional, General and Final Provisions.

77 Lenk H. (2016), 'An Investment Court System for the New Generation of EU Trade and Investment Agreements: A Discussion of the Free Trade Agreement with Vietnam and the Comprehensive Economic and Trade Agreement with Canada', *European Papers*, Vol. 1(2) 665, p. 668. Retrieved from http://www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2016_I_033_Hannes_Lenk.pdf [accessed 9 Jun 2020]

78 *Ibid*.

79 UNCTAD, 'Reforming Investment Dispute Settlement: A Stocktaking', *IIA Issues Note*, Mar 2019, Issue 1, p. 13. Retrieved from https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d3_en.pdf [accessed 12 Jun 2020]

80 The EVIPA, Art.3.38, p. 4.

81 *Ibid*., Art.3.40, p. 01.

The ethics provision under EVIPA may have some limits. Firstly, the ambiguous term of 'appointment' may cause unclear understanding whether this refers to the appointment of members to a particular panel or the appointment as member of the Tribunal. If the former is correct, the ethical standard is much less stringent than thus far perceived.[82] Additionally, it is frequent for Tribunal members to handle various arbitration cases in parallel, the language of the ethics provision seems to be silent on Tribunal members' involvement in multiple and/or simultaneous disputes.[83]

3.3. Dispute settlement proceedings

An intriguing feature of ITS in resolving disputes under the EVIPA is the amicable resolution of disputes to avoid long and expensive burden of ISDS.[84] The conciliation and mediation mechanisms under EVIPA envisage a more flexible evidentiary process aiming to provide a fair and independent system. Particularly, EVIPA provides a mandatory six-month cooling period before a claim can be submitted for arbitration. During this period, the parties should engage in a consultation followed by mediation or conciliation. A party can submit a notice of arbitration only upon expiration of the cooling period. Otherwise, the claim will not be admissible.[85]

To submit a claim for a dispute under the Agreement, the claimant may send a notice of intent to arbitrate within 90 days of the submission of the request for consultations, which automatically triggers the determination of a respondent within 60 days of the notice of intent.[86] It allows investor to submit a claim only with regard to a breach of obligations under provisions of Chapter 2 of EVIPA. It is noteworthy that although there is a substantive protection of market access, investor cannot submit a claim against this due to the exclusion from the jurisdiction of the Tribunal.[87]

The parties have a choice to submit claims under the rules prescribed in the agreement; the rules of ICSID Convention and Rules of Procedure for Arbitration Proceedings, ICSID Additional Facility

82 Lenk H., *supra* note 77, p. 672.

83 *Ibid*.

84 The EVIPA, Art. 3.39.

85 *Ibid*., Art.3.33(1).

86 *Ibid*., Art.3.33: "*1. If the dispute cannot be settled within six months of the submission of the request for consultations and at least three months have elapsed from the submission of the notice of intent to submit a claim pursuant to Article 3.32 (Notice of Intent to Submit a Claim)…*"

87 *Ibid*., Art.2.1.

Rules if the former do not apply, UNCITRAL Arbitration Rules or any other rules agreed by the parties.[88]

In order for a dispute to be resolved under an investment treaty, it is important to establish that the arbitral tribunal has been vested with the authority to determine their jurisdiction for examining the dispute in the present case. The jurisdiction criteria are typically classified as condition of consent, jurisdiction *ratione personae* and jurisdiction *ratione materiae*.[89] The definition of the term '*investor*'[90] is directly related to the jurisdiction *ratione personae* because the dispute to be settled should arise between the investor from a Contracting Party and host State – another Contracting Party – either Viet Nam or, in the case of the EU Party, either the Union or the Member State concerned pursuant to Article 3.32 of the EVIPA.[91] Article 3.43 of such Agreement attempts to prevent claims from investors who 'acquired ownership or control of the investment for the main purpose of submitting the claim under this Section'.

The required conditions for presence of jurisdiction *ratione materiae* are comprised of a legal dispute, the dispute arising from an investment and a direct relationship between the relevant investment and the dispute. The notion of 'investment' under Article 1.2(h) of the EVIPA is very broad and covers variety of assets under direct and indirect control of an investor. However, Article 1.2(q) attempts to deprive illegal investments of treaty protection by requiring that a covered investment is inter alia 'made in accordance with the other Party's applicable law and regulations'. This provision aims to dismiss any claim regarding an investment or an investor that violates core EU values, or that has violated host State's laws or international standards of responsible investment.

Unlike the UNCITRAL rules on transparency, EVIPA does not limit confidentiality pertaining to the access of documents for public,[92] public hearings,[93] a matter of right of a non-disputing third party to

88 *Ibid*., Art.3.33, p.2.

89 Çevik Ö., Şimşek C. & Safi Isik G. (24 July 2018), 'Principle Of Good Faith in Determining the Jurisdiction of ICSID and Commentary on the Phoenix Case', *Mondaq*. Retrieved from https://www.mondaq.com/turkey/arbitration-dispute-resolution/722160/principle-of-good-faith-in-determining-the-juristicdion-of-icsid-and-commentary-on-the-phoenix-case [accessed 26 May 2020]

90 The EVIPA, Art.3.38, p. (c)(i).

91 *Ibid*., Art.3.38, p. (f).

92 *Ibid*., Art.3.46, p. 3.

