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Original citation & hyperlink:

Turksen, U & Chau, Q 2019, 'To sign or not to sign? A conundrum of Vietnam's accession to the ICSID', Coventry Law Journal, vol. 24, no. 1, 1, pp. 1-19.

ISSN 1758-2512

Publisher: Coventry University

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FOREIGN INVESTMENT LAW

To Sign or not to Sign? A Conundrum of Vietnam's Accession to the ICSID⁺

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Introduction and background

Vietnam has pursued a policy to impose a single national dispute settlement mechanism for investment disputes. However, as the Vietnamese economy has liberalised and integrating internationally, this approach is no longer suitable for Vietnam's present needs. Indeed this is one of the primary reasons why Vietnam has faced difficulty in fostering the confidence in its investment environment for foreign investors. Thus, consistency, transparency and predictability (including recognising foreign awards) have been challenging issues for Vietnam. Most foreign direct investment in Vietnam comes from developed countries, and most of the 167 states and territories that have adopted ISDS-style mechanisms are developed nations. As such, the ICSID Convention ought to be seen as a necessity, taking into account the particular context of Vietnam's legal, economic and political realities. In this context, the article provides a critical analysis of the legal developments pertaining to investment disputes in Vietnam, and evaluates the comparative merits of the arguments for and against Vietnam's accession to the ICSID. In doing so, it concludes that Vietnam ought to accede to the ICSID immediately, albeit with a number of reservation as permitted under the ICSID Convention.

This article aims to address the pending issues weighing on Vietnam as to its accession to the ICSID Convention; and whether there is a sufficient case for the state to proceed with ratification. The International Centre for Settlement of Investment Disputes (ICSID) was established in 1966 in Washington D.C. as a part of the World Bank pursuant to the Washington

⁺ This paper was presented at the 29th Annual Fulbright Symposium hosted by the Sompong Sucharitkul Center for Advanced International Legal Studies, Golden Gate University School of Law, San Francisco California on Friday, April 5, 2019.

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Convention,¹ for the settlement of investment disputes between the states and investors of other states.² It has the largest amount of state signatories compared to other similar conventions,³ which has led to it becoming the most popular multilateral arbitration regime in the world.⁴

ICSID provides a mechanism through which investment disputes between states are resolved, and which is utilised through a variety of bilateral investment treaties, free trade agreements or agreements on promotion and protection of the investment between countries.⁵ As a reflection of its popularity, ICSID has handled the majority of all known international investments disputes,⁶ and as of December 31, 2018, had a registered caseload of 706 cases, the vast majority of which had been adjudicated through arbitration.⁷ The overall “ICSID mechanism” for arbitration can be categorised into two sub-mechanisms: (i) ICSID Convention arbitration and (ii) ICSID Additional Facility arbitration. This article will primarily address the former. As the names imply, where the state and the investor’s host state have ratified the ICSID Convention, the parties may avail themselves of the investment arbitration procedures under the ICSID Convention, provided the requisite consent to such process (e.g., in an investment treaty as a written agreement to arbitrate) exists.⁸

With respect to ICSID Convention arbitrations, one of the procedural facets that has positioned it as a leading institution devoted to international investment dispute settlement is that an award rendered under the ICSID Convention is enforceable as a binding judgment in every ICSID member state.⁹ This has been enshrined under Articles 53 and 54 of the ICSID Convention. In particular, Article 53(1) prevents any level of appeal to an arbitration award (unless permitted by the ICSID Convention), while Article 54(1) requires the state to recognise an award rendered against it as binding. Thus, it must enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. It follows that unlike the usual procedures for commercial arbitration awards under the state’s respective civil procedure or arbitration laws, Article 53(1) prevents a party from challenging the arbitral award at its national court on any grounds. The only available remedies are those prescribed under

¹ This Convention sets forth ICSID’s mandate, organisation, and core functions. The *ICSID Convention* is a multilateral treaty formulated by the executive directors of the World Bank. It was opened for signature on March 18, 1965 and entered force on October 14, 1966.

² The ICSID Convention, as of February 21, 2019, has been signed by a total of 162 signatories

³ ICSID, List of Contracting States and Other Signatories of the Convention (as of February 21, 2019), <https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf>, 2019 (last accessed March 19, 2019).

⁴ Gautami S. Tondapu, ‘International Institutions and Dispute Settlement: The Case of ICSID’ (2010) 22 *Bond Law Review* 1, at 89.

⁵ Andreas F. Lowenfield, *ICSID Convention: Origins and Transformation*, (2009) 38 *Georgia Journal of International and Comparative Law* 47, at 57

⁶ ICSID, *The ICSID Caseload – Statistics (Issue 2019-1)*, [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf), 2019 (last accessed March 19, 2019).

⁷ *Ibid.*

⁸ J. Christopher Thomas and Harpeet Kaur Dhillon, ‘The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and Review of Arbitration Awards’, (2017) *ICSID REVIEW – Foreign Investment Law Journal* 459, at 464.

⁹ ICSID, *Special Features of ICSID*, <https://icsid.worldbank.org/en/Pages/about/Special-20Features-20of-20ICSID.aspx> (last accessed March 19, 2019).

the ICSID Convention,¹⁰ and such remedies are exhaustive in excluding national appeal.¹¹ Should a contracting state violate such provisions, it would be in breach of its international treaty (ICSID Convention) obligations, which implies recourse to international law remedies.¹²

The ICSID Regime and its application in Vietnam

Current Status and the Road towards Accession to Date

Vietnam has neither signed nor ratified the ICSID Convention and as a result, recourse against the state via ICSID Convention arbitration is not available to foreign investors. Based on publically accessible information, Vietnam's first serious proposal towards accession ICSID Convention appeared to surface in August 2003, when the Ministry of Planning and Investment ("MPI") put forward a proposal to the Prime Minister ("PM") (under Official Letter No. 5100 BKH-PC) to prepare for accession to the ICSID Convention. The PM thereafter assigned the MPI to assume responsibility for and coordinate with the Ministry of Justice ("MOJ"), and Ministry of Foreign Affairs and other relevant state agencies to "study" the accession and issue its approval on the conclusion.¹³

The fate of this initial proposal remains unknown; although, it appeared that no binding conclusion had resulted from it. This is because in April 2005, the former PM, Phan Van Khai, issued Directive No. 13/2005/CT-TTg in response to recognising the state's shortcomings in attracting FDI, particularly in the field of planning, policy development and state management.¹⁴ In this directive, the former PM directed the MPI to (again) assume prime responsibility, and coordinate with the MOJ towards submitting to the PM plans for the state's accession to the ICSID Convention — this time, with a definitive deadline until the second quarter of 2005.¹⁵ Following this, it was from mid-2005 onwards where positive considerations were articulated within the MOJ for Vietnam's accession to the ICSID Convention.¹⁶

Notwithstanding such initial considerations, and despite the MOJ having recognised that the increase of potential investment disputes is unavoidable in Vietnam's path towards global

¹⁰ Being Articles 50, 51 and 52 of the ICSID Convention, setting forth procedures for interpretation, rectification and annulment of the award respectively.

