

Type: **Research Article**

Investor-State Dispute Settlement Mechanism in Vietnam's New Generation Free Trade Agreements: Challenges and Recommendations

Nguyen Chi Thang✉

HUTECH University, Ho Chi Minh City, Vietnam

✉ Corresponding email: nc.thang@hutech.edu.vn

Abstract *In the recent years, Vietnam's attraction to foreign investment capital has increased rapidly. As a result, the disputes in the field of foreign investment have emerged more frequently. The fact that a dispute occurs between the government of the host country and a foreign investors, regardless of its cause, will bring adverse consequences to both parties. Amicable settlement of such disputes is an important factor to improve the efficiency of foreign investment, maintaining the trust between the host country and foreign investors. Therefore, stipulating commitments on the dispute settlement mechanism for international investment in multilateral*

free trade agreements such as Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Vietnam - EU Investment Protection Agreement (EVIPA), and Regional Comprehensive Economic Partnership (RCEP) are indispensable. Therefore, in this context, the paper studies the investor-state dispute settlement (ISDS) mechanism in new-generation free trade agreements to which Vietnam is a member, namely EVIPA, CPTPP, RCEP; accordingly, the paper proposes some recommendations to Vietnam.

Keywords *Investment Dispute, Dispute Resolution Mechanism, Free Trade Agreement*

1. Introduction

Negotiation, consultation and conciliation are increasingly being proven to be effective dispute resolution methods besides arbitration and courts, consistent with international investment disputes. These methods are also known as the Alternative Dispute Resolution (ADR), a dispute resolution process whereby the disputing parties can reach an agreement without going to courts.¹ The results of negotiation, consultation and conciliation maximize the self-determination rights of the parties, and be very flexible in actively choosing the settlement subject or even settlement procedures. Therefore, the use of ADR methods can reduce the time and cost of litigation.

The FTAs governing the investment sector all have provisions to settle disputes between foreign investors and the government, in which negotiation, consultation and conciliation are recognized as an

¹ Dordi Bocconi, Claudio, and Nguyen T Tam. *Textbook on International Investment Law Hanoi Law University*. (MUTRAP, 2017), pp. 160-161.

option of the parties when settling investment disputes.²

Any kind of communication, whether direct or indirect, in which people with divergent interests debate potential collaborative actions to manage and ultimately settle their conflict is referred to as negotiation.³ Negotiation is also often the first method of settlement in the dispute settlement process,⁴ reflected in the fact that the parties to the dispute actively meet, discuss, and agree on the rights and obligations of each party without the involvement of any third party. This method is often preferred by the parties because the procedure is quick, low cost, the parties have the right to decide, does not affect the cooperation relationship between the parties, the reputation and business secrets are protected. However, the outcome of the negotiation is not guaranteed by law, completely depends on the goodwill of the parties. In the EVIPA⁵, or CPTPP⁶, the negotiation is encouraged to be used but not a mandatory method; this is the premise for dispute settlement by subsequent procedural methods.

In the further context, mediation is a flexible and consensual technique in which a neutral facilitator helps the parties reach a

² James Zhan, et.al. *Investor-State Disputes: Prevention and Alternatives to Arbitration*. (New York: United Nations, 2010). Available online at https://unctad.org/system/files/official-document/diaeia200911_en.pdf

³ Dreu, Carsten K W De. 2010. "Social Conflict: The Emergence and Consequences of Struggle and Negotiation." In *Handbook of Social Psychology*: 1003.

⁴ Sajad Ahmad. "Peaceful settlement of disputes." *Research Ambition an International Multidisciplinary e-Journal* 1, no. 1 (2016): 68-75.

⁵ Article 3.29 Chapter III EVIPA: "Any dispute should as far as possible be settled amicably through negotiations or mediation and, where possible, before the submission of a request for consultations pursuant to Article 3.30 (Consultations). Such settlement may be agreed at any time, including after the commencement of proceedings."

⁶ Article 9.18(1) Chapter 9 CPTPP: "In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation".

negotiated settlement of their dispute.⁷ Similar to negotiation, mediation is also a method of resolving disputes that is implemented completely based on the goodwill of the parties. Compared with the negotiation between the parties in a dispute, when conducting conciliation, the parties can agree to choose an independent, knowledgeable, and skilled intermediary to resolve disputes, giving advice on the rights and obligations of the parties. The mediator's opinion is for reference only and the outcome of the mediation session is the agreement of the parties, not the mediator.

Before using the consultation method to settle investment disputes, the EVIPA recommends that the parties are willing to resolve their disputes by themselves by negotiation or mediation, and this self-settlement is encouraged to apply at any time, including while resolving the dispute by other procedures. This provision creates the maximum opportunity for obtaining a dispute settlement plan based on consensus of the two parties, thereby facilitating the implementation.⁸ In addition, the EVIPA also specifically stipulates the basic mediation settlement for the parties to follow when settling investment disputes.⁹

Likewise, the CPTPP also encourages parties to resolve disputes through consultation and negotiation, including mediation.¹⁰ This regulation intends to encourage the use of good faith, friendly methods, not mandatory. In the RCEP (ASEAN+6), the Dispute

⁷ N. S., Şimşek, and K. Bölten. "Mediation as a Charming Dispute Resolution Mechanism." *Revista Akademike Legal* 1 (2017): 1-13.

⁸ European Commission. 2022. "Individual Information Sheets on Implementation of EU Trade Agreements Accompanying the Document Report From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions on Implementation and Enforcement of EU Trade Agreements {COM(2022) 730 Final}."

