

ISDS mechanism under the EVFTA: Comparison with the CPTPP and Implications for Vietnam

Nguyen Tien Hoang^{1,*}, Nguyen Nguyen Cat Anh², Nguyen Diep Nhat Khang³



Use your smartphone to scan this QR code and download this article

ABSTRACT

International investment plays an indispensable part in the economic development of most countries in the world. Not only does it ensure huge and stable capital flows, but it also creates jobs and transfers advanced technology to host countries. Nevertheless, in that process, investment-related disputes are inevitable and it is impossible not to mention the Investor-State dispute because of the unequal status of the two disputing parties. As a consequence, the Investor-State Dispute Settlement (ISDS) mechanism was born to resolve this particular type of dispute as well as protect the interests of foreign investors, who are always considered to be the subordinate party. This article mainly aims to study the ISDS mechanism in the European Union - Vietnam Free Trade Agreement (EVFTA) in a comparative relationship with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The authors collect, summarize, compare and analyze data from trustworthy sources and conducts the in-depth interviews with the experienced experts in law, dispute settlement and international integration. The findings show that the ISDS mechanism is basically quite similar in EVFTA and CPTPP. However, there are still notable differences in these two new generation free trade agreements in terms of the scope of application, dispute settlement agency and suit procedures. In addition, the study also highlights the situation of widespread application of the mechanism worldwide in the period 1987-2020. Besides, the difficulties and challenges that Vietnam has to face in the context of ISDS-related disputes are expected to increase in the coming time are pointed out. From the analysis, a number of implications are proposed for the state and businesses with the desire to minimize the disputes or damage caused by the disputes.

Key words: International investment, ISDS, EVFTA, CPTPP, Vietnam

¹Van Lang University

²Ho Chi Minh City University of Transport

³Foreign Trade University

Correspondence

Nguyen Tien Hoang, Van Lang University

Email: tienhoang.vlu@gmail.com

History

- Received: 15/01/2022
- Accepted: 20/9/2022
- Published: 15/10/2022

DOI : 10.32508/stdjelm.v6i3.1002



Copyright

© VNUHCM Press. This is an open-access article distributed under the terms of the Creative Commons Attribution 4.0 International license.



INTRODUCTION

The ever-expanding economic integration process requires trade agreements to be committed at a more extensive level resulting in the inescapable existence of the new generation FTAs. The term "new generation" here is completely relative, used to talk about FTAs that are comprehensive, breakthrough, beyond the framework of free trade in goods, are negotiated and signed at a time when international trade has profound changes¹. The two prominent agreements that Vietnam has recently joined are EVFTA (effective on August 1, 2020) and CPTPP (effective on January 14, 2019) with an unprecedented level of comprehensive commitment, notably in the investment sector.

Although international investment plays a key part in the economy, foreign investors often face certain disadvantages due to their inferior status, thus not possessing equal bargaining power with the state². Such situations lead to the fact that international investment activities involve considerable risks like direct or indirect expropriation, violation in legitimate rights, loss of money invested caused by administrative pol-

icy. OECD stated in a paper that ISDS is a fundamental element of States' efforts to reinforce the credibility of the commitments they make in their international investment agreement. If a State is found to be in breach of its treaty obligations, the harmed investor can receive monetary compensation or perhaps other forms of redress³. It means that ISDS is a procedural mechanism giving foreign investors the right to sue the host countries in case that states violate a standard granted under the treaty.

During the development process since 1950, ISDS has proved its leading role in handling investor-state conflicts. Basing on a recent statistic from the official website of the United Nation Conference on Trade and Development (UNCTAD), 124 countries and one economic grouping are known to have been respondents to one or more ISDS claims. However, the foreign investment regime has been subject to an increasing volume of criticism from the public. In that context, EU proposed a brand-new model for ISDS system called Investment Tribunal Court (ITC) with an aim at addressing matters of the traditional one. The inclusion but yet tested ITC in the EVFTA has

Cite this article : Hoang N T, Anh N N C, Khang N D N. ISDS mechanism under the EVFTA: Comparison with the CPTPP and Implications for Vietnam. *Sci. Tech. Dev. J. - Eco. Law Manag.*; 6(3):3105-3117.

gained great attention from scholars and research the world over⁴. It is believed that doing business in Vietnam will also become easier for European companies: They will now be able to invest and pitch for government contracts with equal chances to their local competitors⁵. Despite the high standards on the obligation to protect foreign investors, legal framework of Vietnam still has certain limitations and lack of provisions preventing and regulating investor-state disputes. Therefore, it is necessary to study the ISDS mechanism under the EVFTA.

Through the topic “*ISDS mechanism under the EVFTA: Comparison with the CPTPP and implications for Vietnam*”, the authors hope to provide beneficial information about ISDS mechanism under the EVFTA and denote the fundamental differences of this mechanism under these two New-generation FTAs, thereby, contributing specific implications and recommending possible solutions for Vietnam to prepare and prevent dispute between the investors and the State, or to resolve them in an economic and effective manner if existed.

LITERATURE REVIEW

Research about ISDS mechanism

Both foreign and domestic studies have expressed a strong interest in the ISDS mechanism regarding its history and development. Abbott and et al. (2014), Gauthier (2015) and Reddie (2017) study the characteristics, the growth and impacts of ISDS on the world⁶⁻⁸. Specially, the publication of “Investor-State dispute settlement cases: Facts and Figures 2020” by the UNCTAD has drawn an adequate picture about the application of ISDS in 2020, including the recent trends as well as arbitration award in specific cases⁹. Most of these works use secondary data collection and case-study to assess the impacts of the mechanism’s impacts.

Furthermore, a lot of research evaluates effectiveness as well as criticisms related to ISDS and make suggestions to improve this mechanism. Alvarez, et al. (2017) analyzes the validity of some of the most often-heard criticism against ISDS and calls for a rational and balanced debate based on facts with a view to improving this system¹⁰. Through the analysis of cases, Charris Benedetti (2019) claimed that the current ISDS is far from ideal¹¹. Accordingly, far-reaching reforms in the pursuit for consistency, impartiality and transparency are required in order to strengthen the system’s legitimacy. Kaufmann-Kohler and Potestà (2020) analyze the possible role which national courts could play in the main reform scenarios which states are currently considering¹².

