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FOREIGN INVESTMENT AND INVESTMENT DISPUTE RESOLUTION MECHANISMS

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A BRIEF OVERVIEW ON FDI IN VIETNAM

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A BRIEF OVERVIEW VIEW ON FDI IN VIETNAM

- As of December 2017, the country had 24,748 FDI projects with a total registered capital of 318.72 billion USD, of which disbursed capital was 172.35 billion USD.
- FDI capital accounts for 25% of total social investment, accounts for over 50% of total industrial production value.
- In 2017, FDI enterprises exported 155.4 billion USD, accounting for 72.6% of export turnover.
- FDI makes a significant contribution to labor resolution and the quality improvement of human resources. There are about 3.7 million direct and indirect workers in FDI projects.
- FDI has contributed to promoting and deepening integration.
- FDI is an important factor in the development of technical and social infrastructure and the completion of the legal system which is in accordance with the market mechanism and gradually conforms to international law and practice, including the mechanism dispute resolution.
- Arbitration as a dispute resolution mechanism is stipulated in laws, treaties and contracts.

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INVESTMENT DISPUTES IN VIETNAM

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1. THE INVESTORS' CONCERNS OVER INVESTMENT IN VIETNAM

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- Revocation of Certificate (of Investment Registration), Certificate of Business Registration, Business License.
- Adjustment, non-adjustment of the Certificate (of Investment Registration), Certificate of Business Registration, Business License.
- Revocation of land use rights.
- Disputes over taxes.
- Disputes over incentives under the Certificate (of Investment Registration).
- Disputes over business activities related to investment: sales, construction, services, insurance, renting, logistics, out-sourcing, ship-building…

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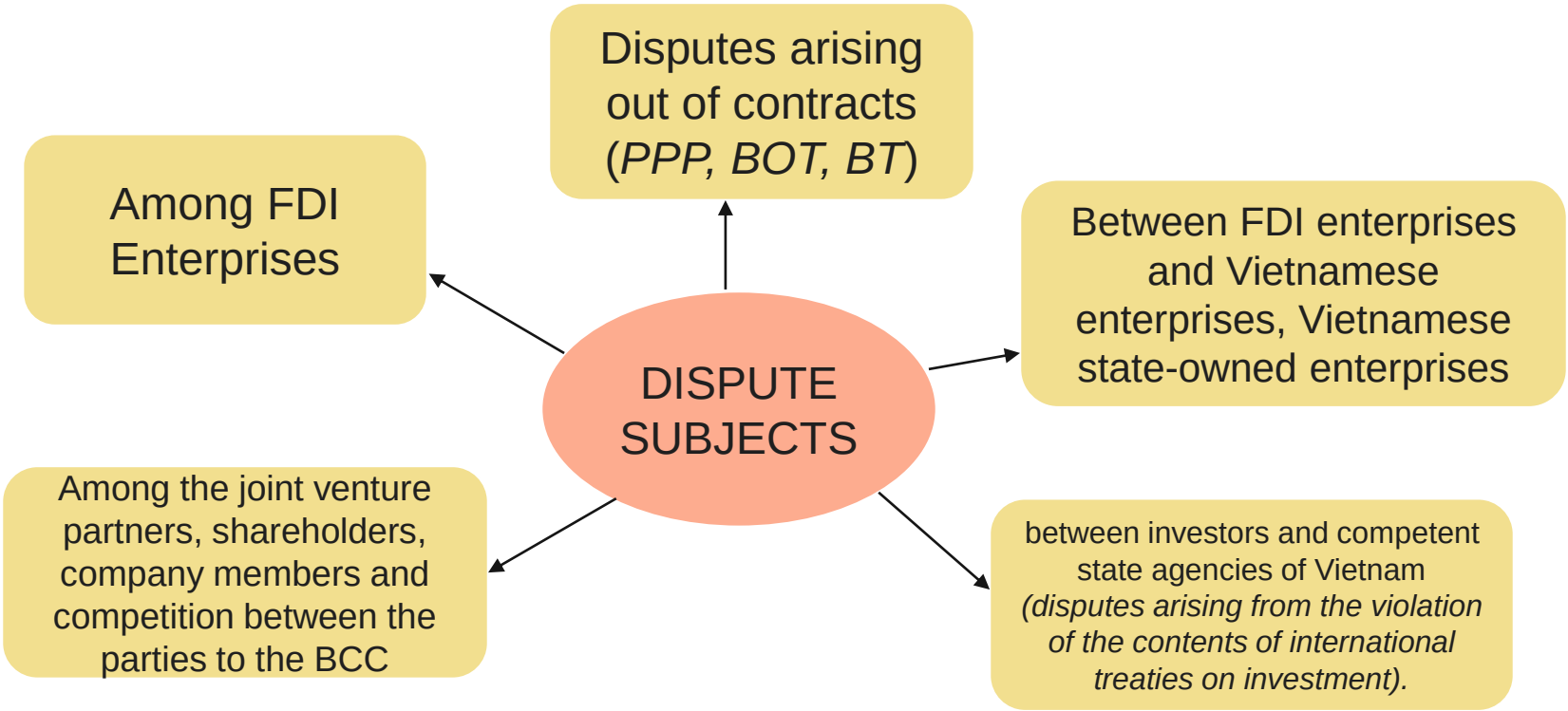
2. DISPUTE SUBJECTS