93 *Ibid*., Art.3.8, p. 4.

attend,[94] and awards of the tribunal.[95] The public disclosure of the award would improve accountability, predictability and consistency in the jurisprudence of the Tribunal creating precedents for future decisions. However, the availability of documents in public is subject to redaction of confidential or protected information such as business secrets and classified government information belonging to the parties. There is a great degree of responsibility entrusted on the Tribunal to determine on confidentiality of information and to take proactive role in cases involving confidential information as unlimited access to and disclosure of such information could damage the interest of the disputing parties and/or may be a cause to appeal the award.[96]

Last but not least, in order to guarantee the recognition and enforceability of ITS awards, the EVIPA provides that final awards shall be binding between the disputing parties.[97] The Vietnam 2015 Civil Procedure Code (CPC) also provides only limited grounds for the setting aside of awards to, for instance, personal misconduct, procedural improprieties, and the lack of a valid arbitration agreement; but do not generally provide for a substantive review of the award.[98]

Although the EVIPA refers in this respect to the New York Convention on the Recognition and Enforcement of Arbitral Awards, it is clear to see that the ITS is envisaged to operate more like a judicial organ – rather than arbitral – in nature, thus, falling outside the scope of that Convention. Other critics have pointed out that the enforcement of ITS awards is dependent on the provisions of the underlying agreement to which third parties are not bound.[99]

Given the strong judicial character of ITS which Vietnam has accepted via legally binding international investment commitments, it is important for Vietnam to transpose these commitments in its domestic legal framework to ensure consistency as well as to monitor their compliance.

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94 *Ibid*., Art.3.37.

95 *Ibid*., Art.3.22, p. 2.

96 Jaswant S. S. (2019), 'Establishment of investment court system under CETA and EU-Viet nam FTA and its compatibility with EU law', *Europa-Kolleg Hamburg*, Institute for European Integration, Study Paper No 02/19, pp. 65-66. Retrieved from https://europa-kolleg-hamburg.de/wp-content/uploads/2019/04/Study-Paper-Shilpa-Singh-Jaswant.pdf [accessed 12 Jun 2020]

97 The EVIPA, Art.3.57, p. 01.

98 Vietnam 2015 Civil Procedure Code, Art.439.

99 Jaswant S. S., *supra* note 96.

4. Case studies of investor-state dispute settlement based on current bilateral treaty between Vietnam and other countries

According to the statistics by the United Nations Conference on Trade and Development (UNCTAD) and the Investor-State Dispute Settlement Navigator (ISDS), there have been at least eight reported investor–state disputes involving Vietnam as a party: three cases were decided in favour of Vietnam; one was decided against Vietnam; one was discontinued and two cases are still pending.[100]

Some of the thematic issues and principles were addressed in these cases.

4.1. Principle of good faith in international investment regulations

McKenzie v. Vietnam (2010) Case

McKenzie v. Vietnam was a case arising under the 'Chapter of Investment' of the 2000 US-Vietnam Bilateral Trade Agreement (BTA).[101] The claimant sought to arbitrate the State's failure of conveying land use rights to permit a mining company to exploit the area, instead of the construction of resort located in Binh Thuan Province, Vietnam. The tribunal rejected the claimant's argument, upholding Vietnam's claim that the act of executing agreements with the mining company by the investor himself had constituted consent to let the mining company utilise the area.[102]

In determining jurisdiction ratione materiae, the tribunal paid its attention to analyse the principle of good faith[103] whereby a claimant did not act in accordance with the good faith to render his investment project he would fall out of the investment protection under the

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100 UNCTAD, 'Vietnam', *Investment Policy Hub*. Retrieved from https://investmentpolicy.unctad.org/investment-dispute-settlement/country/229/vietnam/respondent [accessed 26 May 2020]

101 UNCTAD (2010), 'McKenzie v. Viet Nam', *Investment Policy Hub*. Retrieved from https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/382/mckenzie-v-viet-nam [accessed 26 May 2020]

102 Nguyen P. D. (12 July 2016), 'The Fair and Equitable Treatment Standard in Investor-State Arbitration in Vietnam', *International Arbitration Asia*. Retrieved from http://www.internationalarbitrationasia.com/vietnam-fair-and-equitable-treatment-in-investor-state-arbitration [accessed 26 May 2020]

103 *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No: ARB/06/05, Award of 15 April 2009, p. 107: "*The principle of good faith has long been recognized in public international law, as it is also in all national legal systems. This principle requires parties "to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage…"*. Retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0668.pdf [accessed 26 May 2020]

invoked treaty.[104] It is seen that international arbitrations brought up this issue in many previous cases, and *Phoenix* case is undoubtedly one of the most notable cases relating to good faith:

"The purpose of the international mechanism of protection of investment through *ICSID arbitration cannot be to protect investments made in violation of the laws of the host State or investments not made in good faith*, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system. In other words, *the purpose of international protection is to protect legal and bona fide investments*."[105]

Moreover,

"The protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, *among which the principle of good faith is of utmost importance*."[106]

As such, in the decision of McKenzie case there was a great determination to express the tribunal's duty as "ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected". The tribunal further repeated the principle as stated in *Plama v. Republic of Bulgaria* case:

"The principle of good faith encompasses, inter alia, *the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment*. This obligation is particularly important when the information is necessary for obtaining the State's approval of the investment…[107] *Intentional withholding of this information is therefore contrary to the principle of good faith*."[108]

The claimant had submitted a financial dossier to competent authority in order to obtain the investment certificate. However, the correctness and validity of such a dossier could not be determined or justified after the date of investment certificate issuance, even if

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104 *McKenzie v. Vietnam*, Award of 11 Dec 2013, p. 222. Retrieved from https://www.italaw.com/cases/2370 [accessed 26 May 2020]

105 *Phoenix Action Ltd. v. Czech Republic*, *supra* note 103, p. 100.

