

An award-winning Dispute Resolution Practice Group

Practical & Investment Safeguarding Angle of the ISDS Mechanism

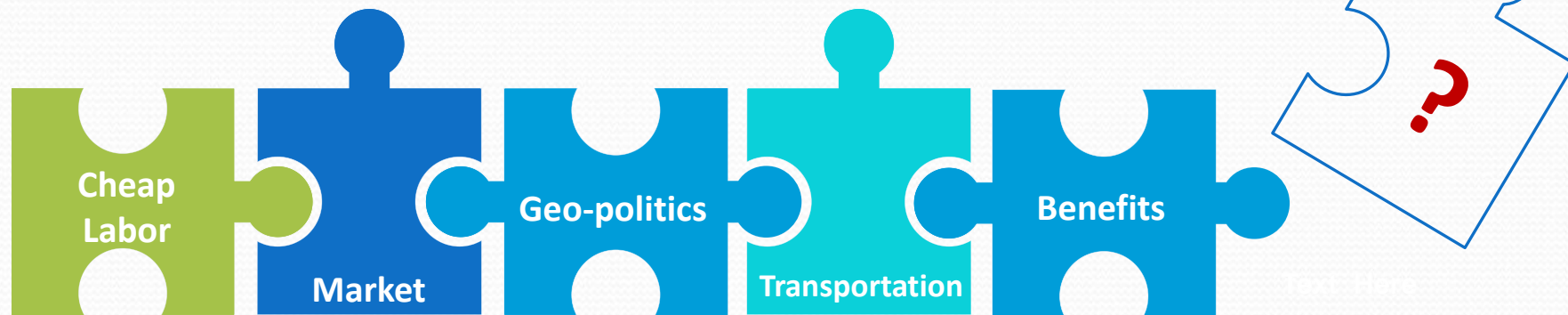
ISDS CONSIDERATIONS BEFORE & DURING YOUR INVESTMENT IN VIETNAM



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VIETNAM CORPORATE LAW FIRM OF THE YEAR

INVESTMENT CONSIDERATION



What about the
Investment Protection?



Investment Protection Mechanism

provided to the investors under various IPAs can easily be overlooked – under which foreign investors have the access to international tribunals to resolve investment disputes, i.e. **ISDS mechanism**



BEFORE THE INVESTMENT

*Choosing the right investor
nationality*



+



- Vietnam has signed 67 BITs and 25 Treaties with Investment Provisions (TIPs).
- **Each IPA offers different level of investment protection.**
- Investors, especially multi-national companies, **can choose the nationality of their investment in Vietnam** (e.g., a US multi-national company can use its Japanese or French subsidiary to invest in Vietnam).
- Investors should consider IPAs' terms and conditions to **choose the most favorable nationality to invest in Vietnam**

PROS and CONS

Criteria that affect IPA protection of investor/investment:

PROS	CONS
<u>Broad</u> definition of protected investor/investment	<u>Narrow</u> definition of protected investor/investment
<u>No</u> Fork-in-the-Road Clause	Fork-in-the-Road Clause (barring concurrent proceedings)
<u>Long or no</u> time limitation	<u>Short</u> time limitation
<u>Easy</u> prerequisites for bringing ISDS	<u>Burdensome prerequisites</u> for bringing ISDS
<u>More</u> grounds for ISDS	<u>Less</u> grounds for ISDS

DEFINITION OF PROTECTED INVESTOR/INVESTMENT

> Broad Coverage:

*"investment means **every kind** of assets" (US-VN BTA, Art 1.1)*

*"owned or controlled **directly** or **indirectly** by nationals or companies" (US-VN BTA, Art 1.1)*

*"company means any entity (...), **whether or not for profit**, and whether privately or governmentally owned or controlled" (US-VN BTA, Art 1.2)*

> Narrow Coverage:

*"has the **characteristics of an investment**, including such characteristics as the **commitment of capital** or other resources, the **expectation of gain or profit**, or the **assumption of risk**" (CPTPP, Chapter 9, Art 1)*

Scope of Investor Protection under IIAs



Non
Discrimination



Right to
Convert and
Transfer



Fair and
Equitable
Treatment



Protection
against
Expropriation



Dispute
Settlement

TIME LIMIT & SCOPE OF PROTECTION

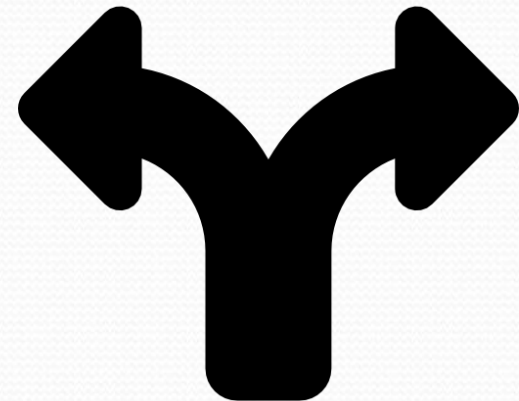
Some IPAs Vietnam participates contain statutes that bar access to international arbitration

