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# From Trinh Vinh Binh to EUVIPA: Vietnam's Meritorious Step towards Transparency in ISDS

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**Introduction**

The topic of Investor-State Dispute Settlement ("ISDS") has never been more trending in Vietnam than now. The year 2019 witnessed two of the most noticeable events pertaining to ISDS that involved Vietnam: the end of over-twenty-year Trinh Vinh Binh v Vietnam saga [1)] and the final conclusion of the EU-Vietnam Free Trade Agreement ("EUVFTA") and EU-Vietnam Investment Protection Agreement ("EUVIPA").[2)]

Although the Trinh Vinh Binh v Vietnam saga is considered to have come to an end after an arbitral award was issued in favour of the investor, its resonance is likely to keep on echoing in the future. It is the resonance of doubt not merely about whether Vietnam is still a promising and healthy investment environment for foreign investors but also about the transparency in ISDS proceedings, which has been put under critical spotlight for a long while now. However, the conclusion of EUVIPA shortly after the Trinh Vinh Binh award is a light at the end of the tunnel which hopefully resurrects the faith in the ISDS mechanisms for foreign investors in Vietnam, particularly with respect to the issue of transparency of proceedings. This blog post focuses on examining Vietnam's meritoriously bold step to expose itself to a more transparent ISDS regime under the EUVIPA and how Vietnam will possibly benefit from it.

**From Trinh Vinh Binh…**

On 10 April 2019, an UNCITRAL arbitral tribunal established under the Vietnam-Netherlands BIT 1994 rendered an award ordering Vietnam to pay Mr. Trinh Vinh Binh – a Dutch national of Vietnamese descent – and his company Binh Chau JSC a total amount of approximately US$45 million, including damages for expropriation of property, moral damages, costs of arbitration and related legal fees. The claim was brought by Mr. Trinh against the Vietnamese Government for the breach of a settlement of a previous claim under the same BIT. The arbitration proceedings were seated in London and administered by the Permanent Court of Arbitration, with hearings organized at the ICC headquarters in Paris in August 2017.

This piece of news was initially published by an US government-funded news agency VOA before rapidly spreading out. Notably, the first article by VOA regarding this information contained a

picture of the last page of the award in which the final decision of the tribunal was clearly revealed, though the authenticity of that picture is still unknown.

Immediately, the Vietnamese Government dismissed the accuracy of this news. In a statement, the Ministry of Justice confirmed that the arbitral tribunal had issued the final award between Trinh Vinh Binh and Vietnam. However, the content of this award along with other dispute-relevant information was supposed to be kept confidential by all parties. The Ministry of Justice further alleged that news agencies and social networks had failed to provide accurate information about the award's outcome with subjective interpretation and speculation that caused serious misunderstanding by the public. Nevertheless, Vietnam or the Ministry of Justice has neither expressly confirmed nor denied the award's outcome provided by the news sources. Hence, a wave of doubts by the public pertaining to the actual result of this case has been raised.

This action from the Vietnamese Government is a perfect demonstration why investor-state arbitration should not be as confidential as private commercial arbitration since the former often involves various issues of public interest that requires to be transparently known. In this particular case, it was the Vietnamese taxpayers who desired to know whether their own money ended up going to a foreign investor as a consequence of the Government's wrongful acts.

On the other hand, investors may take advantage of the fact that there is no presumption of confidentiality in investment arbitration and play the media strategy in order to put pressure on the host state's government. For example, in *Amco v. Indonesia*, the respondent accused the claimants of publishing an article that was allegedly detrimental to Indonesia and requested provisional measures on confidentiality of the dispute. However, the tribunal rejected this request as the ICSID Convention and ICSID Arbitration Rules do not prevent the parties from revealing the case.[3)] The tribunal in *Loewen v. United States* even further acknowledged the value of making information about investment arbitrations public as failure to do so would "preclude the Government (or the other party) from discussing the case in public, thereby depriving the public of knowledge and information concerning government and public affairs".[4)]

In the case at hand, VOA revealed that they had an opportunity to read the whole 200-page award before publishing the news. Regardless of who the person who disclosed the award to VOA was or the rightfulness of such an action, other foreign investors in Vietnam are possibly concerned about the possibility of enforcing an award in case they have disputes with the Vietnamese Government, not to mention that the reason why this case was initiated was because the Vietnamese Government had failed to enforce the settlement agreement with Mr. Trinh in the previous dispute.