¹¹ Aron Broches, Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution, ICSID REVIEW – (1987) Foreign Investment Law Journal 287, at 288,

¹² Charles Vuylsteke, Foreign Investment Protection and ICSID Arbitration, 42 Georgia Journal of International and Comparative Law 343, at 360

¹³ Directive No. 4653/VPCP-QHQT, Government Office, September 24, 2003. While this directive referred to Official Letter No. 5100 BKH-PC, such (internal) letter has not been publically disclosed.

¹⁴ Directive No. 13/2005/CT-TTg on the measures for creating a new transformation in attracting foreign direct investment into Vietnam, The Prime Minister, April 8, 2005 ("Directive No. 13/2005/CT-TTg").

¹⁵ Directive No. 13/2005/CT-TTg, Section II.1(k).

¹⁶ For example, the former Director of the Department of International Law of MOJ had publically raised the consideration of early accession by Vietnam to the *ICSID Convention*: Hoang Phuoc Hiep, Vietnam Law & Legal Forum, Reforming the legal system to meet the nation's WTO commitments, <http://vietnamlawmagazine.vn/reforming-the-legal-system-to-meet-the-nations-wto-commitments-3220.html>, December 25, 2006 (last accessed March 19, 2019).

integration,¹⁷ the proposal awaits a conclusive decision from the MOJ and/or MPI.¹⁸ Only limited information is available as to the status of the state's potential signing or ratification.¹⁹ It can be observed that one of the reasons why Vietnam has been reluctant to proceed with ratification is the preservation of the state's sovereignty.²⁰ If this is the rationale, then it appears such sentiment has remained steadfast since 2003. Nevertheless, recent events have provided some hope that the preservation of sovereignty may not be a resolute position — particularly with an economic payoff. For instance, note Vietnam's negotiations towards signing the Draft EU-Vietnam Investment Protection Agreement ("Draft EVIPA") and more significantly (on November 12, 2018), the National Assembly's ratification of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") in which for the former, the ISDS provisions bear some similarity to that of the ICSID Convention.

Arguments for Vietnam's accession to the ICSID

There are generally two arguments cited in favor of ratification of the ICSID Convention, both of which are not necessarily from a legal perspective but rather support ratification on political and/or economic grounds.

Development of political and foreign relations

The creation of treaties and international agreements have the effect of improving relations on both the state and individual levels, including citizens and corporations.²¹ Whilst Vietnam has been increasingly active in the formation of these agreements, the existing limitation is that that the preferred method of settling investment disputes, being ICSID Convention arbitration, is inaccessible within Vietnam. It is arguable that this reservation undermines the perceived commitment of Vietnam to the terms of the treaties and international agreements because the protection provided through the ICSID Convention, at a conceptual level, represents and symbolises the respect between the agreed states on investment promotion and development.²² Notably, some of Vietnam's peers in the region have ratified the Convention, such as China and Indonesia.

This is an important issue, as the treatment of foreign individuals and companies affects the relationship at state level. Taking positive steps to protect individuals of foreign states through ICSID can demonstrate the capacity of Vietnam to maintain a consistent rule of law and

¹⁷ Mai Hoa, Vietnam Law, Việt Nam có nên tham gia công ước ICSID? [English translation: *Should Vietnam join the ICSID Convention?*], <http://baophapluat.vn/trong-nuoc/viet-nam-co-nen-tham-gia-cong-uoc-icsid-108845.html>, February 14, 2012 (last accessed March 19, 2019).

¹⁸ U.S. Department of State, Bureau of Economic and Business Affairs, Investment Climate Statements for 2018 — Vietnam, <http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2018&dclid=281549>, 2018 (last accessed March 19, 2019).

¹⁹ Maomi Iwase, Legal Development of the Investment Dispute Settlement System in Vietnam: Issues on the Investor-State Dispute Settlement, Conference Paper (Vietnam National University, Hanoi), 2013.

²⁰ *Id.*, at 544.

²¹ Kyla Tienhaara, What you don't know can hurt you: investor-state disputes and the protection of the environment in developing countries, (2006) 6 *Global Environment Politics* 73, at 73-4.

²² *Ibid.*, at 74.

integration with the global economy.²³ Ongoing compliance and economic integration provide the basis through which international relations can be improved. These relations are built on trust and the rule of law, and it is necessary that Vietnam demonstrate a resistance to arbitrary treatment of foreign investment for that trust to be maintained.²⁴ This can enable Vietnam to become an active member of the global community through demonstrating mutual respect on which future agreements can be based. Within an increasingly globalised community, these relationships will be important to the continued development of Vietnam²⁵ and its status/place in international trade and investment.

Attractiveness of the Investment Climate

Foreign direct investment is one of the largest source of income for developing countries, including Vietnam.²⁶ The ability to attract investors to sectors where investment is not based on natural resources is competitive between developing countries because of the potential benefit they may provide to investors.²⁷ From the perspective of investors, the decision to select a foreign state for investment is based on a comparison of the potential risk and reward inherent within investment.²⁸ An attractive investment environment possesses features that enable the success of that investment. The protection of that investment through international agreements such as the ICSID is important, as the foreign investor is both subject to domestic law and unable to participate fully in its creation.²⁹

While ICSID is simply a legal forum for adjudication, there are significant benefits in membership to the Convention, through the demonstration of commitment to fair and equal treatment of foreign investors.³⁰ Investor-state relationships, as with any business relationship, provides the expectation of receipt of an agreed reward based on achieved success, together with accepted potential for one party to attempt to covet or make such reward inaccessible.³¹

The current system of protection provided to foreign investment has yet to be tested through implementation of an arbitration award. While the potential of non-ICSID arbitration against the state of Vietnam is possible, the necessary capacity for recognition by the courts of Vietnam is unknown.³² Implementation of ICSID would require the necessary clarification of the law in relation to ISDS, improving the understanding of present law and providing known structures of enforcement. While Vietnam has seen continued growth in foreign investment, the lack of demonstrated commitment to fair treatment of those investors has the capacity to undermine confidence.³³ Presently, there is no certainty provided to investors as to if and how their interests can be protected should a dispute occur. Without confidence and/or legal certainty,

²³ Larisa Babiy *et al.*, Should Mexico join ICSID? (2012) 88 Graduate Institute of International and Development Studies, 7

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Barnali Choudhury, Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit, (2008) 41 Vanderbilt Journal of Transnational Law 775, at 779

²⁷ Babiy *et al.*, *supra* note 3.

²⁸ Choudhury, *supra* note 6, at 780.

²⁹ Choudhury, *supra* note 26, at 780.

³⁰ Babiy *et al.*, *supra* note 23.

³¹ Choudhury, *supra* note 26.

³² Civil Procedure Code (2015), Article 459.