Research about ISDS under the EVFTA

Most studies come from Vietnamese authors such as Nguyen Phuong Linh (2018), Tran Thi Hai An (2020) and focus on the compatibility between the ISDS mechanism under EVFTA and Vietnam legal framework^{13,14}. Based on the analysis of the limitations of the legal system, these scholars propose some recommendations for Vietnam to improve the current situation. The World Bank (2020) also provides a big picture of Vietnam implementing the EVFTA including economic and distributional impacts, legal gap assessment for Vietnam’s implementation and key implementation issues especially in the context of COVID-19¹⁵. Besides, in “*ISDS Reform & The EU-Vietnam Free Trade Agreement: Challenge Accepted!*” published online in 2021, Nguyen Manh Dzung and Dang Vu Minh Ha has evaluated the EVFTA’s regime for resolving the conflicts and determined possible factors influencing the effectiveness of ISDS mechanism under EVFTA¹⁶.

Research about ISDS under the CPTPP

The ISDS in the CPTPP has received lots of attention from scholars around the world. The writers focus on analyzing the mechanism in the perspectives from the countries with potential to play a greater role in shaping international investment law such as New Zealand, Australia and Japan. Specifically, Ashley Chandler (2018) argues that regardless of stated positions on ISDS, it remains simply one of many tools in the trade negotiator’s toolbox, subject to compromise and concession when convenient¹⁷. Aoki and Teo (2021) set out an overview of the CPTPP, its ISDS provisions and comments on the CPTPP’s future¹⁸. Also a member of the agreement, Vietnam has become the object of domestic research. VCCI (2018) summarizes the core contents of the CPTPP and has straightforwardly explained the ISDS commitments with initial assessments of the impact on Contracting States¹⁹. Vu Kim Ngan (2021) presents an overview of Vietnam’s international investment disputes, analyzes the points to be noted²⁰. Le Duc Ngoc (2021) provides analysis of some differences as well as shortcomings in the dispute settlement mechanism between CPTPP, EVIPA and the law on PPP²¹. These works use secondary data collection, comparative law and case-study to shed light on research issues and then makes some recommendations for Vietnam to proactively respond to international investment disputes. To sum up, there is abundant research, both domestic and international, relevant to the ISDS mechanism in general as well as its emergence in EVFTA or CPTPP

through the years. The above papers have strongly emphasized on specific cases rather than making comparison between such mechanism in the EVFTA and the CPTPP. As a result, to some extent, they are incapable of providing a comprehensive and insightful picture about ISDS system in current FTAs that Vietnam has successfully negotiated and signed. Inheriting the useful scientific results in the above studies, this paper is going to focus on ISDS comparative relationship between the two agreements which appears to be limited.

RESEARCH METHODOLOGY

Secondary data collection

The paper makes use of secondary data sources such as books, newspapers, magazines and postings on the domestic and foreign websites. The data used are highly authentic information, collected from reputable sources such as world-scale organizations and Government Agencies in Vietnam. In addition, the thesis also uses quotations from Vietnamese representatives in meetings such as the discussions with EU representatives and member countries.

In-depth interview

The authors carried out interviews with Ms. Nguyen Tran Dieu My (Specialist at Ho Chi Minh City Centre of International Integration Support), Mr. Pham Van Chat (Senior lecturer, Arbitrator at Vietnam International Arbitration Centre - VIAC), Mr. Nguyen Cong Phu (Arbitrator at VIAC, Former Deputy Chief Judge of the Economic Court of People's Court in Ho Chi Minh City) who are knowledgeable about the dispute settlement in international trade. Their valuable opinions have been applied into the analysis to point out the compatibility between the ISDS regulations under the EVFTA and Vietnamese law, the disadvantages of domestic investors and solutions to improve the situation.

Comparative law

This method involves some essential and vital comparison between relevant law sources. Especially, the comparison between the EVFTA and the CPTPP regarding ISDS regulations is conducted to draw out a contrast picture. Furthermore, the similarities and differences with international laws are also analyzed to assess compatibility and current status of Vietnamese legal system.

Case-study

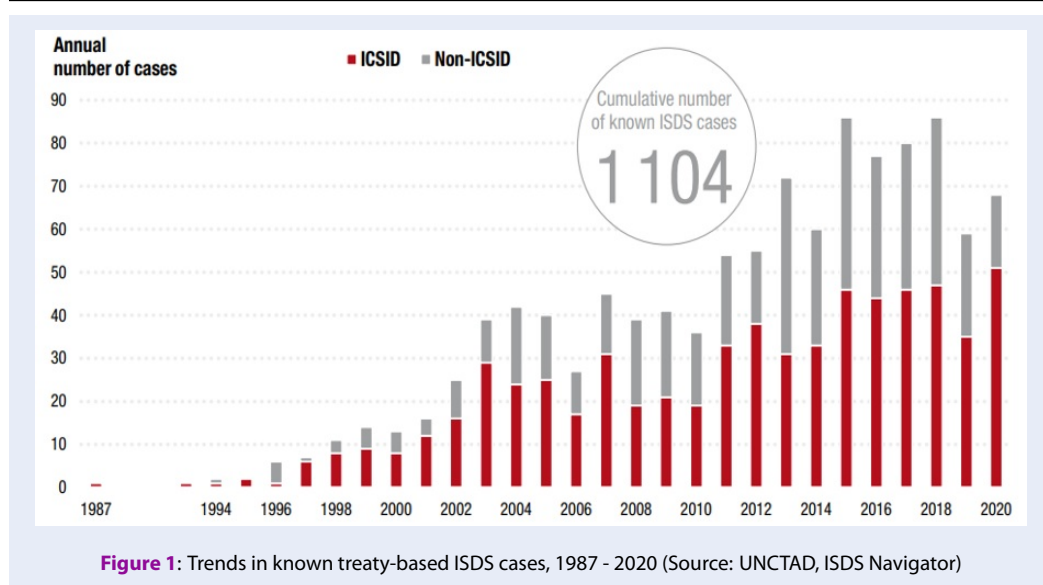
This method is about selecting typical cases relating to the investor-state disputes in the world. These sources are mainly the official database system of the UNC-TAD. The writers then study the cases carefully, which involves reviewing the case abstract, determining the Art. being applied, commenting on the final award brought by the court or arbitration center, and discussing to come up with suggestions for Vietnam to prepare or deal with the same situations in the future.