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3. DIFFICULTIES AND DISPUTES IN INVESTMENT ACTIVITIES

- Investor - Investor disputes are various.
- In 2014, about 72 cases were settled (Ministry of Planning and Investment).
- Recently, Central Authorities receive 1 case per week on average.
- There have not been statistics of local cases which were not notified.
- Investment disputes of Vietnam (4 cases were published on website of UNCTAD; in 3 out of 4, Vietnam prevailed).
- Main problems and disputes are between investors and competent authorities of Vietnam.

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INVESTORS – INVESTOR DISPUTE RESOLUTION MECHANISMS

IN VIETNAM

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1. SUBJECTS OF INVESTMENT DISPUTES

Disputes between investors in which at least one of the disputing parties is a foreign investor or a foreign economic organization (with investors, foreign economic organizations holding 51% of charter capital or majority of partnership members are foreign individuals) ; investment in the form of PPPs.

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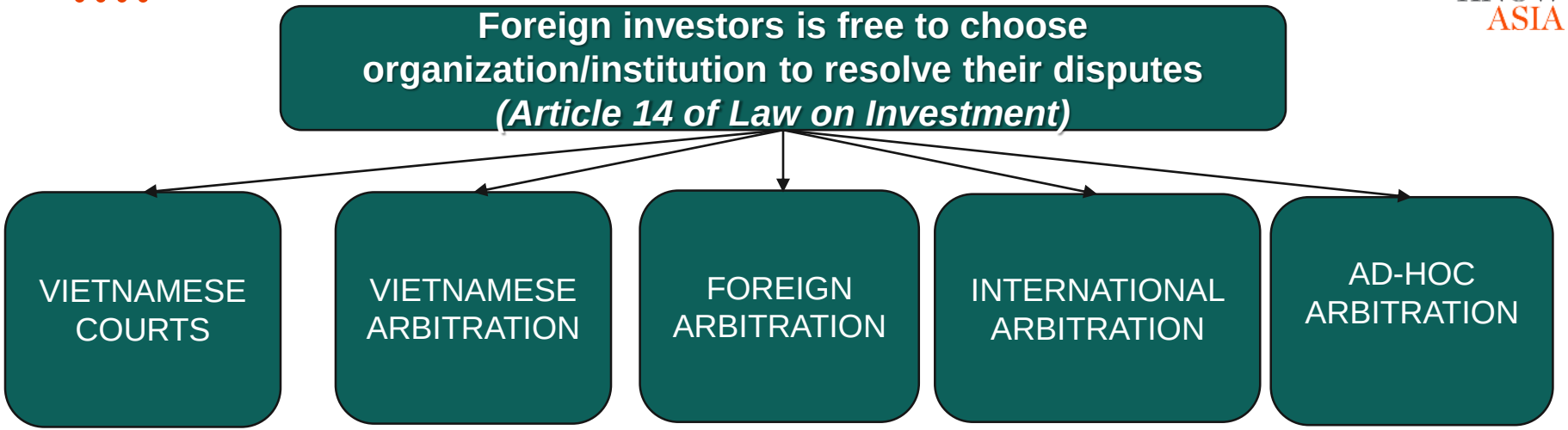
2. DISPUTE SETTLEMENT AUTHORITIES, INSTITUTIONS



- *Any dispute between a foreign investor and a competent State agency of Vietnam relating to business investment activities in the territory of Vietnam shall be resolved by an arbitration body or Vietnamese court, unless otherwise agreed under a contract or otherwise stipulated in international treaties of which the Socialist Republic of Vietnam is a member.*

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3. VIETNAMESE ARBITRATION – SELECTION OF FOREIGN INVESTORS FOR DISPUTE SETTLEMENT

- According to the VIAC's 2017 statistics, disputes with foreign elements settled in the VIAC has increased rapidly, accounting for 51% of the total disputes of the centre and FDI disputes account for 28,48%. There are currently 60 states, territories of which enterprises arbitrated at VIAC. China, the United States, and Singapore are the countries have the largest number of businesses participating in dispute resolution.
- Over the past 30 years, the legislation to ensure the enforcement of the arbitral award has contributed to the effectiveness of the arbitration method has made this method more complete. (On February 24, 2017, the Government also promulgated Decree No. 22/2017 / ND-CP on commercial mediation as the legal ground for commercial mediation activities).