⁹ Appendix 9, 10 EVIPA on Mediation Mechanism in Investment Disputes Cases.

¹⁰ Paragraph 1 Article 9.18 Chapter 9 CPTPP

Settlement Chapter also contains provisions on negotiation, mediation and reconciliation, similar with the rules belong to CPTPP Chapter 28. In essence, the content of the provisions on negotiation and mediation of these two agreements is still quite similar to that of EVIPA. Accordingly, when a dispute occurs, investors are encouraged to use negotiation and mediation to resolve the dispute in good faith before seeking other jurisdictional solutions.

In addition, consultation¹¹ is a method of resolving disputes between investors and the government when the parties cannot resolve them through negotiation or conciliation, an investor of a member party can submit a request for consultation to the member party about the measure of violation. Basically, the method of consultation as well as negotiation, the two sides meet themselves to discuss dispute settlement methods, but in FTA agreements, consultation is the first compulsory settlement method in the investment dispute settlement mechanism, when the parties cannot resolve the dispute by consultation, then other methods such as conciliation, arbitration, court will be considered.

EVIPA provides that if the dispute cannot be resolved in good faith, the complaining party making a claim of violation of the provisions of Article 3.27(1) must send to the other party a written request for consultations to settle disputes.¹²

CPTPP and RCEP also provide for consultations similar to EVIPA, when the disputing parties are unable to negotiate and conciliate themselves to come up with a solution, an investor of a

¹¹ Collins, 2012

¹² EVIPA provides that if the dispute cannot be resolved in good faith, the complaining party making a claim of violation of the provisions of Article 3.27(1) must send to the other Party a written request for consultations. to settle disputes

member party can submit a request for consultation to the other member party about the measure of violation.¹³

Consultations in all three agreements are required before the investor files a request for subsequent arbitration. For the EVIPA, the party requesting consultations may initiate arbitration in the event that the other party does not respond to the request for consultations within 15 days from the date of receipt of the request for consultations; Consultations are not conducted within 30 days of receipt of the request for consultations or, in urgent cases, consultations are not conducted within 15 days of receipt of the request for consultations; The parties agree not to hold consultations; or the consultation has ended but the Parties have not reached a mutually agreed solution.¹⁴

2. Method

The research method employed to analyze the Investor-State Dispute Settlement (ISDS) mechanism in Vietnam's new generation free trade agreements involves a comprehensive and multifaceted approach. Initially, a systematic literature review is conducted to understand existing academic perspectives, legal analyses, and case studies on ISDS mechanisms globally and specifically within the context of Vietnam's FTAs. This foundational research serves as the basis for identifying key challenges and trends. Subsequently, qualitative research methods, such as interviews with legal experts, policymakers, and stakeholders in the investment and trade sectors, are employed to gather insights into the practical implications and perceptions of the ISDS mechanism. Additionally, a thorough examination of the text of relevant trade agreements and legal

¹³ Article 9.18 CPTPP và Article 19.6 Chapter 19 RCEP.

¹⁴ Article 3.3 Chapter III EVIPA

documents is undertaken to extract explicit provisions and understand the intricacies of the ISDS framework. The combination of literature review, qualitative interviews, and legal document analysis enables a comprehensive understanding of the challenges posed by the ISDS mechanism in Vietnam's FTAs and facilitates the formulation of informed recommendations.

In the second phase of the research, a comparative analysis is conducted to draw insights from other countries' experiences with ISDS mechanisms in their trade agreements. This involves studying cases where similar mechanisms have been implemented and identifying best practices and potential pitfalls. The comparative analysis provides a broader perspective on how different jurisdictions have addressed similar challenges and offers valuable lessons that can inform recommendations for Vietnam. Through this comprehensive research method, the study aims to provide a nuanced examination of the ISDS mechanism, taking into account legal frameworks, practical experiences, and international comparisons, ultimately contributing to a well-informed discussion on the challenges and recommendations associated with ISDS in Vietnam's new generation FTAs.

3. Result & Discussion

A. Settlement of international investment disputes by arbitration

Arbitration for international investment dispute settlement is currently the dominant model to enforce the host country's obligation. The CPTPP operates under the framework of the traditional investor and state arbitration. Arbitration in the CPTPP (as with most new-generation FTAs) operates in parallel and

independently of the domestic judicial system; accordingly investors are able to use the ISDS mechanism without having to seek to a domestic court.¹⁵ The CPTPP also allows investors to initiate claims without the participation or permission of the state of investors' nationality, and allows them to choose from among different arbitration rules, including arbitration under the ICSID Convention, or the UNCITRAL Arbitration Rules.¹⁶ Under both the ICSID and UNCITRAL rules, each disputing party has the right to appoint an arbitrator. The chairperson of the arbitral tribunal shall be appointed by agreement of the parties or by an arbitrator appointed by the parties, after consulting the parties.

Regarding remedies, the priority of the CPTPP is monetary damages, the arbitral tribunals cannot issue a specific ruling, such as granting licenses to investors, but they can order a compensation of properties provided that the host state may always choose to compensate in cash rather than return the property.¹⁷ Therefore, the CPTPP does not interfere with the freedom of the host country to adopt any behavior it deems appropriate to foreign investors, including discriminatory measures. Overall, the CPTPP continues to believe in arbitration as an appropriate mechanism to resolve disputes between investors. The CPTPP contains only one provision that requires the contracting parties to consider the choice of an appellate mechanism in the future.¹⁸

In case the investment dispute cannot be resolved through negotiation or conciliation, after a period of 6 months from the date of sending the request for consultation, the complaining party has

¹⁵ Paragraph 1 Article 9.19 CPTPP.