RESULTS AND DISCUSSION

Application of ISDS in the world

The history has witnessed a dramatic increase in the number of lawsuits applied ISDS mechanism. By the end of 2020, the cumulative figure for known treaty-based arbitration had reached 1104 including 354 pending cases, 740 concluded cases and 10 unknown cases²². To be more specific, in the period 1987-1997, the count of disputes was relatively small, particularly no cases being recorded from 1988 to 1992. Since 1996, the ISDS disputes had regularly raised before declining to 27 cases in 2006, a drop of 13 conflicts compared to that in 2005. Afterward, despite experiencing some fluctuations, the number of trials under ISDS mechanism had a tendency to grow and surprisingly achieved the peak in 2015 and 2018 with 86 lawsuits noted. Despite the slight reduction in following years, it is worth recognizing the escalation in the scope of ISDS.

On the basis of newly revealed information by UNC-TAD as being shown in Figure 1, 274 concluded cases were decided in favor of the State, and 212 cases were decided in favor of the investor, with monetary compensation awarded. At the same time, 148 cases were settled while the remaining proceedings were either discontinued or the tribunal found a treaty breach but did not award monetary compensation. From the above analysis, it could be concluded that the winning ratio is rather equivalently shared by the foreign investors and the hosting countries. In addition, most frequent home States come from developed countries with huge investment capital as the United States, Netherlands, United Kingdom. In contrast, most frequent respondent States of claimants are deprived from nations with lower level of economic development as Mexico, Egypt, Argentina, Bolivarian Republic of Venezuela, etc. Vietnam has been also involved in 8 ISDS cases as a respondent (2 pending cases, 1 settled by parties outside the court, 1 being discontinued, 3 cases decided in favor of Vietnam, and 1 case decided in favor of claimant).



Comparison of the ISDS mechanism under the EVFTA and the CPTPP

In terms of scope of application

Scope of application under the EVFTA

Foreign investors legitimately initiate a lawsuit under ISDS mechanism under three circumstances: (1) breach of the Investment Protection in Chapter 2; (2) cause loss or damage to the claimant; (3) bring claim on behalf of a locally established company owned or controlled by the claimant. On the other hand, the foreign investors will not be given the permission to prosecute the host state government when its investment has been considered “fraudulent misrepresentation, concealment, corruption or conduct amounting to an abuse of process” (Clause 2, Art. 3.27). In addition, a case related to debt restructuring of the State will also be adjusted according to regulation under ISDS mechanism together with terms in the Annex 5 (Public Debt). In case there is no other agreement, investor shall be deemed as “claimant” either: acting by himself, satisfying specific conditions regulated in subparagraph 1(b) of Art. 2.1 or acting on behalf of “locally established company” owned or controlled by that investor. The claim submitted shall be related to dispute between Contracting state and citizen of other Contracting State as stipulated in Art. 25 of ICSID Convention.

Scope of application under the CPTPP

Chapter 9 (Investment) of the CPTPP sets a side Section B stipulating the ISDS mechanism. Art. 9.19, Clause 1 defines that in case an investment dispute

cannot be resolved within six months from the receipt by the respondent of a written request for consultations, a foreign investor has the right to bring claim against the hosting government in case:

- The respondent has violated commitments about obligation under Section A, an investment authorization, an investment agreement; and
- The claimant has incurred loss or damage causing by such violation.

In addition, although this mechanism is obviously applied to all Contracting State of the CPTPP, exceptional cases still exist under particular agreements. Taking Vietnam and New Zealand as a typical example, there is a bilateral letter between two countries stipulating that they will not use such kind of mechanism in resolving Investor-State disputes. In case there is a conflict, foreign investors and hosting government take advantage of amicable alternative resolution including negotiation and consultation. Even if these resolutions do not work within 6 months, the investors shall receive approval from the hosting state before initiating a lawsuit under ISDS clauses, which prevents the automatic application of this mechanism.

Comparison and analysis

Depriving from the above findings, it can be concluded that the scope of ISDS under the EVFTA and the CPTPP is basically based on three typical international investment protections: National Treatment (NT), Fair and Equitable Treatment (FET) and Most Favored-Nation Treatment (MFN). Once the State breaches these regulations, the foreign investors are

entitled to make use of ISDS mechanism for proceeding. However, the scope under the EVFTA is considered to be narrower than that of the CPTPP. In particular, while violation is examined through the entire agreement under the CPTPP, it is limited to Investment Protection Chapter under the EVFTA. Furthermore, it is worth noting that FET provisions in the EU-Vietnam FTAs are explained in more detailed manner including the concretization of violated actions.

In terms of dispute settlement agency

Dispute settlement agency under the EVFTA

Unlike the two popular types of arbitration for ISDS namely institutional arbitration and ad hoc arbitration, great public attention is drawn into a brand-new permanent investment court system, which the EU Commission has been experimentally applied to their recently trade deals: TTIP with the US, CETA with Canada and EVIPA with Vietnam. Regarding to the ITS under the EVIPA, it is a two-tier standing panel, including the first instance Tribunal and the Appeal Tribunal. ITS is expected to improve certain limitations of traditional arbitration-based system, increase transparency, accountability and impartiality, thus contributing to promote greater quality and consistency across decisions²³.

Based on regulations under the Sub-section 4 of the EVIPA, upon the entry into force, a Tribunal will be founded by the Committee, which includes 9 Members (regarding Tribunal) or 6 members (regarding Appeal Tribunal). Of which, such Members shall be divided into three independent nationalities: one third of the members shall be nationals of a Member State of the Union; one third of the members shall be nationals of Vietnam and the remaining shall be nationals of the third countries. The Committee is entitled to adjust the number of members of the Tribunal by multiples of three, provided that maintaining the balance of nationality (Art. 3.38, paragraph 2). Tribunal's members shall work in four-year term with once renewable. However, the term of 5/9 members (regarding Tribunal) and 3/6 members (regarding Appeal Tribunal) appointed immediately after the date of entry into force of the EVIPA shall be extended to six years by lot.

