Vietnam’s Experiences with International Investment Agreements Governance: Issues and Solutions

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1 Introduction

Vietnam’s major economic reforms of Doi Moi (Renovation) was launched in 1986 by the Communist Party of Vietnam (CPV) to boost the country’s underperforming economy and restore international ties. Under the Doi Moi policy, the Soviet centrally-planned economy was replaced with a socialist market mechanism, which promoted the concept of a multi-sectoral economy, open-door policies towards international trade and investment, and recognized private property rights.

The leadership of Vietnam has identified investment treaties to be significant for the transition, therefore putting them at the forefront of national economic policy. Vietnam has been active in negotiating and concluding Bilateral Investment Treaties (BITs), with the view that the treaties would help to attract foreign investments. In addition, the BITs were also regarded by the government as a diplomatic instrument to foster integration and break the international isolation caused by the US trade embargo.1 Over time, the International Investment Agreements (IIAs) became an important basis to protect Vietnamese investors overseas.

The expansion of the IIA network during the last decade is regarded as an important aspect of Vietnamese investment policy. As of 1 January 2019, Vietnam has entered into 67 BITs other states.2 Among these 67 BITs, 49 are in effect.3 Additionally, 9 out of 12 free trade agreements (FTA) to which Vietnam...
is a party have an investment chapter that provides for detailed rules dealing with investment liberalization and protection. In terms of the number of BITs and FTAs with investment chapters, Vietnam now is ranked third behind China and Korea amongst Asian countries.

The Vietnamese government has made substantial efforts in developing a favorable Foreign Direct Investment (FDI) environment in the light of its integration. The national legal framework for investment has been regularly amended and revised to meet the country’s IIA obligations. However, it is observed that the country still faces several issues relating to IIA governance, which have resulted in increasing investor-state disputes in recent years. This raises big concerns for the government.

This article seeks to analyze the IIA’s governance in Vietnam. It is believed that a proper assessment of the IIA governance shall be based on two important factors. Firstly, states must have a clear IIA policy and seek to comply with their international treaty obligations. Secondly, states must take the initiative to internalize the IIA’s obligations into the legal system as well as take into account the IIA’s obligations in decision making at both central and local levels. It is of high significance to assess the process through which the IIA internalization happens. The internationalization could be done not only through the legislative processes – transplanting the IIAs into the national legislation, but also through other components, including informational processes – informing the

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4 As of July 2019, Vietnam has signed 12 FTAs, including the ASEAN – India FTA (AIFTA), ASEAN – Korea FTA (AKFTA), ASEAN – Hong Kong FTA (AHKFTA), ASEAN – Japan EPA (AJEPA), ASEAN – China FTA (ACFTA), ASEAN – Australia – New Zealand FTA (AANZFTA), CP – TPP (TPP11), Chile – Vietnam FTA (CVFTA), EU – Vietnam FTA (EVFTA), Korea – Vietnam FTA (KVFTRA), EuroAsia Economic Union – Vietnam FTA (EAYFTA), Japan – Vietnam EPA (JVEPA). Kim Loan, List of Viet Nam’s FTAs as of July, Socialist Republic Viet. Online Newspaper Gov., (July 10, 2019, 3:35 PM), http://news.chinhphu.vn/Home/List-of-Viet-Nams-FTAs-as-of-July/201910/37693.vgp.

5 International Investment Agreements Navigator, UNCTD Inv. Pol’y Hub, https://investmentpolicy.unctad.org/international-investment-agreements/by-economy (last visited Apr. 11, 2021).

6 Tran Hao Hung, Đánh giá việc thực hiện cam kết nhập WTO liên quan đến đầu tư và định hướng hoàn thiện hệ thống pháp luật về đầu tư [Evaluating the Implementation of Investment-Related WTO Commitments and Orientations to Improve Legal Framework on Investment] (2010).

7 Peter J. May, Policy Design and Implementation, in The Sage Handbook of Public Administration 279, 279 (B. Guy Peters & Jon Pierre eds., 2d ed. 2012).
state’s international legal obligations to the relevant domestic actors, monitoring processes – screening the investment policies and measures to ensure the compliance with state’s international obligations, and remedial process – correcting or defending the state’s international obligations.

The article begins with an overview of Vietnam’s investment policy as reflected in its portfolio of IIAs (Part 2). It then reviews the treaty-making process and the IIA’s implementation process in Vietnam (Part 3), and the problems resulting in the increase of ISDS, and the efforts of the Vietnamese government to manage the ISDS (Part 4). Against the background of issues of IIA’s governance of Vietnam, this author attempts to provide some policy suggestions to improve the national system for IIA’s governance (Part 5).

2 Vietnam’s Policy on International Instruments Regulating FDI: Past, Present, and Future Trends

Until 1987, the relationship between Vietnam and foreign investments had been that of distrust and resentment. The country limited its economic relation with socialist countries led by the Soviet Union and shielded itself against foreign economic and political influences by setting up ideological defenses against foreign investors and their protection by international law. In line with its Marxist ideology, notions and concepts of private property and individual economic initiative were strongly rejected and the phenomenon of foreign investment gradually effaced through confiscation and nationalization of foreign capitalists’ property.