¹⁶ Paragraph 5 Article 9.19 CPTPP.

¹⁷ Paragraph 1.b Article 9.29 CPTPP.

¹⁸ Paragraph 11 Article 9.23 CPTPP.

the right to file a complaint to the Tribunal of First Instance¹⁹ established under the provisions of EVIPA, this dossier is sent to the respondent party, the European Union or Vietnam, and one copy is sent to the Trade Commission.²⁰ Note that before filing a claim with the tribunal, the complaining party must send a written notice of its intention to submit a claim to resolve the dispute to the other party.²¹ In fact, this is the first time in the history of free trade agreements that Vietnam and the EU have jointly built a permanent investment dispute settlement mechanism to replace the ad-hoc arbitration mechanism that often appears in BITs.

Unlike the CPTPP and EVIPA, although there is a separate chapter on investment protection, RCEP has no specific commitments on ISDS.²² However, RCEP has also calculated a roadmap for this, according to which within two years from the date of entry into force of the agreement, member countries discussion on ISDS mechanism will be carried out and this discussion will last for 03 years at the latest. Although the RCEP Investment Chapter does not specify any investment dispute settlement mechanism, the mechanism for settling disputes between countries is provided for in Chapter 19 (Dispute Settlement). This means that if a Party to RCEP

¹⁹ Article 3.33 Chapter III EVIPA.

²⁰ Trade Commission is an agency established by the parties and includes representatives of the EU and Vietnam, with the greatest and most general authority in the implementation of EVIPA, especially in making decisions related to the implementation of the EVIPA. examination and revision of the EVIPA; supervise and coordinate all bodies established under the Agreement, including the appointment and change in the number of members of the ISDS tribunal and of the Court of Appeal; information on matters covered by the Agreement with all relevant parties.

²¹ Article 3.32, 3.33 Chapter III EVIPA.

²² Article 10.18 of RCEP indicates that the Parties cannot reach an agreement on ISDS.

violates any of its obligations under the Investment Chapter of the RCEP, investors can request that their state initiate diplomatic protection and bring legal action against the host state under Article 19.3(1) of the RCEP. In the event the respondent fails to respond to a request for consultations in accordance with paragraph 5(a) of Article 19.6; or fail to conduct consultations in accordance with paragraph 6 of Article 19.6; or the consultations are unable to resolve the dispute within 60 days after the date on which the Respondent Party receives the request for consultations made pursuant to paragraph 1 of Article 19.6, the complaining party may request the establishment of an arbitral tribunal to consider the subject matter by notifying the Responding Party.

B. Agencies and procedures for settling international investment disputes in Vietnam's new-generation free trade agreements

1) Agencies and procedures for resolution of international investment disputes in the CPTPP

The CPTPP provides that the international investment dispute settlement body is Arbitration according to UNCITRAL procedural principles, or any other arbitration institution or rule as the plaintiff and respondent may agree, or the ICSID arbitration (including the Official Arbitration Mechanism and the Ancillary Arbitration Mechanism) if either party or both is a member of the ICSID Convention on the Settlement of International Investment Disputes.²³

The International Center for Settlement of Investment Disputes (ICSID) was established by the World Bank in 1966 to settle disputes between an ICSID Convention member state and an investor of another member state. It is a specialized international dispute

²³ Paragrahp 1 Article 9.22 Section B Chapter 9 CPTPP.

settlement body that works on a multilateral level to encourage global investment flows, thereby minimizing non-commercial risks. The ICSID Arbitration Rules and the UNCITRAL Rules are the most commonly used rules in international investment arbitration. The CPTPP dispute settlement mechanism is mainly through a 3-member arbitration panel similar to the WTO panel mechanism.²⁴ Criteria for selection of arbitrators and arbitrators with very high requirements in terms of international law, international trade, English ability, objective selection, reasonable judgment and good judgment, high independence, compliance with the codes of conduct in the Rules of Procedure.

In investment disputes, member states and foreign investors often identify the “investment” to be included in dispute settlement under the provisions of the BIT, IIA, or other FTAs. According to other Arbitration Rules such as UNCITRAL²⁵, International Chamber of Commerce (ICC)²⁶, Stockholm Chamber of Commerce (SCC), the definition of investment only needs to meet the requirements of international trade or investment agreements. However, an investment dispute to be resolved under ICSID must satisfy the requirements of both the agreement and the ICSID Convention.²⁷ The

²⁴ Paragrahp 1 Article 9.22 Section B Chapter 9 CPTPP.

²⁵ Article 1 UNCITRAL Arbitration Rules provides “Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.”

²⁶ Article 1 ICC Arbitration Rules: “The Court does not itself resolve disputes. It administers the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of ICC”

²⁷ Cole, T., & Vaksha, A. 2011. “Power-Confering Treaties: The Meaning of ‘Investment’ in the ICSID Convention.” *Leiden Journal of International Law*, 24(2), 305-330. doi:10.1017/S0922156511000033

ICSID Convention provides: “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”²⁸ Currently, most investment disputes are resolved by this mechanism. In addition, the concept of “investment” in the CPTPP, EVIPA, and RCEP²⁹ free trade agreements is very broad enough for investors to sue any state agency; Therefore, the state needs to realize this to take precautions and preparation.