Within 90 days from submitting of a claim, the division shall be created upon the appointment of the Tribunal's President on a rotation basis. However, under specific situation, when there is agreement of disputing parties, the case can be heard through a sole member of the Tribunal, whose nationality belongs

to a third country. It is required that the respondent should "give sympathetic consideration of such request" from the claimant, particularly in case either claimant is SMEs or claimed compensations are relatively low. Consensus shall be considered as the first priority of division of the Tribunal when making any decision. If consensus cannot be reached, the issue will be handled by majority vote, the members' opinions are undisclosed.

In terms of cost and fees, the permanent court system under the EVIPA requires that Tribunal's members shall be available at all times and stay abreast of dispute settlement activities. As a result, to ensure their availability, these members will be paid a fixed monthly retainer fee decided by the Committee. Regarding to the President and Vice-President of the Tribunal, they also receive daily fee for each working day of fulfilling their functions. Disputing parties shall take the responsibility of paying such defined fee based on the level of work progress. In case one party fails to pay the retainer fees, the other party may be elected to pay instead, thus having the right to ask for appropriate interest on the amount payable.

Dispute settlement agency under the CPTPP

Investment disputes will be settled at an independent international Arbitration. The determination of arbitration will be carried out based on the following principles: ICSID Convention (including ICSID Rules of Procedure for Arbitration Proceedings and ICSID Additional Facility Rules) if either side or both sides are members of the ICSID Convention; UNCITRAL Arbitration Rules; Any other arbitral institution and arbitration rules upon agreement of both disputing parties.

If there are no other agreements between parties, the tribunal shall involve three arbitrators. Of which, one arbitrator shall be appointed by each party and the third, who serves as a presiding arbitrator, will be determined based on agreement of claimant and respondent. In case there is failure to constitute the tribunal within 75 days after the submission of claim to arbitrator, the Secretary-General shall be in charge of deciding the arbitrators. Both the disputing parties and the Secretary-General are required to take the expertise and relevant experience of arbitrators into great consideration. In addition, Art. 9.29, clause 3 stipulates that regarding to the award costs and attorney's fees incurred with arbitral proceedings, the tribunal shall determine how and whom will pay with respect to arbitration rules.

Table 1: Fundamental differences of the dispute settlement agency under EVFTA and the CPTPP

Criteria	EVFTA	CPTPP
Dispute settlement agency	-Permanent Investment Court. -Include 2 tiers court: tribunal and appeal tribunal.	-Independent International Arbitration. -Only one tier jurisdiction.
Number of Arbitrators	-Usually 9 arbitrators (Tribunal). -Usually 6 arbitrators (Appeal tribunal). -The Committee can adjust the numbers of tribunal by multiples of three. -Work in four-year term.	-Usually 3 arbitrators.
Arbitrators' determination	-Appointed by competent authority.	-Decided basing on party autonomy.
Requirement for arbitrators	-Detailed standards for tribunal members regarding the nationality, the expertise, experience and independence.	-Not concretize the standards for arbitrators regarding the expertise and experience.
Cost	-Fixed salary for members of tribunal paid by the Committee. -Proceeding's fee paid by disputing parties.	-Attorney's fee paid by disputing parties.
Tribunal award	-Provisional award -Final award	-Only final award

(Source: Compiled by the authors)

Comparison and analysis

It is concluded from the above findings that the dispute settlement unit in the EVFTA is totally different from that of the CPTPP. Such major discrepancies are summarized in Table 1.

In terms of suit procedures

Suit procedures under the EVFTA

The EVIPA stipulates four methods for resolving a dispute between a foreign investor and the State, including: negotiation, mediation, consultation and ICS. Of which, the Art. 3.29 specifies that dispute shall be handled amicably through negotiations or mediation before submitting a request for consultations. Such methods of settlement could be agreed at any time, even after the initiating of proceedings.

By mediation

At any time in the process of dispute resolution, disputing parties can request the settlement of disputes by mediation. EVIPA mediation procedure is provided for in Chapter 3, Section B, Sub-section 2, Art. 3.31 and the Annex 10 called Mediation Mechanism for Disputes between Investors and Parties. In case disputing parties have recourse to mediation, they may agree on the appointment of a mediator within 15 working days from the receipt of the reply to the request. The chosen mediator may come from either the Members of the Tribunal in accordance with Art. 3.38 or Members of the Appeal Tribunal pursuant to Art.

3.39 (Appeal Tribunal). In case parties cannot agree on the choice of a mediator within the time frame defined, Members of the Tribunal will be appointed as mediator by the President of the Tribunal. Based on the Art. 3.31, Clause 5, during the mediation process, the time lines of all other proceedings specified in paragraphs 2 and 5 of Art. 3.30 (Consultations), paragraph 6 of Art. 3.53 (Provisional Award) and paragraph 5 of Art. 3.54 (Appeal Procedure) shall be suspended until the process comes to an end. Mediation results will be implemented by the parties without any compulsory enforcement mechanism.

By consultation

Consultation is a compulsory step in resolving ISDS cases under EVIPA, before conducting proceedings at ITC. In case conflicts could not be resolved through Amicable Resolution in Art. 3.29, a claimant shall send a request for consultations to the respondent. Art. 3.30, Clause 2 stipulates that the submission of the consultation case shall be carried out within three years since the date on which the claimant first acquired or should have first acquired of the measures alleged to be in breach of the provisions of the Investment Protection Chapter as well as incurred loss and damages; otherwise two years of the date on which the claimant, or the locally established company, terminates the lawsuit before a tribunal or court pursuant to domestic law. However, in no case does the permissible time exceed 7 years. Unless otherwise agreed, the consultations will implemented within 60 days of

submitting the claim for consultations. In addition, within 18 months from the date of sending the application for consultation, the claimant will be considered as withdrawing from the proceedings if he fails to submit a claim in accordance with the Art. 3.33. Such regulation will not be applied to the circumstance in which the claimant can prove that his failure to submit a claim is because of claimant's inability to act causing by deliberate behaviors taken by the related parties. At the same time, if disputing parties don't have other commitments, consultation will be taken place in the territory of the involved subject. In details, it shall be: Hanoi if the consultation related to measures of Vietnam; Brussels if the consultations related to measure of the Union; may be the capital of EU's Member State if the claim concerning exclusively measure of these states. With the presence of the small and medium-enterprise (SMEs), videoconference or other equivalent means shall also be utilized.