106 *Ibid*., p. 106.

107 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 Aug 2008, p. 144. Retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0671.pdf [accessed 26 May 2020]

108 *Ibid*., p.145.

there was suspicion of fraud. Thus, the tribunal cited "Nemo auditur propriam turpitudinem allegans (nobody can benefit from his own wrong)" to judge that the claimant had not complied with the condition precedents stated in aforementioned investment certificate, which is the framework of defendant's consent with jurisdiction of such tribunal under the applicable BTA.[109]

The general application of principle of good faith has also been highlighted in Inceysa Vallisoletana SL v. El Salvador case as 'a supreme principle, which governs legal relations in all of their aspects and content'.[110] Such principle therefore has been the object of analysis in various cases concerning the dispute between foreign investor and the respondent state and it is likely to be relevant to other similar cases in the future. More importantly, in international investment law, substantive standards of treatment (investment treaty provisions), such as 'fair and equitable treatment', 'full protection and security', 'protection of legitimate expectation', 'transparency', 'non-discrimination', 'national treatment' and 'most-favoured-national treatment', are considered fundamentally based on good faith, but their content depends on the specific contexts in which they are applied.[111]

4.2. The fair and equitable treatment in investor-state arbitration

The fair and equitable treatment (FET) is a provision commonly enshrined in investment agreements despite the absence of a rigid definition. The 'equitable' treatment was initially referred in the 1948 Havana Charter for the International Trade Organisation as Article 11(2) provided that investment (the enterprise, skills, capital, arts and technology brought from one Member country to another) should be assured 'just and equitable treatment'.[112] Then, the FET has been identified as one of the minimum standards of treatment of foreigners and of their property, required by international law, a concept which

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109 *McKenzie v. Vietnam*, *supra* note 104, pp. 226-49.

110 *Inceysa Vallisoletana SL v. El Salvador*, ICSID Case No. ARB/03/26, Award of 2 Aug 2006, p. 230. Retrieved from https://www.italaw.com/sites/default/files/case-documents/ita0424_0.pdf [accessed 27 May 2020]

111 Maniruzzaman M. (30 Apr 2012), 'The Concept of Good Faith in International Investment Disputes – The Arbitrator's Dilemma', *Kluwer Arbitration Blog*. Retrieved from http://arbitrationblog.kluwerarbitration.com/2012/04/30/the-concept-of-good-faith-in-international-investment-disputes-the-arbitrators-dilemma-2/?doing_wp_cron=1590563877.0344359874725341796875 [accessed 27 May 2020]

112 United Nations Conference on Trade and Employment, Final Act and Related Documents, Havana (21 Nov 1947 to 24 Mar 1948). Retrieved from https://www.wto.org/english/docs_e/legal_e/havana_e.pdf [accessed 27 May 2020]

was further interpreted in the *Waste Management* cases.[113] Other cardinal elements which inform the FET principle include (but not limited to) transparency, non-discrimination, due process and non-arbitrariness:

"…the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or radical prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process. In applying this standard, it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on the claimant."[114]

The FET standards have been invoked in numerous other cases where the claims were based on the FET standards under the applicable treaty. In addition to *McKenzie v. Vietnam* case where the claimant alleged a contravention of FET principles and a lack of transparency by Vietnam, the claimant in DialAsie SAS v. Vietnam case[115] also alleged breaches of indirect expropriation, fair and equitable treatment and full protection and security set forth in the 1992 France – Vietnam Bilateral Investment Treaty (BIT) by imposing the operating standards of a hospital on the nephrology and dialysis facility of DialAsie. The international arbitral tribunal accepted Vietnam's argument that DialAsie did not raise any objection during its operation in Vietnam and therefore, no expectations of DialAsie arose.[116] The tribunal thus found in favour of Vietnam and held that the State had not in fact imposed unfair criteria on the medical facility of DialAsie, instead merely expressed its concern regarding the advantageousness and convenience of patients.[117]

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113 *Waste Management, Inc. v. United Mexican States (I)* (ICSID Case No. ARB(AF)/98/2) and *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3 (NAFTA).

114 *Waste Management, Inc. v. United Mexican States (II)*, p. 93.

115 *Dialasie v. Viet Nam* (2011). Retrieved from https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/423/dialasie-v-viet-nam [accessed 3 Jun 2020]

116 Nguyen M. D. & Nguyen T. T. T. (2018), 'Chapter 9: International Investment Dispute Resolution in Vietnam: Opportunities and Challenges', p. 292, in Chaisse J. & Nottage L. (ed.) (2018), *International Investment Treaties and Arbitration Across Asia*, Bril Nijhoff, Leiden.