³³ Babiy *et al.*, *supra* note 23.

there is a limit to the amount of potential investment because of the proportional relationship between a state's rule of law³⁴ and the volume of FDI inflows per capita that it generates (not least because an investor needs to be satisfied that the government's policies will be sustainable to ensure the investor's competitive advantage).³⁵ This limit exists, as the reduced attractiveness either has the capacity to discourage the potential investor from investment, or diverts interest to a more attractive environment.³⁶

However, to attribute non-ratification to underdevelopment of a state's rule of law is, arguably, a stretched analysis, considering that major economies (such as India and Brazil, which attract significant levels of FDI) have not ratified, while those Asian states with perceivably poorer rule of law records (such as Cambodia, the Philippines and Bangladesh) have ratified. Furthermore, whilst it is true that the extent of useable ISDS mechanisms is an important determinant of available safeguards for investors, this advantage is likely to only hold true in the extreme example where a state has no available ISDS recourse at all. This is not the case for Vietnam, where, by virtue of its multiple ratified investment treaties, aggrieved investors are still able to avail themselves of investment arbitration under other institutional rules or by ad-hoc arbitration. Accordingly, the supposed "cap" on FDI inflows for the reasons of rule of law deficiencies may be negligible, particularly if one were to consider only this factor from the standpoint of non-ratification of the ICSID Convention. It follows that, for Vietnam, the extent of correlation between ICSID ratification and bolstering the attractiveness of the investment climate may be negligible or non-existent for this advantage to be truly realised.

The argument against Vietnam's accession to the ICSID

Restrictions on Public Policy

A major implication of ICSID ratification is that accession would place Vietnam under the authority of a foreign adjudicator and may erode the notion of public policy. A state has a distinct character in comparison to an investor, in that the consideration of public policy is of greater importance to the development of any financial gains.³⁷ This is complicated in developing countries in general, and in Vietnam in particular, where public policy is, often, directed singularly towards the development of the economy.³⁸ Being bound to such an authority over the treatment of foreign investors, reduces the flexibility of the state to meet its

³⁴ Two major bodies have ascertained and categorised an index to determine a country's rule of law metric on an annual basis: The World Bank and the World Justice Project. The World Bank provides a ranking based on a normal standard distribution (ranging from approximately -2.5 to 2.5). The World Bank recently provided Vietnam with an estimated coefficient of approximately 0.07, giving the country a percentile rank of approximately 55.77. The World Bank, TCdata360, <https://tcdata360.worldbank.org/> (last accessed March 19, 2019). The World Justice Project recently giving Vietnam a score of 0.50 (ranking it 74 out of 113 countries, with the lowest score representing the country with the strongest rule of law). World Justice Project, WJP Rule of Law Index 2017 – 2018, published 2018. Available at https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf (last accessed March 19, 2019).

³⁵ David Kunsch *et al.*, The relational effect of the rule of law: A comparative study of Japanese and South Korean foreign direct investment, (2014).19 Asian Academy of Management Journal 147, 150

³⁶ Babiy *et al.*, *supra* note 23, at 85.

³⁷ Kate M. Supnik, Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law, (2009) 59 Duke Law Journal 343, at 349

³⁸ *Ibid.*

responsibility to their citizenry. This is particularly so considering that foreign investors are generally not obliged to take into account the interests of the public of the .host state. At the very least, foreign investors have some tendency to choose and exploit a developing state for investment where accountability to the public is lower (e.g., those with perceivably weaker rule of law), and where they may be afforded with more significant “bargaining power” over the state.³⁹ It is possible that from these conditions foreign investors might actively seek the potential windfall from conflict.⁴⁰ This is of greater significance within developing countries, especially where unequal bargaining powers may result in excessively protective provisions favoring foreign investors. The authority of a foreign adjudicator to protect foreign investment has the potential to require Vietnam to allow for a public harm in order to avoid any breach of its responsibility to those foreign investors.

It is thus desirable for the state to retain capacity to apply the law to meet the current needs of the state. Protection of the environment, natural resources and other social goods will not always be possible whilst simultaneously complying with protection of foreign investment.⁴¹ Forcing consideration of foreign investors to a position of primacy is undesirable for the public. The consequence of any dispute or award would cost the state significant amounts, which may in turn cause acquiescence to harm in order to avoid the loss of public funds from the state and taxpaying public.⁴² As the *ICSID* Convention creates state liability, it is understandably a concern for the domestic population because of the potential harm that liability may create.

Perceived bias in favour of foreign investors

A further common criticism of the *ICSID* Convention is that it carries a perceived bias against developing economies, in favor of institutional investors.⁴³ Such argument, accordingly, counters the supposed “fair forum” for ISDS through which *ICSID* is intended to facilitate among states. This trend may to some extent be ascertained through the most recent caseload statistics of *ICSID*, which reveals that developing states are more often the recipient of (or are more “susceptible” to) investment arbitrations.⁴⁴ Franck summarised the criticisms of commentators as to the *ICSID* system, including those that go as far as asserting that the “system is rigged” and that “*ICSID* represents the inequities of an international system biased against the developing countries”.⁴⁵ However, despite these criticisms, proponents of the *ICSID* system have argued that the perceived bias were generally a result of the state’s internal political circumstances, which are reflective of the positions of only a small handful of states, and is reflective of a general consensus.⁴⁶

³⁹ Yulia Levashova, *The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law*, (2018).14 *Utrecht Law Review* 40, at 43

⁴⁰ Supnik, *supra* note 37 at 345.

⁴¹ Tienhaara, *supra* note 21, at 75.

⁴² *Ibid.*

⁴³ Susan D. Franck, ‘The *ICSID* Effect? Considering Potential Variations in Arbitration Awards’ (2011) 51 *Virginia Journal of International Law* 825

⁴⁴ *ICSID, ISCID Caseload Statistics 2019-1, ICSID World Bank*, [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf), 2019 (last accessed March 19, 2019)

⁴⁵ Franck, *supra* note 43 at 828, 844.

⁴⁶ Franck, *supra* note 43 at 848.

This bias appears to be perceived, rather than actual and empirical studies have not revealed any statistically significant correlation between a state's ICSID accession status, the amounts claimed, and the ultimate outcome of the arbitration.⁴⁷ In fact, Franck's empirical analysis had shown that respondent states actually succeeded in their arbitrations at approximately twice the rate as the counterparty claimants.⁴⁸ Notably, Franck's analysis concluded that there was "no reliable statistical relationship between the developmental background of the respondent state and case outcome, whether as a function of winning or losing, or in the amounts awarded."⁴⁹ Whether there is such a bias does not change the reality that a large proportion of these cases are pursued against emerging economies, where political circumstances and/or strength of the rule of law are continuing to develop. This is perhaps not surprising as these states are typically the recipients of economic exploitation by foreign investors.⁵⁰

Economic impact of resultant arbitration awards

In addition to the number of cases brought against developing economies, one factor that challenges ICSID arbitration (or ISDS in general) is the requirement for the state to compensate the investor in the event of the state's breach of its international commitments. However, a number of developing economies often do not have sufficient resources to settle such compensation, which are generally significant in value.⁵¹ In fact, even if resources are sufficient, it could be the case, especially for less wealthier states, that their economy may be adversely impacted or crippled through effecting the settlement to the investor. Vietnam will not be shielded from this impact, having recorded persistent and sizeable fiscal deficits in recent years;⁵² which could spell severe economic repercussions in the event of an award of sizeable quantum. This goes against the "Fair and Equitable" treatment that is commonly enshrined in a state's international investment commitments,⁵³ almost to the extent of being a "standard clause" that is not seriously negotiated.⁵⁴

The Draft EVIPA

For the purposes of analysing Vietnam's readiness towards ratifying the ICSID Convention, it is important to consider the headway that the state has made in negotiating the Draft EVIPA. At the outset of, and throughout the negotiations towards, signing the EU-Vietnam Free Trade Agreement ("EVFTA"), the EU and Vietnam had intended to have a comprehensive free trade

⁴⁷ Franck, *supra* note 43 at 859, 860.

