

The EU-Vietnam FTA: What Does It All Mean? What Does It Mean for the Future?

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On 2 December 2015 after more than three years of negotiations, the European Union and Vietnam finalized talks for a free trade agreement. This follows after the EU and Vietnam reached an agreement "in principle" on 4 August 2015. With the EU hailing it "the most ambitious and comprehensive FTA that the EU has ever concluded with a developing country," and David Cameron recently completing the first trip to Vietnam of any serving UK Prime Minister, people are curious to hear the details. What do you need to know?

Import tariffs are to be largely eliminated within seven to ten years, which should provide a boon for business interests on both sides. For example, the Scotch Whisky Association sees the deal as a game changer because it would eliminate the stiff 45 percent tariff it currently faces on all spirits imported to Vietnam. EU Foreign Direct Investment in Vietnam in general — already estimated in 2013 at US\$ 656 million — would skyrocket even further based on the treaty.

But no draft agreement has been released to the public while the negotiating parties settle on a final text, so specific provisions remain a mystery. For all of the arbitration enthusiasts wondering how the agreement tackles ISDS, the European Commission released a press release on 2 December 2015, stating:

"Vietnam has also agreed to accept the EU's new approach on investment protection - in particular a permanent investment dispute resolution system with an appeal mechanism."

Those who have seen the European Commission's recent official text to create a permanent investment court to resolve investment disputes arising under The Transatlantic Trade and Investment Partnership have a good idea what to expect from the EU-Vietnam FTA. Disputes under the TTIP proposal would be resolved by a three-member panel chosen from 15 pre-selected judges comprised of five U.S. nationals, five nationals from the EU Member States and five third-country nationals. The proposal also envisions an appeal court comprised of six judges holding nationalities from the U.S., EU and third-countries.

Applying the EU's TTIP approach to Vietnam, though, raises all sorts of questions: Has Vietnam, in effect, agreed to one system vis-à-vis the EU but to a completely different, more traditional ISDS system vis-à-vis the United States and the other parties to the Transpacific Partnership Pact? What would this say about the harmonization of investment law more generally? Assuming the success of a bilateral EU-Vietnam investment court, how would such an institution accommodate other countries that wish to join it? How stable could the institution be while it remains a "moving target"? Questions abound.

The EU may seek to propose an Asia-wide permanent investment court to resolve disputes arising under the FTAs that the EU is currently negotiating with some Asian States (Malaysia, Thailand, India, Philippines and Japan). While the EU-Singapore FTA, which is pending signature and ratification, does not provide for the creation of a distinct permanent investment court, it does establish a joint committee (known as the 'Trade Committee') comprised of the Parties' Trade representatives with the task to, *inter alia*, oversee the implementation of the FTA, consider amendments to the FTA and issue binding decisions. With these wide powers, the creation of an Asia-wide permanent investment court is not entirely far fetched. The Trade Committee is tasked, after all, to examine whether an appellate mechanism could be created (Article 9.30(1)(c) of the EU-Singapore FTA).

Putting aside the uncertainty about a standing investment tribunal, most signs indicate that Vietnam increasingly embraces arbitration and would want its deal with the EU to offer an open and transparent environment for foreign investors. Dating back to the mid-1980s, Vietnam's economy has steadily adopted a set of liberalizing reforms as part of its Doi Moi policy. The country ratified the New York Convention in 1995, it joined the World Trade Organization in 2007, it became a party to the 2012 ASEAN Comprehensive Investment Agreement, and it has 46 bilateral investment treaties in force. Vietnam is not a member State to the ICSID Convention, but this is not uncommon for many Asian and Pacific countries (which tend to opt for UNCITRAL arbitration over ICSID).

More importantly, recent years have revealed Vietnam to be a willing — and successful — participant to several international arbitrations. In December 2013, an UNCITRAL tribunal dismissed claims for US\$3.75 billion brought by a U.S. real estate venture against the State on jurisdictional grounds, and it included a cost award in favor of the Respondent. The Government further announced in January 2015 that it had prevailed on the merits of another arbitration under the France-Vietnam BIT brought by the French investors of a dialysis clinic in Ho Chi Minh City who sought \$47 million. And in May of this year, an ICC tribunal rejected claims for \$100 million brought by a consortium of international oil companies concerning taxes against State entity PetroVietnam, and the tribunal ordered the claimants to reimburse PetroVietnam's costs of the arbitration in full. In each instance the Government maintained a positive position toward the arbitral process, stating for example:

"While Vietnam wishes to continue to encourage foreign investment and remains committed to its obligations under international treaties which afford protection to foreign investors, it will strongly defend any unmeritorious claims brought against it under such treaties."

Looking to other recently concluded treaties by Vietnam provides further food for thought. In 2014 and 2015, Vietnam signed the Eurasian Economic Union-Vietnam FTA and the ASEAN-India Investment Agreement respectively that both provide for investor-State arbitration. More recently, Vietnam was one of the 12 States that signed the Trans-Pacific Partnership on 4 October 2015 and the treaty will provide for an investor-State arbitration provision. According to the official text released in November, the investment chapter draws inspiration from the 2012 U.S. Model BIT.

Based on the above recent activity, there is little reason to doubt Vietnam's support for investor-State arbitration as an effective mechanism to resolve disputes between an investor and a State. This stance will undoubtedly meet some resistance from the EU as the topic of investment dispute

settlement is ironed out.

What types of investment and what types of claims might we see in the future as a result of the new EU-Vietnam FTA? Expect heavy involvement from EU companies in large-scale privatizations of Vietnamese State-owned enterprises. The European Commission is already promoting the new deal by noting that EU companies will be able to bid for public contracts with Vietnamese ministries, including for infrastructure such as roads and ports, power distribution companies, railways, and 34 public hospitals. British investors, in particular, are poised to become involved in the metro rail project for Ho Chi Minh City and massive pavement projects scheduled for roads throughout the country. EU mining companies will look to invest in Vietnam's largely undeveloped mineral resources, especially bauxite (a key raw material necessary for the production of aluminum). Some fear that China's close position just north of Vietnam will create problems with illegally traded Chinese minerals and metals finding an easier passage into Europe via Vietnam. Future investment claims stemming out of that sector may bring new waves of allegations involving fraud or corruption.

All speculation aside, the new EU-Vietnam FTA will likely set an important marker in the development of international trade and investment standards. It is no surprise that President Obama recently devoted a part of his speech concerning the TPP specifically to addressing Vietnam. For many in the EU and Vietnam, opportunity awaits.