117 Nguyen P. D., *supra* note 102.

Recofi v. Vietnam[118] was another case arising under the France – Vietnam BIT, arising out of alleged outstanding payments by the Government concerning contracts for sale of foods and other basic comodities by claimant to both private and State-owned entities in Vietnam when the country faced food shortages in 1987. On 28 September 2015, the Arbitral Tribunal rendered an award declining their jurisdiction to decide the dispute.[119] Despite the confidentiality of the award, the legal reasoning of arbitration's conclusion was summarized by the Swiss Federal Tribunal when it examined Recofi's application for annulment:

"This being so, the scrutiny of the case will begin with an inquiry as to the meaning of the word 'investment' as defined at Art. 1(1) of the BIT… However, there is no need to enter into this debate here; indeed, the issue is first to define the expression 'investment' as it appears in the BIT at issue and not as defined pursuant to other bilateral treaties. Second, there is no rule requiring an arbitral tribunal to heed decisions previously taken by other arbitral tribunals on the same issue, as they are not binding precedents. Third, as this arbitration is under the UNCITRAL rules, the criteria germane to ICSID arbitrations are not to be taken into consideration."[120]

However, it could be perceived in this case whether the FET standards had been breached in considering the fact that there was a reasonable expection by a non-native investor to receive reimbursement from the State when it met the criteria set forth by the State itself in domestic legal framework and mechanism on public debt management.[121]

There is no full consistency in the application and interpretation by arbitral tribunals of the FET obligations. This patchwork of approaches are a result of a variety of formulated standards and different factual situations. Furthermore, in the absence of an appellate review, tribunals may evaluate the FET standard only in terms of an investor's expectations, without due consideration given to a State's

118 *RECOFI v. Viet Nam* (2013). Retrieved from https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/554/recofi-v-viet-nam [accessed 3 Jun 2020]

119 Tran N-H. T. (12 Aug 2017), 'The Swiss Federal Tribunal's decision in Recofi v. Vietnam: a case study', *Lalive* (Ho Chi Minh City). Retrieved from https://newsite.lalive.law/wp-content/uploads/2017/11/12.08.2017_NhuHoangTranThang12Aug2017_ENVN.pdf [accessed 27 May 2020]

120 *Judgment of the Federal Supreme Court of Switzerland No. 4A_616/2015* (20 Sep 2016), s. 3.2.2. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw10121.pdf [accessed 27 May 2020]

121 Nguyen P. D., *supra* note 102.

wider political and social obligations. The challenge for investment treaty negotiators is to enshrine this in new treaty language or to use it to clarify existing treaty provisions. In other words, investment treaties should continue considering how to formulate the FET standards and obligations – or provide an agreed interpretation to existing FET clauses that would guide the tribunals and address existing and future problems of its application.[122]

4.3. Transparency in investor-state arbitration

Trinh and Binh Chau v. Viet Nam (I) (2004); and Trinh and Binh Chau v. Viet Nam (II) (2014)

Mr. Trinh Vinh Binh – a Dutch national of Vietnamese descent – and his company Binh Chau JSC. (Trinh and Binh Chau) had filed a claim against the Vietnamese government before the UNCITRAL arbitral tribunal for the alleged unlawful confiscation of real estate and other claimants' assets without compensation, including the criminal conviction of Mr. Trinh, with the claimed value of approximately US$100 million. The legal framework of this lawsuit was the 1994 Vietnam-Netherlands Bilateral Investment Treaty. Accordingly, disputing parties agreed to settle the dispute with an undisclosed amount of compensation.[123]

However, by 2014 the claim was brought by Mr. Trinh against the Vietnamese government for the breach of a settlement of a previous claim under the same BIT. The arbitration proceedings were seated in London and administered by the Permanent Court of Arbitration, with hearings organised at the ICC headquarters in Paris in August 2017. The arbitral tribunal rendered an award ordering Vietnam to pay Mr. Trinh Vinh Binh and his company Binh Chau JSC a total amount of approximately US$37.5 million, including damages for expropriation of property, moral damages, costs of arbitration and related legal fees.[124]

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122 UNCTAD (2012), 'Fair and Equitable Treatment', *UNCTAD Series on Issues in International Investment Agreement II*, UNCTAD/DIAE/IA/2011/5, pp. 90-92. Retrieved from https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf [accessed 3 Jun 2020]

123 UNCTAD, 'Trinh Vinh Binh and Binh Chau Joint Stock Company v. Socialist Republic of Viet Nam (I)', *Investment Policy Hub*. Retrieved from https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/168/trinh-and-binh-chau-v-viet-nam-i- [accessed 24 May 2020]

124 UNCTAD, 'Trinh Vinh Binh and Binh Chau JSC v. Viet Nam (II)' (PCA Case No. 2015-23), *Investment Policy Hub*. Retrieved from https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/785/trinh-and-bin-chau-v-viet-nam-ii- [accessed 24 May 2020]

In a press release, the Vietnam Ministry of Justice refused to disclose any news regarding the final award rendered for this dispute.[125] The content of this award along with other dispute-relevant information was supposed to be kept confidential by all parties although the government had promised to respond to a lawsuit with full transparency.[126]

The inclusion of the new Investment Tribunal System (ITS) in the EVIPA is an assurance that serious concerns about 'lack of transparency' in the current ISDS mechanism are being addressed.[127] Particularly, Article 3.46(1) of the EVIPA provides for the application of the UNCITRAL Transparency Rules to ISDS proceedings: *"The UNCITRAL Transparency Rules apply to disputes under this Section, subject to paragraphs 2 to 8."* In comparison with the EU – Singapore Investment Protection Agreement (ESIPA), Article 3.16 and Annex 8 ('Rules on Public Access to Documents, Hearings and the Possibility of Third Persons to Make Submissions') of such agreement adopts the UNCITRAL Transparency Rules only to match the terms of the ESIPA ISDS procedure.