⁴⁸ Franck, *supra* note 43 at 860. Note that Susan Franck's empirical study was taken in respect of cases prior to 2007. Such study has not yet been undertaken for post-2007 cases. However, unless there has been a significant procedural shift in the ICSID dispute settlement mechanism, we would not be anticipating material deviations from Franck's analysis.

⁴⁹ Franck, *supra* note 43 at 852, 853.

⁵⁰ Leon E. Trakman, 'The ICSID Under Siege' 45 *Cornell International Law Review* 603, at 607.

⁵¹ *Ibid*, at 613.

⁵² Khai Nguyen, *Asia Times*, Vietnam has a debt problem, <http://www.atimes.com/article/vietnam-debt-problem/>, September 27, 2017 (last accessed March 19, 2019).

⁵³ Trakman, *supra* note 50, at 607.

⁵⁴ Even if it were omitted, the most-favored-nation provision (if incorporated) may enable the investor to avail of such protection anyway.

agreement to encompass both free trade and investment protection mechanisms.⁵⁵ This is similar to the CPTPP text. However, in August 2018, with the intention of expediting the ratification process, the EU and Vietnam decided to split the text into two: an FTA and a separate investment protection agreement.⁵⁶ Accordingly, as of August 2018 the decision was to carve out the protections afforded to investors into the EVIPA. The protections set forth in the Draft EVIPA are relatively standard and align with similar protections afforded to investors under other investment treaties to which Vietnam is a member. These include national treatment, most-favored nation treatment, fair and equitable treatment, protection and security, and non-nationalisation or expropriation.⁵⁷

ISDS innovations introduced by the Draft EVIPA

The most remarkable addition under the Draft EVIPA is the distinct ISDS mechanism (the “investment tribunal system”) which the contracting states intend to adopt.⁵⁸ Cited as a “radical” change to the existing investor-state arbitration mechanisms prevalent in other investment instruments,⁵⁹ the Draft EVIPA provisions aimed to address issues that the above mechanisms faced. These include a perceived lack of independence and impartiality, ethical issues, consistency and coherence of arbitration awards, and transparency.⁶⁰ Nevertheless, the specific innovations brought about by the Draft EVIPA remain a separate topic. Instead, in the context of ICSID membership, what is important is the agreed regime for recognising and enforcing investment awards.

Similar to conventional ISDS mechanisms, the Draft EVIPA stipulates that final awards shall be binding between the disputing parties.⁶¹ Here, instead of merely deferring the process for enforcement to the relevant domestic laws, the Draft EVIPA mandates that awards are not to be “subject to appeal, review, set aside, annulment or any other remedy.”⁶² Mirroring Article 54(1) of the ICSID Convention, the Draft EVIPA will *prima facie* require the member states to recognise the final award as binding and enforce the pecuniary obligation within its territory as if it were a final judgment of its national court.⁶³ Notably for Vietnam in the event it is a respondent state, there is an express qualifier in which despite these foregoing obligations, the recognition and enforcement of a final award will be conducted pursuant to the New York Convention.⁶⁴ In such a case, the requirement that the final award be non-appealable or unable

⁵⁵ European Parliament, Briefing – International Agreements in Progress, EU-Vietnam free trade agreement, October 2018, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/628248/EPRS_BRI\(2018\)628248_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/628248/EPRS_BRI(2018)628248_EN.pdf) (last accessed March 19, 2019).

⁵⁶ *Ibid.*

⁵⁷ Draft EVIPA, Chapter 2.

⁵⁸ Nguyen Phuong Linh *et al.*, Vietnam’s recognition and enforcement of foreign arbitral awards and preparation for EVFTA, Working Paper No. 18/2017, Swiss State Secretariat for Economic Affairs, December 2017, at 31. Draft EVIPA, Chapter 15.

⁵⁹ Elsa Sardinha, The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement, 32 ICSID REVIEW 625 (2017), in Meg Kinnear & Christine Sim, *NUS Centre for International Law Collection of Articles on an Appellate Body in ISDS*. Oxford University Press (2017), at 628.

⁶⁰ *Id.*

⁶¹ Draft EVIPA, Article 3.57(1). Sardinha, *supra* note 59, at 668.

⁶² Draft EVIPA, Article 3.57(1)

⁶³ Draft EVIPA, Article 3.57(2).

⁶⁴ Draft EVIPA, Article 3.57(3).

to be set aside will not be applicable.⁶⁵ While Vietnam has ratified the New York Convention, this qualifier is to be read together with the reservations that Vietnam had stipulated at the time of ratifying the New York Convention. Notably, the EU is not subject to such qualifier,⁶⁶ so that Vietnam will not be held to the same standard as that applied to the EU (or EU member state) until Vietnam decides to accede to the ICSID Convention.⁶⁷

In any case, the qualifier only applies for a period of five years following the date of entry into force of the EVIPA, or a longer period as determined by the Committee should the conditions warrant it.⁶⁸ Therefore, essentially, the Draft EVIPA has provided Vietnam with a five-year window to align its legal framework with the recognition and enforcement provisions of the Draft EVIPA.⁶⁹ Considering the imminence of the EU's and Vietnam's signing of the EVIPA,⁷⁰ and the history of recognition and enforcement of arbitration awards (see below), such provision has arguably been one of the greatest concerns for Vietnam at the time of negotiating the Draft EVIPA.⁷¹ In order for Vietnam to move towards complying with its commitments under the EVIPA (if it were to be signed in its current form), it would need to immediately reform its legal framework in line with the EVIPA provisions, particularly with those on enforcement of awards.⁷²

The land expropriation reservation

In addition to the obligatory recognition and enforcement mechanisms introduced by the Draft EVIPA, it is also notable that for Vietnam specific reservations have been made in respect of claims for expropriation of land; in which the state's domestic land legislation would need to be considered prior to the determination of whether a claim can be legally pursued:⁷³

Notwithstanding paragraphs 1 and 2, in the case that Vietnam is the expropriating Party, any measure of direct expropriation relating to land shall be

⁶⁵ Draft EVIPA, Article 3.57(3).

⁶⁶ Relevantly, the EU is not a member of the *New York Convention*, such that it is unable to enliven the provisions therein. Sardinha, *supra* note 59, at 669.