The CPTPP Agreement stipulates quite detailed the process of filing an ISDS lawsuit, specifically as follows:

The first step in the dispute settlement procedure is consultation and negotiation. The Plaintiff and the Respondent must first find a solution to the dispute through (i) consultation, direct negotiation or (ii) through mediators based on a request for formal consultation in writing of the plaintiff.³⁰ The written request for consultations should briefly describe the facts relevant to the measure or measures in dispute.³¹ This provision encourages the parties to resolve disputes by negotiation, including procedures involving third parties such as mediation and conciliation, but this provision is only intended to encourage the use of amicable methods out of court, but not of a mandatory nature. Moreover, despite encouraging dispute

²⁸ Convention on Settlement of Investment Disputes between State and Foreign Citizens, Article 25, signed on 18/3/1965, 17 UST. 1270 (entered into force from 14/10/1966), [http:// icsid.worldbank.org/ ICSID/ICSID/RulesMain.jsp](http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp)

²⁹ Definition “investment” provided at Article 9.1 CPTPP, Article 10.1 RCEP, Article 1.2 EVIPA

³⁰ Paragraph 1 Article 9.18 Section B Chapter 9 CPTPP

³¹ Paragraph 2 Article 9.18 Section B Chapter 9 CPTPP

settlement by negotiation and conciliation, the CPTPP does not have specific provisions on the order and procedures for conciliation, which the parties can freely choose to conduct mediation by an organization providing mediation services such as the Singapore International Mediation Center (SIMC) or the International Chamber of Commerce (ICC) or conduct ad hoc mediation in accordance with the parties' agreement or apply the UNCITRAL Mediation Rules or the International Bar Association (IBA) Rules for Conciliation of Disputes between Investors and States.³² The procedures of these dispute resolution methods are kept confidential, without prejudice to the rights of the parties in other proceedings.

The second step of the dispute settlement procedure is that the parties bring the case to international arbitration. Here, the CPTPP stipulates that only after 06 months from the date of receipt of the request for consultation by the Respondent, the dispute cannot be resolved by the above-mentioned methods, then the plaintiff can initiate an international arbitration according to ISDS.³³ The arbitration process is carried out in two stages as follows:

The first stage is the pre-arbitration stage, at which stage the claimant can initiate arbitration when the investment dispute is not resolved within 6 months from the date the respondent receives the request for consultation. The plaintiff sends a written notice of its intention to submit the claim to arbitration ("notice of intent" – "notice of intent" – NOI) and the content of the NOI must clearly state in accordance with Clause 3, Article 9.19 of the CPTPP.

The second stage, conducting arbitration proceedings includes

³² Nguyen, Hoang, Anh Nguyen, and Khang Nguyen. 2022. "ISDS Mechanism under the EVFTA: Comparison with the CPTPP and Implications for Vietnam." *VNUHCM Journal of Economics, Business and Law* 6 (3).

³³ Paragraph 1, Article 9.19 Section B Chapter 9 CPTPP

the following 04 steps: Step 1, the plaintiff submits the claim at least 90 days after submitting the NOI.³⁴ A claim is not considered to be submitted to arbitration if more than 3 years and 6 months have elapsed since the date on which the claimant knew, or ought to have known the alleged breach, and that the claimant (or the claimant's business) suffered loss or damage.³⁵ Vietnam has its own reservation on this issue, according to which CPTPP investors will lose their right to sue under the ISDS if they have complained about the case according to the administrative complaint procedure or filed a lawsuit in a Vietnamese court.³⁶ Step 2 is about the consent of the parties to the arbitration's jurisdiction, that is, each party is required to show its consent to the submission of a claim to arbitration in accordance with the regulations.³⁷ The claimant's consent is usually in writing, together with the notice of arbitration, and a written waiver of the right to sue, or the right to continue the case in court or administrative arbitration under the provisions of the Party's law, or any other dispute settlement procedure, any procedure relating to the alleged measure. Step 3 is the selection of an arbitrator, and the last step is to proceed with dispute resolution and awarding.

In making a final award, the Arbitral Tribunal may issue an award for the entire case or for individual aspects of the case such as: (a) damages and interest; (b) return the property.³⁸ In this case, the arbitral award provides that the respondent could pay damages or return the property. The arbitral tribunal shall also rule on the costs

³⁴ Paragraph 3, Article 9.19 Section B Chapter 9 CPTPP

³⁵ Paragraph 3, Article 9.21 Section B Chapter 9 CPTPP

³⁶ Nguyen, Hoang, Anh Nguyen, and Khang Nguyen. 2022. "ISDS Mechanism under the EVFTA: Comparison with the CPTPP and Implications for Vietnam." *VNUHCM Journal of Economics, Business and Law* 6 (3). <https://doi.org/https://doi.org/10.32508/stdjelm.v6i3.1002>.

³⁷ Paragraph 1, Article 9.20 Section B Chapter 9 CPTPP

³⁸ Paragraph 1, Article 9.29 Section B Chapter 9 CPTPP

and attorneys' fees incurred by the disputing parties in conducting the arbitration, and must decide how and by whom the parties should pay such attorneys' fees and expenses.³⁹ In addition, the Arbitration council is also not allowed to award damages for the purpose of punishing or warning a party that has breached its obligations under the Agreement. Each Party to the Agreement shall provide for the enforcement of an arbitral award within its territory, and may request security of enforcement if the aggrieved party fails to comply the final judgment.⁴⁰

2) Investment Court System (ICS) mechanism and international investment dispute settlement process in EVIPA

First, on the organizational structure of the ICS

The most obvious difference between the ICS jurisdiction and the traditional ISDS arbitration mechanism is the organizational structure. Historically, ISDS cases have been heard by tribunals at international arbitration centers, consisting of arbitrators that each party proposes to choose (usually 3 people), with only one level of first instance, and the award of the arbitral tribunal is considered a final award, binding between the two parties to the dispute. However, ICS was established as a permanent investment dispute settlement body, consisting of two levels of first instance (Tribunal) and appeal (Appeal Tribunal) to adjudicate cases on international investment disputes.

