

Nagoya University
Graduate School of Law

Summary of Doctoral Thesis

THE DEVELOPMENT OF INVESTOR - STATE ARBITRATION
UNDER INTERNATIONAL INVESTMENT AGREEMENTS:

Lessons of the European Union - Vietnam Investment Protection Agreement

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Chapter I: Introduction

1.1 The Context of the Research

The world has witnessed significant investment flows among states accompanied with an unprecedented proliferation of international investment agreements (IIAs). Both developing countries and developed countries have been made respondents under Investor-State Dispute Settlement (ISDS) mechanism in IIAs and their responses to this mechanism are divergent. Developed countries, which are often rule-makers, have started to design a new ISDS mechanism in their IIAs. Some developing countries, which are usually rule-takers, decided to withdraw from the ISDS system and are wary of such new IIAs. A review of IIAs shows waves of both pulling backs and pushing forwards of ISDS mechanisms not only in bilateral investment treaties (BITs) but also in regional treaties and multilateral treaties. No one model fits every state. As will be examined in this thesis, ISDS is now at a crossroads with different structural changes and reforms.

Vietnam is a relative newcomer in the world of Foreign Direct Investment (FDI), but it has managed to attract significant inflows of FDI. These inflows have contributed to Vietnam's economic transformation during the last two decades. In order to create a more secured investment environment for foreign investors, Vietnam has participated in a great number of investment treaties. Not surprisingly, these agreements may produce both opportunities and challenges. One of the toughest challenges is a ISDS mechanism. So far, Vietnam has been made respondent in several ISDS cases under its BITs. The number of such cases may increase in the future.

ISDS mechanisms in Vietnam's investment treaties are different from one another, mainly because they are concluded with different partners with various levels of economic growth, culture, legal thoughts, and in various periods. Because of worldwide changes to ISDS provisions, Vietnam's harsh experience with investment claims, and apparent inconsistencies in the existing ISDS mechanisms in Vietnam's treaties, Vietnam needs to reevaluate the likelihood of being a target in an investment arbitration. Although these issues may make Vietnam decide to opt out of the ISDS in investment treaties, it has not officially expressed such an idea of withdrawing from ISDS mechanisms or of terminating investment treaties. Conversely, Vietnam has been actively engaged in the investment treaty making process not only within the Association of Southeast Asian Nations (ASEAN) but also with other countries. Recently, Vietnam has concluded the Investment Protection Agreement with the European Union (EVIPA). The EVIPA is the first agreement of

the European Union (EU) with a low-medium income country, and involves an investment tribunal system, an appeal mechanism, and higher investment protection standards than in Vietnam's previous IIAs. In the context of the development trends of the ISDS arbitration in the world, and the new ISDS provisions in the EVIPA, Vietnam may find it necessary to evaluate the pros and cons of such mechanism in the given EVIPA. Furthermore, Vietnam should review and promote its role in designing ISDS provisions and developing its domestic rules to mitigate the risk of ISDS cases.

1.2 Research Questions

This thesis examines two questions. First, the research addresses the question of how a new ISDS mechanism in the EVIPA reflects the development trends of the ISDS in the world, and how such mechanism challenges the Vietnamese Government. Second, the author posits to what extent Vietnam can mitigate the risks and maintain ISDS provisions in its international investment agreements and how Vietnam should control ISDS provisions in future negotiations.

1.3 Significance of the Thesis

A large number of scholars have approached various investment instruments with the idea of finding a common trend among different states' reactions to ISDS mechanisms in the world. In terms of research on the new ISDS mechanism under investment treaties between the EU and its partners, scholars have analyzed the pros and cons of the significant characteristics of the EU's new ISDS model. These scholars' papers are a good starting point to demystify new ISDS provisions, and view the opposing and supporting opinions on this system. The repercussions from Asian countries, however, are mentioned in general without resorting to any specific national context and solutions for the host states to overcome ISDS mechanisms' challenges. In terms of research on the ISDS mechanism in several of Vietnam's investment treaties, some scholars normally view Vietnam as a rule-taker in IIAs without analyzing other reasons driving Vietnam to be a party to these instruments. While the authors mention several vague measures to prevent and mitigate international investment disputes, such as amending domestic law and building human resource capacity, these measures are only based on the material facts of Vietnam's cases and a number of municipal legal documents without analyzing the issue in a wider range of contexts.

The thesis analyzes hidden drivers behind recent developments in ISDS arbitration mechanism under IIAs, including the EVIPA. While there is not a global consensus on the necessity of ISDS arbitration mechanisms, most IIAs contain one. The EVIPA involves provisions which facilitate ISDS arbitration such as transparency, loser pays rule, an appellate mechanism, a permanent tribunal, compulsory enforcement, security for costs, and disclosure of third-party funding. Such provisions embody the willingness of contracting states to design and accept novel rules and help balance interests between host states and foreign investors. While the new ISDS mechanism in the EVIPA can be viewed as Vietnam's *quid pro quo* to pave a path to the EU's investments, explicit evidence of the EU's achievement as an active booster of such mechanism in IIAs, it may be Vietnam's achievement to include a number of new ISDS provisions, such as security for costs and disclosure of third-party funding, into its IIA.

The thesis will also identify the pros and cons of the ISDS provisions in the EVIPA from the Vietnamese Government's perspective and recommend for this country empirical solutions to make use of advantages and overcome potential challenges. For these existing instruments, Vietnam has to find solutions to better implement, prevent, and mitigate risks. For future commitments, this country should control the divergence of ISDS provisions in its investment agreements and strike a balance between its own interests and those of foreign investors.

1.4 Research Objectives

The main purposes of the thesis are threefold. First, the thesis examines the trends of ISDS arbitration mechanism in the world of IIAs. Second, the thesis takes a specific approach of ISDS mechanism from the EVIPA. Third, the thesis proposes the possibility of including ISDS provisions in Vietnam's investment treaties and redesigning the existing agreements and contracts to mitigate the risks of disputes.

1.5 Structure of the Thesis

Chapter I: Introduction

Chapter II: An Overview of Investor - State Dispute Settlement Arbitration in International Investment Agreements

Chapter III: ISDS Provisions in the European Union - Vietnam Investment Protection Agreement - Problems to Vietnam

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

Chapter V: Conclusion

Chapter II: An Overview of Investor - State Dispute Settlement Arbitration in International Investment Agreements

Chapter II 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 one 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 III: 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 III 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 IV: 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 III, 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 V: Conclusion

Chapter V summarizes the findings in the previous chapters. As analyzed in Chapter II, the backlashes and development trends of ISDS arbitration in international investment agreements reflected the states' reactions to this mechanism. The ISDS reforms under the auspice of international investment agreements and arbitration rules may help mitigate the asymmetric characteristics of traditional ISDS provisions. These reforms eventually perpetuate the ISDS system.

The ISDS provisions in the EVIPA, as analyzed in Chapter III can reflect both trend's characteristics, which may bring both advantages and challenges for Vietnam. In order to better implement the EVIPA and enhance Vietnam's capacity in arbitration proceedings, Chapter IV suggests some solutions. These solutions help strike a balance of interest between the host state and investors, protect public interests, and protect quality investments.