⁶⁷ Sardinha, *supra* note 59, at 669.

⁶⁸ Draft EVIPA, Article 3.57(4).

⁶⁹ Linh, *supra* note 58, at 89.

⁷⁰ European Commission, Commission presents EU-Vietnam trade and investment agreements for signature and conclusion, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1921>, October 17, 2018 (last accessed March 18, 2019).

⁷¹ Linh, *supra* note 58, at 87.

⁷² Linh, *supra* note 58, at 89.

⁷³ Draft EVIPA, Article 2.7. This can potentially give rise to concerns from investors with investment interest in Vietnam's land use rights. This is because Vietnam's Law on Land prescribes a broad set of circumstances in which "land recovery" can take place, including: (i) for national defense or security purposes; and/or (ii) for socio-economic development purposes which are in the national or public interest: Law on Land No. 45/2013/QH13, The National Assembly of Vietnam, November 29, 2013, Chapter VI.

- (a) for a purpose in accordance with the applicable domestic laws and regulations; and
- (b) upon payment of compensation equivalent to the market value, while recognising the applicable domestic laws and regulations.

Claims for expropriation of land against Vietnam are not uncommon and in fact, some of the largest investment arbitrations pursued against the state were likely land-related, including *Trinh Vinh Binh and Binh Chau Joint Stock Company v Vietnam*, *Michael McKenzie v Vietnam*, and *Shin Dong Baig v Vietnam*.⁷⁴ The land expropriation reservation is not unique to the Draft EVIPA, and such reservation has been incorporated in the ISDS provisions of the CPTPP.⁷⁵

The court's role in ISDS: The recognition and enforcement of foreign arbitral awards

Judicial Involvement in the Arbitration Process

Save for ICSID arbitrations, the extent to which a state is able to intervene in the arbitration process will be determinant upon the seat, or the legal place of the arbitration that is typically determined by the arbitration tribunal. In particular:

- (a) In an ICSID arbitration, there is no seat, and the proceedings are considered to be “delocalised” from the domestic procedures, such that the local courts are barred from intervening in the ICSID process.⁷⁶ This is made possible by the contracting states’ ratification of the ICSID Convention that enshrines their international commitment towards such delocalisation.
- (b) For non-ICSID arbitrations, such as arbitration under the UNCITRAL Arbitration Rules or the ICSID Additional Facility Rules, unless the ISDS provision stipulates, or there is an agreement otherwise, the tribunal will typically determine this. However, seldom is an investment arbitration seated in the jurisdiction of a disputant (especially of the host state), as this would compromise the extent of any neutrality that international arbitration is to attract.⁷⁷

It follows that the determination of a seat influences the extent (if any) to which the Vietnamese court is able to intervene in the arbitration process. Relevant to this principle, there has yet to be an instance in which the Vietnamese courts have attempted to intervene in an investment arbitration, or otherwise an international arbitration with a seat domiciled outside of Vietnam. Such attempt, should it be carried out, would have been futile from both a legal and procedural perspective, while its enforceability would see the state depart from its international commitments. It would not be acceptable to the international investment community if a

⁷⁴ *Shin Dong Baig v. Socialist Republic of Vietnam*, ICSID Case No. ARB (AF)/18/2.

⁷⁵ Nguyen Manh Dzong & Nguyen Thi Thu Trang, International Investment Dispute Resolution in Vietnam: Opportunities and Challenges. In Julien Chaisse & Luke Nottage (Eds.), *International Investment Treaties and Arbitration Across Asia*. BRILL, 2018.

⁷⁶ ICSID, Process Overview, ICSID World Bank, <https://icsid.worldbank.org/en/Pages/process/Overview.aspx> (last accessed March 26, 2019).

⁷⁷ Muruga Perumal Ramaswamy, Enforcement of ICSID and Non-ICSID Arbitration Awards and the Enforcement in BRICS, 15 *International Journal of Business, Economics and Law* 15, at 75.

national court were conferred with powers to review in depth the awards in the context of its national laws.⁷⁸

Recognition and enforcement of foreign arbitration awards

Relevant for this topic (and similarly related to the seat of arbitration), the judiciary's role in the "arbitration process" primarily comes into play at the point in which the arbitration award is rendered, and where the investor pursues measures to recognise and enforce it against the host state. In these circumstances, for the case of a non-ICSID arbitration, any challenge against the award's recognition will be subject to the law of the seat of arbitration.⁷⁹ If the seat of arbitration is not the host state (as is often the case), then the standards and procedures for judicial review in that state will not ordinarily be of concern. Further, it is typically in the investor's interest to champion for a seat that is perceived to be more "neutral" in the interest of an independent and impartial judicial review).⁸⁰

Notwithstanding such seat, and the provisions of the New York Convention that prescribes a general obligation on the member state to recognise the arbitration award as binding, the extent of recognition (if any) can still be subject to the member state's national laws. In practice, awards in which a seat is designated in a jurisdiction outside Vietnam's territory will be considered a "foreign arbitration award" - which may be interpreted as encompassing investment arbitration awards. Accordingly, such award will likely to be subject to the recognition procedures under the Civil Procedure Code (2015),⁸¹ in which Article 424 prescribes the scope of awards that may be recognisable and enforceable:

Article 424. Foreign arbitrators' award that shall be recognised and enforced in Vietnam

1. The following foreign arbitrators' award shall be considered to be recognised and enforced in Vietnam:
 - (a) Arbitration awards of a foreign country which is a signatory to an international treaty on the recognition and enforcement of foreign arbitration awards with Vietnam;
 - (b) Foreign arbitration awards other than those specified in point (a) of this [Article 424.1] on the basis of principle of reciprocity.
2. Foreign arbitration awards specified in Clause 1 of this [Article 424] to be considered to be recognised and enforced in Vietnam shall be final awards of the arbitral tribunal that resolve all the contents of the dispute, complete the arbitral procedures and are effective.
3. Foreign arbitrations and foreign arbitrators' awards that are provided for in Clause 1 of this [Article 424] shall be determined according to the provisions of Vietnamese Law on Commercial Arbitration.

⁷⁸ Kamal Huseynli, *Enforcement of Investment Arbitration Awards: Problems and Solutions*, (2017) 31 *Baku State University Law Review* 40, at 64.

⁷⁹ Ramaswamy, *supra* note 77, at 75.

⁸⁰ *Ibid.*

⁸¹ Civil Procedure Code (2015), Chapter XXXV, Part VII.