According to the EVIPA, the First Instance panel will consist of

³⁹ Paragraph 3, Article 9.29 Section B Chapter 9 CPTPP

⁴⁰ Paragraph 11,12, Article 9.29 Section B Chapter 9 CPTPP

9 members, the appellate panel will consist of 6 members, at these two levels of trial there are similarities in the regulations on the membership structure of the panel, in which 1/3 members are Vietnamese nationality, 1/3 are European nationality and 1/3 members in the third country.⁴¹ The members will be appointed by the Trade Committee - established under the Agreement - (for a term of 4 years with possible extension) on the basis of consensus between the two parties. Each case will be tried by a three-member Panel, with the same membership ratio as above.

Second, regarding the required standards for ICS members

The EVIPA also sets high standards of competence and ethics that ICS members representing Vietnam and the EU must meet in order to be appointed and maintained for a 4-year term. The members of the trial and appellate panels must be qualified to take up positions in the judiciary or be recognized jurists in their respective countries.⁴² In addition, they must also demonstrate expertise in the field of international public law. Members shall be persons not affiliated with any government, not subject to the direction of any government or organization, not participating in disputes that may create a conflict of interest even directly or indirectly, whether as a consultant or as an expert.⁴³

3) The process of settling international investment disputes in the EVIPA Agreement

Facing with an international investment dispute, the parties to the dispute need to understand the mandatory steps in an

⁴¹ Paragraph 2 Article 3.38 Chapter III EVIPA

⁴² Paragraph 4 Article 3.38, Paragraph 7 Article 3.39 Chapter III EVIPA.

⁴³ Article 3.38 Chapter III EVIPA.

international investment dispute resolution as follow.

The first step in the international investment dispute settlement procedure under the EVIPA is consultation. Under this Agreement, an investor of one Contracting Party must submit a request to the other Party for consultations on the measure of violation. This is a mandatory procedure. The request for consultations must include the following: name and address of the claimant, the terms that the plaintiff claims to be infringed, the legal and factual basis, etc. The request for consultations must meet the following time conditions: (i) within 3 years after the claimant finds that the measure taken by the host country is not appropriate as mentioned in the scope of settlement dispute and cause damage to the plaintiff; (ii) Within two years after the claimant withdraws the claim from arbitration or a domestic court and in any case no later than seven years from the date of finding the measure of violation taken by the host country and damage caused by this measure.⁴⁴ Consultations must commence within 60 days of the submission of the request for consultations and end within a period of 18 months. Within 18 months from the date of sending the notice requesting consultations (the parties may agree to extend the time limit for consultations), if the complaining party does not submit a claim to arbitration to settle the dispute, Dispute is automatically considered to have withdrawn from the case and the plaintiff no longer has the right to file a claim.⁴⁵ If yes, then move on to the next step.

The second step is Arbitration, which takes place after the consultations are unsuccessful. Filing a claim for arbitration consists of two stages: Stage one, also known as the pre-arbitration stage, at which stage the claimant sends written notice of its intention to

⁴⁴ Article 3.30 Chapter III EVIPA.

⁴⁵ Paragraph 4, 5 Article 3.30 C Chapter III EVIPA

submit the claim to arbitration to the other party. The defendant knows and the second stage, also known as the stage of conducting arbitration, includes the following steps: Plaintiff submits the claim to arbitration - Acceptance of the parties on arbitration - Selection of arbitrators - Proceed to settlement Dispute and awarding – Appeal before appellate arbitrator (if any) - Enforcement of arbitral awards.

Negotiation or conciliation is not a mandatory procedure when settling international investment disputes. The parties are encouraged to resolve their own disputes through this method when a dispute arises, and are encouraged to use it at any time in the dispute resolution process, even during the dispute resolution process by other procedures.⁴⁶ Unlike the EVIPA, both the CPTPP and the RCEP Agreement do not provide specific provisions on mediation procedures, giving priority to the freedom of agreement between the parties. The EVIPA has specific provisions on this issue. As conciliation proceedings will be subject to Annex 10 to this Agreement, the parties to the dispute shall have the right to appoint a mediator or to request the President of the tribunal to appoint a conciliator from members of the panel of first instance, provided that such person does not hold Vietnamese or European Union nationality.⁴⁷ As for the implementation of the successful mediation agreement, the EVIPA does not provide for this issue and is completely voluntary by the parties.

C. The agency and process for settling international investment disputes in the RCEP Agreement

Like the CPTPP Agreement, the RCEP also allows the disputing parties to agree to choose one of a number of dispute settlement

⁴⁶ Article 3.31 Chapter III EVIPA.

⁴⁷ Article 3.31 Chapter III EVIPA.

forums, including arbitration under the ICSID Convention, or arbitration under the UNCITRAL Arbitration Rules or any arbitration institution with any other arbitration rules. Thus, it can be seen that, regarding the dispute settlement mechanism by arbitration, the RCEP Agreement has shown respect for the will of the parties' agreement, without showing any binding or limitation.

Similar to other agreements, RCEP initially encourages parties to resolve disputes by themselves through negotiation and conciliation⁴⁸ but this is not a mandatory step in the dispute settlement process. The process of investment dispute settlement under the provisions of RCEP also has many similarities with the provisions of the CPTPP and the EVIPA as well as the process of the Dispute Settlement Mechanism among WTO members. Accordingly, the first step of the international investment dispute settlement process under this Agreement is consultation.⁴⁹ If the dispute remains unresolved by consultation, the parties may appeal to arbitration.