Suit procedures under the CPTPP

When an investment conflict occurs, disputing parties should take advantage of the consultation and negotiation for resolution. In the event that the dispute could not be solved within six months, the claimant can submit the claim to the tribunal. Proceedings for initiating ISDS lawsuit are divided into four main phases: submission of claims, parties' consent to arbitration, arbitrators' selection, conducting dispute resolution and rendering final award (Chapter 19, Section B, Art. 9.18).

In the first period, the claimant can submit claim to arbitration at least 90 days after sending the notice of intent (NOI) to the respondent. It will be considered as being invalid if claim submission is carried out more than 3 years and 6 months from the date, in which the claimant knows about the violation causing its loss and damage. Regarding Vietnam, the government has made its reservation on this issue. Therefore, the foreign investors shall not be permitted to commence a lawsuit under the ISDS if they have already used the administrative complaint procedure or initiated a lawsuit under Vietnamese Court.

In the second phase, it is required that both disputing parties show their consent for submission of a complaint to arbitration as prescribed. The consent has to satisfy the requirement of: "Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for Written consent of the parties to the dispute; Art. II of the New York Convention for an agreement in writing; Art. I of the Inter-American Convention for an agreement."

In the third stage, the selection of arbitrators is implemented basing on the party autonomy. Regarding members of the Tribunal (usually 3 arbitrators), one arbitrator will be chosen by each parties and the third, who serves as a presiding arbitrator, will be determined upon the agreement of the claimant and respondent.

The final phase, conducting disputing resolution and rendering an award is taken place. One highlight point of the ISDS under the CPTPP is that it adds regulations of transparency of arbitral proceedings into Art. 9.24. Documentation including NOI, NOA, and transcripts of hearings of the tribunal, memorials and briefs submitted to the tribunal, awards and decisions of the tribunal will be made available to public.

Comparison and analysis

Regarding to similarities of suit procedure of ISDS case under the EVFTA and the CPTPP, these two New-generation FTAs stipulate that negotiation and consultation is compulsory step. In case of any disputes, parties have to seek way for solving through alternative dispute resolution before submitting a claim to the tribunal. This rule contributes to reducing the tension between parties, helping them to clarify conflict's causes and considering whether they should bring claim to the panel. If the case is successfully settled through such alternative methods, not only investment relations will be maintained but both sides also save time and huge fee for arbitrations. However, it is worth noting that the orders and procedures for negotiation and consultation under the CPTPP are not specified as clearly as that under the EVFTA.

In terms of the difference, under the CPTPP, ISDS cases only go through first instance tribunal. In the event of a need for consideration of an award, disputing parties have no other choices, instead of replying on the arbitrators. However, the ITS under the EVFTA allows the trial to be conducted under two tiers of jurisdiction (Tribunal and Appeal Tribunal). Moreover, members of the Tribunal and Appeal Tribunal are completely independent, making decisions and awards are considered being more objective and accurate.

Overall assessment of the ISDS mechanism under the EVFTA

Specific scope of application

Scope of application of the ISDS under the EVFTA is clearer and more specific. At the same time, with the Anti-Circumvention Art. , such agreement contributes to preventing unreasonable claims from investors, with a sole purpose of gaining compensations.

Another worth considering point is the concretization of Fair and Equitable treatment provision under the EVFTA. In the past, traditional FTAs mention cursorily about this term, leading to an ongoing debate about the exact scope of fair and equitable treatment standard in international law. As a consequence, multinational companies make use of this loophole to bring claim against hosting nations concerning measures taken to protect public health as well as environment. A typical example is the case between Philip Morris and Uruguay. In particular, the claimant sued Uruguay for anti-smoking legislation, namely the Single Presentation Requirement and 80/80 Regulation, which devaluates its cigarette trademarks and investments. Philip Morris stated that those two measures were arbitrary due to failure to serve a public purpose but causing substantial harm, thus breaching FET's standard. On the contrary, Uruguay counter-argued that its policy was implemented in good faith, in a non-discriminatory manner and connected with the state's public health objectives. Therefore, to limit possible disputes regarding this issue, the EVFTA has provided detailed scope of FET standards and pointed out specific measures, which is considered as breaching this obligation. With the aforementioned highlights. This has narrowed the range of situation in which investors can resort to ISDS.

Improving the consistency, objectivity and accuracy of the arbitral decisions

One of major criticisms against the traditional ISDS mechanism is the inconsistency in outcomes that it promotes. An obvious example of this shortcoming is the arbitration's assessment of the foreign exchange policy of Argentina's government in the early 2000s. To be more specific, during the financial crisis of 2001, when its economy was in complete stagnation and exchange rate was fixed at one U.S dollar per Argentine peso, Argentina's government had issued Corralito measures to limit foreign investors' withdrawal of foreign currency. Besides that, economic emergency law was also sanctioned in 2002, allowing the president to influence the exchange rate, set the price of taxes and tariffs as well as turn debts in US dollars into debts in Argentina peso. Unfortunately, many US investors brought claim against the Argentina for violating the BIT between those two countries. Regarding three cases namely CMS Gas Transmission Company v. The Republic of Argentina, Sempra Energy International v. The Argentine Republic, Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, the tribunal hold the opinion that the Corralito and economic emergency had violated investment

commitments even though such measures were used to resolve financial crisis. However, the situation became completely different in two lawsuits: LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic and; Continental Casualty Company v. The Argentine Republic. The tribunal argued that the above measures were necessary to protect the nation's essential interests. This inconsistency had created suspicion in the community about the award rendering.

To solve this drawback, ITC was born as a one stop shop solving all disputes arising out of the instruments. The stability and systematic of the awards will help disputing parties in predicting future cases as well as making basic foundation for the government to issue decisions and policies. Besides, it reinforces public awareness and legitimacy of ISDS and contributes to increase the efficiency of ISDS mechanism when disputing parties can assess the cost and expected outcome of disputes²⁴.

Improving the transparency

EVFTA promotes transparency in ISDS procedures. All documentation sent to investment court (if not include the confidential information) shall be made available for the community and the entire tribunal hearing shall open to the public except for those that are secret and protected under defined agreement. Such regulations are established on the basis of UNCITRAL Transparency Rules in Treaty-based Investor-State Arbitration. A noteworthy point is that it has developed beyond UNCITRAL's requirements to extend the obligation to publish pre-trial documents such as the notice of intent, the request for consultations, to name but two. Moreover, upon its own initiative or request from any person after consulting with disputing parties, the tribunal is entitled to public other related documentation.