Vietnam strongly advocated the concept of the sovereignty of States over their natural resources and denied any substantial protection of foreign investment under international law. Concerning foreign investment, the Vietnamese government, like most socialist countries post-colonization period, took the position that the state has the absolute sovereign right to control the economic resources within its territory as well as regulate the entry of foreign direct investments. It has been clearly demonstrated in the first regulations on foreign investment of the Vietnamese government in 1977,8 which placed a strong emphasis on the role of the state, and subordinated foreign investment to the structure of the national economy. Under these regulations, only the State could enter into a joint venture with a foreign party, and the foreign party

8 Nghị định Ban hành Điều lệ về đầu tư của nước ngoài ở nước Cộng hòa Xã hội chủ nghĩa Việt Nam [Decree on Promulgating the Charter on Foreign Investment in the Socialist Republic of Vietnam], No. 115-CP (Apr. 18, 1977).
could not invest more than 49% of the joint venture’s capital. Moreover, the right to nationalize or expropriate foreign property was considered an inherent attribute of national economic sovereignty of the state, and the exercise of this fundamental right was not subject to any pre-conditions, including the “public purpose, due process, and compensation” as required by international law. As a result of the above-mentioned policy, Vietnam was not able to attract a handful of investment from overseas (but some from socialist countries). In fact, between 1977–1986, “Vietnam licensed only one western foreign enterprise, a French pharmaceutical firm.”

However, Vietnam’s policy toward international cooperation radically changed in 1987 after the leaders of the CPV decided to adopt the Doi Moi Policy at the Sixth National Party Congress and openly accepted the development of a “socialist-oriented market economy” and the significance of international economic cooperation. Attracting foreign direct investment (FDI) has become a key part of Vietnam’s external economic affairs. Since the adoption of the first foreign investment law in 1987, foreign investors
have been encouraged to invest and conduct business in Vietnam. The government has gradually eliminated the restrictive business sectors for foreign investment.\textsuperscript{15}

The Constitution 1992 has declared that “[the] State encourages foreign organizations and individuals to invest capital and technology in Vietnam in accordance with Vietnamese law and with international law and practice; ensures the legal ownership of capital and assets as well as other interests of foreign organizations and individuals. Enterprises with foreign-invested capital shall not be nationalized.”\textsuperscript{16} The reference to ‘international practice’ illustrated the desire of Vietnam to engage with the habits of the international community and bound itself with international standards developed for the protection of foreign investment.

The development of the market economy together with a pro-active economic integration policy has resulted in rapid economic growth in the country. Since the 1990s, Vietnam has emerged as one of the world’s most attractive places for FDI in the developing world. Inflows of foreign direct investment in Vietnam rose from 1.78 billion USD in the year 1995 to over 12.6 billion USD in the year 2016,\textsuperscript{17} contributing to around 6.14% of the national GDP.\textsuperscript{18} The successful accession to the World Trade Organisation (WTO) in 2007 resulted in lowering trade barriers and granted greater access for Vietnamese products to foreign markets and, thus, encouraged the growth of export-oriented FDI.\textsuperscript{19}
The liberalization of trade in services under the General Agreement on Trade in Services (GATS) provides foreign investors with greater access to the market in various service sectors such as banking, insurance, distribution, education, engineering, logistics, legal services, tourism, telecommunications, etc.\(^{20}\)

Vietnamese have been serious in developing the legal framework for FDI. At the national level, the government offered certain forms of legal protection to foreign investors, such as most-favored-nation treatment, national treatment, protection, and security for investors. The government also enacted a provision on compensation for losses incurred by foreign investors due to nationalization under the national legislation on foreign investment.\(^{21}\) At the international level, Vietnam has paid special attention to developing the IIA network. From the first BIT with Italy concluded in 1990\(^{22}\) until 2019 the number of investment treaties concluded by Vietnam is over 80 IIA/s, including both BIT and FTA with investment chapter.\(^{23}\)

The development of Vietnam’s IIA network reflects Vietnam’s economic policy during the last several decades. In the early 1990s, when Vietnam began the “open door” policy, the government primarily entered into BITs with capital-exporting countries from Europe, including Italy (1990), Belgium (signed in 1991), Switzerland (1992), France (1992), Germany (1993), the Netherlands (1994), and some neighboring countries in Asia, including Malaysia (1992), Singapore (1992), Taiwan (1993), and Korea (1993).\(^{24}\) For those BITs, Vietnam

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\(^{20}\) Đánh giá tác động tổng thể khi Việt Nam trở thành thành viên của WTO đến thay đổi xuất nhập khẩu và thế chế [Assessing the Overall Impact of Vietnam’s Membership of the WTO on Import and Export Changes and Institutions], SLIDESHARE, https://www.slideshare.net/changtraicotondon/nhat-khau-thai-viet-nam-thay-doi-xuat-nhap-khau-va-the-che-assessing-the-overall-impact-of-vietnams-membership-of-the-wto-on-import-and-export-changes-and-institutions-264251517 (last visited Apr. 30, 2021); See also Working Party on the Accession of Viet Nam, WORLD TRADE ORG., https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=58832&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (last visited Apr. 11, 2021) (listing Vietnam’s schedule of specific commitments in services).

\(^{21}\) These standard FDI protection provisions have been provided in the Law on Foreign Investment in 1987 (as amended and supplemented in 1990, 1992, 1996, 2000) and continuously presented in the Law on Investment in 2005 (as amended and supplemented in 2014).

\(^{22}\) International Investment Agreements Navigator: Viet Nam, supra note 2.

\(^{23}\) Id.; See also Danh mục Hiệp định Việt Nam – Các nước [List of (Investment and Double Taxation) Treaties Between Vietnam and Other Countries], Bộ KẾ HOẠCH VÀ ĐẦU TƯ [MINISTRY PLAN. & INVESTMENT], http://www.mpi.gov.vn/Pages/qhsp.aspx (last visited June 6, 2018); Hiệp định khác [Other Treaties of Vietnam], TRUNG TÂM WTO, http://trungtambwo.vn/hiep-dinh-khac (last visited Mar. 28, 2021).