Furthermore, greater transparency in the proceedings is also reflected in the EVIPA's treatment of third-party funders. While the ESIPA requires foreign investors to disclose merely the identities of the third-party funder,[128] the EVIPA goes a step further by mandating disclosure of the "the existence and nature of the funding arrangement".[129] Thus, the "incorporation-by-reference" methodology without any major change and provisions of third party funding applied in EVIPA will provide complete transparency and allow a third party to deeply involve in the proceedings.

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125 Vietnam Ministry of Justice, Press Release dated 12 Apr 2019. Retrieved from https://moj.gov.vn/qt/thongtinbaochi/Lists/ThongCaoBaoChiVeCacSuKien/Attachments/34/Thong%20cao%20bao%20chi.pdf [accessed 6 Jun 2020]

126 Tuoi Tre News (31Aug 2017), 'Vietnamese government promises transparency in businessman's lawsuit'. Retrieved from https://tuoitrenews.vn/news/business/20170831/vietnamese-government-promises-transparency-in-businessmans-lawsuit/41277.html [accessed 6 Jun 2020]

127 *Ibid*.

128 ESIPA, Art.3.8: *"1. Any disputing party benefiting from third party funding shall notify the other disputing party and the Tribunal of the name and address of the third-party funder."*

129 EVIPA, Art. 3.37: "1. In case of third-party funding, the disputing party benefiting from it shall notify the other disputing party and the division of the Tribunal, or where the division of the Tribunal is not established, the President of the Tribunal *the existence and nature of the funding arrangement, and the name and address of the third-party funder*." (itslis added).

Last but not least, the status of transparency will be likely to change in not only EVIPA, but also other treaties whereby Vietnam is one of parties since the birth of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ('Rules on Transparency'), effective as of 1 April 2014.[130] Although Vietnam is not yet a member of the 2014 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "*Mauritius Convention*")[131] and thus not expressly bound by the 2014 UNCITRAL Transparency Rules, such Rules on Transparency have been incorporated in the new 2013 UNCITRAL Arbitration Rules, and automatically apply to disputes arising out of treaties concluded as of 1 April 2014.[132]

5. Future prospects for Vietnam

5.1. Coordination mechanism of state agencies in investment-based disputes

As Vietnam has taken a strategic approach to international trade[133] and been increasingly integrated into the global economy so have the growth in international trade and investment in Vietnam.[134] In tandem with these developments the risk of disputes arising in trade and

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130 The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration are a set of procedural rules for making publicly available information on investor-State arbitrations arising under investment treaties.

131 The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the '*Mauritius Convention on Transparency*'), came into force on 18 October 2017, is an instrument by which Parties to investment treaties concluded before 1 April 2014 express their consent to apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

132 UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013): "4. For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency"), subject to article 1 of the Rules on Transparency."

133 Perez S. (2018), 'The Strategic Vision behind Vietnam's International Trade Integration', *Journal of Current Southeast Asian Affairs*, Vol. 37, No. 02, p. 3–38. Retrieved from https://journals.sagepub.com/doi/pdf/10.1177/186810341803700201 [accessed 05 June 2020]

134 Imports, exports and foreign direct investment have shown a steady and consistent growth in Vietnam since the country joined the WTO in 2007. World Trade Organisation, Vietnam – Trade Profile. Retrieved from https://www.wto.org/english/res_e/statis_e/daily_update_e/trade_profiles/VN_e.pdf, accessed 05 June 2020. For an a detailed analysis of trade surplus in Vietnam see, Trading Economics, Vietnam Balance of Trade, https://tradingeconomics.com/vietnam/balance-of-trade [accessed 05 June 2020]

business spheres would also increase.[135] Regarding the negotiation of new investment treaties, Vietnam has shown to be more prudent. It has embarked upon a new generation of FTAs which may not only minimize the abuse of FTA-based ISDS mechanism by foreign investors, but also promote sustainable development through responsible investment conduct rather than merely focus on the protection of investors.[136]

During the past ISDS cases, Vietnam was confronted by challenges and difficulties similar to those identified by other developing countries responding to investor-state disputes, including a lack of coordination mechanisms among a lead agency and relevant agencies, inexperience in ISDS processes and shortcomings in the national legal systems for foreign investment.[137]

The first and most serious difficulty has been the lack of institutional coordination among State institutions and an absence of a permanent lead agency. For example, in the case of *Claimant v. PetroVietnam*,[138] PetroVietnam (PVN), which on behalf of government manages petroleum contracts, faced a claim by investors who challenged its refusal to grant a tax reduction for the operation of an offshore oil concession under a production sharing contract. Moreover, under the signed Petroleum Sharing Contract (PSC), as an additional element of the total fiscal package, there was a "s*tabilisation*" clause provided that the investor should be secured where possible from the adverse economic effects of certain new statutes and regulations. This meant that the investors were entitled to apply for more favourable commercial terms subject to the approval of government, and PVN was obliged to assist its partners in obtaining such approval. Thus, it sought for a tax refund of approximately US$82 million by PVN – a national oil company.

