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Chapter 3

The legal framework for investment in Viet Nam

This chapter provides an overview of Viet Nam's legal framework for investment. It examines the quality of the country's investment policies and the level of legal protection granted to both domestic and international investors. Particular attention is given to the new Investment Law enacted in 2015. The chapter looks into the rules for expropriation, contract enforcement and dispute settlement as well as the regimes for intellectual property rights and for access to land. It also reviews Viet Nam's international investment treaty practice, including its relation with ASEAN practice and its legal framework for investor-state dispute settlement.

The significant economic reforms undertaken by Viet Nam over the past three decades have been coupled with numerous, successive regulatory reforms, from the 1987 *Law on Foreign Investment* to the recently enacted laws on enterprises and investment. These gradual improvements have brought Viet Nam's legal investment framework closer to the level of the most advanced economies across Southeast Asia. As a result, the investment framework has gradually improved over time: registration procedures, tax policies, rights to transfer capital and foreign exchange abroad and access to land have been progressively relaxed, while the investment environment has gradually been brought more in line with Viet Nam's international commitments (ASEAN in 1995, and WTO in 2007).

In 2005, a significant milestone was achieved with the introduction of the unified law on investment. The *Investment Law* came into force together with a new *Enterprise Law* and an *Intellectual Property Rights Act*. In 2013-15, the government revised various laws fundamental to the investment climate, such as the *Enterprise Law*, the *Investment Law*, the *Housing Law*, the *Real Estate Business Law* and the *Land Law*. The new *Investment Law* draws on the reform initiated in the 2001 *Enterprise Law* and moves further away from the previous "positive list" approach to a "negative list". It also abrogates the evaluation procedure and provides for a single registration process. These various amendments have played a significant role in Viet Nam's efforts to fully integrate the ASEAN Economic Community (AEC).

The wave of legislative reforms has been a very positive step – widely praised by the business community – but further efforts could help Viet Nam to become a top investment destination. Despite well-drafted laws, the legal environment still suffers from a lack of predictability, as delays in adopting implementing decrees has caused confusion among the business community and hence has had a deleterious – although perhaps only temporary – effect on the investment climate. The application of regulations is also sometimes hampered by inconsistent administrative practices, notably at provincial level. Likewise, a more uniform and harmonised implementation of these regulations across the country would greatly enhance the enabling environment for investment.

International investors in Viet Nam tend to favour alternative dispute resolution means over domestic courts to settle their business disputes. Commercial arbitration has thus become the most common way of settling business disputes, such as the Viet Nam International Arbitration Centre. There seems to be a widely shared perception within the business community that the difficulty – too often encountered – of having foreign arbitral awards recognised and enforced by domestic courts, is one of the most stringent impediments to an enabling investment climate in Viet Nam.

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While private ownership of land is still not permitted in Viet Nam, restrictions on access to land have been progressively relaxed. The new *Land Law*, , enacted in 2013 and in force since 2014, was a significant milestone towards further opening access to land for foreign investors. As for the protection of intellectual property (IP) rights, there is a strong awareness, at the highest level of government, of the immediate stakes of having a robust IP policy. Substantial improvements to better protect IP have been made over the past two decades at policy and legislative levels, but enforcement of IP regulations still needs to be further strengthened.

Viet Nam is a contracting party to 66 bilateral investment treaties and an increasing number of multilateral trade and investment agreements. With TPP and the Viet Nam-EU FTA, the country has recently concluded two major and high-profile treaties, placing it at the centre of international investment policy making. Viet Nam's investment treaties typically protect existing covered investments against expropriation without compensation and against discrimination, and give covered investors access to investor-state dispute settlement (ISDS) mechanisms to enforce those provisions. Increasingly, the treaties also facilitate the establishment of new investments by extending their application to foreign investors seeking to make an investment. The conclusion of the FTA with the EU makes Viet Nam the first country to agree to the Investment Court System proposed by the European Union which constitutes an important departure from other ISDS mechanisms found in Viet Nam's treaties, all largely inspired by commercial arbitration.

The review of the substantive provisions in Vietnamese investment treaties shows that the language of key treaty provisions has evolved, particularly since the advent of the new regional ASEAN treaty policy in 2009. In recent treaties, Viet Nam has specified the meaning of key treaty provisions, such as on indirection expropriation and fair and equitable treatment, to clarify government intent. These clarifications can be an important tool in the quest for balance between investor protection and governments' right to regulate. Overall, investment treaties appear to be an important element in Viet Nam's efforts to create an attractive investment climate. Recently concluded treaties suggest that Viet Nam is actively managing its treaty policy, which will help the country to integrate its treaties into its broader economic development objectives.

Policy recommendations

- While Vietnamese laws are often well-drafted, the implementation of legislation sometimes proves to be difficult. For legal security purposes, the authorities would need to ensure that the enactment of

new laws is promptly followed by implementing regulations. Likewise, the application of laws and regulations should be harmonised, so as to ensure consistency of rules and administrative practices from a province to another.

- The enforcement of foreign arbitral awards by domestic courts should be made easier, in accordance to the provisions of the New York Convention to which Viet Nam is a party. Giving access to dispute resolution mechanisms, including arbitration, with the guarantees that awards will easily be enforced is key to creating a strong and enabling business climate.

- Viet Nam's legal instruments – its laws, but also its investment treaties – provide different levels of protection to specific groups of investors, not only between domestic and foreign investors but also among different groups of foreign investors because of differences in the treaty provisions under which they are covered. Viet Nam might wish to ensure that offering different levels of protection to specific investors is justified by a need to provide extra incentives for their investment.

- Many Vietnamese investment treaties only protect investors once they have invested, *i.e.* post-establishment. Viet Nam could consider strengthening the use of investment treaties to facilitate new investments by extending the coverage of certain clauses to the pre-establishment phase.

The domestic framework for investment regulation and protection

Major regulatory improvements have been achieved over the past 30 years

Viet Nam has undergone an economic upheaval at an unprecedented pace over the past three decades as part of *Doi Moi*. Economic reform efforts have been coupled with many, successive regulatory reforms, from the 1987 *Law on Foreign Investment* to the recently enacted laws on enterprises and investment. These gradual improvements have brought Viet Nam's legal investment framework closer to the level of the most advanced ones across the ASEAN region, as shown in Table 3.1.

Longstanding and sustained efforts to modernise the legal framework have resulted in a fairly robust *de jure* investment framework, which has reinforced Viet Nam's position as a country that is, by and large, perceived as a safe and attractive investment destination. These progressive improvements, together with reforms to gradually liberalise FDI restrictions,

have resulted in a much greater foreign participation in the economy and integration into the global economy, while accession to ASEAN and to the WTO has in turn further accelerated the pace of legislative improvements.

More recently, Viet Nam has continued to take concrete steps to improve its business climate and to attract more FDI. There is a strong political will to further advance in this direction, as shown by the 2015 Prime Minister's resolution to improve the business environment and the competitiveness of Viet Nam and to bring Vietnamese regulation further in line with ASEAN standards. In 2014-15, the government revised various laws fundamental to the investment climate, such as the *Enterprise Law*, the *Investment Law*, the *Housing Law*, the *Real Estate Business Law* and the *Land Law*. These amendments, some of which have undoubtedly contributed to substantially improving the business environment, have also played a significant role in Viet Nam's efforts to fully integrate the AEC.

Yet, substantial challenges persist and there is still some way to go to fully achieve an enabling legal infrastructure for investment. Despite well-drafted laws, the legal environment still lacks predictability. The implementation of the newly enacted laws has been challenged by delays in adopting the implementing decrees, which caused confusion among the business community and had deleterious – although perhaps only temporary – effects on the investment climate. The application of regulations is also hampered by uneven, and sometimes corrupt, administrative practices, notably at provincial levels. While the wave of reforms of economic legislation is a very positive step towards Viet Nam's global integration and, as such, has been widely praised by the business community, further efforts are needed to create the conditions as a top investment destination.

The main liberalisation measures taken over the past 30 years are described in Chapter 2. This chapter will focus on legal guarantees and property rights provided to domestic and foreign investors followed by a review of legal guarantees in international agreements to which Viet Nam is a party. It will seek to identify the main improvements brought about by successive reforms as well as areas where further progress remains to be done.

Successive legal amendments have paved the way for a safe and open legal environment

Successive reforms have allowed the country to evolve away from a centrally planned economy and towards a market-based one, with strong guarantees that investors' rights will be protected. The first major legislative change in this direction was the enactment of the 1987 *Law on Foreign Investment*, which repealed an earlier 1977 version by virtue of which the state formerly had maintained 51% of ownership of all businesses. The new

Law on Foreign Investment was a first milestone in the progressive opening to foreign investment by prohibiting nationalisation, allowing foreign investors to operate via joint ventures and providing for a principle of freedom of investment for foreign investors, albeit limited by an extensive list of restricted sectors. This partial opening was nevertheless circumscribed by a number of conditions not always evenly applied.

The government's strong commitment to *Doi Moi* was further solidified and reaffirmed in a new constitution adopted in April 1992 which officially recognised the role of the private sector. The economic chapter affirmed its willingness to increase the inflow of foreign investment and specifically encouraged foreign organisations and individuals to invest capital and technology in Viet Nam (Article 25). In return, it promised to "guarantee the right of ownership of the legitimate capital, property and other interests of foreign organisations and individuals". It specified issues concerning the introduction of a market economy, proprietary rights and private enterprises, long-term land use rights and joint enterprises with foreign investors. In 1990, the *Law on Private Enterprises* and *Law on Companies* further established a liberal corporate regime.