\(^{24}\) Id.
largely accepted the treaty texts proposed by counterparties without substantial modification. At that stage, Vietnam seriously needed an inflow of foreign investment capital and did not have much knowledge and expertise on the subject matter. In addition, the conclusion of international economic treaties was pushed by the government as they were used as a diplomatic instrument fostering the normalization of relations with the western countries after decades of isolation from the US embargo.25 After the conclusion of the US-Vietnam Bilateral Trade Agreement (BTA) in 2000, Vietnam continued entering into BITs with more economies around the world. The form and substance of those BITs were generally based on the texts of the BITs Vietnam had already negotiated with European countries. These BITs contained substantive provisions to protect foreign investors and their investments, such as non-discrimination (both national and most favoured nation treatment), compensation for expropriation, fair and equitable treatment, and full protection and security, assets and capital transfers as well as access to Investor-State Dispute System (ISDS).

After joining the multilateral trading system of the WTO in 2007, Vietnam has recognized the significance of regional trade arrangements26 and actively started negotiating FTA with key trading partners. From 2007 onwards, Vietnam has negotiated and signed 15 FTAs, all of which are already in force, covering 54 states and customs territories.27

Vietnam signed most of its FTAs within the framework of ASEAN-Plus, including the ASEAN – India, ASEAN – Korea (2007), ASEAN – Hong Kong, ASEAN – Japan, ASEAN – China, ASEAN – Australia – New Zealand. Currently, it is negotiating the Regional Comprehensive Economic Partnership (RCEP), the FTA between ASEAN and its six FTA partners (including China, Japan, India, South Korea, Australia, and New Zealand). Vietnam and other ASEAN members have concluded the ASEAN Comprehensive Investment Agreement (ACIA) on February 29, 2009. The ACIA forms the legal framework for investment protection within the ASEAN Economic Community. Vietnam has

25 Castelli, supra note 1, at 325.
26 Nghị quyết Hội nghị Ban Chấp hành Trung ương lần thứ 10 về tiến toàn tổ chức, cải tiến lệ lơi làm việc [Resolution of the 10th Central Committee Meeting on Organizational Reform and Improvement of Working Style], Báo điện tử Đảng Cộng sản Việt Nam [Electronic Rep. Vietnamese Communist] (Apr. 4, 2021), https://tulieuvankien.dangcongsan.vn/van-kien-tu-lieu-dang/hoi-nghi-bch-trung-uong/khoa-ii/nghi-quyet-hoi-nghi-ban-chap-hanh-trung-uong-lan-thu-10-ve-kien-toan-toc-chuc-cai-tien-le-loi-lam-viec-792; see also Hy V. Luong, Vietnam in 2006: Stronger Global Integration and Resolve for Better Governance, 47 Asian Survey 168 passim (2007).
27 Other Treaties of Vietnam, supra note 23.
concluded bilateral FTA with Chile (2011), Korea (2015), Japan (2008), and the EuroAsia Economic Union (2015). Most of the FTAs of Vietnam include an investment chapter with ISDS.

Vietnam has been involved in the negotiation of two new-generation FTA, including the Trans-Pacific Partnership (TPP) and the EU-Vietnam FTA (EVFTA). The TPP was signed in 2016, however, failed to take effect because the United States decided to walk away from the agreement. In 2018, Vietnam and 10 other countries of the TPP concluded the agreement without the United States under the framework of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The investment chapter of the CPTPP in general has adopted the form and substance of the investment chapter of the North American Free Trade Agreement (NAFTA). The negotiation of the EVFTA was completed in 2015. Hence, due to the disagreement of EU members regarding the Mandate of the European Council, the EU and Vietnam have decided to split the investment chapter of the EVFTA into a separate agreement named the EU-Vietnam Investment Protection Agreement (EVIPA). The EVIPA shall replace the existing 21 BITs in force between Vietnam and EU Member States. It is noteworthy that Vietnam and the EU have attempted to establish a new ISDS model by establishing the International Investment Court system, which follows the WTO dispute mechanism. The EVFTA and EVIPA were signed in Hanoi on 30 June 2019.

28 Fukunari Kimura & Lurong Chen, Implications of Mega Free Trade Agreements for Asian Regional Integration and RCEP Negotiation 1 (2016), http://www.eria.org/ERIA-PB-2016-03.pdf. The TPP is supposed to be the largest free trade area in the world, covering 40 percent of the global economy. The TPP was signed on Feb. 4, 2016, but never entered into force as a result of the withdrawal of the United States.

29 The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), also known as TPP-11 is a trade agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. The CPTPP incorporated most of the Trans-Pacific Partnership (TPP) provisions by reference, but suspended 22 provisions that the United States had favored but which other countries opposed, and lowered the threshold for enactment so that the participation of the U.S. was not required. The CPTPP was signed on Mar. 8, 2018 and took effect on Dec. 30, 2018.