In another tax related case in 2017, two Vietnamese oil fields were sold by two UK subsidiaries of ConocoPhillips to Perenco, with the

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135 Vietnam News (15 Dec 2018), 'Vietnam courts should be more prepared to handle foreign investor v. State investment disputes'. Retrieved from https://vietnamnews.vn/politics-laws/482114/viet-nam-courts-should-be-more-prepared-to-handle-foreign-investor-v-state-investment-disputes.html [accessed 26 May 2020]

136 Nguyen, T. T. & Vu, T. C. Q. (2014), 'Investor-State Dispute Settlement from the Perspective of Vietnam: Looking for a "Post-Honeymoon" Reform', *Transnational Dispute Management*, Vol. 11, issue 1, p. 01. Retrieved from https://www.transnational-dispute-management.com/article.asp?key=2041 [accessed 28 May 2020]

137 *Ibid*.

138 Due to the confidentiality of this dispute, the paper cannot provide the detail of each relevant party and precise wording in their documentation.

value of US$1.29 billion, making a profit of US$896 million.[139] Vietnam government believed that it had the right to tax this previously untaxed gain, as it was generated by exploiting the country's oil resources under the UK-Vietnam double taxation treaty. These multinational oil companies have launched a pre-emptive legal strike, seeking to stop Vietnam from levying an estimated US$179 million (£140 million) in taxes on the profits made from the sale of oilfields in the country.[140] The dispute was submitted to the United Nations Commission on International Trade Law (UNCITRAL) court of arbitration, under the terms of the UK-Vietnam bilateral investment treaty. It was observed that such arbitration proceedings were secretive, expensive and that "Most of the potential arbitrators in tax-related cases are not tax experts or else are tax advisers to corporations, with insufficient experienced and non-partisan arbitrators from the developing world (such as academics) which "[as] a result is extremely difficult for developing country governments to secure the expertise they need to defend these cases".[141]

The case was eventually settled via arbitration[142] albeit at the time of writing this chapter, no details were made public.

Such cases revealed that because of the lack of a permanent lead agency for ISDS, the preparation for ISDS proceedings was sluggish in the beginning. It took time for not only the Prime Minister to determine the *ad hoc* lead agency in each specific case, also for such a lead agency to understand the dispute in question to properly react to the ISDS proceedings as well as prepare a defense.[143]

In dealing with such challenge, the Vietnam's Prime Minister enacted a regulation on ISDS coordination in 2014,[144] which is replaced by the Decision No. 14/2020/QD-TTg dated 08 Apr

139 UNCTAD, 'ConocoPhillips and Perenco v. Viet Nam', *Investment Policy Hub*. Retrieved from https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/906/conocophillips-and-perenco-v-viet-nam [accessed 05 June 2020]

140 *Ibid*.

141 Turner G. (20 Aug 2018), 'Analysis: How rich oil firms are using secretive court to fight capital gains tax in developing world', *Finance Uncovered*. Retrieved from https://www.financeuncovered.org/tax-havens/analysis-how-rich-oil-firms-are-using-secretive-court-to-fight-capital-gains-tax-in-developing-world/ [accessed 05 June 2020]

142 Djanic V. (22 Jan 2020), 'ConocoPhillips and Perenco Settle BIT Case Against Vietnam', *IAReporter*. Retrieved from https://www.iareporter.com/articles/conoco-and-perenco-settle-bit-case-against-vietnam/ [accessed 05 June 2020]

143 Nguyen T. T. & Vu T. C. Q., *supra* note 137, pp. 3-4.

144 Vietnam Prime Minister's Decision No. 04/2014/QD-TTg dated 14 Jan 2014.

2020, which came into effect on 01 June 2020 (ISDS Regulation). The definition of lead agency is expressly provided as a Ministry, ministerial agency, Governmental agency or People's Committee of a province or central-affiliated city (hereinafter referred to as "provincial People's Committee") that have a measure that a foreign investor claims against or threatens to claim against, excluding the case of other entity particularly assigned by the Prime Minister or the Ministry of Finance in relation to public debt management, application of law on finance and tax.[145] The role of such lead agency in ISDS is mainly comprised of liaison hub and presiding over negotiations with foreign investor; presiding over and cooperating with the Government's legal representative body and relevant bodies in resolving disputes; selecting and hiring lawyers; attending on behalf of Vietnamese government before the tribunal; and reporting to and being responsible with the Prime Minister during the whole ISDS process.[146]

Another obstacle faced by Vietnam was insufficient resources for defending ISDS cases, including human and financial resources. Almost all officials in charge of ISDS, particularly legal officials from the lead agency, did not have experience and expertise in international arbitration proceedings.[147] To make up for the inexperience, Vietnam had to engage foreign law firms as outside counsel, and officials from relevant agencies needed to closely interact with outside counsel,[148] to assist in the collection of documents and evidence[149] as well as in the preparation of ISDS strategies,[150] submissions and hearings.[151] Furthermore, costs and fees for an ISDS case were usually high, i.e. millions of US dollars. It was not easy for a lead agency to secure these amounts from state budget to pay foreign law firms, experts and deposit for the costs of the arbitration.[152]

In overall, the ISDS Regulation establishes a clear mechanism for cooperation and coordination in ISDS in Vietnam during three phases, namely: conflict management, dispute resolution and award

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145 The Prime Minister's Decision No. 14/2020/QD-TTg, Art.5.

146 *Ibid*., Art.6.

147 Nguyen T. T. & Vu T. C. Q., *supra* note 137, p. 5.

148 The Prime Minister's Decision No. 14/2020/QD-TTg, Art.24.

149 *Ibid*., Art.18.

150 *Ibid*., Art.14.

151 *Ibid*., Arts.19, 20.