### … to EUVIPA

In the midst of doubt from the public and foreign investors, the signing of the EUVIPA came on 30 June 2019 as a savior to help Vietnam somewhat win their trust back. Not only did it draw more attention to Vietnam as a promising land for future foreign investors, the inclusion of the new Investment Court System ("ICS") in the EUVIPA is an assurance that serious concerns about 'lack of transparency' in the current ISDS mechanism are being addressed.

The ICS under the EUVIPA will be fully transparent and allow a third party to make submission to intervene in the proceedings. Article 3.46(1) EUVIPA provides for the application of the

UNCITRAL Transparency Rules to ISDS proceedings and adapts them to the context of the EUVIPA without much alteration. This incorporation-by-reference methodology contrasts with Annex 8 ('Rules on Public Access to Documents, Hearings and the Possibility of Third Persons to Make Submissions') of the EU – Singapore Investment Protection Agreement ("EUSIPA ") which adopts the UNCITRAL Transparency Rules only to match the terms of the EUSIPA ISDS procedure.

Greater transparency in the proceedings is also reflected in the EUVIPA's treatment of third-party funders. While the EUSIPA requires foreign investors to disclose merely the identities of the third-party funder, the EUVIPA goes a step further by mandating disclosure of the "nature of the funding arrangement".

Information about all investment arbitration disputes involving Vietnam so far has always been confidential. However, with the birth of the UNCITRAL Transparency Rules in 2014, the situation will be likely to change. Although Vietnam is yet a member of the 2014 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention") and thus not expressly bound by UNCITRAL Transparency Rules, such Rules nonetheless have been incorporated in the new 2013 UNCITRAL Arbitration Rules. The Rules will automatically apply to disputes arising out of treaties concluded as of 1 April 2014, not to mention that the EUVIPA adopts many key provisions of the UNCITRAL Transparency Rules.

**Conclusion**

As noted in a previous post, both UNCITRAL Transparency Rules and Convention were born as a response to the criticism against the secrecy of investment arbitration: "investment tribunals frequently decide matters of public importance behind closed doors". Since the inception of investment arbitration, a multitude of commentators did not approve of the idea of letting a small group of unknown arbitrators handle investment disputes with enormous awards of damages in secrecy, especially when these disputes may lead to national law being revoked, justice systems questioned, environmental regulations challenged and public policy threatened. Therefore the public nature of investment arbitration should never be underestimated. Furthermore, stepping towards transparency will express the fairness that host states are willing to guarantee to their own local citizens, who are members of the society that could be affected by the outcome of investment arbitration. Hence, giving non-parties, including groups of local people, the right to make amici curiae submission is a vital aspect of transparency in ISDS.

Nevertheless, from host state's perspective, transparency in ISDS can be a double-edged sword which may take a toll on its reputation if it is known to lose in a dispute for wrongly treating foreign investors. Given the current state Vietnam has no other option but to play with the sword to regain the trust from foreign investors and its locals, especially when the trust has been significantly tainted after the Trinh Vinh Binh saga. Exposing itself to a more transparent dispute settlement mechanism like the EUVIPA's ISDS is a brave move from the Vietnamese Government. What matters now is how Vietnam is going to get prepared to adapt to the new wave of transparency policies under the EUVIPA as well as the new generation of international investment treaties. Only time will tell.

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References

**?1** Global Arbitration Review, 'Dutch national wins moral damages against Vietnam'.

**?2** EU-Viet Nam free trade agreement – Joint press statement by Commissioner Malmström and Minister Tran Tuan Anh.

**?3** Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1), Decision on Request for Provisional Measures of 9 December 1983, 1 ICSID Rep. 410 (1993).

**?4** The Loewen Group, Inc. and Raymond L. Loewen v. United States (ICSID Case No. ARB/(AF)/98/3), Decision on Hearing of Respondent's Objection to Competence and Jurisdiction of 5 January 2001, para. 26.

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