30 Viet Dung Tran, Cơ chế giải quyết tranh chấp giữa nhà đầu tư và nhà nước của Hiệp định Thương mại tự do EU-Việt Nam – sự hình thành tòa án đầu tư quốc tế? [Investor-State Dispute Settlement Mechanism of the EVFTA – Formation of an International Investment Court?], in Giải quyết tranh chấp đầu tư quốc tế – một số vấn đề pháp lý và thực tiễn trong bối cảnh hội nhập [Settlement of International Investment Disputes: Legal and Practical Issues in the Integration Context] 58–60 (Viet Dung Tran & Thi Lan Huong Nguyen eds., 2018).
It is observed that compared to the early stage of development of the IIA network, the approach of Vietnam in negotiating the investment chapter of the FTA has changed. Vietnam has been active in negotiating to make the investment protection rules of the FTA more detailed to avoid the ambiguity favoring the foreign investors as well as the inclusion of the exception provisions in its new IIA to confirm the flexibility for the host state in implementing policies for public interests, i.e. protection of the environment, and the protection of human rights. It also supported some new initiatives that would alter the ISDS landscape, such as the creation of the International Investment Court under the framework of EVFTA. In the case of CPTPP, Vietnam has concluded with New Zealand and Australia side letters to exclude compulsory ISDS.31

As the Vietnamese economy has grown and matured, Vietnamese enterprises have started to look for opportunities to invest overseas. According to the Foreign Investment Agency (FIA) of the Ministry of Planning and Investment (MPI), the total registered capital of outward investment of Vietnamese enterprises in 2017 is about USD 22 billion and the amount of profit transferred back to Vietnam reached about USD 1.5 billion.32 Until 2018 Vietnam had an investment in 59 countries and territories, of which Lao is the biggest investment destination with a total registered investment capital of over USD 4.2 billion, followed by Cambodia, Russia, Myanmar, the United States, some African and South American countries.33 This phenomenon is reflected on the Vietnamese investment treaty policy, which now has a second goal of protecting overseas investment by Vietnamese investors.34 This partially reflects in Vietnam’s negotiation and conclusion of IIA with relevant countries such as Mozambique (2007), Venezuela (2008), Slovakia (2011), Kazakhstan (2014), and Russia (2015),

31 The side letters constitute bilateral agreements between the relevant states that shall aim to prevent the raise of investor-state disputes. The letters were signed and came in force together with the CPTPP.

32 Báo cáo tình hình đầu tư ra nước ngoài năm 2017 [Vietnamese Report on Outward Investment of Vietnamese Enterprises in 2017], Bộ Kế hoạch và Đầu tư [Ministry Plan. & Investment] (Dec. 22, 2017), http://www.mpi.gov.vn/Pages/tinbai.aspx?idTin=38656&idcm=208.

33 Id.; see also Đầu tư Việt Nam ra nước ngoài và công tác thương vụ [Vietnam Outward Investment and the Works of Trade Missions], Bộ Công Thương Việt Nam [Ministry Industry & Trade] (Dec. 16, 2013), http://www.moit.gov.vn/tin-chi-tiet/-/chi-tiet/%C4%99ia-tu-viet-nam-ra-vo-nao-va-cong-tac-thuong-vu-102586-401.html.

34 Vũ Văn Chung, Tổng quan về đầu tư nước ngoài và đánh giá tình hình quản lý đầu tư nước ngoài tại Việt Nam [Overview of the Outward Investment and Evaluation of Status of Management of Outward Investment Activities in Vietnam], Speech at Workshop: The Policy on Outward Investment for Central, Local Investment Agencies and Enterprises in the North (photo. reprint 2015) (minutes available from the Foreign Investment Agency).
where the Vietnamese negotiators had a mandate to maximize the investment protection standard during the negotiation as these countries were considered investment targets for Vietnamese investors.\textsuperscript{35}

It could be concluded that over the years Vietnam’s policy toward investment treaty has been changed. The government nowadays shall have dual missions upon negotiating the IIAs, namely (i) protecting the interests of Vietnamese investors abroad and (ii) safeguarding the public interests against foreign investment interests. Vietnam supports the inclusion of provisions on exceptions to advocate the protection of public interests and public order as well as raising the corporate social responsibility of foreign investors. This is reflected clearly in the position of Vietnam during the negotiation of the recent IIAs, such as the ACIA, EVFTA, CPTPP.

3 International Investment Agreement Adopting and Implementing Process

3.1 II A Adoption: Coordination of Relevant Agencies

In Vietnam, there are three main governmental agencies in charge of investment-related issues. The Ministry of Planning and Investment (MPI) is the main agency in charge of state management of investment promotion. The MPI takes charge of matters relating to the liberalization of investment, through the conclusion of IIAs, developing the investment legal framework, and admission of foreign investments. The Ministry of Foreign Affairs is the agency representing Vietnam in conclusion of all international treaties, including the IIAs. The Ministry of Justice is mandated by law to review and provide opinion on all legislations and international treaties of Vietnam. However, for investments in specific sectors, the relevant ministries will be responsible for the sectors that they manage. Their opinion regarding particular aspects of IIAs will always be requested during the treaty negotiation and conclusion.

Generally, the IIAs are not subject to ratification by the National Assembly of Vietnam (NAV) but can be approved directly by the Government to take effect in Vietnam. The IIAs must be ratified by the NAV in two cases: (i) the II A requires ratification by the representative body, and (ii) the treaty conflicts with the existing laws, resolutions of Vietnam. In practice, most IIAs would fall into the category of a treaty to be approved by the Government; only some new

\textsuperscript{35} Interview by Viet Dung Tran with Legal Dep’t of Ministry of Planning and Inv. (May, 2018) [hereinafter Interview].
generation FTAs (due to their complexity and contradiction to the existing laws), such as the EVFTA and CPTPP, would be subject to NAV’s ratification.36

The MPI is assigned by the Government to be the lead agency for the negotiation and conclusion of IIAs, including investment protection chapters in the FTA. The MPI shall take initiative to propose negotiation of bilateral and regional investment agreements of Vietnam. If the proposed IIA does not have any content that contradicts the existing laws, resolutions of Vietnam, the Government will decide the negotiation and conclusion of the treaty and also approve the effectiveness of the treaty. If there is diverse opinion relating to the IIA, the Government Office will take initiative to organize a meeting between relevant agencies to analyze the issue and make a final decision regarding the status of the proposal.37