D. Challenges and recommendations for Vietnam when participating in international investment dispute settlement in new-generation free trade agreements

1) Challenges of Vietnam when participating in the international investment dispute settlement mechanism under the EVIPA

First, regarding the transparency of the proceedings. Unlike traditional treaty-based arbitrations, where all data related to the case

⁴⁸ Article 19.7 Chapter 19 RCEP.

⁴⁹ Article 19.6 Chapter 19 RCEP.

is kept confidential, the ICS mechanism in the EVIPA will be completely transparent. The EVIPA adopted the UNCITRAL rules on transparency in arbitration proceedings for disputes between investors and the Government.⁵⁰ Article 4 of the UNCITRAL rules allows a third party with an interest to submit an intervention in the proceedings before the court, so that the third party will be able to interfere in the proceedings even if they are not recognized as a party to the dispute. The UNCITRAL provisions will apply to all proceedings under the EU-Vietnam Agreement, before the Court of First Instance and before the Court of Appeal.⁵¹

Although, up to now, Vietnam has not been a member of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, Vietnam has not yet agreed to adopt the UNCITRAL principle of transparency for any investment dispute between the State and foreign investors. According to the public database, investment arbitration cases related to Vietnam are always kept confidential. This is a feature of traditional treaty arbitration, where data is normally kept confidential and very little information is publicly available.⁵² However, as mentioned above, the EVIPA has adopted the UNCITRAL rules on transparency in ICS, so it is necessary for Vietnam to adapt the transparency rules in the arbitration process in relation to the arbitration proceedings related to disputes based on the EVIPA and this can be seen as a significant

⁵⁰ Article 3.28 Chapter III EVIPA.

⁵¹ Nguyen, Thi Anh Tho. 2022. "The Enforcement Of Final Awards In The European Union-Vietnam Investment Protection Agreement: A Look From Vietnam's Perspective." <https://ssrn.com/abstract=4426124>.

⁵² Ly, Filip De, Mark Friedman, and Luca Radicati Di Brozolo. 2012. "International Law Association International Commercial Arbitration Committee's Report and Recommendations on 'Confidentiality in International Commercial Arbitration'." *Arbitration International* 28 (3): 355-96. <https://doi.org/10.1093/arbitration/28.3.355>.

challenge for the Government of Vietnam.

Second, regarding the ICS mechanism. Compared with other FTAs to which Vietnam is a member, the usual ISDS mechanism is arbitration at international arbitrations agreed by the two parties. For EVIPA, the International investment disputes will be resolved through a completely different ICS mechanism, which is a permanent and two-tier arbitration court. The biggest challenge when accepting the ICS mechanism proposed by the EU that Vietnam faces is that Vietnam will become a test country for this ICS model. However, considering the positive effects on trade, tariffs and other areas that the EU can bring to Vietnam, the ICS mechanism may be an opportunity.

Third, regarding the required standards for ICS members. EVIPA also sets high standards of competence and ethics that must be met by ICS members representing Vietnam and the EU.⁵³ Setting such high standards for the selection of members of the trial panel will be a big challenge for Vietnam. Because, finding a person who can meet all of the above requirements is a difficult task, given the lack of human resources with high professional qualifications, quality, capacity and good understanding of the international law nowadays.

Fourth, regarding the enforcement of the arbitral award. The final award is final, once the final award is made, the disputing parties no longer have the right to appeal, the governments must recognize and enforce the award as a judgment of its own court. In the first 5 years from the date of entry into force of EVIPA, this provision does not have to apply immediately, but the recognition and enforcement of the award of the arbitral tribunal in Vietnam will

⁵³ Paragraph 4,5 Article 3.38 EVIPA

be governed by the New York Convention 1958.⁵⁴

In the past, Vietnam often relied on cases of non-recognition and enforcement of foreign arbitral awards. However, in theory, the arbitral award is still enforceable in any other State Party to the New York Convention where the Government of Vietnam has assets. Therefore, the procedure for recognition and enforcement of foreign arbitral awards in Vietnam may no longer be a safeguard for the Government of Vietnam in evading the obligations imposed by the award. Furthermore, after five years of preparation, Vietnam must treat and enforce foreign arbitral awards as if it were a Vietnamese court's award. Faced with the inevitable, the Vietnamese government needs to be prepared to deal with the increasing foreign investment in Vietnam and the consequences it may bring.

2) Challenges of Vietnam when participating in the international investment dispute settlement mechanism under the CPTPP and RCEP Agreements

Firstly, as mentioned above, one of the methods that foreign investors can apply to sue the Vietnamese government under CPTPP is the ICSID mechanism. This poses a problem for Vietnam whether it should join ICSID or not. Vietnamese's scholars offer two views. First, some experts believe that Vietnam should not join ICSID. Specifically, they believe that once Vietnam joins the Washington Convention 1965, it also means that Vietnam allows a foreign investor to sue the Vietnamese government through a jurisdiction in accordance with the provisions of a treaty or a contract. This jurisdiction is composed of highly specialized arbitrators and often tends to favor foreign investors and companies. Their decisions, once made, cannot be appealed to any other mechanism. Another group supports the idea

⁵⁴ Article 3.57 EVIPA

of joining ICSID. They believe that joining and becoming a member of the Washington Convention 1965 will also bring certain advantages to Vietnam. Specifically, for a developing country, participating in a highly binding dispute resolution mechanism will help Vietnam improve the legal environment and strengthen the confidence of foreign investors. Joining the Washington Convention 1965 is a guarantee for foreign investors of a clear resolution mechanism, through which investors will feel more secure when investing in Vietnam.