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3. VIETNAMESE ARBITRATION – THE SELECTION OF FOREIGN INVESTORS FOR DISPUTE SETTLEMENT

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ADVANTAGES OF DISPUTE RESOLUTION BY ARBITRATION

- Arbitration gives more space for mutual wills of disputing parties (free to mutually choose the arbitration institution, the place and the language used in the prodeedings, the applicable law. Etc.).
- Prompt and flexible procedures, confidentiality, private procedures; Neutral arbitration agency with high professionalism.
- VIAC is the most experienced and prestigious arbitration institution in Vietnam. The issuance of VIAC's arbitration rules version 2017 with 03 new matters: Multiple contract (Article 6); Consolidation (Article 15) and Expedited procedures (Article 37) has helped investors reduce the time and costs spent on dispute resolution.
- The launching of the Vietnam Mediation Centre-VMC is also an important support mechanism for FDI enterprises to solve problems and disputes in doing business in Vietnam

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4. SOME SOLUTIONS ENHANCING THE ATTRACTIVENESS OF ARBITRATION

- The Commercial Arbitration Law 2010 and Resolution No. 01/2014 of the Supreme Court has given clarification on the Court's supportive and supervisory role for arbitration. However, there are still some shortcomings such as the application of interim measures in in violation of contract provisions; Court's enrollment although there is an arbitration agreement, creating concerns for FDI enterprises.
- Setting-aside of arbitral awards: in principle, the Vietnamese arbitral award will be treated and enforced as Court's judgments. Ensuring the enforceability of arbitral awards is crucial for FDI enterprises to choose arbitration as dispute settlement method.
- Although Resolution No. 01/2014 has made the term of "basic principles of Vietnamese law" a little more clear, the guidelines still need to be more specific to avoid controversy in implementation.
- Improve the quality of arbitrators, lawyers by arbitrator training and Issue incentive policies to encourage the participation of foreign arbitrators and foreign lawyers in arbitral proceeding..
- Keep up to promote the image of arbitration as well as each arbitration centre nationwide.

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INVESTOR-STATE DISPUTE RESOLUTION MECHANISM

UNDER INTERNATIONAL TREATIES

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INVESTOR-STATE DISPUTE RESOLUTION MECHANISM UNDER INTERNATIONAL TREATIES

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- As of December 2017, Vietnam has signed approximately 60 Investment Promotion and Protection Agreements, including about 10 FTAs
- Outstanding agreements:

✓Asean Comprehensive Investment Agreement (ACIA-2012);

✓Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) signed on 09/03/2018 in Chile;

✓The ECFTA Agreement negotiation has been finalized on 01/12/2015 and the Parties are currently reviewing and planning for signing in 2018.

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INVESTOR-STATE DISPUTE RESOLUTION MECHANISM UNDER INTERNATIONAL TREATIES

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Limited protection of BIT Agreements signed in the 1990s:

- Mainly protect direct investment
- Allow investment under the laws of each country or state approval
- Principles of treatment and protection of investment, mainly MFN treatment, restriction on the application of the principle of NT treatment.

Dispute Resolution Methods

- Settlement at the administrative or judicial bodies of the investment-receiving state.
- Settlement through ad-hoc arbitration
- Settlement at ICSID
- Settlement through arbitration agreed by the Parties
- Settlement through arbitration under VNICITRAL
- Arbitration settlement under rules

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CONTENT AND MECHANISM

OF INVESTMENT DISPUTE RESOLUTION UNDER CPTPP AND EPFTA

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1. REQUIREMENTS UNDER NEW-GENERATION FTA(S)

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The new generation agreements have higher requirements and wider scope than traditional agreements

- ✓*Protect the pre-licensing period, future contracts*
- ✓*Open the door on the principle of opt-out*
- ✓*Obligations of the Contracting Parties are broader including State bodies at all levels and State enterprises and individuals exercising the functions authorized by the State.*
- ✓*Principles of national treatment, most favored nation, requirements for activities, minimum treatment of expropriation.*
- ✓*Human capital transfer issues and senior management, exceptions, incompatible measures.*