Pursuant to the law, the time required for the agencies to provide written feedback is 15 days upon receipt of the proposal. In practice, the feedback from the respective agencies usually arrive earlier. It is explained by two main factors, namely (i) the number and quality of IIA experts of the Ministry of Justice (MOJ) and Ministry of Foreign Affairs (MOFA) have improved remarkably after two decades of active integration, and (ii) the current regime allows the representatives of MOJ and MOFA to participate in all stage of treaty negotiation.38

After the IIA comes into effect (upon notice of the MOFA), within 15 days, the MPI shall prepare a plan for the implementation of the treaty and submit it to the Prime Minister.39 A plan for implementation of a treaty must detail the (i) implementation schedule, (ii) proposed responsibilities of state agencies to organize the implementation of the IIA, (iii) proposed amendment and supplementation or annulment or promulgation of legal documents for the implementation of the IIA, (iv) measures of organization, management, funding for the implementation of the IIA, (v) dissemination of the IIA.

3.2 Dissemination of IIA’s Obligations
At the implementation stage, the MPI still takes the leading role in organizing the propagation and dissemination of the term of the respective IIA, while the MOFA and the MOJ shall coordinate with the MPI in this regard. Accordingly, the MOFA is responsible for monitoring and urging the application of the IIA in Vietnam as well as coordinating in adopting necessary measures to

36 Id.
37 Nghị định Quy định chức năng, nhiệm vụ, quyền hạn và các câu có trách của Văn phòng Chính phủ [Decree on The Functions, Tasks, Powers and Organizational Structure of the Government Office] No. 150/2016/NĐ-CP art. 2 (Nov. 11, 2016).
38 Interview, supra note 35.
39 Luật điều ước quốc tế [Law on Treaties], No. 108/2016/QH13 art. 76 (Apr. 9, 2016).
protect the rights and interests of Vietnam in case a foreign contracting party breaches the IIA.\textsuperscript{40} It shall also report to the Prime Minister/the President on an annual basis or when requested, on the implementation of international treaties; regularly prepare a report for the Government to submit to the NAV on the conclusion and implementation of treaties.\textsuperscript{41}

Meanwhile, the main responsibilities of the MOJ to implement IIA is to urge the formulation and submission for promulgation, amendment, and supplementation or annulment of legal documents (if required) to implement treaties and appraise the conformity of national normative documents with the treaty.\textsuperscript{42} Under the Law on Treaties, other state agencies might be involved in the process of IIA internalization include the Supreme People's Court, the Supreme People's Procurator, the State Audit Office of Vietnam, ministerial-level agencies, and the People's Committees of provinces and centrally-run cities.\textsuperscript{43} Hence, their role is rather fuzzy and vague as they are mainly focused on the accurate implementation of the national laws and regulations only, which is assumed to be designed in accordance with Vietnam's international obligations. The local governments only deal directly with certain international investment agreements that directly impact their province or city, i.e. the ODA Agreements for infrastructure development. It is observed that the knowledge and expertise on the IIA of local governments are unequal from place to place. Thus, the IIA's internalization in Vietnam is mainly put on the shoulder of the central state bodies only.

In Vietnam, the internationalization process so far has not accorded much importance to the dissemination of investment treaty obligations until 2013. Since then, the MPI and MOJ have started organising regularly workshops and training courses for government officials, especially for those who work at the provincial departments of planning and investment and departments of justice. Those workshops/training address the Investor-State dispute settlement (ISDS) as well as an explanation of various IIA's obligations. However, the effect of these events is still limited because of two factors: (i) lack of human and financial resources for conducting deep and long training. The division in charge of the MOJ and MPI does not have much human capacity to conduct a long and intensive training course. It also does not have substantial funding to invite experts for the training. As a result, they only can conduct the events within the given capacity. (ii) the officials attending the workshops/training

\textsuperscript{40} Id. art. 77.
\textsuperscript{41} Id.
\textsuperscript{42} Id. art. 78.
\textsuperscript{43} Id. art. 80.
programs only concern with provisions under the purview of their sphere of works and do not fully understand the legal implication of other provisions in the investment treaty.\textsuperscript{44} It should also be noted that judges are usually not taking part in the workshops and training programs.\textsuperscript{45}

\subsection*{3.3 IIA's Compliance}

In Vietnam, there is no specific mechanism that ensures that governmental measures comply with IIA's obligations. Nonetheless, there are different ways in which such measures may be reviewed against Vietnam's international law obligations, including those in investment treaties. First, when the relevant agency directly seeks the legal opinion of the MOJ or MPI as the leading authority for international law issues on a draft law or measure. In Ho Chi Minh City, Hanoi, and some provinces, the Peoples Committees have set rules that the drafting of all regulations and designing of the measures must be consulted with the department of justice of the locality to ensure compliance with the laws and international obligations. Hence, the quality of this screening is not uniform across all provinces. Second, when those policies or measures require approval from a type of national committee mechanism, the representatives of the three lead agencies of MPI, MOFA, and MOJ must always participate as a member. Third, when those measures require the government office's approval, whereby all relevant agencies will be consulted, and MPI and the MOJ must caution about possible risks of IIA claims. In practice, the legal opinion does not specifically focus on compliance with investment treaty obligations. The MOJ has given many legal opinions concerning the compliance of trade-related measures with international obligations (WTO agreements as well as other regional FTAs).