The investment framework has gradually improved over the years: registration procedures, tax policies, rights to transfer capital and foreign exchange abroad and access to land have been progressively relaxed, while the investment environment has gradually been brought closer to Viet Nam's international commitments (ASEAN in 1995, and WTO in 2007). The authorities have made major adjustments towards further transparency and stronger protection for foreign investors. The 1987 law was amended four times in 15 years, including twice in the first five years. The revisions were intended to progressively strengthen investor rights, create a more investor friendly environment and narrow the policy gap between foreign and domestic investors. These gradual and iterative reforms of the legal framework brought new waves of FDI into the country.

In spite of these impressive reform efforts, the legal modernisation process has not been all smooth sailing, with successive investment laws that have had varying degrees of success in strengthening and modernising the legal framework for investment. Despite widely acknowledged improvements brought about by each new version of the investment law, delays in adopting implementing regulations tend to create some uncertainty, upon which the private sector has often expressed its concerns, notably with regards to the scope of application of restricted sectors.

Viet Nam's legal framework for investment protection in a regional context

Table 3.1 compares Viet Nam with its ASEAN peers in terms of where they stand in introducing what are considered to be the key pillars of a healthy investment regulatory climate. First, it looks at the successive legal amendments undertaken by ASEAN member states and identifies which countries have enacted a single law covering both domestic and foreign investment, which was achieved by Viet Nam in 2005. It also compares the core protection provisions for investors, and looks at whether countries have adopted a positive or a negative list approach to the entry of foreign investment. The table also considers the availability of arbitration, as well as adherence to international investment treaties. It thus helps to pinpoint where Viet Nam positions itself compared to its neighbours, and what are the areas that need to be further improved to bring the country closer to the standards set in ASEAN instruments.

The 2005 Investment Law added significant investor protections

The introduction of the unified law on investment in 2005, which merged the regimes for foreign and domestic investment into one single regulatory framework governing all investment activities, was a significant milestone. The *Investment Law* came into force together with a new *Enterprise Law* which unified the treatment of public and private firms and an *Intellectual Property Rights Act*. The clarity and coherence of the laws, regulations and administrative practices associated with investment were thereby substantially improved. Prior to this reform, investment activities were governed by the *Enterprise Law* (1999), *State-Owned Enterprise Law*, *Law on Domestic Investment Facilitation* and the *Law on Foreign Investment*. Other sector-specific laws also contained provisions for foreign investments, resulting in a scattered and unclear regime for investment, unable to create a common playing-field for all investors.

Investment guarantees were considerably improved with the 2005 *Investment Law* which introduced a legal stabilisation clause to protect investors against adverse effects of regulatory changes, recognised intellectual property rights, and ensured consistent prices, fees and taxes for all investors. This major revamping of the regulatory infrastructure created a more uniform and coherent legal framework and had a positive impact on the amount of registered FDI.

Table 3.1. **Comparison of ASEAN members' investment frameworks**

	BRN	KHM	LAO	IDN	MYS	MMR	PHL	SGP	THA	VNM
Existence of a single investment law covering domestic and foreign investments	No, but 2001 Investment Incentives Law	Yes	Yes	Yes	No	2 separate laws for domestic and foreign investments	2 inv. laws	No	2 inv. laws	Yes
Recent amendments of the Investment legislation		Ongoing	Ongoing	2007		2012, 2013, 2015	1987, 1991		2000	2005 - 14
Provision on distributional effects of investment : environmental impact, sustainable economic development, etc.	No	No	Yes	Yes	No	Yes		No		
Guarantee of non-discrimination at post-establishment stage enshrined in domestic legislation	No	Yes, except for land	Yes	Yes	No	No	Yes	Yes	No	Yes
Negative list approach	/	/	/	Yes	/	Yes, but inadequate	Yes	/	Yes	Yes, but still not clear
Protection against expropriation	Yes, but not specific to investors	Yes, but incomplete	Yes	Yes	Yes	Yes, but incomplete	Yes	Yes	Yes, but incom-plete	Yes
Guarantee of free transfer of funds provided by law	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Possibility to recourse to investment arbitration provided by law	Yes	Yes	No	Yes	Yes	Yes, but unclear	Yes	Yes	Yes	Yes
Adherence to international conventions on arbitration (ICSID Convention, & New York Convention)	Yes	Yes	Not ICSID member	Yes	Yes	Not ICSID member Adhered to NY Conven-tion in 2013	Yes	Yes	ICSID Conv. signed but not yet ratified	Not an ICSID mem-ber
Adherence to International Investment treaties (incl. BITs, FTAs)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

With this key reform, Viet Nam made a major step towards achieving a progressive harmonisation of the regimes for foreign and domestic investments, as set by the successive ASEAN agreements. This stance laid the foundations for the application of a general principle of non-discrimination, which is one of the pillars of the ASEAN Comprehensive Investment Agreement. Yet, the objective of attaching both domestic and foreign companies into a single system was not fully achieved, as foreign investors faced restrictions in many sectors and still have to go through a two-tier registration system to start new business operations in Viet Nam.

The 2005 law has recently been replaced by a new law on investment, passed by the National Assembly in November 2014 which came into force in 2015, aimed at streamlining the entry and registration of foreign investment. The new law shows the recent renewed political impetus within the Foreign Investment Agency of the Ministry of Planning and Investment and has emerged from a widely consultative process.

The new Investment Law

While the 2005 *Investment Law* represented a major improvement in Viet Nam's legislation for investment, the 2014 *Investment Law* is likely to have a more modest impact with regards to the legal protection of investment. Among the recent legal amendments that have been introduced, the 2013 *Land Law* and the 2014 *Real Estate Law* will possibly bring more significant improvements to the regulatory environment for investment. The *Enterprise Law* significantly simplifies and shortens registration procedures for companies (Chapter 2) and strongly improves the regulatory environment for corporate governance (Chapter 4).

As described earlier, the new *Investment Law* moves away from the previous "positive list" approach to a "negative list". It also abrogates the evaluation procedure and provides for a single registration process. Provided that the remaining loopholes are clarified, it will eventually simplify the procedures for issuing investment certificates. Yet, the new law still leaves some questions unanswered, notably with respect to its implementation. With delays in the adoption of some of the implementing decrees, it is difficult to ensure that the commitment to apply consistently all related laws and regulations (Article 4) will be implemented in practice.

Concerns have been expressed, among members of the legal community consulted by the OECD team, as to the degree of uncertainty surrounding the timeframe for implementing the two laws. Pending the introduction of implementing decrees, some of which, but not all, had been issued in January 2016, there is no clear guidance for the interaction across all laws and regulations that apply to the operations of domestic and foreign

investors. The legal loopholes created by delays in adopting the implementing decrees, notably on PPPs and on conditional sectors, and the widely shared perception of a lack of visibility with regards to the upcoming implementing decrees have impeded the potential improvements that could have been brought about with the recent enactment. The conditions applying to the lists of restricted investment are still unclear, which could have a deterrent effect on prospective investors. Clarity and predictability of the regulatory environment are key to attracting investment, and the authorities should give priority to reassuring the business community by having a more predictable and co-ordinated regulatory agenda.

The law-making process is gradually improving

The Department of Legal Affairs of the MPI is the leading authority for designing investment legislation and negotiating treaties. The mandate of MPI also includes bringing together line ministries and other relevant government agencies in order to ensure full involvement of all relevant bodies in the law-making process. Likewise, the Policy Division of FIA is the reference authority for collecting private sector feedback on implementing investment regulations and on ways to improve the business regulatory environment, although it did not appear to be actively involved in drafting the new law. In parallel, the International Law Department of the Ministry of Justice ensures the coherence of draft laws with legislation already in force, as well as of treaties under negotiation.

MPI collected comments on successive drafts of the law, to ensure that views from a wide range of stakeholders, including both civil society and the business community, were fully taken on board. Stakeholders and observers acknowledge MPI's success in undertaking an inclusive stakeholder consultation, which has played a prominent role in the current impetus for reform. The Viet Nam Business Forum was central in driving this process. It has become, over the past ten years, the most important policy dialogue forum between the public and private sectors where ministries can comment on on-going changes, anticipate regulatory frameworks associated with economic activities and in turn, listen to ideas from representatives of the private sector (See Chapter 6 on Investment Promotion and Facilitation). Such dialogues help ensure transparency of the laws and regulations and avoid overlaps and conflicts in the business legal environment. Greater participation of stakeholders in policy design and implementation has been seen to lead to better targeted and more effective policies. Experience from many countries, and Viet Nam is no exception, shows that soliciting investors views, when revising investment policies, contributes to policy effectiveness.

The Ministry has also been very active in disseminating information about the new law, including 36 capacity-building workshops to raise awareness and ensure consistent interpretation of the new legal provisions at provincial level. But the lack of co-ordination across various departments of the MPI, with other line ministries, and between central and provincial levels has been pointed out by observers as a major impediment to a more open, coherent and inclusive law design process. Inter-governmental co-ordination is a key prerequisite to sound investment policy making. On the admission of the MPI itself, institutional co-ordination in designing the new investment law and its implementing regulations has been insufficient, which may slow the pace of reform and its implementation. Experience from other countries shows that the full engagement of all parties, be they from the government or the private sector, is key to ensuring that policies and laws better match the needs and expectations of citizens and businesses. The new legislation is also more likely to be implemented in a consistent and effective manner if it is formed in a structured and transparent way that gathers inputs from all interested parties.

Implementation is a major obstacle to the legal environment for investment

The lack of clarity as to the scope of application of various regulations pertaining to investment is widely acknowledged, particularly of the decree setting out the list of restricted and closed sectors. This weakness was highlighted in the first OECD *Investment Policy Review of Vietnam*: "A thoroughly unequivocal and effective mechanism is still not in place to ensure the transparency of existing discriminatory restrictions on international investment and to review periodically the cost-effectiveness of such discrimination" (OECD, 2009). An English version of the list of restricted sectors is currently under preparation by MPI.