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2. INVESTMENT DISPUTE RESOLUTION MECHANISM UNDER INTERNATIONAL TREATIES

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- The subject of the lawsuit may be any organization or individual exercising a state function, including state-owned enterprises as defined in the Agreement. (This scope is broader than which is defined under the Enterprise Law)
- Approval of arbitration in CPTPP is on an automated basis.
- Causes of action (i) violate the obligations of the chapter on investment and (ii) incur damages due to the defendant's breach.
- Violation of the agreement in the contract, mechanism of dispute settlement in accordance with the provisions of the contract.
- ICSID arbitration includes official arbitration and arbitration under the supplementary support mechanism; procedural rules is VNICITRAL or agreed in the Contract.
- The limitation period for initiating legal action is 3 year and a half.
- Shall follow the negotiation procedures and notify the intention to initiate a lawsuit.
- Principle of transparency.

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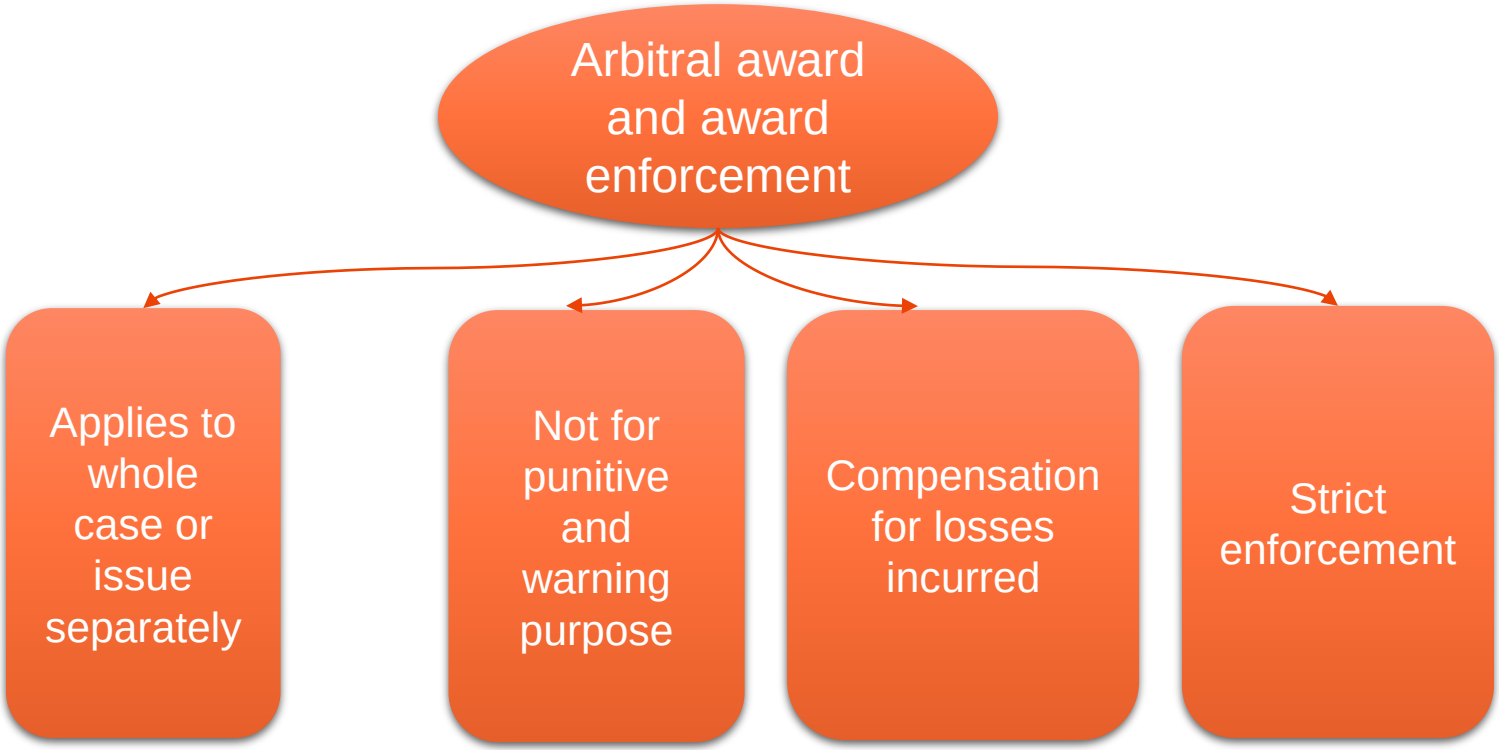
3. ARBITRAL AWARD AND AWARD ENFORCEMENT