Article 424.1(a) of the Civil Procedure Code (2015) does not identify any particular treaty, although its reference is most commonly associated with the New York Convention. Nowadays the legal basis upon which a foreign (commercial) arbitration award is recognised is typically through this provision, in view of the expansive scope of signatories to the New York Convention. As this provision applies to any international treaty, it is arguably extendable to the ICSID Convention as well. Where no such treaty exists (e.g., a foreign award issued in a state that is not a member of the New York Convention), then recognition shall be achieved on a “reciprocity” basis. To date, there has been no clear guidance as to the elements to which a court is required to be satisfied in order to apply recognition on reciprocity grounds.⁸²

The Civil Procedure Code (2015) envisages a two-step process for an award creditor to obtain relief: (i) recognition of the foreign arbitration award by the competent Vietnamese court; and (ii) thereafter enforcement by the competent civil judgment enforcement authority.⁸³ On the completion of these two steps, the award will be legally effective in the same manner as an effective decision of a Vietnamese court or a Vietnamese arbitration institution, and would be enforced in accordance with the procedures for enforcing a civil judgment.⁸⁴ The Civil Procedure Code (2015) also provides for a maximum timeline of approximately six months until issuance of a decision to recognise (or not to recognise) a foreign arbitration award. However, while this Code prescribes specific procedures and timelines for each milestone, there is often divergence between the law and practice. It is not unusual for such legislated timelines to be prolonged for multiple reasons, including the workload of the court, perceived insufficiency of applications, requests for postponements and non-cooperation or attendance by involved parties. The timeline is also impacted by the fact that one level of ordinary appeal is permitted against the initial decision by the court to recognise (or not recognize) the arbitration award.⁸⁵

Grounds for refusing recognition of a foreign arbitration award

One main cause of practical inefficiencies is often the consideration by the court of the factors that may allow it to refuse the recognition of a foreign arbitration award. In particular, the court must not recognise a foreign arbitration award if the award debtor provides sufficient evidence to the court to establish any of the following cases:⁸⁶

- (a) The parties of the arbitration agreement do not have capacity to conclude such agreement according to the law applicable to each party;
- (b) The arbitration agreement is not legally effective according to the law of a country which is chosen to be applied or according to the law of where the award is made in case the parties cannot choose a law to be applied to such agreement;
- (c) The award debtors being agencies, organisations and individuals were not promptly and sufficiently notified of the appointment of the

⁸² However, it is likely that the competent court will consider the extent to which the relevant state has recognised or enforced an arbitration award issued in Vietnam. In other words, whether that state has reciprocated in such process.

⁸³ Civil Procedure Code (2015), Article 427.3. “A civil judgment/decision of a foreign court or the award of a foreign arbitrator shall be enforced in Vietnam only when the decision of a Vietnamese Court to recognise and enforce such civil judgment/decision and/or award takes legal effect”.

⁸⁴ Civil Procedure Code (2015), Article 427.2.

⁸⁵ Civil Procedure Code (2015), Article 461.

⁸⁶ Civil Procedure Code (2015), Article 459.1.

arbitrator/tribunal and of procedures for adjudicating the dispute through foreign arbitration, or due to other plausible reasons, such agencies, organisations and individuals were unable to exercise their procedural rights;

- (d) The foreign arbitrator's award was in respect of a dispute that neither disputing party had requested to be settled or exceeds the request of the parties to the arbitration agreement;⁸⁷
- (e) The composition of the foreign arbitrator and/or procedures for settling the disputes adjudicated by the foreign arbitrator does not comply with the arbitration agreement or to the law of the country where the foreign arbitrator's award has been made (in case the arbitration agreement does not provide for such matters);
- (f) The foreign arbitrator's award had not taken mandatory legal effect against the parties; or
- (g) The enforcement of the foreign arbitrator's award has been cancelled or terminated by a competent agency of the country where such award is made or the home country of the law that is applied.

The burden of proof lies on the award debtor to establish the above (such that the court would and should take the foreign arbitration award on face value). However, in practice, the courts have employed their inquisitorial powers in shifting the onus onto the award creditor to establish that the foreign award does not fall within the above cases. Considering the extensive scope of these cases, this has at times proven, to be overwhelming for a judgment creditor. The court can also refuse to recognise a foreign arbitration award if it considers (i.e., without any requirement for the award debtor to submit the same) that:⁸⁸

- (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".

Of the above, the annulment on the grounds of violating the "basic principles of Vietnamese law" has drawn the greatest attention. It is slightly distinguishable from the public policy provision under the New York Convention,⁸⁹ but modelled on a similar concept.⁹⁰ While each state would have its own concept of "public policy" in the context of the New York Convention, many civil law jurisdictions, such as Switzerland and Germany, have recognised them as reflecting fundamental legal principles or notions.⁹¹

⁸⁷ If the relevant (infringing) sections in the arbitration award can be separated from the remainder of the award then the remaining portions may be recognised and enforced in Vietnam.

⁸⁸ Civil Procedure Code (2015), Article 459.2.

⁸⁹ New York Convention, Article V.2(b). "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...the recognition or enforcement of the award would be contrary to the public policy of that country."

⁹⁰ Elena Blanco *et al.*, *Evolving to Perfection? Enforcement of International Arbitral Awards in Vietnam* (2010) 11 *Journal of World Investment and Trade* 39.

⁹¹ Alan Redfern & Mark Hunter, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, 2004, at 41.

Today, the term has typically been associated with a narrow interpretation.⁹² Vietnam has not enacted a specific definition for “basic principles of Vietnamese law”, and this has resulted in an inconsistent application among the courts. Unfortunately, this has led to some courts applying it broadly. This is done in order to consider any inconsistency in the findings of the arbitrator(s) during the course of the arbitration with a provision of Vietnamese law, to constitute a violation of such “basic principles” (even if the substantive law is not of Vietnam). In 2014, the Council of the Supreme People’s Court had attempted to promulgate guidance to the provincial/municipal people’s courts on interpreting such provision. This defined such principles as where “the arbitral award violates the effective basic rules for formulation and implementation of the laws of Vietnam.”⁹³ It further elaborated that the courts could cancel an arbitration award on such basis if:⁹⁴

- (a) the court proved that the arbitration award contravened one or multiple basic rules of Vietnamese law;
- (b) such rules were not adhered to by the arbitration tribunal upon rendering the arbitration award; and
- (c) the arbitration award was a serious infringement upon the interests of the state, the lawful rights and interests of either party (to the arbitration) or to a third party.

However, such guidance was largely ineffective in practice, as it was layered on another undefined term, thus creating uncertainty as to what such “basic rules” comprised. It did not resolve the complete discretion that was afforded to the courts in determining the extent of “basic principles of the laws of Vietnam”.

The implications of this discretion was criticised among the legal and business community, as it became the most commonly cited grounds on which the Vietnamese courts refused to recognise a foreign arbitration award. This led to a variety of outcomes.⁹⁵ For example, in *Tyco Services Singapore Pte. Ltd. v Leighton Contractors (VN) Ltd.*,⁹⁶ a failure by the Singaporean claimant in obtaining a foreign construction contractor’s license under Vietnam’s construction laws was considered a violation of Vietnamese law (or the basic principles of it). Accordingly, the resultant award was refused recognition.⁹⁷ In *Toepfer v Sao Mai*,⁹⁸ the claimant’s alleged failure to mitigate their damages in accordance with Vietnam’s Civil Code was also considered a violation. Although the Civil Procedure Code (2015) procedurally prevented a re-opening by

⁹² Blanco *et al.*, supra note **Error! Bookmark not defined.**90 at 39.