In the law-making process, Vietnam ensures the compliance of IIA's through the system of consultancy of the MOFA, MOJ, and public participation. Since the WTO accession, the procedure of drafting and promulgation of the laws and regulations must be subject to comprehensive screening, which is regulated under the law on promulgation of legal documents.\textsuperscript{46} The Government Office must not only publish all new legal documents and regulations of the government but also publish the draft of those documents on the Internet portal or in mass media for comments by agencies, organizations,

\textsuperscript{44} Interview, \textit{supra} note 35.

\textsuperscript{45} \textit{Id.}

\textsuperscript{46} Law on Promulgation of Legal Documents was first adopted in 2002, amended in 2008 and 2015.
and individuals.\textsuperscript{47} Public participation in drafting law has become a part of legislative procedure.\textsuperscript{48} The agency in charge must post the draft law on the public website at least 60 days in order to receive opinions, except for those promulgated under simplified procedures.\textsuperscript{49} The business associations and chambers of commerce of foreign countries in Vietnam are invited to contribute opinions on the drafts of the investment law document. Their opinions are seriously considered by the law drafting agency.

At the local level, the procedure for drafting and adoption of administrative and normative documents of the local government (namely the People’s Committee and Peoples Council of province/cities) shall also be subject to a screening process by the Department of Justice of the respective province. However, in practice, the quality of the review procedure of implementation of IIA at the provincial level is quite diverse from province to province. The knowledge and expertise of these agencies on the IIA are rather limited. The provincial investment authorities build their awareness and expertise related to the IIA mainly through the international investment disputes taken place in their locality. The legal officers in Ho Chi Minh City are better aware of the state obligations under IIA, as they have been dealing with most international investment dispute cases in Vietnam. This problem might potentially lead to the enactment of inaccurate decisions and/or measure by the local government against foreign investors and their investment project(s) in the locality, breaching the provisions of the IIA. To reduce this risk, in recent years the MPI and the MOJ have organized a number of workshops and training courses on the topic related to international investment law for local government officials and business associations.\textsuperscript{50} However, as analyzed in previous sections the actual effect of these workshops and training seminars is still rather limited and needs to be improved.

\textsuperscript{47} Cu\a\c g\u00f4c h\u00f4i n\u00f4c c\u00f3ng ho\c a x\u00e0 h\u00f4i ch\u00f3 ngh\u00e0 vi\e t n\u00e0m s\u00f3 02/2002/qhn ngày 16 tháng 12 năm 2002 Lu\a\c t s\u00f3a d\u00f3i, b\o sung m\u00f4t s\u00f3 di\e u c\u00f3a lu\a\c t ban h\u00e0nh v\u00e0n b\u00f3n quy ph\u00e0m ph\u00e0p lu\a\c t [Law on Promulgation of Legal Instruments], No. 02/2002/QH11 arts. 62(2), 65(2) (Dec. 16, 2002).

\textsuperscript{48} Lu\a\c t Ban h\u00e0nh v\u00e0n b\u00f3n quy ph\u00e0m ph\u00e0p lu\a\c t [Law on Promulgation of Legislative Documents], No. 80/2015/QH13 art. 5 (June 22, 2015).

\textsuperscript{49} Id. art. 57.

\textsuperscript{50} Interview, supra note 35.
4 Managing Investor-State Disputes

With increased foreign investment activities in Vietnam over the years, the number of disputes involving those investments is also likely to rise. Accordingly, before 2017 there have been only six investor-state dispute settlement (ISDS) cases taken before international arbitration against Vietnam. Yet, the number of disputes between investors and national agencies has increased significantly since 2010. According to the research by the Judicial Institute of the MOJ, during 2010–2017 there are 14 cases where the foreign investors have notified their intention to raise a claim against the government of Vietnam or sent a request to the national agencies to resolve the dispute between them and national agencies of Vietnam (these cases could easily be converted into the ISDS case).

Most of the mentioned disputes are related to issue of land allocation and site clearance. The local government often fails to allocate the “clean land” for foreign investors to carry out the investment project after conclusion of the land lease with them causing the delay of implementation of the investment project. Additionally, to attract FDI to the province, some local governments had also offered more favorable incentives to a foreign investor than legally permitted, thereby receiving claims and complaints of the investor when they could not fulfill its undertakings. To that end, in recent years, the central authority has applied more strict control and supervision over local government to restrict them act beyond their power in relation to foreign investments causing wrong expectations from the foreign investors.

Another phenomenon of disputes between foreign investors and state agencies in Vietnam is that the authorities do not comply with the requirements or sequence on the procedures prescribed in the law while taking action against

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51 International Investment Agreements Navigator: Viet Nam, supra note 2 (including the cases of Binh and Binh Chau Joint Stock Company v. Socialist Republic of Viet Nam (Stockholm Chamber of Commerce 2004); Michael McKenzie v. Viet Nam (Perm. Ct. Arb. 2010); Dialasie SAS v. Socialist Republic of Viet Nam (Perm. Ct. Arb. 2011); RECOFI v. Viet Nam (Perm. Ct. Arb. 2013); Trinh Vinh Binh v. Viet Nam (Perm. Ct. Arb. 2014)). https://investmentpolicy.unctad.org/investment-dispute-settlement/country/229/viet-nam (last visited Dec. 12, 2020).

52 Cổ chế giải quyết tranh chấp giữa nhà đầu tư nước ngoài và nhà nước Việt Nam và đề xuất các biện pháp phòng ngừa [ISDS Involving the Government of Vietnam and Recommendation for Prevention Measures], Bộ TƯ PHÁP [MINISTRY JUST.] (2015).