The legal regime also suffers, at the implementation phase, from overlapping and conflicting views, practices and procedures across levels of government, particularly between national and provincial levels. This creates additional administrative burdens for investors and increases the scope for corruption. There seems to be a widely shared perception, among the business community as well as public servants, of a capacity gap across provincial investment agencies, which not only channels investors to provinces endowed with better-functioning administrations, but might also promote corrupt practices in provinces with less capacity. Due to such challenges, the interpretation and application of investment regulations tend to vary greatly from a provincial authority to another.

More broadly speaking, OECD country experience tends to suggest that some central co-ordination is essential for successful regulatory governance.

While Viet Nam has made great efforts to ensure that the formulation of investment policies and regulations is centralised, a more even and harmonised implementation of these regulations nationwide would greatly enhance the enabling environment for investment.

The enactment of the 2014 *Investment Law* has not been promptly followed by the adoption of the implementing decrees. As a result of the lack of co-ordination described above, delays in passing implementing decrees that complete and substantiate legislative reforms sometimes occur in Viet Nam. This situation reinforces the perceived uncertainty among investors about the enforceability of their legal rights and obligations. The confusion over the scope of application of the negative lists attached to the *Investment Law* (see sections above) could increase the cost of capital, thereby reducing investment in Viet Nam and weakening the competitiveness of already-established firms. An unpredictable legal regime can also foster corruption: investors might be more likely to seek to protect or advance their interests through bribery and government officials might seek undue benefits.

It is widely acknowledged by public officials that there is a need to create a legal environment that is more stable, transparent and also more consistent with the stated policy objectives of the government. The multiplicity of tax incentives and, too often, their *intuitu personae* basis, (see Chapter 5) is another illustration of the lack of a coherent translation into regulatory terms of the political vision for the country's investment policy. Investment incentives should not be used as a substitute for a sound, comprehensive legal regime for investment. Delays in implementing reforms and introducing new regulations create legal loopholes that may also encourage these case-by-case approaches to the entry and treatment of investors.

The transparency of the law-making process and the predictability of the legal infrastructure should henceforth be significantly improved with the recent enactment, in 2015, of the *Law on the Promulgation of Legal Documents*. Also known as the *Law on Laws*, it was first adopted in 1996 and later modified in 2002 and 2008. According to the OECD review of *Administrative Simplification in Viet Nam*, the law is intended to "strengthen the rule of law, enhance the quality of legal normative documents, ensure transparency, efficiency and accountability in the preparation of regulation and improve transparency of policies and regulation" (OECD, 2011).

The most recent version of the law aims to enhance the uniformity, transparency, and implementation of the legal system. It ensures greater public involvement in the drafting of laws by requiring all legal instruments to be published online for public consultations and comments for a period of 60 days prior to its enactment, and the opinions of the Ministry of Finance, the Ministry of Home Affairs, the Ministry of Foreign Affairs and the

Ministry of Justice will automatically be collected. As a response to complaints over delays in issuing implementing regulations, the law requires that future draft implementing regulations be prepared and presented at the same time as the draft law. The Ministry of Justice is the leading authority to supervise the issuance of these regulations.

Core investment protections guarantees under the current regime

With regards to the core protection provisions of the laws, there have been some changes but the new *Investment Law* does not entail any substantial overturning of the *de jure* regime, which had already been substantially improved by the earlier 2005 law. As stated earlier, the adoption of the 2014 *Investment Law* was mainly prompted by the necessity to simplify the registration process and the protection dimension of the law did not appear to be a priority in the amendment process. The focus given on the entry of investment might have led to a watering down of some core investment protection provisions that had previously been gradually improved throughout the successive investment laws. As a result, most of the investment protection provisions have remained unchanged.

Commitment to ensure consistency of laws and regulations

Article 4 of the law ensures consistency across various legal instruments and in interpreting the law. The article has been introduced as a safeguard against inconsistent applications of the law, notably on whether a given sector is deemed to be open or closed to some categories of investors. While it is good practice to include this type of provision, it remains to be seen to what extent this commitment to a consistent application of the legislation can be effectively implemented when implementing decrees are missing.

Guarantee of legal stability

The 2005 *Investment Law* contained a legal stability clause, which granted legal predictability to investors while leaving some leeway for the authorities to introduce new regulations. But the guarantee that, in case of changes of law, compensation should be considered in some necessary circumstances was ambiguous as to the extent of protection granted in that regard. The 2014 amendment has slightly changed this stabilisation clause by limiting the application of the stabilisation clause in the new regulation for "reasons of national defence or security, social order and security, social ethics, public health, or environmental protection". While regulatory predictability is at the core of a healthy investment climate, it is legitimate to limit the scope of clauses that could be interpreted as commitments from the state that the legal framework will remain unchanged and hence undermine the state's capacity to take legitimate public policy measures. In the future,

this might prevent interpretations of the clause that a measure that may negatively affect an investment or affect an investor's expectations of profits violates the guarantees provided to investors.

Definitions of covered investment

The definitional section of an investment law is crucial, as it determines the scope of the law, and hence the extent of the obligations, rights and guarantees that are provided in the law. Clearly defining the typology of covered investments is key as it determines the scope of application of the lists of restricted sectors. Rules that apply only to foreign investors, such as profit repatriation, are provided together with provisions applying to domestic investors only, such as those applying in sectors that are not open to foreign investment, and with provisions applying to both foreign and domestic investors. It is therefore crucial to clearly define "foreign" and "domestic" investment within the law, as well as to avoid any ambiguity as to the criteria that must be met to benefit from the provisions of the law. Some national legislation in other countries, for example, clearly excludes portfolio investment, or states that the investment must meet certain conditions of durability, or contribute to national economic development objectives, to fall under the scope of the law.

The definition of covered investment has been refined through the changes to the law. While the former foreign investment law excluded portfolio investment, the domestic investment law had no such requirement as to its material scope. The 1996 *Law on Foreign Investment* removed any ambiguities as it used the term "direct foreign investment" instead of "foreign investment" as used in the previous version of the law. As a result, the protection and incentives provided by the law were not applicable to portfolio investment. Before the merger of the two regimes for domestic and foreign investments, domestic investors had to operate in a rather less clear regulatory environment than foreign ones. In 2005, the unified law defined in detail "direct" and "indirect" investment.[1]

This distinction between indirect and direct investment has not been retained in the 2014 law because, while on paper this distinction was expected to bring further clarity as to the scope of the law, it has proved to be difficult to apply in practice. The authorities have hence decided to adopt a new approach to the definition of covered investment according to which any investment activity is either governed by the Stock Exchanges law or by the investment law, with no distinction between direct and indirect investment. The law still provides for a condition of duration in the definition of "investment projects", which must involve a "midterm or long-term" commitment of capital to be eligible as a covered investment. One of the most significant changes brought about by the new law is the clarification of

what defines a foreign investment. While ambiguities persisted under the former regime, the introduction of a clear threshold in the ownership to define the nationality of a company is likely to provide investors with greater legal predictability, stability and transparency.

Gradual introduction of a principle of non-discrimination

The government commits to treat equally investors in all sectors and not to discriminate between domestic and foreign investors. Affirming the non-discrimination principle in a law is a common practice that signals a positive and open investment policy, without prejudice to the possibility for the state to preserve its sovereign right to implement any developmental policies.

This commitment to the non-discrimination principle was introduced with the merger of the two laws regulating domestic and foreign investment separately which was the main innovation brought about by the 2005 law. Prior to enacting a single investment law, the treatment of established domestic and foreign investment did not differ substantially, despite the fact that there were two distinct laws. The 1998 *Law on Domestic Investment* already provided the same level of protection as the one granted to foreign investment in the *Law on Foreign Investment*. The same protection against unlawful expropriation was contained in the law, as well as a general commitment to protect the right of ownership of assets.

Guarantee of equitable treatment of investors

The 2014 *Investment Law* does not contain specific protection provisions such as those found in investment treaties, like the fair and equitable treatment (FET) and full protection and security (FPS) provisions. Instead, Article 5 reaffirms the state's commitment to treat investors equitably. Provided that the authorities strictly abide by this principle, it is good practice to provide only for a general commitment of equitable treatment. As extensively shown in the section on Viet Nam's international investment agreements, provisions such as FET and FPS, when not well drafted, can strongly interfere with the state's ability to introduce public policy measures that have an impact on the operation of investment. It is therefore advisable not to introduce these protection provisions in a domestic law. As in the previous one, the law provides foreign investors with a guarantee of free transfer of funds abroad, with no limitation to this right in case of exceptional circumstances.

Investment dispute settlement provision

The article on the settlement of investment disputes does not apply exclusively to disputes involving state authorities, but also cover those

between domestic and foreign investors, which is rather uncommon. It provides that investment disputes must be settled through negotiation and conciliation, yet it does not give any indication of the relevant bodies before which the disputes should be referred to seek amicable settlement. With no precision of a cooling-off period, the article states that if amicable settlement cannot be reached, the dispute can be brought either before domestic courts, domestic arbitration, foreign arbitration, international arbitration or before an *ad hoc* arbitral panel as decided by the parties, depending on whether they are domestic or foreign or if the state is involved in the dispute.

This article raises unanswered questions. While the provision contained in the 2005 law had the merit of being clear and unambiguous, the vagueness of the new drafting creates confusion as to the availability of foreign and international arbitration. The provision would deserve to be further clarified, so as to avoid any difficulties of interpretation. If it is the intention of the authorities not to give a unilateral consent to international arbitration, then it should be clearly stated in the law. It could also be improved by including a "fork in the road" provision stipulating that if the investor chooses to submit a dispute to the courts of the host state or to any other agreed dispute resolution procedure, the investor will lose the right to submit the same claim to international arbitration. The "cooling-off" period within which amicable settlement should be sought also needs to be detailed. Investment legislation in other countries typically specifies that parties to the dispute must try to reach amicable settlement for a period of six months before being allowed to bring the case before a court or an arbitral tribunal.