152 Nguyen T. T. & Vu T. C. Q., *supra* note 137, p.5

enforcement (as similar to the 2014 regulation). According to this Regulation, the function and duty of Ministry of Justice has been reinforced as the legal representative of Vietnam government for investment treaty-based disputes,[153] and relevant entities have to coordinate comprehensively, actively and in a timely manner with the Ministry of Justice in specific ISDS process, including a pre-ISDS phase.[154] It also requires both central and local agencies to improve their awareness not only in ISDS proceedings but also in the process of preventing and avoiding conflicts that may become disputes under investment treaties.

Although it will take time to assess the efficiency and effectiveness of the ISDS Regulation in ISDS and relevant dispute prevention in Vietnam, the Regulation is regarded as a cornerstone for Vietnam to prepare well for ISDS to protect legitimate rights and interests of Vietnam. In addition to this Regulation, Vietnam is in the process of amending the 2014 Law on Investment. This amendment is aiming at, among other things, better protection of investors and prevention of as well as minimising the risks of investment disputes.[155]

5.2. Recognition and enforcement of international arbitral awards

Even though the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) came into force in Vietnam since 1995, there are significant concerns as to the extent to which foreign arbitration awards can be enforced in Vietnam. The ratio of applications for enforcement of foreign arbitral awards which have been annulled by the Vietnamese courts is notably high. According to statistic of the Vietnam Supreme People's Court, the court rejection accounts for 46% of applications for enforcement of foreign arbitral awards (24 out of 52) for the period of 2005 – 2014.[156]

After the issuance of the Supreme People's Court Resolution 01/2014/NQ-HDTP[157] and the 2015 Civil Procedure Code (CPC),[158]

153 The Prime Minister's Decision No. 14/2020/QD-TTg, Art.2.4, Art.7.

154 *Ibid*., Art. 8.

155 Law on Investment No 61/2020/QH14 dated 17 June 2020.

156 Burkill S. (27 Apr 2020), 'Enforcement of foreign arbitral awards in Vietnam', *Watson Farley & Williams*. Retrieved from https://www.wfw.com/articles/enforcement-of-foreign-arbitral-awards-in-vietnam/ [accessed 4 Jun 2020]

157 The Supreme People's Court Resolution No. 01/2014/NQ-HDTP dated 20 March 2014 guiding the implementation of Law on Commercial Arbitration.

158 Civil Procedure Code No. 92/2015/QH13 dated 25 November 2015.

which are designed to decrease the number of arbitral awards being unreasonably annulled and make Vietnam legal system more arbitration-friendly, it has witnessed a lower incidence of applications for enforcement being rejected, with the percentage of rejected application in Hanoi People's Court decreased to 33% during 2014 – 2017, and in Ho Chi Minh City People's Court dropped down to 31% from 2011 to 2018.[159]

According to Article 459(1) of 2015 CPC the Courts shall not recognise a foreign arbitrator's award when deeming that the evidences provided by the award debtors for appealing against the application for recognition are well-grounded and the arbitrator's award falls within one of the stipulated cases. The most attributing cause of practical inefficiencies is that the burden of proof of award debtor has usually been shifted to award creditor to establish that the foreign award does not fall within the above cases. Considering the extensive scope of these cases, this has proven to be overwhelming to an award creditor.[160]

In addition, key consideration by Vietnamese courts for annulment of foreign arbitral awards could include the validity of arbitration agreement, capability to execute arbitration agreement, the notifications rendered to award debtors during the arbitral procedure, the jurisdiction of arbitral tribunal over the dispute, composition of the tribunal or arbitral procedure, the enforceability of arbitral award and whether the award is contrary to the fundamental principles of Vietnamese laws.[161]

The tendency of Vietnamese courts to refuse to enforce arbitral awards due to infringement of the basic principles of Vietnamese law has drawn the greatest concern.

"Article 459. Cases of non-recognition (of 2015 CPC)

…

2. A foreign arbitration award shall be refused to recognise when Vietnam's Court considers that:

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159 Burkill S., *supra* note 157.

160 Turksen U. & Chau Q. (2019), 'To sign or not to sign? A conundrum of Vietnam's accession to the ICSID' *Coventry Law Journal*, 24(1), 2. [1].

161 Nguyen M. D (6 Dec 2018), 'Enforcement of arbitral awards and other aspects of international arbitration in Vietnam', Seoul. Retrieved from https://adr.com.vn/upload/files/1130enforcementSeoul2018%20%5Bfor%20audiences%5D.pdf [accessed 4 Jun 2020].

(a) the dispute was not capable of being adjudicated by arbitration under Vietnamese law; and/or

(b) the recognition and enforcement in Vietnam of the foreign arbitrator's award will *be contrary to the basic principles of Vietnamese law*."

This provision uses the term 'basic principles of Vietnamese law' instead of 'public policy' as pursuant to Article V(2)(b) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[162] The term has been interpreted and applied arbitrarily by many Vietnamese courts in the past.