53 Interview with Dep’t of Justice of Ho Chi Minh City (Sept. 2018).

54 Id.

55 Id.
any misconduct or wrong-doing of foreign investors.\textsuperscript{56} Such attitude of the state body had created grounds for a foreign investor to protest the administrative measures against them.

Under the law, whenever an investment dispute with state bodies (national or local administrative body) arises, the foreign investor or foreign-invested enterprise concerned may resort to administrative reconsideration. According to the Law on Complaints of 2011,\textsuperscript{57} foreign investors may make a complaint and request administrative reconsideration if they consider that certain administrative measures or decisions infringe their lawful rights or interests or that a state body has infringed upon their lawful decision-making power, i.e. imposed duties on them illegally and failed to protect their property rights. When refusing to accept a specific administrative measure or decision (i.e. the late handover of clean land sites for a project), the applicant shall submit a request for administrative reconsideration to either the local government at the same level,\textsuperscript{58} the competent Government agency, or People’s Committee at the next higher level\textsuperscript{59} depending on the circumstances. The applicant then must claim for administrative compensation while applying for administrative settlement reconsideration.\textsuperscript{60} Foreign investors, who are not satisfied with the decision of administrative reconsideration, may then initiate an administrative lawsuit against the relevant state agency at the competent People’s Court in Vietnam.\textsuperscript{61} Although the law guarantees non-discriminatory treatment of foreign nationals at the administrative judicial proceedings, foreign investors rarely go to the administrative court for an injunction against the state agencies due to lack of trust in the impartiality of the court in cases against the state agencies. In addition, they are refrain from the court proceedings because the judges in Vietnam tend to be conservative and rarely refer to international treaties when assessing the cases. Therefore, the foreign investors find it impractical to take legal actions in the Vietnamese court, and instead, they directly initiate international arbitration proceedings if administrative reconsideration fails.

To overcome this problem, the government of Vietnam has taken efforts to develop the ISDS mechanism which is predominantly based on good office

\textsuperscript{56} Id.

\textsuperscript{57} Luật Khối nại và quyền khởi kiện hành chính của người dân [Law on Complaints and the Right to Initiate Administrative Lawsuits], No. 02/2011/QH13 art. 2 (Nov. 11, 2011) [hereinafter Law on Complaints].

\textsuperscript{58} Id. art. 5.

\textsuperscript{59} Id. art. 7.

\textsuperscript{60} Id. art. 12.

\textsuperscript{61} Id. art. 7.
and mediation. The investment law expressly advocates the non-litigation methods, such as consultation and mediation, for resolving investment disputes. Accordingly, Article 14 of the Law on Investment 2014 states that any dispute relating to business investment activities in Vietnam shall be resolved first through negotiation and conciliation. Similarly Decree No. 15/2015/ND-CP of the Government on public-partnership investment form also provides that any dispute between the competent authority and investors shall be resolved through negotiation and conciliation.\(^{62}\) To address the investor-state disputes, the Prime Minister of Vietnam has adopted a special Decision No. 04/2014/QD-TTg in 2014 to provide uniform guidelines for state bodies in the settlement of investment disputes between Vietnam and foreign investors.\(^{63}\) Under the Decision, MOJ shall be the pioneer state body assisting the government and other government agencies in settling the disputes.

Decision No. 04/2014/QD-TTg also provides the responsibility of relevant national agencies in the stage of resolving complaints of a foreign investor in order to prevent international investment disputes. Accordingly, in the case where state agencies, organizations and individuals receive complaints or requests for consultancy sent by foreign investors, but they have no competence for resolution, they shall guide foreign investors to send complaints or request for consultancy to competent agencies and notify this event to competent agencies.\(^{64}\)

At the stage of good office and consultation with foreign investors, some state agencies, organizations, and individuals may be invited or assigned by superior agencies to deal with the complaints. They must immediately report the case to their direct superior agencies and the MOJ (being the legal representative of the Government) if they notice the following:

- Measures being the subject of complaints have signs of violation of law or commitments with foreign investors, affecting the lawful rights and benefits of foreign investors; or
- Failing to definitely resolve complaints of foreign investors; or
- International investment dispute can arise.\(^{65}\)

The state agencies, organizations, and individuals, assigned to participate in the process of consultation and good office with a particular case, shall regularly notify the status of the settlement of complaints or consultancy to

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\(^{62}\) Nghĩa định về đầu tư theo hình thức đầu tư công tư [Decree on Investment in the Form of Public-Private Partnership], No. 15/2015/ND-CP art. 63(1) (Feb. 14, 2015).

\(^{63}\) Law on Complaints, supra note 57, art. 2.

\(^{64}\) Id. art. 9(2).

\(^{65}\) Id. art. 10.
the MOJ, competent state agencies coordinating the process of settlement of the complaint. In addition, they are required to strictly comply with options approved by the directly superior agencies (after they received the advice from the MOJ).

In the case that the dispute cannot be settled via consultation and good office, and the foreign investors decide to initiate legal action against the state through the international dispute settlement mechanism (usually an *ad hoc* international arbitration as Vietnam has not participated in ICSID Convention), the Government will form an inter-branch working group, comprising of the representative of the concerned state bodies, the MOJ, and lawyers or legal consultants (if any), to formulate strategies for settling international investment disputes to be sent to the Government for approval. According to Decision 04/2014/QĐ-TTg, the agency in charge shall coordinate with the inter-branch working group and the lawyers to handle the dispute case within 30 working days from the date on which the strategy for settling the investor-state dispute is approved, but no later than the time of filing of the first defense report to the international arbitration panel in accordance with the respective arbitration rules.