Investors require an effective and transparent legal system to carry out their contracts and settle disputes pertaining to their investments. As developed below, arbitration plays a primary role as an alternative dispute resolution mechanism to settle disputes between foreign investors and host states. It is therefore key to create the conditions for a clear arbitration regime, not only in the domestic arbitration law, but also through a clear and well-drafted dispute settlement provision in the investment law.

Expropriation regime

Protection against expropriation without fair compensation is one of the most crucial rights of investors and must be granted in the regulatory framework for investment through provisions for transparent and predictable procedures.

The 1992 Constitution stipulates that "business enterprises with foreign invested capital shall not be subject to nationalisation" (Article 25). The 1987 *Law on Foreign Investment Law* explicitly ruled out nationalisation, a position that Vietnamese leaders have consistently emphasised.

Subsequently, the protection against expropriation as stated in the 1996 *Law on Foreign Investment* was detailed and contained guidelines as to the compensation process and methodology. The 2005 *Investment Law* followed along the same lines for protecting against expropriation and the mechanisms for compensation. The expropriation provision in the 2014 law is more succinct which could add further uncertainty as to its scope, with detrimental effects not only on investors' rights, but also on the state's ability to introduce legitimate public policy measures that may be tantamount to an expropriation.

Article 9 grants that "lawful assets of investors shall not be nationalised or confiscated by administrative measures". It also provides for a list of exceptional reasons whereby the state can expropriate an asset for "reasons of national defence and security, national interests, state of emergency, prevention or recovery of natural disaster". In the event of a legal expropriation occurring under these conditions, the investor shall be reimbursed or compensated. While it is good practice to provide for a general principle of prohibition of expropriation, accompanied by a list of exceptions, the current expropriation provision may be difficult to interpret due to its lack of detailed language. It is silent on the calculation of compensation in case of expropriation and does not make any explicit distinction between direct and indirect expropriation, although it is understood that both direct and indirect forms of expropriation are covered under the new regime.

Ideally, a good expropriation regime should distinguish indirect expropriation from lawful regulation in the public interest, the latter being non-compensable, even if it has an economic impact on a particular investment. The distinction between expropriation, be it direct or indirect, and regulatory takings, is crucial as it retains the policy space necessary to implement public policy objectives. Expropriation can take many forms, and this should be reflected in legislation. It includes direct expropriation where the state obtains a formal transfer of title or outright physical seizure and indirect expropriation where a state interferes in the use of a property or in the enjoyment of its benefits even where the property is not seized and the legal title to the property is not affected. Determining whether a regulation may constitute an indirect expropriation for which compensation should be paid is made on a case-by-case basis. It is not enough that a regulation adversely affects profits for it automatically to be regarded as an act of expropriation. For example, some legislation provides that, except in rare circumstances, non-discriminatory regulatory actions to protect legitimate public welfare objectives, such as public health, safety and the environment, are not considered to constitute expropriation.

Despite the lack of detail in the expropriation provision of the law, in practice, expropriations do not appear to be a major issue in Viet Nam, although the 2015 Investment Climate Assessment issued by the US Department of State reports that several foreign investors have expressed concerns over threats by state authorities to revoke their investment licences if additional capital is not raised.

Obligations for investors

The incorporation into domestic legal frameworks of an obligation for investors to preserve the environment and other public policy objectives is increasingly common among ASEAN member states. This practice aims to strike a balance between guarantees offered to investors and obligations that investors must respect in order to be eligible for these guarantees and for incentives. Viet Nam was once a leader in this area and had incorporated, through legal changes mainly introduced in the past decade, a set of general obligations binding upon investors. As of 1987, it provided a set of obligations upon foreign investors, mainly relating to tax and social obligations. It subsequently provided a much wider range of obligations that were binding upon foreign investors, specifically, that foreign investments operate in conformity with labour collective agreements and laws, and "respect the honour, dignity, and traditional customs of each other", and comply with environmental obligations. A few other obligations relating to the corporate governance principles (accounting rules, transparency principles, etc.) were also contained in the law. The article dedicated to investors' obligations in the 2005 *Investment Law* was not retained in the recent law.

Contract enforcement and dispute settlement

The judiciary in Viet Nam is composed of the Supreme People's Court; Provincial People's Courts; and District People's Courts. Meanwhile, the People's Procuracy supervises the judiciary and can appeal any judgment. In parallel to its court system, Viet Nam has developed a legal framework for commercial arbitration. In 2010, the adoption of a *Commercial Arbitration Law* and of the *Law on Administrative Procedures* brought the legal system more in line with international standards. The *Commercial Arbitration Law* covers only domestic arbitration for business disputes, exclusive of those involving a public authority.

When investors perceive a lack of independence and efficiency of the court system, they tend to favour alternative dispute resolution means to settle their business disputes. Commercial arbitration has thus become the most common way of seeking business dispute resolution before private arbitration centres such as the Viet Nam International Arbitration Centre. Foreign companies established in Viet Nam commonly bring dispute cases

before the Centre, where awards are more easily enforced than foreign arbitral awards. There seems to be a widely shared perception among the business community that one of the problems with Viet Nam's investment climate is the difficulty, too often encountered, of getting foreign arbitral awards recognised and enforced by domestic courts. Vietnamese courts tend to have an extensive interpretation of the clause by virtue of which if the award to be enforced is found to be in violation of fundamental principles of Viet Nam's legal system, domestic judges can refuse to recognise and enforce it. As a result, and despite Viet Nam's obligations under the New York Convention, it is often difficult to obtain enforcement of an arbitral award obtained in a foreign jurisdiction.

Beyond this difficulty, there seems to be a broader issue of enforcement of arbitral awards, even when they are rendered by local arbitration centres within Viet Nam. During consultations with the private sector, the OECD team came across recurring concerns about the growing tendency of businesses to seek annulment of unfavourable local arbitral awards before domestic courts. Despite these major challenges, the first signs of an evolution towards a more arbitration-friendly judicial system are occurring. In 2014, for the first time in Viet Nam, an arbitral award rendered against an SOE at a local arbitration centre has been recognised and enforced by an Economic Court.

Another positive step was taken with the enactment of a new *Bankruptcy Law* in 2014 which substantially simplified and clarified the bankruptcy procedures for companies. It was prompted by the very low rate of declarations of bankruptcy, and by the high number of companies which ceased their operations instead of seeking recovery. Further reforms are nevertheless necessary in this regard, as the recovery rate remains half as high as in most Asian countries (World Bank, 2015).

Access to investor-state dispute settlement

The Ministry of Justice has been mandated since 2014 to lead the defence of the state in investor-state dispute cases. Other relevant bodies, such as the FIA, are involved in such cases, although not automatically. The MPI takes part in the inter-ministerial taskforce managing investment dispute cases but does not automatically follow ongoing disputes. Line ministries should consider intensifying their dialogue and cooperation to ensure a better management of investment disputes and, to the extent possible, to prevent conflicts from evolving into a formal dispute case. The mandate of the inter-ministerial taskforce includes the responsibility to establish dispute prevention mechanisms and, in practice, MPI and FIA work efficiently to prevent disputes at an early stage and are recognised by the business

community for their very active and efficient role in mediating at an early stage emerging disputes.

There is nevertheless no institutionalised mediation mechanism to avoid having claims escalate into international arbitration proceedings. Viet Nam could consider establishing a formal dispute prevention and early alerts mechanism and setting up an Ombudsman inter-ministerial team to forestall potentially very costly international arbitration proceedings that may stem from investor-state disputes. Early alert mechanisms for preventing disputes are increasingly used in many countries, notably in Asia. Under these mechanisms, relevant government bodies would be required to share any information they have on potential emerging investment disputes to a designated co-ordinator within one ministry. This early warning mechanism to central authorities allows for early and co-ordinated action to be taken. Part of the mandate of the appointed team would typically involve centralising information on the legislation, contracts and international investment agreements applicable to the cases. It would also keep track of all commitments made by the state, and provide guidelines for the negotiations of dispute settlement processes. Such initiatives could be envisaged as part of a broader effort to optimise the defence of the state in the event of international investment disputes, which represent a growing challenge for the government of Viet Nam.

Viet Nam is one of the last ASEAN countries, with Myanmar and Lao PDR, not to have adhered to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention). Despite heavy pressure from the international investment community, the government has not expressed any willingness to adhere to ICSID although the MPI is reportedly once again studying the possibility (see Box 3.1 for a discussion of the New York and Washington Conventions). In the absence of the availability of ICSID-based arbitral panels, most investor-state dispute cases involving Viet Nam are brought before *ad hoc* tribunals applying UNCITRAL arbitration rules.

Regardless of any political considerations, becoming a member of the ICSID Convention could enhance Viet Nam's perception abroad as an investor-friendly country. The ratification of the Convention would allow foreign investors to be able to choose ICSID arbitration, provided that they benefit from an investment treaty containing an ICSID clause. From an investor's view, the availability of ICSID arbitration could therefore reduce the risk of investing in a given country. Compared to other *ad hoc* arbitration forums, ICSID tribunal awards are not subject to national laws on the recognition of foreign arbitral awards and domestic courts cannot interfere with arbitral proceedings. If envisaged in the future, the adhesion to

the ICSID convention should be preceded by an assessment of political and economic costs and benefits.