⁹³ Resolution No. 02/2014/NQ-HDTP providing guidelines for the Law on Commercial Arbitration, Council of Judges of the Supreme People’s Court, March 20, 2014, Article 14.2(dd).

⁹⁴ Ibid.

⁹⁵ Nadia Dridi, ‘The Enforcement of Foreign Arbitration Awards in Vietnam: Overview and Criticisms’ (2017) 59 Harvard International Law Review. Online journal, available at <http://www.harvardilj.org/2017/12/the-enforcement-of-foreign-arbitration-awards-in-vietnam-overview-and-criticisms/> (last accessed October 19, 2018).

⁹⁶ Decision No. 02/PTDS, January 21, 2003, Court of Appeal of Ho Chi Minh City.

⁹⁷ Blanco *et al.*, supra note **Error! Bookmark not defined.** at 40, 41.

⁹⁸ Dridi, supra note 95.

the court of the merits of the arbitration,⁹⁹ in practice this was still commonly carried out by the courts.¹⁰⁰

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.”

The judiciary’s track-record

While no recent statistics are publicly available, according to the Supreme People’s Court of Vietnam, between the years 2000 and 2014, only 24 of 52 petitions for recognition of a foreign arbitration award were successful.¹⁰¹ The reasons for this track record, despite the supposed effect of *the New York Convention*, and leaving aside the enablement of discretion of the domestic laws, may be attributed to two major reasons:¹⁰²

- (a) First, the Vietnamese courts have a tendency to apply only the domestic laws, while neglecting the impact of international law. This is despite the fact that the provisions of international treaties are supposed to take precedence over the provisions of domestic law.¹⁰³
- (b) Secondly, the Vietnamese courts have traditionally maintained a conservative view, electing to refuse recognition on the intention to protect the interests of Vietnamese entities — particularly where state-owned corporations are involved as the award debtors.¹⁰⁴

Notably, these statistics do not simply capture data from awards of investment disputes, but generally any foreign commercial arbitration awards. If it were only to cover investment disputes, then perhaps the record may be even worse. Considering the potential impact of investment treaties to FDI inflows, as well as the courts’ general reluctance to avoid direct application of international law in their legal adjudicative process, there is a fear that many of

⁹⁹ Civil Procedure Code (2015), Article 458.4. The predecessor Civil Procedure Code (2004) also contained a similar provision at Article 369.4.

¹⁰⁰ Blanco *et al.*, supra note **Error! Bookmark not defined.** at 40.

¹⁰¹ Ministry of Justice, Hội nghị tổng kết 20 năm thực hiện công ước New York năm 1958 về công nhận và cho thi hành quyết định của trọng tài nước ngoài [English translation: *Review of Conference on 20 Years of Implementing the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*], <http://moj.gov.vn/qt/tintuc/Pages/hoat-dong-cua-lanh-dao-bo.aspx?ItemID=2052>, November 21, 2014 (last accessed March 26, 2019).

¹⁰² Blanco *et al.*, supra note **Error! Bookmark not defined.** at 40, 41.

¹⁰³ Law on Treaties No. 108/2016/QH13, The National Assembly, April 9, 2016, Article 6.1

¹⁰⁴ Dzung, Trang, supra note **75Error! Bookmark not defined.**, at 291.

the recognition and enforcement mechanisms introduced by the ICSID Convention may go disregarded.

Should Vietnam accede to the ICSID Convention?

Overall, improving the business and investment environment of Vietnam requires a highly committed and sustainable effort from the entire society, including governmental enforcement agencies, the law and policy makers, the judicial organs, and the entrepreneurial community (including domestic and foreign investors). In Southeast Asia, Vietnam has demonstrably become one of the most successful states in attracting FDI inflows since its economic reforms of 1986. The continued inflows have been a significant contributor to the state's growth and position in the global economy, which was traditionally founded on agriculture. In comparison to its regional neighbors, as a host state it has been said that Vietnam has surpassed Indonesia, Thailand and the Philippines in terms of FDI attraction.¹⁰⁵ However, Vietnam needs to continue its development, and in order to maintain its economic growth, the state will undoubtedly need to implement substantive measures to protect the interests of existing and future foreign investors. Vietnam's growth is expected to continue from 2019 onwards,¹⁰⁶ providing a ripe opportunity for the state to enhance its economic position by improving the existing investment environment and capacity constraints.

Any country that has tightly bridged its economic growth with attraction of FDI inflows will always be positioned as an "obligatory state." This is especially so if that state has acceded to international investment instruments in order to afford foreign investors recourse against the host state as an obligor (e.g., investment arbitration as a means of finality, or other means of dispute settlement). In that context, regardless of whether Vietnam would become a member of the ICSID Convention, as a host state, foreign investors still have a choice of legal forums to pursue relief against the state in the event of the state's violation of its international commitments under those investment instruments. Since the economic reforms of 1986, Vietnam has already faced a multitude of investment disputes with an aggregate quantum in the billions of US dollars. For example, *Michael McKenzie v. Vietnam* evidences that even if Vietnam ratifies the ICSID Convention, it would not necessarily result in an increase in the volume of investment disputes filed against the state.¹⁰⁷ More particularly for Vietnam, from a practical point of view it is not whether ratification of the ICSID Convention would aid the state towards capturing more FDI inflows. Rather, it whether such ratification will be able to convey a strong and positive message to the state to foreign investors seeking confidence that their investments will be met with economic, political and legal protection and stability.

With respect to the latter, this is concerned with whether the domestic legal system will be able to align with the international standards that have been (largely) adopted globally. To that extent, as a popular concept, when developing economies such as Vietnam intend to ratify any multilateral or bilateral treaty, they must work towards reforming existing domestic legislation

¹⁰⁵ Sri Jegarajah, CNBC, Vietnam shines despite Southeast Asia's struggles with trade and emerging market pressures, September 10, 2018, <https://www.cnbc.com/2018/09/11/vietnam-economy-shines-despite-southeast-asia-struggles-with-trade.html> (last accessed March 19, 2019).

¹⁰⁶ Viet Nam News, Prospects look good for VN's economy in 2019, <https://vietnamnews.vn/economy/484012/prospects-look-good-for-vns-economy-in-2019.html>, January 18, 2019 (last accessed March 19, 2019)

¹⁰⁷ Ahkil Raina *et al.*, TradeLab – International Economic Law Clinic, Should Country X Become a Member of the ICSID?, January 2018. Available at <https://georgetown.app.box.com/s/e19eyzc3ly8620usgeq53ktkckf2eqbt> (last accessed March 19, 2019).

to align with the international commitments in those treaties. This can be done prior to or after the ratification of international legal instruments (though the former action is preferred). In its current legal framework, Vietnam faces challenges in this respect if it were to ratify the ICSID Convention. This is because of the absence of any real substantive difference compared to its dispute mechanism, and given issues arise from practice, rather than theory. It is, therefore, a matter of allowing time to enable Vietnam to incorporate certain flexibility in its choice of forum (arbitration) in settling investment disputes with investors.