Thus, participating in the Washington Convention for Vietnam both brings positive aspects and can bring certain difficulties for Vietnam.

Secondly, the CPTPP and RCEP Agreements respect the choice of arbitration to settle international investment disputes. Moreover, it cannot be denied that many international arbitration centers in Asia such as HKIAC (Hong Kong), SIAC (Singapore), JCAA (Japan), etc. have established a long-standing reputation, creating confidence and attraction for foreign investors than domestic international courts and arbitrations. It can be said that the limited capacity of international litigation is also one of the reasons leading to the low possibility of winning the case of the Vietnamese Government.

As a defendant, the Government of Vietnam will face many troubles, such as large costs for the lawsuit, a long time to pursue the case and most importantly, in case of failure, Vietnam will bear a bad impression to other countries and foreign investors about the non-transparent business legal environment and the ineffective implementation of international commitments.

Thirdly, there is a lack of human resources with in-depth understanding of the ISDS mechanism. The publication of the

regulation on Coordination in International Investment Dispute Resolution 2020⁵⁵ is said to have overcome this situation by raising the awareness of the relevant state agencies in coordinating and cooperating to resolve investment disputes under the leadership of the Ministry of Justice.

However, the number of cadres, civil servants and officials directly engaged in investment law work and dispute settlement between the state and foreign investors have extensive knowledge of this field and the international law is still very limited, so it is still awkward to face an international investment lawsuit. Moreover, initiating international arbitration is the preferred method for foreign investors, but in the face of that situation, many regulators of Vietnam is still very unfamiliar with these arbitration institutions, many officials tasked with state management of foreign investment have not yet distinguished the difference between the ICSID Arbitration Center and the arbitration according to arbitration rules of UNCITRAL or with the Arbitral Tribunal of the ICC... Many experts and lawyers have not yet understood the regulations of international arbitration organizations on procedures and processes for dispute settlement at arbitration, which can put the Government at risk by losing the case.

3) Some recommendations

Firstly, actively internalize the regulations related to the implementation of commitments related to ISDS. Currently, Vietnam's legal regulations on the recognition and enforcement of foreign arbitral awards are not really compatible with EVIPA's ICS investment arbitration mechanism, so commitments on this

⁵⁵ Vietnamese Government. 2020. "Decision-No-14-2020-Qd-Ttg-on-Promulgation-of-Regulation-on-Coordination-in-Resolution-of-International-In." Decision of Prime Minister.

jurisdiction need to be internalized into the domestic legal system, specifying which regulations will apply exclusively to European investors and not to other subjects. At the same time, it is necessary to continue to attach importance to the interpretation and correct understanding of the nature of the commitments in the CPTPP through research, analysis, review and comparison between the commitments in the CPTPP and those of the other agreements, domestic laws and regulations of 11 member countries.

Secondly, strengthen coordination among functional agencies in settling international investment disputes. The relevant authorities should work together to establish and maintain a stable and effective jurisdiction. Specifically, the commitments on ICS in the EVIPA will relate directly and most directly to the Ministry of Justice and the Ministry of Planning and Investment (MPI). The Ministry of Justice needs to coordinate with the MPI on many tasks, such as providing expert advice in the field of investment, to find judges, experts with the most seasoned experience and the highest competence in foreign investment disputes for appointment as a member of the ICS tribunal.

The Ministry of Planning and Investment will update detailed information on investment activities of European investors in Vietnam and provide it to the Ministry of Justice in a timely manner, to serve as a basis for early elimination of incomplete complaints of European investors and helps to reduce investment disputes that may arise in the future.

Thirdly, complete relevant legal provisions to perform obligations under the 1958 New York Convention. During the 5-year period when the recognition and enforcement of ICS arbitral awards are governed by the 1958 New York Convention, Vietnamese courts still have the right to consider and reject foreign arbitral awards.

Therefore, the current points of inadequacy compared with the provisions of the New York Convention need to be adjusted, the guiding documents for the implementation of the Civil Procedure Code 2015 need to stipulate the strict application of the provisions of the Convention, including grounds for rejection of the award by the basic principles of law and the burden of proof. In particular, the party requesting enforcement is only obliged to provide a valid award to the Court with a valid arbitration agreement and with the application for enforcement of the award; and the Vietnamese Court only rejects the application for recognition and enforcement of the award when there is a basis in accordance with the New York Convention and the Civil Procedure Code, which prohibits the Court from reviewing the facts of the case.⁵⁶

Fourthly, continue to study and evaluate Vietnam's accession to the ICSID Convention Vietnam is increasingly integrating into global trade with new-generation free trade agreements, including provisions on investment dispute settlement mechanisms. In particular, ICSID is the leading institution, established to monitor and handle international investment disputes, accounting for 70% of global disputes.⁵⁷ As of 2022, nearly 900 disputes have been resolved by ICSID under the ICSID Convention and its Ancillary Regulations.⁵⁸ Currently, although Vietnam is not a member of the ICSID Convention, but in the context of receiving the growing foreign investments, Vietnam need to learn from the experiences of other countries to prepare carefully in terms of legal aspects. When joining the ICSID Convention, Vietnam can use ICSID experts and

⁵⁶ Euro Cham. *Sustainability Whitebook 2020-2021*. (Singapore: Euro Cham, 2021). Available online at <https://eurocham.org.sg/publication/sustainability-whitebook-2020-2021/>

⁵⁷ ICSID. 2020. "Guide To Membership In The Icsid Convention": 2

⁵⁸ ICSID. 2023. "Annual Report 2023 ICSID": 4.

arbitrators, get technical support and capacity in ISCID's dispute resolution process, as well as simplify the implementation of the arbitral award.