Box 3.1. **Recognition and enforcement of arbitral awards**

For disputing parties it is important to know that decisions and awards of arbitral tribunals will be enforced. The international community has developed specific institutions and rules to enforce arbitration awards. Viet Nam is a party to the New York Convention and is currently considering adhering to the ICSID Convention. Both agreements increase investor confidence that arbitral awards will be recognised and enforced effectively.

New York Convention

Viet Nam is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also called New York Convention), the leading international treaty applicable to commercial arbitration. The New York Convention addresses the recognition and enforcement of foreign arbitral awards (i.e., those made in a country other than Viet Nam) and for certain awards made in Viet Nam. The national courts of contracting parties to the New York Convention must generally recognise arbitration awards rendered in other contracting parties, subject to narrow exceptions, and enforce the awards in accordance with their rules of procedure. Since Viet Nam is a contracting party to the New York Convention, investors that have prevailed in arbitral proceedings know the conditions under which the awards will be recognised and enforced in Viet Nam. The New York Convention also facilitates the recognition and enforcement of Vietnamese awards in third countries that are party to it.

ICSID Convention

The ICSID Convention addresses both the arbitral proceedings and the enforcement of awards rendered under these proceedings. The recognition and enforcement of ICSID awards is governed by the ICSID Convention itself rather than the New York Convention. The ICSID regime is thus more self-contained in this respect. In particular, ICSID awards cannot be reviewed by national courts of the country in which their enforcement is sought. In contrast, the New York Convention permits national courts to refuse the enforcement of awards for, inter alia, reasons of public policy.

Access to land and protection of investors' land rights

Private ownership of land is not permitted in Viet Nam and the state is the administrator of all land rights. Within this overall framework, restrictions have nevertheless gradually been relaxed. The *Land Law* has been revised many times and, together with the *Real Estate Law* enacted in 2015, the legal framework for land ownership has been characterised by concerted efforts over time which have yielded major improvements in the treatment of investors, particularly foreign ones.

The new *Land Law* is a very significant milestone towards further opening access to land to foreign investors. Prior to this reform, one of the major measures taken under *Doi Moi* was to transfer state-owned agricultural land to household farms. The *Land Law* introduced in 1987 established the private use of allocated agricultural land, albeit with some major limitations to the rights of possession to the land, including the transfer of land parcels through inheritance. Following the 1993 revision of the law, farming households were granted more property rights, including the right to rent out, to use land properties as collateral and to transfer property rights by inheritance.

The regime only allows ownership of "land use rights" (LUR), which can be acquired from the state and are divided in three main categories: allocation, recognition and leasing. No fee is applicable to the recognition of LURs, while the allocation can sometimes be subject to fees. Under the new law, the state can lease LURs to both domestic and foreign companies. LUR leases are concluded on a contractual basis and are subject to a land use rent.

Foreign investors can lease land parcels either directly, once they have established as a foreign company in Viet Nam, or by way of a joint venture with a Vietnamese partner. Prior to the 2013 *Land Law*, foreign investors could only lease land parcels from the government or sublease land from an infrastructure developer. Under the new regime, foreign investors established in Viet Nam can lease land from domestic companies, such as limited liability companies or SOEs, or from existing foreign companies which lease land from the state, and develop an infrastructure project on the land. Except under very specific circumstances set out in the law, only domestic companies or citizens that have obtained a land allocation can subsequently lease land to foreign investors.

The duration of the lease must be aligned to the duration of the approved project, for a maximum period of 50 years or, in special circumstances, 70 years. The lease term can be extended upon approval by the state authority and provided that the use of the land is consistent with the initial land plan. LURs leased by foreign investors are paid either through an annual rent or a one-off rental payment at the date of conclusion of the lease contract. If the lease is paid by an annual rent, foreign investors are not allowed to transfer, sublease or mortgage the LUR, while investors that have paid their lease through the one-off arrangement are allowed to transfer, sublease or mortgage their LURs as well as assets attached to their land.

The new law places local and foreign investors on an equal footing regarding the pricing of land. Land prices are now fixed on a case-by-case basis based on a market price, leading to concerns in some quarters that land pricing will be less predictable with this new system. But despite these important liberalisation efforts, foreign and domestic investors still face some differences in treatment with regards to their access to land.

While Land Use Rights are managed at district level, the land registration system for enteprises is managed at provincial level. The existing registers are often partially outdated and inaccurate. Full computerisation of the land titling and registration system will be needed to efficiently address common problems of fraudulent titling. It has recently started and has already been completed in a minority of districts. These modernisation efforts are essential to enhance firms' ability to take securities on their land properties and thus improve their access to credit, when their LUR allows them to use the land parcel as a mortgage. Reliable land titling and property registrars also help individuals and businesses to seek legal redress in case of violation of property rights.

The revocation of LURs by state authorities has been made more difficult by the more stringent conditions to the expropriation by public authorities in the new land law, which is likely to greatly improve the protection of investors' land rights. The LUR licence can be revoked by MPI if the investment project for the completion of which the land parcel has been granted is not implemented. Investors can challenge such decisions by bringing their land disputes against state authorities before administrative courts. Land disputes occurring between private parties are not arbitrable and must be settled before civil courts.

Protection of intellectual property rights in Viet Nam

The legal regime for the protection of intellectual property (IP) rights comprises several pieces of legislation, including the 2005 *Civil Code*, the *Criminal Code*, the 2005 *Intellectual Property Law* as amended in 2009, and a series of implementing regulations. Viet Nam is party to the main international conventions on IPRs, such as the Berne Convention on Copyright and the Paris Convention on Industrial Property. Since Decree 31 in 1981, through which IP regulations were first introduced in Viet Nam's legal framework, Viet Nam has substantially improved its IP system, especially over the past 15 years. The government started by developing an IP Rights Action Plan to bring its IP system in line with the WTO's Trade-Related aspects of Intellectual Property Rights (TRIPS) commitments There is a strong awareness, at the highest level of the government, of the immediate stakes of having a robust IP policy (Box 3.2).

The introduction of a new dedicated IP Law in 2005 was a milestone in the reform process and fully implemented the country's TRIPS obligations. The three main categories of IP rights – copyrights and related rights, industrial property rights, rights to plant varieties – are all managed under the authority of different ministries: Ministry of Culture, Sports and Tourism, Ministry of Science and Technology, Ministry of Agriculture and Rural

Development. The 2005 IP law was amended in 2009, so as to further bring the legislation in line with the provisions of the TRIPS WTO agreement, thereby considerably reducing the timeframe for trademark applications.

In parallel with legislative reform efforts, the government initiated a "modernisation of industrial property administration project, as well as a number of sensitisation campaigns to raise awareness on the legal and institutional IP protection framework among the business community. Capacity-building programmes were undertaken to train specialised IP officers. Awareness raising programmes are regularly undertaken through mass media and more specifically targeted training courses. These efforts have borne fruit and the number of IP assets, Vietnamese inventions and utility solutions applications in Viet Nam has increased dramatically.

Box 3.2. **The benefits of IP rights in developing countries: The shifting debate**

Traditionally, a limited number of developed countries in which a high proportion of the world's R&D was concentrated were the main "demandeurs" of strong IP rights internationally. Four recent developments are helping to broaden acceptance of the benefits of intellectual property rights.

- More firms in more developing countries are now producing innovative products and thus have a direct stake in the protection of intellectual property rights. In Brazil and the Philippines short-duration patents have helped domestic firms to adapt foreign technology to local conditions, while in Ghana, Kuwait, and Morocco local software firms are expanding into the international market. India's vibrant music and film industry is in part the result of copyright protection, while in Sri Lanka laws protecting designs from pirates has allowed manufacturers of quality ceramics to increase exports.

- A growing number of developing countries are seeking to attract FDI, including in industries where proprietary technologies are important. Foreign firms are reluctant to transfer their most advanced technology, or to invest in production facilities, until they are confident their rights will be protected.

- There is growing recognition that consumers in even the poorest countries can suffer from the sale of counterfeit goods, as examples ranging from falsely branded pesticides in Kenya to the sale of poisoned meat in China attest. Consumers usually suffer the most when laws protecting trademarks and brand names are not vigorously enforced.

- There is a trend toward addressing intellectual property issues one by one, helping to identify areas of agreement and find common ground on points of difference.

Source: OECD, (2015).

Despite this successful reform process and concrete and substantial improvements, there is still room for improvement in the enforcement of IPRs. As of 2015, Viet Nam remained one of the 37 trading partners of the United States included on the Special 301 Watch list issued yearly by the US Trade Representative. Although the authorities have shown a strong political willingness to fight IP rights infringements, violations of IP rights remain very common and implementing agencies are not always fully armed to prevent and prosecute such violations. Problems of trademark counterfeiting and design infringement persist. The implementation of civil, criminal and customs procedures still needs to be further improved. Viet Nam's case illustrates that a successful legal reform process nevertheless requires a strong complementary emphasis on enforcement mechanisms, which is a prerequisite for policies and laws to have a real and positive impact.

Another recognised issue is the overlapping powers and mandates among the various agencies involved in enforcing IP rights. Some implementing decrees have also never been issued, which has compounded the lack of clarity and guidance for implementing agencies. The Ministry of Science and Technology is the governmental body in charge of the execution of intellectual property. In parallel, a wide range of authorities are also involved in executing IP policies, including the Market Management Authority, the Economic Police, Customs authorities, the provincial committees in charge of issuing licences, and the courts of justice dealing with IP cases.

The Ministry of Industry and Trade's market management is also involved in the fight against counterfeit products. Sanctions for IP infringements are of three types: administrative, civil and criminal penalties. There are no specialised IP courts, and IP cases are resolved by administrative or civil courts. IP cases between IP holders and state authorities are brought before administrative courts, before which decisions to refuse a licence can be challenged. Although judges in local courts are often not sufficiently aware of the existing tools and measures to protect IP rights, courts have recently started to tackle IP dispute matters more efficiently, particularly in major urban areas, as well as at higher level courts such as the People's High Court. IP disputes are most often settled by administrative measures; companies also tend not to bring IP cases before civil courts and favour alternative dispute resolution means such as mediation and conciliation.

