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## 主 論 文 の 要 旨

論文題目 THE DEVELOPMENT OF INVESTOR - STATE ARBITRATION  
UNDER INTERNATIONAL INVESTMENT AGREEMENTS:  
Lessons of the European Union - Vietnam Investment Protection  
Agreement

氏 名 NGUYEN Thi Anh Tho

## 論 文 内 容 の 要 旨

**ABSTRACT****Chapter 1: Introduction**

The world has witnessed significant investment flows among states accompanied with an unprecedented proliferation of international investment agreements (IIAs). A review of IIAs shows waves of both backlashes and development of investor - State Dispute Settlement (ISDS) mechanisms. No unique model fits for every state. As will be examined in this thesis, ISDS is now at the crossroad with different structural changes and reforms.

In order to create a more secured investment environment for foreign investors, Vietnam has constructively participated in a great number of investment treaties. Not surprisingly, these agreements may turn out both opportunities and challenges. Because of worldwide changes of ISDS provisions, Vietnam's harsh experience with investment claims, and apparent inconsistencies in the existing ISDS mechanisms in Vietnam's IIAs, Vietnam needs to reevaluate the likelihood of being targets in investment arbitration.

Vietnam may need to evaluate the pros and cons of ISDS provisions in the European Union-Vietnam

Investment Protection Agreement (EVIPA), which was signed in 2019, in light of the development trends of ISDS mechanisms in the world. Furthermore, Vietnam should review and promote its role in designing ISDS provisions and develop its domestic rules to mitigate the risk of ISDS cases.

This thesis examines two questions. First, how does the ISDS mechanism in the EVIPA reflect the development trends of the ISDS in the world and what challenges does it pose to the Vietnamese Government? Second, how can Vietnam mitigate the risk of ISDS cases and how should Vietnam negotiate future ISDS provisions?

## **Chapter 2: An Overview of Investor - State Dispute Settlement Arbitration in International Investment Agreements**

Chapter 2 illustrates two development trends in reactions of States to ISDS arbitration mechanisms in IIAs and existing international arbitration rules. On the one hand, although some recent IIAs still provide for ISDS mechanisms, some States have pulled back from ISDS mechanisms by terminating IIAs, limiting access to or not providing ISDS arbitration in IIAs, denouncing the ICSID Convention, or making joint interpretations of treaty provisions with the other parties. On the other hand, other States have pushed forwards ISDS mechanisms and dilute their asymmetric features by incorporating provisions on transparency in proceedings, counterclaims, corporate social responsibility, permanent tribunal, appeal mechanism, advisory centre, and enforcement mechanism. These provisions may strike a better balance between a state's interests and investors' rights.

## **Chapter 3: ISDS Provisions in the European Union - Vietnam Investment Protection Agreement: Problems to Vietnam**

As in several IIAs of the European Union (EU), the EVIPA provides for an innovative ISDS mechanism, which is expected to mitigate the asymmetric issues in traditional ISDS mechanisms. But it may pose challenges to Vietnam. Chapter 3 analyzes the ISDS mechanism in the EVIPA by comparison it with other IIAs. It turns out that, the EVIPA maintains ISDS provisions, which contains detailed ISDS provisions. On the one hand, the EVIPA provides some innovative ISDS provisions, which do not exist in Vietnam's previous IIAs.

As different from many existing IIAs, the EVIPA excludes an umbrella clause and contains some new rules such as the loser pay rule, the security for costs, third-party funding, the two-tier tribunal system, and the appeal mechanism. But, on the other hand, it omits a few provisions which exist in other IIAs and may favor to a host state such as a provision on corporate social responsibilities and an explicit provision on counterclaims. Having analyzed the ISDS provisions in the EVIPA, thesis concluded that such provisions may bring both challenges and advantages to the Vietnamese Government.

## **Chapter 4: Solutions to Problems of the ISDS Mechanism in the EVIPA and Suggestions for Future International Investment Agreements and Contracts**

The innovative provisions in the EVIPA, to a certain extent, help balance interests between a host state and foreign investors, but as mentioned in Chapter 3, these provisions may bring both challenges and

advantages to the Vietnamese Government. This chapter then makes some recommendations so that Vietnam can better implement innovative ISDS provisions in the EVIPA and control its commitments in future investment treaties and contracts.

First, in order to draft a favorable investment treaty, Vietnam should design a model Bilateral Investment Treaty (BIT) with ISDS provisions. Vietnam's Model BIT may: (i) take advantage of several EVIPA provisions, such as provisions on mediation, exclusion of umbrella clause, excluding reliance on procedural provisions of other agreements, preliminary objections, the loser-pay rule, and security for costs; (ii) improve some provisions, such as: provisions on amicable settlement period, clean hands clause, and third-party funding; (iii) provide explicit provisions on counterclaims and corporate social responsibilities (CSR). While CSR is a substantive provision, it is necessarily included with a counterclaim provision. Many tribunals affirmed their jurisdiction on counterclaims, but then rejected them on the merits on the ground that the BIT does not provide investors' obligations. Thus, an explicit provision imposes obligations or responsibilities on investors, for which a CSR clause may provide, is desirable.

A model BIT cannot eliminate all diversities or shortages, but it helps create common standards or at least reflect the ideas, actual thoughts, and the goal of the Vietnamese Government. Such a model BIT would constitute a good starting point of negotiation.

Second, Vietnam should insert provisions on counterclaims and corporate social responsibilities (CSR) in contracts with investors. A counterclaim clause in an investment contract can function as a legal ground for a state's counterclaim, supplementing a narrow BIT clause. A provision on CSR in an investment contract can reinforce clauses on responsibilities of foreign investors under investment treaties and domestic law, especially when they lack a provision on CSR. These recommendations and solutions are designed based on the ISDS arbitration practice, states' experience, and actual situations in Vietnam. They are expected to shed light on the asymmetric feature of ISDS, balance interests between a host state and investors, and protect quality investments.

## **Chapter 5: Conclusion**