- ASEAN Comprehensive Investment Agreement:
 - **03 years from first acquired or should have first acquired knowledge of the breach/loss or damage.**

Fork-in-the-Road (FITR)

FITR Clause:

- claimant investor must chose between **ISDS v local courts**/other settlement provided for in contractual mechanisms
- bars concurrent proceedings → if the same subject matter has been domestically litigated in the host state, then no ISDS is allowed.



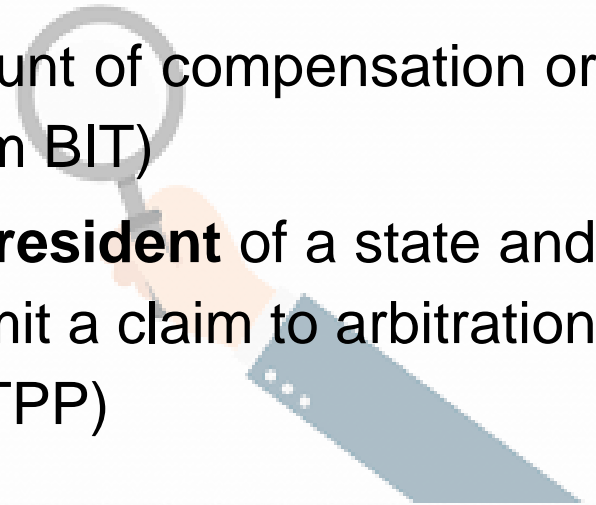
Prerequisites for ISDS

Some typical conditions:

- Notice of Intent to respondent state
- Certain period (normally 3-6 months) has elapsed from the pre-arbitration consultation and negotiation
- Waiver of right to resort to domestic forum (e.g., Art 3.34, EVIPA)

Additional conditions:

- The dispute must be relevant to the amount of compensation or expropriation (e.g., Art 8.3, China-Vietnam BIT)
- An individual investor, being **permanent resident** of a state and a national of another state, may **not** submit a claim to arbitration against that latter state (e.g., Art 9.1, CPTPP)

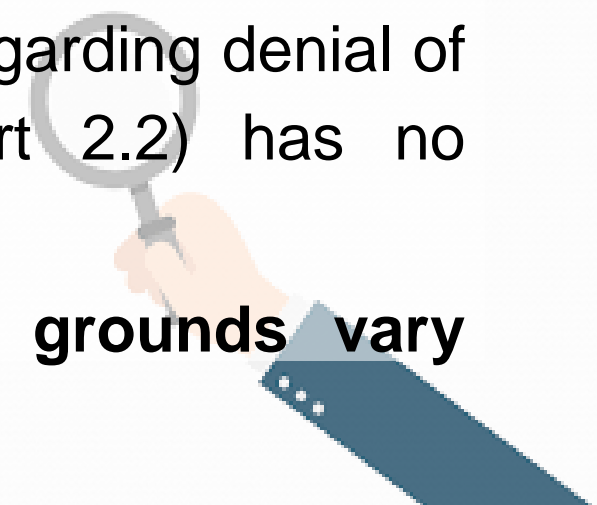


Grounds for ISDS

Substantive rights of investors are prescribed differently under the IPAs in terms of quantity and scope. For instance:

- The US-VN BTA provides for national treatment (Art 2), but the Malaysia-VN BIT does not; and
- The fair and equitable treatment under the CPTPP (Chapter 9, Art 9.2) has specification regarding denial of justice, while the Korea-VN BIT (Art 2.2) has no specification for this treatment.

The grounds for restrictions – limit grounds vary among the IPAs.



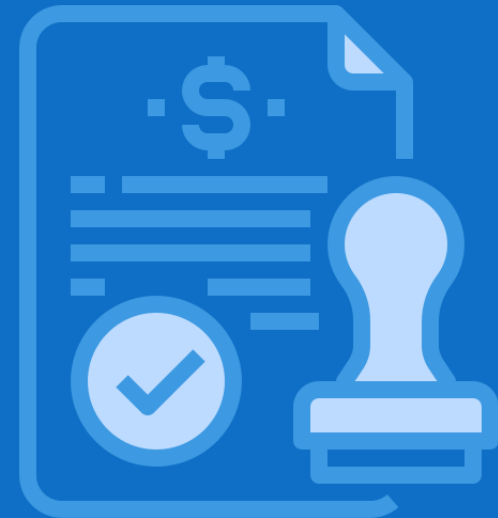
General overview of Vietnam's IPAs with major economy