The government has shown that it is very well aware of the need to uphold its efforts to create a well-functioning infrastructure for protecting intellectual property. A National Steering Committee was created in 2014 to give further impetus to enforcement agencies' fight against IP violations, and new decrees were also recently issued to impose heavier and more dissuasive fines.

Viet Nam's international investment agreements

Viet Nam has a broad network of international investment agreements, both stand-alone treaties and investment chapters in broader free trade agreements. Investment treaties typically protect existing covered investments against expropriation without compensation and against discrimination, and give covered investors access to investor-state dispute settlement mechanisms (ISDS) to enforce those provisions (see Box 3.3 for common features of IIAs). Increasingly, treaties also facilitate the establishment of new investments by extending their application to foreign investors seeking to make an investment. Viet Nam has over 40 bilateral investment treaties in force and is also a party to an increasing number of regional and multilateral trade and investment agreements. Its first bilateral investment treaty – concluded with Italy in 1990 – was signed shortly after the *Doi Moi* reforms began.

Box 3.3. **Common features of international investment agreements**

IIAs, entered into between two or more countries, typically offer covered foreign investors substantive and procedural protection. They provide additional protection to covered foreign investors beyond that provided to all investors and or to foreign investors specifically in national legal frameworks.

Substantive protections generally include protection against expropriation without compensation and against discrimination by, for example, guaranteeing that covered foreign investors will be treated no less favourably than investors from the host state (national treatment, or NT) or third states (most-favoured nation treatment, or MFN). Particularly important for policy considerations are guarantees of fair and equitable (FET) treatment or treatment, which can be equated (or not) with the international minimum standard of treatment of aliens under customary international law. The FET provision has been the one most frequently invoked by foreign investors in recent years. Additional clauses in IIAs can facilitate the transfer of profits, or limit or exclude certain performance requirements, such as local content rules.

IIAs can also foster liberalisation of investment by including commitments to open sectors to more foreign investment (market access) or by giving prospective covered foreign investors certain rights, typically by extending the NT and MFN standards to those seeking to make investments.

IIAs usually provide for procedural venues to enforce the host state's obligations under the substantive standards. Today, most IIAs give investors the right to bring claims themselves against the host state before international arbitration tribunals for an alleged breach of the IIA – the so-called investor-state dispute settlement mechanism (ISDS) (Pohl et al., 2012; Gaukrodger and Gordon, 2012). The number of ISDS claims under IIAs has risen significantly in recent years to over 600 known claims currently (UNCTAD, 2015). Precise numbers of the cases are difficult to establish because of the confidentiality of certain arbitral proceedings.

As an ASEAN member state, Viet Nam's recent investment treaty policy has in many cases been driven by a new regional dynamic: since the conclusion of the intra-ASEAN Comprehensive Investment Agreement (ACIA) in 2009, the group of ASEAN member states has signed agreements with Australia and New Zealand (2009), Korea (2009), China (2009), and India (2014).[2] ASEAN is currently also negotiating the inclusion of an investment chapter for the existing Economic Partnership Agreement with Japan. Viet Nam has recently concluded two major and high-profile treaties, the Trans-Pacific Partnership (TPP) and the EU-Viet Nam FTA, and it is also negotiating the Regional Comprehensive Economic Partnership (RCEP) as part of ASEAN.[3] These treaties and negotiations place Viet Nam at the centre of international investment policy making today.[4]

The review of the substantive and procedural provisions in Vietnamese investment treaties[5] shows that the language of key treaty provisions has evolved, particularly since the advent of the new regional ASEAN treaty policy in 2009. In recent treaties, Viet Nam has specified the meaning of key treaty provisions to clarify government intent. Viet Nam might wish to consider the consistency of its existing treaties with recent approaches. Table 3.2 below gives some useful information on the temporal validity of Viet Nam's investment treaties in this regard. Dates for renewal or termination of treaties could inform Viet Nam's timetable to engage with its existing treaty partners.

Regional and multilateral approaches offer an opportunity to create an integrated investment region in ASEAN and to establish common rules on investment protection and liberalisation. At the same time, additional commitments in agreements covering investment relations already subject to bilateral or other multilateral treaties may jeopardise the consistent implementation of Viet Nam's treaty policy: investors may circumvent new treaty policies by invoking the older investment treaty, which does not yet reflect these new policies. International practice shows that investment protection standards in older IIAs have often been relatively vague. Where they provide for arbitration, this gives investment arbitrators broad discretion to interpret and thereby determine the scope of protection they provide. While Viet Nam's investment treaty practice since 2009 reflects more specific treaty language, its older treaties, which are still in force, often remain vague.

Direct and indirect expropriation

Vietnamese IIAs require host states not to expropriate unless the measures are taken in the public interest, on a non-discriminatory basis and under due process of law, with prompt, adequate and effective compensation.6 The relevant provisions typically address the determination and modalities of payment of compensation as well. Vietnamese treaties distinguish and cover

both direct and indirect expropriation.7 Direct expropriation generally refers to an actual taking of legal title to property or a physical seizure of property by a government. As a result, the host state is enriched by, and the investor deprived of, the value of the expropriated property. Indirect expropriation is a more complex and sensitive issue. Regulatory action or other behaviour by a government can sometimes have a dramatic effect on an investment, without involving a formal transfer of title or outright seizure. At the same time, provisions on indirect expropriation can affect the host state's policy space because regulatory action can give rise to claims for compensation. Because most policy issues relating to expropriation arise with regard to indirect expropriation, this section focuses on Viet Nam's policy in that area.

Most Vietnamese IIAs explicitly cover indirect expropriation, but they typically do not clarify the circumstances under which regulatory measures do not amount to expropriation and where therefore no compensation has to be paid. This gives arbitrators discretion to draw the line between indirect expropriations that entitle the covered investor to compensation, and legitimate regulation that has a significant economic impact on the investor without obligating the government to pay compensation. Under treaties that refer only generally to indirect expropriation, ISDS tribunals have used varying approaches to determining whether an indirect expropriation has occurred (UNCTAD, 2012).

Beginning with ACIA in 2009, some treaties with Vietnamese involvement started to include specifications on indirect expropriation, aiming to ensure that non-discriminatory measures, designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation.[8] Such clarifications are also included in the ASEAN agreement with Australia and New Zealand, and in the agreement signed with India; it is also referred to in the Work Programme for the ASEAN agreement with Korea.[9] In contrast, the investment chapter of the FTA with the Eurasian Economic Union (2015) and the agreements with UAE (2009) and Morocco (2012), none of which is in force yet, do not contain a clarification. While several investment agreements signed since 2009 are not publicly available,[10] it appears that only the ASEAN agreements and the EU-Viet Nam FTA contain a clarification regarding the scope of indirect expropriation.

Fair and equitable treatment and the international minimum standard of treatment of aliens

Fair and equitable treatment (FET) is another standard at the centre of investment treaty claims and treaty policy. Since 1997, investors worldwide have invoked the standard in 341 claims and tribunals have found a breach in 129 of the cases.[11] All Vietnamese IIAs reviewed grant FET to covered

investors. These treaties often merely state that foreign investors shall be accorded FET without further specification. Provisions for fair and equitable treatment have been considered or applied by tribunals in a broad range of claims. Some interpretations of FET are widely seen as having a significant impact on the right to regulate.

There is a growing trend to define fair and equitable treatment provisions, both in Viet Nam and internationally, to give more direction to arbitrators by clarifying the original intent of the contracting parties. Two approaches are outlined in Box 3.4 below.

Box 3.4. **Two approaches to specifying and limiting the FET provision**

Two important approaches to further specifying the scope of fair and equitable treatment have emerged:

- **Limitation to the minimum standard of treatment under customary international law:** This approach has been used in a number of major recent treaties in Asia and the Americas. ASEAN-Korea IIA (Art. 5), ASEAN-India IIA (Art. 7) and the ASEAN IIA with Australia and New Zealand (Art. 6) A FET provision limited to Minimum Standard of Treatment has been repeatedly interpreted under the North American Free Trade Agreement (NAFTA). It has been interpreted more narrowly than FET provisions under other treaties and NAFTA governments have had much greater success than other governments in defending FET claims (UNCTAD, 2012: 61). In addition to the limitation to MST, the Trans-Pacific Partnership agreement (TPP), which is a largely built on US practice, specifies that the mere fact that government action is not consistent with an investor's expectation does not constitute a breach of FET (Art. 9.6(4). Art. 9.6(3) and (5)) contain further specifications.
- **Defined lists of elements of FET:** The EU's proposal for the Transatlantic Trade and Investment Partnership (TTIP), which is reflected in the investment chapter of the EU-Viet Nam FTA, contains a defined list of elements of the FET provision. The FET provision lists the elements that can constitute a breach of the standard, namely denial of justice, fundamental breach of due process, targeted discrimination on manifestly wrongful grounds, and abusive treatment of investors. While it is a closed list, this approach is broader than some interpretations of MST. Under this emerging EU policy, the parties may agree to add further elements to the list. The article also provides that the tribunal "may take into account" (or "will take into account", in EU-Viet Nam FTA) specific representations that created legitimate expectations. Other defined list approaches are also used. For example, the ASEAN-China Investment Agreement (2009) limits the application of its FET provision to cases of denial of justice (Art. 7).

Both options are more specific than the broad language of treaties that only refer to "fair and equitable" treatment. This does not mean, however, that issues of interpretation might not arise. The content of the minimum standard of treatment, for example, is subject to important debates as are a number of elements in the defined EU lists.