Saving cost

The cost serves as a major concern for both disputing parties, especially the SMEs. Regarding state's perspective, even if winning the case, the claimant is requested to pay a great deal of money on lawyers and arbitrators fee, laying financial burden on national budget and preventing the use of those funds for other urgent needs. ISDS mechanism under the EVFTA is assessed more economically for disputing parties, with arbitration fee lower than that of international practice thanks to the fixed monthly salary payment and determined period of proceedings. Besides, EVFTA obliges disputing parties to conduct amicable

dispute resolution as negotiations and consultations before submitting claims to the tribunal. This serves as an effective tool to minimize dispute costs.

Supporting small and medium enterprises

ISDS mechanism pays considerable attention to small and medium enterprises (SMEs), which account for highest percentage in Vietnam. Small and micro enterprises accounted for 67.2% of enterprises nationwide as of December 31, 2019²⁵. Online negotiation is recommended in case of disputes between SMEs and hosting countries helping these enterprises save huge costs for development goals. EVFTA also stipulates good faith of hosting nations under circumstances when claimant is SME or compensation is rather low at Sub-section 4, Art. 3.38, Clause 9: “The respondent shall give sympathetic consideration to such a request from the claimant, in particular where the claimant is a small or medium-sized enterprises or the compensation or damages claimed are relatively low.” In addition, regulation on conduct of proceedings changes a few points to suit the capabilities of the small-sized business, such as allowing to reduce the number of members in division hearing the case from 3 to 1 arbitrator: “The disputing parties may agree that a case be heard by a sole Member who is a national of a third country, to be selected by the President of the Tribunal.” In general, SMEs have received certain legal protection and raised their position in negotiating investment with hosting countries under the EVFTA.

CONCLUSION AND IMPLICATION FOR VIETNAM

Conclusion

After examining the application of ISDS in the world and the basic content relating to ISDS mechanism, the research analyzes the specific regulations of ISDS under the EVFTA and then compares it with that under the CPTPP. Accordingly, there are three fundamental differences in ISDS mechanism between two mentioned agreements in terms of the scope of application, dispute settlement agency and suit procedure. As an outstanding new generation FTA which Vietnam has participated in, EVFTA represents the superiority of detail in each regulation, specially the consistency, objectivity and accuracy of the arbitral decisions as well as the guarantee of the interests of the SMEs.

From the above analysis, three main issues have been drawn: (1) the increasing in the number of ISDS cases under the EVFTA in Vietnam in the future; (2) the

limitations in Vietnamese legal framework regarding ISDS commitments; (3) certain disadvantages facing by domestic investors. Therefrom, three major proposals have been made to improve the current situation: (1) Perfecting Vietnamese legal framework; (2) Establishing the State Coordination and Response System for International Investment Dispute; (3) Supporting domestic investors. It is expected that this study will provide valuable information regarding the ISDS mechanism in the EVFTA and serve as a helpful reference for our state and businesses as well as more extensive research.

Implication for Vietnam

Since the renovation from a centrally planned economy to a market economy model, socialist orientation, management and regulation by the State, Vietnam has become a potential destination for foreign investors owing to political stability, abundant human resources with cheap labor costs. FDI capital reached 20.38 billion USD, accounting for about a quarter of total social investment and contributing 20.35% of GDP in 2019²⁶. It is predicted by Mr. Nguyen Cong Phu that the number of disputes arising between the Vietnamese state and foreign investors will increase sharply in the near future as a consequence of three main reasons: favorable dispute settlement mechanism, the increase in investment capital and the incompleteness of our country’s legal system. In addition, the fact that the Covid-19 pandemic, lasting since the beginning of 2020, has not shown signs of cooling down is also a major cause affecting investment relations. The COVID-19 pandemic has resulted in intensified screening of foreign investment for national security reasons as countries strengthen their legal frameworks or introduce new regimes. Furthermore, they employ FDI reviews to protect other critical domestic businesses and technologies that may be particularly vulnerable to hostile foreign takeovers²⁷. As a result, disputes are expected to increase and Vietnam needs to prepare a response scenario for this issue.

Perfecting Vietnamese legal framework

To be compatible with commitments in the EVFTA regarding investment as well as investment protection, there are certain limitations on domestic regulations about ISDS mechanism. Especially, as a matter of fact, the EVFTA pays considerable attention to FET, which serves as a major tool for foreign investors to bring claim against the local authorities. However, at present, Vietnamese official documents guiding the implementation of ISDS mechanism under the

EVFTA in general and direct regulations on FET in particular are scattered in Code of Civil Procedures of Vietnam or other legal documents concerning investment²⁸. As a result, Vietnamese government faces with great difficulties in the process of implementing its commitments under the EVFTA.

Regarding this matter, Ms. Nguyen Tran Dieu My expressed: “During the investment process, even when preparing to invest, but not necessarily having a project, investors can sue the host country’s government if they feel that there is a problem that is not transparent, causing negative impacts for its business. With such a wide scope plus the application of the current investment decentralization mechanism in our country, we face a high risk of being sued. To avoid possible inadequacies, it requires the Vietnamese legal system to be transparent, tight and synchronous between stages, such as regulations on land and bidding.” Mr. Pham Van Chat stated that the agreements in the CPTPP force Vietnam to amend and supplement at least 7 current Laws along with Decrees, Circulars and sub-law documents. As a result, the legal system will be more synchronous, clear, transparent and feasible, helping to reduce disputes. At the same time, the pressure to change management and operating mechanisms and policies, business conditions of enterprises, registration procedures, inspection, etc. will create an open, competitive, healthy and equal business environment among economic sectors.