Vietnam's domestic law, including particularly the Law on Investment (2014), is presently open and does not give rise to tangible restrictions with regard to allowing a path to investment arbitration. Perhaps of greater concern is the reform towards the recognition and enforcement of foreign arbitration awards, including future ICSID arbitration awards. This is not a recent area of concern, considering the existing challenges to the recognition and enforcement of foreign commercial arbitration awards, and the international commitment for the same in the New York Convention. Where such recognition is mandated by the ICSID Convention Vietnam will need to prepare its legal framework, together with the mindset and competence of the judicial authorities in their treatment of awards that are rendered against the state.

Whereas conventional ISDS mechanisms had generally left enforcement to the sole mercy of the courts in interpreting the New York Convention, the ISDS provisions in the Draft EVIPA have suggested a recent breakthrough in Vietnam's openness towards reforming its system for recognising awards. This goes so far as to pave the way for the state's ratification of the ICSID Convention. The very existence of a five-year "honeymoon period" under the Draft EVIPA with regard to automatic enforcement of the award seems to suggest that this finality provision have been one of the major impediments in Vietnam's consideration of ICSID Convention ratification.

Hence, whether Vietnam should proceed with ICSID ratification will be determinant on balancing the advantages and disadvantages of doing so; although such analysis has arguably already been accomplished by the state in consideration of the Draft EVIPA. Although it is still subject to further negotiations, the domestic legal implications of the Draft EVIPA's ISDS provisions are comparable to those that would be brought about under the ICSID Convention if they were to be ratified. This is particularly so of the ICSID Convention and the Draft EVIPA mandate that the arbitration award is to be final and binding as if it were a final judgment of the host state's national court.¹⁰⁸ Accordingly, if Vietnam were to accede to the EVIPA and its existing ISDS provisions in the near future, there would be optimism that Vietnam would be looking to accede to the ICSID Convention as well, not least because it would already be in the process of readying its regulatory framework to accommodate the EVIPA provisions. It follows that the only significant pending issue - largely related to timing - will be addressed in due course.

¹⁰⁸ ICSID Convention, Article 54(1); Draft EVIPA, Article 3.57(1). Notwithstanding this, it is worth noting that the Draft EVIPA's ISDS provisions cross-references the ICSID Convention, in stipulating that "*for greater certainty*", a final award rendered under its provisions "*shall qualify as an award under Section 6 of Chapter IV of the ICSID Convention*". In any case, however, even if Vietnam were to ratify the ICSID Convention, considering the EU is not a member, it remains to be seen how such type of provision would be enlivened in reality.

Conclusions

For emerging economies such as Vietnam, it is essential to formulate a realistic roadmap for implementation based upon an achievable timeline. While ICSID has published a straightforward guide to membership to the ICSID Convention (including in signing and ratification), which appears to be addressed to state players, Vietnam would still need to ready its existing legal framework for such membership.¹⁰⁹ A detailed and clear roadmap will ensure that costs are minimized, for both states and investors. In particular, there needs to be a balance between the state's interest in reducing its exposure to legal risks and the imperative of developing confidence for investors in the host country.

As a matter of practice, a single dispute settlement mechanism is no longer suitable for Vietnam's needs. One of the primary reasons why Vietnam has faced difficulty in being able to foster the confidence in its investment environment for foreign investors is because consistency, transparency and predictability (including recognising foreign awards) have been challenging issues for Vietnam. Indeed, most of the 167 states and territories that have adopted ISDS-style mechanisms are developed nations, from which a majority of investors originates. As such, the ICSID Convention must be seen as a necessity, taking into account the particular context of Vietnam's legal, economic and political reality.

The decision to ratify also gives rise to the question as to whether the state's ratification should be qualified by any reservation as permitted under the ICSID Convention.¹¹⁰ In particular, the ICSID Convention would enable Vietnam to notify ICSID on the class or classes of disputes that it seeks to exclude from the jurisdiction of ICSID. Notably, unlike the permissible reservations for the New York Convention to which Vietnam had availed on signing, the reservations under the ICSID Convention only envisage those that seek to limit the category of disputes that may be submitted, and does not otherwise provide for treaty reservations.¹¹¹ This has been achieved by member states in a few instances. For example, at the time of China's ratification of the ICSID Convention, the state included a reservation that it would only submit to the jurisdiction of ICSID in respect of disputes over compensation resulting from expropriation and nationalisation (to the exclusion of other types of disputes, such as breaches of investment agreements).¹¹²

It is worth noting that while Vietnam has since made a commercial reservation to the New York Convention, this reservation already purports to include investment disputes in general terms (as opposed to limiting certain subsets of investment disputes). Therefore, such reservation would not be pursuable by Vietnam for the purposes of Article 54(3) of the ICSID Convention. Nevertheless, one pertinent reservation that stands out is the "land expropriation reservation" which Vietnam has prescribed in the Draft EVIPA and the CPTPP. This

¹⁰⁹ ICSID, Guide to Membership in the ICSID Convention, <https://icsid.worldbank.org/en/Documents/about/Guide%20to%20Membership%20in%20the%20ICSID%20Convention%20-%20EN.pdf> (last accessed February 22, 2019).

¹¹⁰ ICSID Convention, Article 25(4).

¹¹¹ ICSID, Joining ICSID, <https://icsid.worldbank.org/en/Pages/about/Joining-ICSID.aspx> (last accessed February 23, 2019).

¹¹² ICSID, Contracting States and Measures Taken by them for the purpose of the Convention (February 2019), <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%208-Contracting%20States%20and%20Measures%20Taken%20by%20Them%20for%20the%20Purpose%20of%20the%20Convention.pdf>, February 2019 (last accessed March 10, 2019).

reservation, in essence, enables Vietnam to expropriate land in accordance with its domestic land laws and on the condition that compensation is paid to the expropriated party in observation of such laws. The inclusion of this reservation appears to be a recent phenomenon and save for some relatively recent investment treaties,¹¹³ it has not been specifically incorporated in Vietnam's other BITs. The justification for this type of reservation has not been clearly elucidated. While such reservation is in line with Vietnam's notion of "common property" which is associated with the state's one-party communist regime,¹¹⁴ it should be pointed out that China, with a similar political regime, has not adopted such reservation. Therefore, to the extent it would alleviate the state's concern over limitations to its ability to recover land on allowable legal grounds¹¹⁵ - and accordingly, remove the primary obstacle to ratification, it is suggested that Vietnam deposits its notice to incorporate such reservation at the time of signing the ICSID Convention.

¹¹³ For example, the mutually applicable exception under Agreement between the Government of the United Arab Emirates and the Government of the Socialist Republic of Vietnam for the Protection and Promotion of Investments (February 16, 2009), Article 6.3.

¹¹⁴ Constitution of Vietnam (2013), Article 53; Law on Land No. 45/2013/QH13, The National Assembly of Vietnam, November 29, 2013, Article 4. The central theme is that all land belongs to the entire people and is managed by the state.

¹¹⁵ Although, the reasons on which Vietnam can expropriate (or "recover") land is relatively wide under Vietnam's land laws.