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INVESTOR-STATE DISPUTE PREVENTION POLICIES

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INVESTOR-STATE DISPUTE PREVENTION POLICIES

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- Continuing to negotiate international treaties is a step towards attracting FDI and preventing abuse of disputes.
- ICSID was established in 1996 and currently has 153 signatories. Most of the CPTPP Contracting Parties who are members of the treaty and of disputes settlement mechanism under the CPTPP have been agreed upon the ICSID so that Vietnam should facilitate the process of acceding to the ICSID Convention as a mechanism of action at multilateral level and to attract global investment.
- There should be regulations to deal with issues of prevention and settlement of investment disputes, mechanisms for coordination, supervision and early detection of investment disputes; set up early warning system; monitoring mechanisms in sensitive areas.
- Strengthening the supervisory mechanism of the parliament by canceling, recognizing and enforcing the arbitration award in such a way that the arbitral award cancellation is rare.
- The State should support the development of arbitration, professional training for arbitrators.

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THANK YOU

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Kháng cáo & các vấn đề pháp lý	Tài chính & Ngân hàng	Thị trường vốn	Tranh chấp thương mại	Cạnh tranh & Chống độc quyền và pháp luật thương mại
Xây dựng & Dự án	Tuyển dụng & Phúc lợi	Năng lượng & Tài nguyên	Giải trí & Truyền thông	Gia đình, Di chúc & Ủy thác
Định chế Tài chính	Chấp thuận đầu tư nước ngoài	Gian lận, Thu hồi tài sản & Điều tra	Gây quỹ và Quản lý đầu tư	Trò chơi
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Trọng tài quốc tế	Tài chính Hồi giáo	Luật Y tế	Mua bán & Sáp nhập	Khách hàng cá nhân
Tài trợ dự án	Bất động sản	Tái cơ cấu & Nợ	Vận chuyển & Thương mại Quốc tế	Thể thao
Thuế	Công nghệ, Truyền thông & Viễn thông	Tội phạm công nghệ cao		

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GIẢI THƯỞNG

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Competition Focused

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ĐÁNH GIÁ CỦA CHAMBERS ASIA 2014, 2015, 2016 & 2017

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Chuyên môn:

"Nhóm có uy tín cao, tư vấn cho khách hàng đa quốc gia và địa phương về các vấn đề cạnh tranh, thường xuyên tham gia vào các quyết định mang tính bước ngoặt. Ghi nhận sự chuyên nghiệp trong xử lý vấn đề, đồng thời cũng rất tích cực và chủ động trong việc nộp đơn sáp nhập trước khi tiến hành CCS."

Kiến thức pháp lý:

"Họ được đánh giá cao bởi tạo cho không chỉ ở Singapore, mà còn ở các khu vực địa phương."

Dịch vụ khách hàng:

"Họ rất tập trung vào khách hàng và có sự hiểu biết rất lớn về công việc kinh doanh và nhu cầu của khách hàng."

Chuyên môn:

"Họ đưa ra lời khuyên rất phù hợp với những thay đổi trong bối cảnh kinh doanh và ngành nghề hoạt động của khách hàng."

Kiến thức pháp lý:

"Họ có kinh nghiệm về chống độc quyền và thông thạo về khu vực. Họ đã cho chúng tôi lời khuyên rất đúng đắn một cách nhanh chóng."

Dịch vụ khách hàng:

"Chúng tôi rất ấn tượng khi họ có thể nhanh chóng bắt kịp với yêu cầu của chúng tôi và theo kịp với lịch trình gấp gáp của chúng tôi."

Chuyên môn:

"Nhóm được đánh giá cao với kinh nghiệm chuyên sâu về tư vấn cho khách hàng quốc tế và địa phương về các vấn đề kiểm soát sáp nhập, điều tra cartel và nghiên cứu thị trường. Ghi nhận sự tích cực trong việc nâng cao nhận thức về các tiêu chuẩn cạnh tranh quốc tế tại Singapore."

Thế mạnh:

"Tôi ghi nhận thực tế họ đưa ra lời khuyên rất thiết thực và thái độ chắc chắn khi đưa ra lời khuyên."

Dịch vụ khách hàng:

"Chúng tôi rất hạnh phúc, đây là một sự hợp tác rất tuyệt. Dịch vụ rất xuất sắc."

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