	Broad Definition Coverage	No Fork-in-the-Road	No Time Limitation
US-VN BTA	✓	✗	✓
UK-VN BIT	✓	✓	✓
France-VN BIT	✓	✓	✓
Japan-VN BIT	✓	✗	✓
Korea-VN BIT	✓	✗	3 years
China-VN BIT	✓	✗	✓
EVIPA	✗	✗	Up to 7 years
CPTPP	✗	✗	3.5 years
ACIA	✗	✗	3 years

DURING THE INVESTMENT

Mind the legality of your investment

- IPAs normally require legality of the investment ("in accordance with the law")
- i.e. investment made illegally would not be protected.
- YET It's often unclear what type of Investment is considered illegal & serious level



Illegality of investment

- ISDS practices

- **Minor illegality** is not intended to exclude investors from ISDS (*Kim & Ors v. Uzbekistan*)
- **Serious illegality** “*If the investor acts illegally, the host state can request it to correct its behavior and impose upon it sanctions available under domestic law*”(*Yuko v Russia*)
- Focus on the illegality in the “**making**” of investment instead of the subsequent operations (*Copper Mesa v Ecuador*)
- Illegality committed during the “making” of the investment cannot be raised by the Respondent States **if they have elected to tolerate such illegalities** (*Aven v. Costa Rica*)

Ways to cure illegality of investment

- Significant illegality during the making of investment would prevent investors from ISDS claims
- Investors should **wait for a certain period of time** before bringing ISDS (if a significantly illegal investment was made) to **prove the state's tolerance**
- It is also a good practice to **rectify such illegality** and (also wait again for a while), if investors decide to bring ISDS.

ISDS to attract, retain & expand investments

- > 25% of investors in a World Bank MIGA-EIU Political Risk Survey indicated:
 1. political risk caused them to withdraw existing investments or cancel planned projects.
 1. political risk they cared about: not terrorism/war rather **government conducts**: adverse regulatory changes, breach of contract, or transfer and convertibility restrictions
 2. government conduct dissuades new prospective investors.
- Minimizing risks at the source is critical not only to **attract, retain and expand investments** but also to **prevent potentially costly investor-state disputes**.

CONDUCTS THAT MAKE COUNTRIES LOSE FDI...

Political Risk Derived From Government Conduct	Investment Protection Guarantees included in IIAs
1. Expropriation	1. Expropriation
2. Breach of Contract	2. Umbrella Clauses/Expropriation
3. Transfers and Currency Convertibility	3. Transfers
4. Sudden/Adverse Regulatory Changes	4. Minimum Standard of Treatment Fair & Equitable Treatment
4.1. Contradictory government action	National Treatment
4.2. Lack of transparency	
4.3. Discriminatory Treatment	
4.4. Abuse of authority <ul style="list-style-type: none"> Abuse of discretion in the interpretation of laws and regulations Disguised targeted harassment through regulations Lack of proportionality 	

CONDUCTS THAT MAKE COUNTRIES LOSE FDI...

Issue Classification

Example

1. Expropriation	<ul style="list-style-type: none"> Government confiscated land and give it to other investors. Government authority refused to renew the communication license.
2. Breach of Contract	<ul style="list-style-type: none"> Government did not comply with its contractual obligations to pay for completed road construction service. National Agency of the State Property unilaterally terminated the agreement.
3. Restriction of Transferability / Convertibility	<ul style="list-style-type: none"> Government has a law regulating the deposit made only to national bank.
4. Sudden regulatory change	
4.1. Contradictory government action	<ul style="list-style-type: none"> Architecture Service partly invalidated construction permits by the mayor of Tbilisi, and penalized investors. MoF refused to give tax incentive guaranteed by Investment law by arguing no grounds in the tax law.
4.2. Lack of transparency	<ul style="list-style-type: none"> Government required investor to pay \$440,000 for technical service of the state inspection agency. The construction was restricted because the land belongs to the transport zone without owner's knowledge.
4.3. Discriminatory treatment against foreign investors	<ul style="list-style-type: none"> Government operated arbitrary tender process effectively preventing foreign investors from joining in procurement.
4.4. Abuse of authority	
• Lack of Proportionality	<ul style="list-style-type: none"> New proposed regulation in communication sector would result in increasing costs from 3.9% to 14.4%.
• Abuse of discretion	<ul style="list-style-type: none"> Ministry of Revenues suspended license and raided the office on the claim that they had anonymous tips. Local government restricted the transportation of oil due to the damage to environment and Tax Service adopted amendments to local Tax Code and



MORE QUESTIONS?



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