Given the centrality of FET to many investor claims, clarification of government intent could improve predictability for both governments and investors, and Viet Nam might wish to reflect the more specific language found in recent treaties to its older treaties as well.

Most-favoured nation treatment

Most of the investment treaties entered into by Viet Nam reviewed for this report contain most-favoured nation (MFN) treatment provisions which guarantee that covered investors will be treated no less favourably than those of third states. Similarly to the other investment treaty provisions reviewed above, the Vietnamese international investment agreements (IIAs) typically use general language to accord MFN treatment to foreign investors.

The meaning of general wording in an MFN clause has been subject to doctrinal and arbitral debates. With respect to investment protection granted to nationals of third states in investment treaties, one important element is the question of whether the MFN provision only applies to substantive protection provisions – such as the indirect expropriation or FET provisions discussed above – or also to procedural aspects, and notably the ISDS mechanism (Dolzer and Schreuer, 2012). On this particular question, several Vietnamese agreements provide more specific language, and some specifically provide that the MFN clause does not apply to ISDS available to investors under IIAs.[12] The agreement with the United Arab Emirates specifies that MFN does not apply to "procedural and juridical" matters.[13] The agreement with Japan does not specifically exclude access to ISDS from the scope of MFN, but it provides that MFN applies to access to the courts of justice and administrative tribunals and agencies.

Specifications of treaty language reflect policy choices

More specific language in investment protection provisions would lead to increased predictability and thereby benefit both investors and governments. The specifications also reflect policy choices and, in some cases, may affect the degree of protection for covered foreign investors. Policy-makers need to carefully consider the costs and benefits of these choices, and their potential impact on foreign investors and domestic investors, as well as on the host state's legitimate regulatory interests and its exposure to investment claims (see Box 3.5 on the increasing public scrutiny of IIAs).

Box 3.5. **Public scrutiny and reform of international investment agreements**

IIAs have come under increasing scrutiny by a variety of stakeholders, including civil society and academia, but also by contracting parties to IIAs themselves. Critics argue that international investment agreements unduly restrict governments' "right to regulate" and that arbitral proceedings are subject to important flaws. In this process, a number of core assumptions have been challenged. Econometric studies, for example, have failed to demonstrate conclusively that IIAs actually lead to increased FDI flows – a policy goal commonly associated with the investment protection regime (Sauvant and Sachs, 2009). Furthermore, while it has been contended that IIAs advance the international rule of law and good governance in host states by providing mechanisms to hold governments accountable, critics argue that opaque legal proceedings and potential conflicts of interest of arbitrators are contrary to rule of law standards (Van Harten, 2008). Moreover, the availability of international investment arbitration to investors has been seen by some as an instrument that could circumvent, and thereby weaken domestic legal and governance institutions instead of strengthening them (Ginsburg, 2005). Many governments are engaged in review of their investment treaty policy and the field has been marked by significant reforms in recent years.

Reconsidering policy rationales for different levels of treatment

Treatment of domestic and foreign investors

In general, Viet Nam should seek to guarantee a sound investment climate for both domestic and foreign investors. Parts of Viet Nam's legal framework applicable to investment protection, such as its 2014 *Investment Law*, apply to both domestic and foreign investors. Viet Nam's legal framework for investment also contains many provisions that exclusively cover only some foreign investors, such as IIAs. Viet Nam should consider whether distortions to efficient investment decisions may occur because of more favourable regulatory conditions for certain investors based on nationality. At the same time, many governments see the value or the need to provide certain extra incentives and guarantees to attract foreign investment in a highly competitive market for that investment. The balance between these interests is a delicate one and may evolve over time. In an apparent response to such considerations, Viet Nam already shifted from a *Law on Foreign Investment* from 1987 covering exclusively foreign investors to an *Investment Law*, applicable to both foreign and domestic investors.

Increasing complexity of investment obligations towards foreign investors

Different levels of investment protection and liberalisation in Viet Nam's various investment treaties also raise policy issues. If and when they enter into force, TPP and the FTA with the EU will cover the investment relations with 39 countries.[14] For many of these countries, Viet Nam already has investment treaties in place. Some investment relations might as a result be covered by more than one treaty. The investment relations between Singapore and Viet Nam provide an example: the bilateral investment treaty between the two countries entered into force in 1992; since 2012, investments between the two countries can also be covered by ACIA; TPP adds another layer of protection, which investors could invoke in their claims against the respective host government. The impact of treaty reforms and policy innovations can be negated because covered investors can circumvent them by choosing to bring a claim based on the bilateral, potentially more favourable, treaty. Multi-layering of investment provisions can be a burden on the effective implementation of new policies.

The EU-Viet Nam FTA addresses this issue by providing for the replacement of existing bilateral treaties with EU member states, with only narrow exceptions.[15] It also clarifies that the "survival clauses", which typically extend certain treaty protections following termination of a treaty for already-made investments, cease to have effect. The FTA norms thus supersede the earlier norms immediately upon the entry in force of the FTA. Multiple layers of investment protection reflecting different treaty policies would also jeopardise the establishment of harmonised investment policy across ASEAN member states, a policy goal set forth in the ACIA.

Investment treaties as a tool to liberalise investment policy

Although econometric studies have not found any unambiguous link between the extent of investor protection and FDI inflows, several studies have found that investment treaties might lead to more FDI flows when they facilitate investment, for example by reducing barriers and restrictions to foreign investments (Berger *et al.*, 2013; Lesher and Miroudot, 2006).

Increasingly, IIAs are being used to liberalise investment policy. These provisions are often referred to as applying to the "pre-establishment" phase of an investment. A key tool to foster liberalisation is to extend the national treatment (NT) and most-favoured nation (MFN) standards to those covered foreign nationals seeking to make investments. The Vietnamese agreement with Japan grants covered investors pre-establishment NT and MFN.[16] The Agreement with the Eurasian Economic Union contains a specific section on

pre-establishment providing for MFN and NT, subject to reservations (Box 3.6).[17]

Box 3.6. **Negative and positive list-approaches to NT and MFN exceptions**

When countries grant national and/or most-favoured nation treatment, whether pre- or post-establishment, they typically do so subject to reservations. There are two broadly different approaches.

A negative list-approach typically provides that MFN and NT are generally afforded, except for specific exceptions or provisions ("negative lists") specified in annexes. The Japan-Viet Nam IIA, for example, provides that the governments may adopt and maintain measures not conforming with the MFN and NT provisions in the sectors or with respect to matters specified in Annex I (Art. 5), and maintain non-conforming measures specified in Annex II (Art. 6). The Annexes themselves specify which exceptions apply only to NT, and not to MFN.

A positive-list approach specifies that its liberalisation provisions only apply to specific identified sectors, as with ACIA, for example (those listed in Art. 3(3)). Generally, the negative list-approach is seen as more conducive to investment liberalisation particularly over time with the development of new areas of economic activity that are not covered by negative lists.

Investment liberalisation is a core commitment under ACIA, and it provides for pre-establishment MFN and NT.[18] At the same time, ACIA limits the application of its liberalisation provisions to a defined list of sectors which can be expanded, including manufacturing, agriculture, fishery, forestry, mining and quarrying, and to services incidental to these sectors. The ASEAN Plus agreements also address investment liberalisation, but there are differences with ACIA, notably the exclusion of MFN from the pre-establishment phase in some of them.[19] These differences may be explained by the fact that a country does not necessarily want to grant advantages, which it might have agreed to in exchange for other concessions, to all international partners.

In sum, the liberalisation provisions – in ACIA in particular, targeting only specific sectors – are carefully calibrated and subject to important reservations. Providing explicitly for the possibility to cover additional sectors by the liberalisation provisions and by aiming to reduce the reservations,[20] ACIA provides a framework for further investment liberalisation. If Viet Nam seeks to foster liberalisation, it might wish to consider broadening the pre-establishment application of NT and MFN provisions.

Sustainable development and responsible business conduct considerations

A new emphasis in recent treaty making has been on sustainable development and responsible business conduct considerations. Some of these innovations are also found in Viet Nam's existing investment treaties and they play an even more prominent role in the EU-Viet Nam FTA and TPP texts. While specific investor obligations are so far not encountered in treaty practice, treaties often make investment protection conditional on compliance with host state law. The Vietnamese IIAs use different ways to ensure that only investments that do not violate host state law are covered and protected. These include making legality a condition for application of the treaties or by defining covered investments as those made in accordance with host state law.[21] Such requirements serve as a filter mechanism and can potentially incentivise investors to be more mindful of their obligations under host state law.[22]

To seek to protect certain types of regulation from challenge, several Vietnamese IIAs have used other tools, often apparently inspired from international trade law, such as general exceptions clauses. While individual bilateral treaties include exception clauses,[23] they are more regularly found in the ASEAN agreements since 2009. The rationale for these clauses is to ensure that the host state will not be prevented from implementing measures that pursue specific regulatory goals providing certain requirements are satisfied. Unlike clarifications limited to a particular provision, like for indirect expropriation addressed above, these provisions can apply to protect measures that satisfy their criteria from challenge under most if not all treaty provisions. These general exceptions clauses are in a few cases also complemented by more targeted provisions relating to measures addressing security issues, the stability of the financial system, or efforts to safeguard the balance-of-payments.[24]

The investment chapter of the EU-Viet Nam FTA also includes sustainable development and responsible business conduct considerations. Some provisions seek to influence the actions of governments themselves. In the Japan-Viet Nam IIA, for example, both countries "recognize that it is inappropriate to encourage investment by investors of the other Contracting Party by relaxing environmental measures".[25] In a bilateral side instrument to TPP with the United States, Viet Nam committed to specific reforms in its labour laws.[26] Practice suggests that contracting parties have rarely sought to enforce this type of commitment, which is subject to state-to-state dispute settlement mechanisms.[27] The absence of a venue for other stakeholders to enforce those provisions is seen as a weakness by some civil society organisations.[28]

Viet Nam's legal framework for investor-state dispute settlement

Starting in the 1990s, mechanisms for covered investors to bring claims directly against host governments – ISDS mechanisms – have become a frequent feature of investment treaties. OECD research shows that around 96% of the global IIA stock provides access to ISDS (Pohl *et al.*, 2012). It appears that all of the investment treaties to which Viet Nam is a party – all signed in the 1990s or later – contain ISDS provisions.