Establishing the State Coordination and Response System for International Investment Dispute

ISDS mechanism under the EVFTA creates certain pressure on Vietnamese economic, legal and social organizations including central state management, local authorities, social security agencies, department of customs as well as arbitration center because of high requirements for protecting foreign investors’ rights. To meet the increasingly complex situations, it requires these agencies to closely coordinate and support each other. On that basis, Mr. Nguyen Cong Phu said that central state management shall strictly comply with regulations on agreement, be cautious when issuing economic policies as well as administrative decisions. In case of existing proceedings, not only will Vietnamese government have to pay huge money for arbitration costs or even compensations, but it may also reduce prestige, affecting business environment. In addition, given the fact that managerial capacity of local authorities still exists certain limitations, it is required that the state must pay considerable attention

to supervising operations of these subordinate agencies as well as guiding them behave in proper and consistent manner. Beside that, on the grounds of current investment decentralization mechanism, the local authorities are given great power and have the autonomy in licensing investing projects. In case of just small error, ISDS cases may happen. Therefore, they are required to gain expertise in certain field of economic laws, usually update new regulations as well as enhancing managerial capacity. In addition, EVFTA sets high standard for tribunal’s member, regarding their expertise, experience, ethic, independence as well as autonomy. If Vietnamese arbitrators wish to have the chance to handle ISDS cases, they must dramatically enhance their expertise in economic and commercial issues, fluently using foreign languages in lawsuits as well as learning valuable experience from ISDS cases settled.

Supporting domestic investors

In essence, ISDS mechanism is used to protect the rights of foreign investors, and thus attracting huge capital inflow, with no exception under the EVFTA. Unfortunately, such regulation contributes to reducing the protection for domestic investors. To be more specific, local investors are not permitted to initiate proceedings under ISDS system. In case of existing conflicts with national government, they only seek to resolve through filing a complaint directly with the disputing parties or otherwise submitting a claim to competent authorities. However, judgment issuing by domestic courts are sometimes considered to be biased and lack of transparency due to their relationship with the state management. On the contrary, ISDS cases under the EVFTA are settled through investment court with high level of expertise, autonomy as well as independence.

Protection layer for foreign investors is established basing on three main principles named MFN, NT and FET. These principles are concretized and enforced directly under the EVFTA. In contrast, protection for domestic firms is carried out basing on emotional criteria such as ethnicity, localization rate or competitiveness’s facilitation rather than international standards. This practice gradually becomes obsolete in integrated economy as nowadays and thus creating certain confusion as well as drawbacks. Moreover, as a matter of fact, the competitiveness of EU investors is much higher than the majority of Vietnamese investors. That possibility is further reinforced under the protection of ISDS mechanism. As an inevitable

consequence, local enterprises will face more difficulties in operating business and implementing investment projects in their own territory. Domestic investors, therefore, have to be more proactive. In Ms. Dieu My's opinion, Vietnamese enterprises investing abroad can also sue the management agencies of those countries under ISDS. Therefore, this is a mechanism that Vietnamese enterprises in general, specifically those with business activities in foreign countries, need to pay much attention. Only then will they know how to protect their legitimate rights and interests. In addition, their position on the negotiating table is also enhanced when they understand these regulations./.

LIST OF ABBREVIATIONS

Art.: Article

CPTPP: Comprehensive and Progressive Agreement for Trans-Pacific Partnership

EVFTA: European Union - Vietnam Free Trade Agreement

EVIPA: European Union -Vietnam Investment Protection Agreement

FET: Fair and Equitable Treatment

ISDS: Investor-state dispute settlement

ITC: Investment Tribunal Court

MFN: Most Favored Nation

NT: National Treatment

SMEs: Small and Medium Enterprises

TTIP: Transatlantic Trade and Investment Partnership

UNCTAD: United Nation Conference on Trade and Development

VCCI: Vietnam Chamber of Commerce and Industry

CONFLICTS OF INTEREST

The authors declare that there are not any conflicts of interest.

AUTHORS' CONTRIBUTIONS

The authors have equally contributed to the article.

The first author (Nguyen Tien Hoang) is responsible for the part: Results and Findings.

The second author (Nguyen Nguyen Cat Anh) is responsible for the parts: Literature Review, Research Methodology.

The third author (Nguyen Diep Nhat Khang) is responsible for the parts: Introduction, Conclusion and Implications.

REFERENCES

1. Asia business consulting. The Impact New Gener Free Trade Agreements Viet Econ. 2019:1;
2. Collins D. An introduction to international investment law. Cambridge University Press; 2016; Available from: <https://doi.org/10.1017/CBO9781316675687>.

3. Gaukrodger D, Gorden K. Investor-state dispute settlement. OECD Publishing; 2012. p. 10;
4. Dzung NM, Ha DVM. ISDS reform & the EU-Vietnam Free Trade Agreement: challenge. Cambridge University Press; 2021. p. 199-217; Available from: <https://doi.org/10.1017/9781108675772.012>.
5. European Commission. Press release, 2020. EU-Vietnam trade agreement enters into force;
6. Abbott R, Erixon F, Ferracane MF, 2014. Demystifying investor-state dispute settlement (ISDS). European centre for international political economy (ECIPE), ECIPE Occasional Paper No. 5/2014;
7. Gauthier A. Investor-state dispute settlement mechanism: what is their history and where are they going? [background papers]; 2015. p. 4-7;
8. Reddie A. Power in international trade politics: is ISDS a solution in search of a problem? Bus Polit. 2017;19(4):738-57; Available from: <https://doi.org/10.1017/bap.2017.27>.
9. UNCTAD. Investor-State Dispute Settlement Cases Figures. 2021;2020:1-11;
10. Alvarez GM, Blasikiewicz B, Hoolwerff TV, Koutouzi K, Lavranos N, Mitsi M et al. A response to the criticism against ISDS by EFILA. J Int Arbitration. 2017;33:1-36; Available from: <https://doi.org/10.54648/JOIA2016001>.
11. Benedetti JBC. The proposed Investment Court System: does it really solve the problems? Univ Externado Colomb. 2019;42:83-115; Available from: <https://doi.org/10.18601/01229893.n42.04>.
12. Kaufmann-Kohler G, Potestà M, 2020. Investor-state dispute settlement and national courts. European yearbook of international economic Law, pp. 87-102; Available from: https://doi.org/10.1007/978-3-030-44164-7_4.
13. Linh NP. Cơ chế tài phán đầu tư trong EVFTA và sự chuẩn bị của Việt Nam. External Econ Rev. 2018;102;
14. Hai An TT, 202. Tim hiểu cơ chế giải quyết tranh chấp theo Hiệp định bảo hộ đầu tư giữa Việt Nam và EU (EVIPA). Graduate Academy of Social Sciences;
15. The World Bank. Vietnam: deepening international integration and implementing the EVFTA. Publishing and Knowledge Division; 2020;
16. Manh Dung N, Ha DVM. ISDS reform & the EU-Vietnam Free Trade Agreement: challenge. Cambridge University Press; 2021. p. 199-217; Available from: <https://doi.org/10.1017/9781108675772.012>.
17. Chandler A. Investor-state dispute settlement in the CPTPP: perspectives from Australia, Japan and New Zealand. Vol. 16. Brill | Nijhoff Publisher; 2018. p. 3-38;
18. Aoki H, Teo W. CPTPP and ISDS: three years on. Wolters Kluwer Publisher; 2021;
19. Aoki H, Teo W. CPTPP and ISDS: three years on. Wolters Kluwer Publisher; 2021;
20. Ngan VK. Chủ động ứng phó với tranh chấp giữa nhà đầu tư nước ngoài và nhà nước tiếp nhận. J Int Econ Manag. 2021;138:124-35;
21. Le DN. Giải quyết tranh chấp đầu tư - những vấn đề đặt ra đối với Luật Đầu tư theo phương thức đối tác công tư. J Legis Stud. 2021;08;
22. UNCTAD. Investment dispute settlement navigator; 2021; Available from: <https://investmentpolicy.unctad.org/investment-dispute-settlement>.
23. Trakman L, Musayelyan D. The repudiation of investor-state arbitration and subsequent treaty practice: the resurgence of qualified investor-state arbitration Law Research Series. Australia: University of New South Wales; 2016; Available from: <https://doi.org/10.2139/ssrn.3050287>.
24. Dung TV, Huong NTL. Giải quyết tranh chấp đầu tư quốc tế: Một số vấn đề pháp lý và thực tiễn trong bối cảnh hội nhập. Ho Chi Minh City: National University Publishing House; 2018. p. 57-76;