The establishment of the coordination mechanism for settlement of international investment disputes under Decision No. 04/2014/QĐ-TTg has helped the government to manage the ISDS more efficiently with clear assignment of functions amongst the government agencies. However, the issue for Vietnam remains – how to prevent investor-state disputes.

Despite the efforts by the Government and relevant agencies in internalizing investment treaties, the governance of IIA is far from perfect. The challenge remains to ensure that the local governments have a proper understanding of the legal implication of the state’s international obligations. As the realization of state investment treaty obligation is assumed to all state agencies, both central and local, it is significant that they accumulate appropriate understanding and awareness about investment treaty obligation. It is believed that Vietnam must pay more attention to educating and training the government officials of IIA’s to strengthen their awareness of potential international investment disputes. In particular, the training must provide practical knowledge on the state’s IIA obligations and liabilities, such as the content of the principles of “most-favored-nation” treatment and “national treatment”, “fair and equitable treatment” and the requirements for an application of these principles; practical interpretation of the term “investor” and “investment” under the respective IIA; “indirect expropriation” and legal implication of such measure. It is of high significance that the government agencies understand the treaty obligations clearly. Such continuous education programs are crucial for IIA’s governance.
Suggestions for Improving IIA’s Governance

Based on previous analysis, it is clear that Vietnam still needs to improve its investment treaty internalization with regard to three aspects, namely (i) treaty management, (ii) coordination for treaty implementation, and (iii) investor-state dispute settlement:

First, Vietnam should review and strengthen the investment protection regime to streamline the foreign investment policy. Since Vietnam has concluded BITs and FTAs with the same countries, while standards of investment protection in those treaties may vary greatly. Having dual investment regimes may cause confusion to the government “because it cannot be completely certain of the treatment standards required to grant to investors.” Thus, Vietnam should analyze and identify the adoption of the investment regime of the treaty that provides more certainty to the government actions. That would help to limit the discretion of the international tribunal in interpreting the scope of the obligations of the state in the application of complex investment protection rules, such as fair and equitable treatment, expropriation, and general exceptions.

Second, the government must work on improving coordination between state agencies, both inter-ministerial coordination and national-provincial government coordination. When the government introduces any policy it must not just assign to one particular ministry to carry out the preparation of the policy. The government must require closer coordination and cooperation between the ministries in the rule-making process; encourage the active involvement of local governments in the process of rule-making so that they fully understand the policy. The provincial governments and ministries must not issue conflicting regulations, as this leads to uncertainty and may eventually lead to investor-state disputes.

More effective dissemination would be useful for a better understanding of investment treaty obligations, in particular, targeting government agencies on the legal implication of investment treaty obligations for respective agencies. The ‘post-negotiation dissemination of knowledge should be encouraged. This can be accompanied by the handbook or manual which explains what types of measures can give rise to obligations.

Third, in order to prevent litigation before international arbitration, the government of Vietnam shall also develop an efficient dispute prevention mechanism that can prevent a conflict from escalating to the level of a dispute.

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66 Junianto James Losari, Comprehensive or BIT by BIT: The ACIA and Indonesia’s BITs, 6 Asian Journal of International Law 15, 43 (2016).
This mechanism shall also comprise of the investor after-care services that would provide continued assistance to foreign investors once their investment is up and running.67

For investors, an ombuds office provides an institutional interlocutor to turn to, an official channel to address issues and problems at an early stage. It can remain at the informal level but can also constitute a formal approach to the host government and a request to resolve the issue. It can constitute a mandatory channel or be available to the investor as an additional choice. It may operate according to strict procedures or be available in a more flexible manner. In any event, the ombuds office can constitute a way for the investor to attempt a prompt, early, potentially cheap and amicable resolution of a problem relating to its investment.68

Vietnam could follow the Korean model of the Office of the Foreign Investment Ombudsman (OIO) – “an ombuds office strategically located within the KOTRA,”69 Korea’s trade-investment promotion agency, but accountable solely and directly to the Prime Minister.

[T]he OIO includes an investment aftercare team that consists of so-called “home doctors” who are experts on various industrial sectors in the Republic of Korea. They provide individualized support to foreign investors in [the Republic of] Korea who face grievances of any kind. In addition, an investment service team within the OIO makes sure that the investment environment for foreign investors is generally favorable, by addressing, among other things, the daily concerns of foreign managers and other individuals at a personal level.70

By having this type of mechanism, whenever foreign investors face a problem they can turn to an official channel to address the problem at an early stage. This can provide a prompt, inexpensive, and amicable resolution of a problem for investors.

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67 U.N. Conference on Trade & Dev., Investor-State Disputes: Prevention and Alternatives to Arbitration, at 87, U.N. Sales No. E.10.II.D.11 (2010).
68 Id.
69 Id. at 88.
70 Id.
6 Conclusion

Over the last thirty years, Vietnam has gradually learned the international practice on promotion and protection of foreign investment. It has become a contracting party to many IIAs, which contains provisions on full protection and security, fair and equitable treatment, umbrella clauses, minimum standards of treatment, etc. This demonstrates Vietnam’s willingness to establish itself as a reliable destination for foreign investment and take an active part in the global manufacturing network.

However, with the increased integration of the number of investor-states, disputes also increased in Vietnam. This greatly contributed in raising the awareness of IIAs in general, and ISDS in particular. Vietnam now must be ready to accept international arbitration on any matters relating to IIAs obligations as well as improve the IIA governance.