4. Conclusion

In general, the international treaties on investment that Vietnam has signed do not provide a single ISDS method. Vietnam will need to make efforts to improve its legal and institutional framework to ensure that its investment protection obligations are fulfilled in accordance with the commitment. In addition, the Vietnamese government and relevant agencies need to actively develop prevention strategies and response plans international investment disputes. Studying and mastering international legal provisions related to ISDS jurisdiction, order and procedures has also become necessary.

5. Declaration of Conflicting Interests

The author states that there is no conflict of interest in the publication of this article.

6. Funding Information

None.

7. Acknowledgment

None.

8. References

- Ahmad, Sajad. "Peaceful settlement of disputes." *Research Ambition an International Multidisciplinary e-Journal* 1, no. 1 (2016): 68-75.
- Cole, Tony, and Anuj Kumar Vaksha. "Power-conferring treaties: The meaning of 'investment' in the ICSID convention." *Leiden Journal of International Law* 24, no. 2 (2011): 305-330. <https://doi.org/10.1017/S0922156511000033>
- Collins, David. "Alternative dispute resolution for stakeholders in international investment law." *Journal of International Economic Law* 15, no. 2 (2012): 673-700. <https://doi.org/10.1093/jiel/jgs019>
- De Dreu, Carsten KW. "Social conflict: The emergence and consequences of struggle and negotiation." S. T. Fiske, D. T. Gilbert, & G. Lindzey (Eds.), *Handbook of Social Psychology* (pp. 983–1023). John Wiley & Sons, Inc. <https://psycnet.apa.org/doi/10.1002/9780470561119.socpsy002027>
- De Ly, Filip, Mark Friedman, and Luca Radicati Di Brozolo. "International Law Association International Commercial Arbitration Committee's Report and Recommendations on 'Confidentiality in International Commercial Arbitration'." *Arbitration International* 28, no. 3 (2012): 355-396. <https://doi.org/10.1093/arbitration/28.3.355>
- Dordi, Claudio, and Nguyen Thanh Tam. *Textbook on International Investment Law Hanoi Law University*. (Hanoi: Youth Publishing House, 2017).
- Euro Cham. *Sustainability Whitebook 2020-2021*. (Singapore: Euro Cham, 2021). Available online at <https://eurocham.org.sg/publication/sustainability-whitebook-2020-2021/>
- European Commission. "Individual Information Sheets on Implementation of EU Trade Agreements Accompanying the Document Report from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of The Regions on Implementation and Enforcement of EU Trade Agreements

- [COM (2022) 730 Final]." *Online Document*, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021SC0297>>
- ICSID. *ISCID Annual Report 2023*. (Washington D.C.: World Bank Group, 2023). Available online at <https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR2023_ENGLISH_web_spread.pdf>
- ICSID. *Guide to Membership in the ICSID Convention*. (Washington D.C.: World Bank Group, 2020). Available online at <https://icsid.worldbank.org/sites/default/files/Guide_to_Membership_in_the_ICSID_Convention_2020.pdf>
- Nguyen, Hoang Tien, Anh Nguyen Cat Nguyen, and Khang Diep Nhat Nguyen. "ISDS mechanism under the EVFTA: Comparison with the CPTPP and Implications for Vietnam." *VNUHCM Journal of Economics, Business and Law* 6, no. 3 (2022): 3105-3117. <https://doi.org/https://doi.org/10.32508/stdjelm.v6i3.1002>
- Nguyen, Tho. "The Enforcement of Final Awards in the European Union–Vietnam Investment Protection Agreement: A Look from Vietnam’s Perspective." *Contemporary Asia Arbitration Journal* 15, no. 1 (2022): 25-54.
- Şimşek, N. S., and K. Bölten. "Mediation as a Charming Dispute Resolution Mechanism." *Revista Akademike Legal* 1 (2017): 1-13.
- Vietnamese Government. *Decision No. 14/2020/QĐ-TTg Regulation on coordination in settlement of international investment disputes*. Available online at <<https://english.luatvietnam.vn/decision-no-14-2020-qd-ttg-on-promulgation-of-regulation-on-coordination-in-resolution-of-international-in-182343-doc1.html>>
- Zhan, James, et.al. *Investor-State Disputes: Prevention and Alternatives to Arbitration*. (New York: United Nations, 2010). Available online at https://unctad.org/system/files/official-document/diaeia200911_en.pdf

How to cite (Chicago style)

Thang, Nguyen Chi. "Investor-State Dispute Settlement Mechanism in Vietnam's New Generation Free Trade Agreements: Challenges and Recommendations". *Lex Scientia Law Review* 7, no. 2 (2023): 740-770. <https://doi.org/10.15294/lesrev.v7i2.70577>

Copyrights & License

This work is licensed under a Creative Commons [Attribution-NonCommercial-ShareAlike 4.0 International License](#). All writings published in this journal are personal views of the authors and do not represent the view of this journal and the author's affiliated institutions. **Authors retain the copyrights under this license, see [our copyrights notice](#).**

History of Article

Submitted: June 26, 2023

Revised: August 27, 2023; November 24, 2023

Accepted: November 28, 2023

Available Online: November 30, 2023