25. Ministry of Planning and Investment. The white book. Vietnam. 2021:36;
26. Thu DT. Đầu tư trực tiếp nước ngoài và vấn đề phát triển kinh tế - xã hội ở Việt Nam. Financial magazine. 2021;
27. UNCTAD. Investment policy responses to the Covid-19 pandemic. Invest Policy Monit. 2020:7;
28. Huong NT. Chính sách đầu tư theo Hiệp định Thương mại tự do Việt Nam - EU (EVFTA). Industry and Trade magazine. 2018;

Cơ chế ISDS trong Hiệp định EVFTA: So sánh với Hiệp định CPTPP và những hàm ý đối với Việt Nam

Nguyễn Tiến Hoàng^{1,*}, Nguyễn Nguyên Cát Anh², Nguyễn Diệp Nhật Khang³



Use your smartphone to scan this QR code and download this article

TÓM TẮT

Đầu tư quốc tế đóng vai trò không thể thiếu trong quá trình phát triển kinh tế của hầu hết các quốc gia trên thế giới. Nó không chỉ đảm bảo dòng vốn khổng lồ và ổn định mà còn tạo công ăn việc làm và chuyển giao công nghệ tiên tiến cho nước nhận đầu tư. Tuy nhiên việc phát sinh các tranh chấp liên quan trong quá trình đó là điều không thể tránh khỏi và không thể không kể đến tranh chấp giữa Nhà nước và nhà đầu tư nước ngoài bởi sự không cân bằng về địa vị của hai bên. Chính vì vậy, cơ chế giải quyết tranh chấp Nhà nước - Nhà đầu tư nước ngoài (ISDS) đã ra đời nhằm giải quyết loại tranh chấp đặc thù này cũng như bảo vệ lợi ích của nhà đầu tư nước ngoài, những người luôn được coi là có địa vị thấp hơn. Bài viết này nghiên cứu cơ chế ISDS trong Hiệp định Thương mại Tự do Việt Nam - Liên minh Châu Âu (EVFTA) trong mối quan hệ so sánh với Hiệp định Đối tác Toàn diện và Tiến bộ xuyên Thái Bình Dương (CPTPP). Các tác giả đã thu thập, tổng hợp, so sánh, phân tích dữ liệu từ các nguồn đáng tin cậy và phỏng vấn sâu các chuyên gia có kinh nghiệm trong lĩnh vực pháp luật, giải quyết tranh chấp và hội nhập quốc tế. Kết quả cho thấy cơ chế ISDS giữa hai hiệp định về cơ bản có nhiều điểm tương đồng. Tuy nhiên, vẫn có những điểm khác biệt đáng chú ý về phạm vi áp dụng, cơ quan giải quyết tranh chấp và thủ tục khởi kiện. Bên cạnh đó, nghiên cứu cũng phân tích tình hình áp dụng cơ chế trên thế giới giai đoạn 1987-2020 và nêu rõ những khó khăn, thách thức mà Việt Nam phải đối mặt trong bối cảnh tranh chấp liên quan đến ISDS dự kiến sẽ gia tăng trong thời gian tới. Từ những phân tích trên, các tác giả đã đưa ra một số đề xuất đối với Nhà nước và các doanh nghiệp với mong muốn giảm thiểu tranh chấp hoặc thiệt hại do tranh chấp gây ra.

Từ khóa: Đầu tư quốc tế, ISDS, EVFTA, CPTPP, Việt Nam

¹Trường Đại học Văn Lang

²Trường Đại học Giao thông Vận tải TP.HCM

³Trường Đại học Ngoại thương

Liên hệ

Nguyễn Tiến Hoàng, Trường Đại học Văn Lang

Email: tienhoang.vlu@gmail.com

Lịch sử

- Ngày nhận: 15/01/2022
- Ngày chấp nhận: 20/9/2022
- Ngày đăng: 15/10/2022

DOI: 10.32508/stdjelm.v6i3.1002



Bản quyền

© ĐHQG Tp.HCM. Đây là bài báo công bố mở được phát hành theo các điều khoản của the Creative Commons Attribution 4.0 International license.



Trích dẫn bài báo này: Hoàng N T, Anh N N C, Khang N D N. **Cơ chế ISDS trong Hiệp định EVFTA: So sánh với Hiệp định CPTPP và những hàm ý đối với Việt Nam.** *Sci. Tech. Dev. J. - Eco. Law Manag.*; 2022, 6(3):3105-3117.