Firstly, the broad approach is that any breach of Vietnamese law, including primary legislation and delegated legislation, could be construed as being against the basic principles of Vietnamese law. For instance, in *Energo – Novus v. Vinatex* (1998), the court found that the Russian arbitration tribunal's refusal to admit a notarised document submitted by the Vietnamese defendant contradicted a Vietnamese government decree supporting the validity of notarised documents. It thus refused to recognise the foreign tribunal's award on that basis.[163] In another case, *Tyco Services Singapore v. Leighton Contractors Vietnam* (2003), the failure of contractor to register for 'foreign contractor' license in Vietnam under a Ministerial circular was held to constitute a violation of the fundamental principles of Vietnamese law and the request for recognition and enforcement of the foreign arbitral award was consequently refused.[164]

Secondly, another way of interpretation of the phrase is that only a breach of primary legislation is deemed to be inconsistent with basic principles of Vietnamese law. Particularly, In *Toepfer v. Sao Mai* (2011), the Supreme Court held that the failure of the awarded party to mitigate its loss constituted a breach of the principle of good faith set out in Article 6 of the Civil Code. The court also held that the UK

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162 New York Convention, Art. V: "2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
(b) The recognition or enforcement of the award would be contrary to *the public policy of that country*."

163 *Energo – Novus Co (Russia) v. Vietnam Textile Corporation (Vinatext)* [2000], Case No.58, Decision of the Appellate Court of the Supreme People's Court of Vietnam in Hanoi.

164 *Typo Services Singapore Pte Ltd v. Leighton Contractors (Vietnam) Ltd* [2003], Decision No.02/PTDS, Decision of the Appellate Court of the Supreme People's Court of Vietnam in Ho Chi Minh City.

arbitration tribunal's award of liquidated damages was contrary to the Civil Code's provisions regarding actual damages and consideration of fault for civil liability; therefore, contrary to the principle set out in Article 11 of the Civil Code.[165]

For a more restrictive approach towards award enforcement, the Supreme People's Court issued Resolution No 01/2014/NQ-HDTP providing guidelines for the Law on Commercial Arbitration. Pursuant to Article 14.2 of Resolution No 01/2014/NQ-HDTP: "the arbitral award is contrary to the basic principles of the law of Vietnam" means that the award violates basic principles on conduct, whose effects are most overriding in respect of the development and implementation of Vietnamese law".

The Resolution No 01/2014/NQ-HDTP provides two additional criteria: the award has any content which is contrary to one or more basic principles of Vietnamese law and the award seriously violates interests of the government and/or violates the legitimate rights and interests of third party or parties. In the circumstance when the arbitral award meets these two criteria, the court may vacate that award with the justification of the violation of basic principles of Vietnamese laws.[166]

Moreover, other reason cited by the courts for refusing 16 cases in 2018 was that the award debtor had not been promptly and duly informed on the appointment of the arbitrators. For example, in *Wisdom v. Hao Hung* case, *ad hoc* arbitration in Hong Kong had sent notice by email to the staff of the award debtor rather than the legal representative of the award debtor. It is crucial for the courts to ensure that contractual notice provisions and notice requirements as prescribed by Vietnamese law are adhered to.[167]

Despite the efforts of Vietnam to provide and interpret the limited ground for refusal of foreign arbitral awards, the refusing cases are still too abstract and remain vague. The EU – Vietnam trade and investment agreements, particularly the provisions of tribunal system and enforcement mechanism should be an impetus to improve the certainty and efficiency of the recognition and enforcement of foreign arbitral awards in Vietnam whereby Vietnamese courts shall carry out

165 *Toepfer v. Sao Mai* [2011], Decision of the Appellate Court of the Supreme People's Court of Vietnam in Hanoi.

166 The Resolution No 01/2014/NQ-HDTP, Art.14(2)(dd).

167 Burkill S., *supra* note 157.

the principle below in practice: "*When considering the application for recognition and enforcement, the Panel [of Judges] shall not conduct a re-trial over the dispute when the foreign arbitrator's award has been issued. The Court shall be only entitled to check and compare the foreign arbitrator's award and accompanying papers and documents against the provisions of Chapter XXXV and Chapter XXXVII of this [Civil Procedure Code], other relevant provisions of Vietnamese law and international treaties to which the Socialist Republic of Vietnam is a signatory to form the basis for the issuance of decision to recognise and enforce such award.*"[168]

Conclusion

This article has reviewed the cardinal aims and objectives of the legal provisions of the recent bilateral trade agreements between the EU, a regional economic super power, and Vietnam, a transitional economy within an equally big regional trading block (ASEAN) albeit with less legal and political integration compared to the EU Single Market.

The critical analysis conducted in this paper provides a number of important and novel conclusions. First of all, the good governance standards and the rule of law principles that are enshrined in the EVFTA are likely to yield positive results only if they are practiced in good faith and in the spirit of these legal provisions. Secondly, these principles, if they are applied in practice of ITS effectively, are likely to provide additional safeguards and guarantees to investors whereby FDI flow to Vietnam would subsequently be increased in the coming years. Thirdly, the ITS regime provides a powerful incentive or a catalyst to review and modernize the domestic legal system of Vietnam and address the gaps which in turn would not only improve the investment eco-system (in terms of good governance and the rule of law) in Vietnam but pave the way for optimization of its economic potential and competitive power in the region (i.e. in the ASEAN). It would not be erroneous to posit that the earlier problems of the lack of institutional coordination in Vietnam are likely to be addressed given the importance of making the EVFTA and ITS a success story for all the parties involved.

While the ITS regime emphasizes FET as a standard of investment protection, it applies to foreign investors only thus creates inequality for domestic/national investors which consequently presents an area to be addressed and reformed without delay.

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168 2015 CPC, Art.438(4).

Despite such a shortcoming, the proposed legal processes are likely to result in a speedier, fair and effective settlement of disputes for foreign investors. ●

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