Box 3.7. **The EU-Viet Nam FTA and new approaches to investor protection and dispute settlement**

In response to growing criticism of international investment agreements and ISDS in particular, the EU has developed a new approach to investment protection and dispute settlement. The European Commission proposes to set up a permanent court and an appellate tribunal to resolve investor-state disputes (the Investment Court System (ICS)).

A slightly revised version of this approach was agreed upon by Viet Nam and EU in the EU-Viet Nam FTA. As the first concluded treaty to include provisions for a standing investment court and appellate tribunal, this treaty is a major innovation in dispute settlement. Canada has also agreed on a similar standing investment court and appellate tribunal system for dispute settlement in its Comprehensive Economic and Trade Agreement (CETA).

The EU development of the ICS provisions follows the outcome of a 2014–15 EU public consultation and extended public debates about ISDS, as well as input from the European Parliament and national Parliaments in Europe. The European Commission has explained the ICS as a response to "a fundamental and widespread lack of trust by the public in the fairness and impartiality of the old ISDS model" of *ad hoc* investment arbitration and a way to help "enshrine government's right to regulate".[29]

The ICS continues to allow for claims against governments by individual covered foreign investors, but seeks to address legitimacy issues associated with such claims in investment arbitration by "introducing the same elements that lead citizens to trust their domestic courts". These include judges publicly appointed in advance by governments, removal of certain perceived economic incentives and conflicts of interest among adjudicators and appointing authorities, transparency of dispute settlement, and elimination of foreign investor input into the selection of judges in individual cases. The ICS also contains innovative provisions to help investors by accelerating the treatment of claims and facilitating access to dispute settlement for SMEs. Aspects of the system that have attracted interest and commentary include its approach to the enforcement of awards, the selection of judges and appellate members, and the functioning in light of the expected flow of cases.

The EU has proposed negotiations towards a permanent multilateral Investment Court and appellate tribunal. In the EU-Viet Nam FTA and in CETA, the Parties have agreed to work towards this goal. Questions remain about how individual treaty versions of the ICS could evolve into or be superseded by a multilateral ICS that would apply to many treaties.

Until recently, ISDS provisions in investment treaties provided for investor-state arbitration using *ad hoc* arbitration tribunals selected for each case in an approach derived from international commercial arbitration. Proponents of investor-state arbitration contend that it provides a forum to settle disputes that is independent from both the host state and the investor. This view has been increasingly challenged in recent years. Issues raised in the debate include among other things the characteristics of the pool of investment arbitrators, conflicts of interest, and lack of transparency (Gaukrodger and Gordon, 2012).

Some jurisdictions have been actively developing different approaches to dispute settlement. In September 2015, the EU Commission announced a proposal to use a standing court of judges publicly appointed in advance by governments and an appellate tribunal for its on-going and future investment treaty negotiations (Box 3.7). As agreed by the Parties, the EU-Viet Nam FTA was the first treaty to reflect this new approach with minor modifications.

While it is difficult to establish a precise number and status of investment claims due to the confidentiality of certain ISDS proceedings, it appears that there have been few such claims against Viet Nam. It has prevailed in two known cases and settled in another; a fourth claim is pending.[30] There are no known claims by Vietnamese investors against foreign states.

Vietnamese investment agreements still feature a low level of regulation of ISDS

OECD research suggests that ISDS mechanisms in investment treaties are typically subject to only low levels of regulation (Pohl *et al.*, 2012: 39; Gaukrodger and Gordon, 2012). Some issues are addressed by the arbitration rules, but as rules designed for commercial disputes between private parties, they may need adjustment in light of the nature of investment claims. Other issues remain unregulated if the treaties refrain from doing so. The available data suggest that Vietnamese IIAs do not provide a high level of regulation.[31] As part of the government's drive to foster an enabling investment climate, Viet Nam could consider assessing whether this low level of regulation of ISDS proceedings appropriately reflects its treaty policy objectives. For example, few agreements in Viet Nam specify time limits for claims. Recent agreements include time limits often set at three years. The post-2009 ASEAN Plus agreements constitute an exception in this regard by providing that the submission of the investment dispute shall take place within three years of the time at which the investor became aware, or should reasonably have become aware, of a breach of an obligation of the host state under the IIA.[32]

Arbitral proceedings and enforcement of awards

Since investment claims are typically not brought before public courts – such as the proposed EU Investment Court System – but administered by arbitral tribunals, these proceedings need to be regulated and the decisions and awards enforced. Even under the Investment Court System proposal, the enforcement of awards remains an important legal and policy issue. The international community has developed specific institutions and rules to guarantee the effectiveness of arbitral justice. As discussed above, Viet Nam is a contracting party to the New York Convention and is currently considering joining the ICSID Convention (See Box 3.1 above for a more detailed discussion of both conventions).

Decisions about review and possible renegotiation of existing investment treaties should take account of their temporal validity

The analysis of investment treaties suggests that Viet Nam might wish to consider reviewing its existing agreements to ensure that they well-reflect government intent and emerging sound practices in recent treaty policy.

Review and renegotiation of investment treaties takes time. It may be more easily conducted without the time pressure of either an imminent tacit renewal for an extended period or its denunciation with the attendant publicity. Viet Nam should accordingly monitor the temporal validity of its treaties in order to allow it sufficient time to approach treaty partners where appropriate. Viet Nam's treaties have varying duration and different mechanisms for renewal and termination. Bilateral investment treaties generally contain, in the final provisions, the definition of an initial validity period; at the end of this period, treaties are often extended tacitly either for an indefinite period or for another fixed term. Denunciation is possible at certain points in time, but requires advance notice. Most treaties define an additional period during which the treaty has effect for existing investments following termination (Pohl, 2013).

Table 3.2 shows for each of Viet Nam's treaties the dates of signature and entry into force and key characteristics of their temporal validity (fixed term validity or open-ended validity; indefinite extension or renewal for fixed terms). Treaties that renew for fixed terms require more monitoring, as they limit the possibilities to update or unilaterally end the agreement. For all treaties, Table 3.2 also shows additional information such as the approximate date when the current period to give notice of denunciation ends (i.e. the last notice date before tacit renewal) and the approximate first date when the treaty could cease to be in force.[33]

The temporal validity of Viet Nam's treaties can also inform discussions on possible joint interpretations of treaty provisions with treaty partners. Joint

interpretations can be issued at any time and can be a simpler and faster device than renegotiation to address some aspects of treaty policy providing that the existing treaty text allows sufficient scope to achieve the jointly-desired interpretation (Gaukrodger, 2016). This may often be the case in older treaties with vague provisions. Discussions and exchanges of views with treaty partners about proposed joint interpretations in advance of treaty renewal dates can also help inform future negotiations and decisions about treaties.

Table 3.2. **Viet Nam's investment treaties and their temporal validity**

Treaty	Date of signature	Date of entry into force	Definition of temporal validity	Last notice date before tacit renewal (approx. date)	Treaty will be in force at least until (approx. date)
Bilateral investment treaties					
Argentina	03-06-1996	01-06-1997	indefinite extension	08-07-2016	09-07-2017
Australia	05-03-1991	11-09-1991	indefinite extension	08-07-2016	09-07-2017
Austria	27-03-1995	01-12-1996	indefinite extension	08-07-2016	09-07-2017
Belgium/ Luxembourg	24-01-1991	11-06-1999	renewal for fixed terms	10-12-2018	11-06-2019
Bulgaria	19-09-1996	15-05-1998	renewal for fixed terms	14-05-2017	15-05-2018
Chile	16-09-1999		indefinite extension	*	*
China	02-12-1992	01-09-1993	indefinite extension	08-07-2016	09-07-2017
Czech Republic	25-11-1997	09-07-1998	indefinite extension	08-07-2016	09-07-2017
Protocol (2008) to Czech Republic-Vietnam BIT (1997)				*	*
Denmark	25-08-1993	07-08-1994	indefinite extension	08-07-2016	09-07-2017
Egypt	06-09-1997	04-03-2002	renewal for fixed terms	03-03-2021	04-03-2022
Finland	13-09-1993	02-05-1996	indefinite extension	no action required	expired or terminated
Finland	21-02-2008	04-06-2009	indefinite	04-06-2029	05-06-2030

Treaty	Date of signature	Date of entry into force	Definition of temporal validity	Last notice date before tacit renewal (approx. date)	Treaty will be in force at least until (approx. date)
			extension		
France	26-05-1992	10-08-1994	indefinite extension	08-07-2016	09-07-2017
Germany	03-04-1993	19-09-1998	indefinite extension	08-07-2016	09-07-2017
Greece	13-10-2008			*	*
Hungary	26-08-1994	16-06-1995	contradictory	*	*
India	08-03-1997	01-12-1999	indefinite extension	08-07-2016	09-07-2017
Indonesia	25-10-1991	03-04-1994	indefinite extension	no action required	expired or terminated
Italy	18-05-1990	06-05-1994	renewal for fixed terms	05-05-2033	06-05-2034
Japan	14-11-2003	19-12-2004	indefinite extension	08-07-2016	09-07-2017
Japan-Vietnam EPA				*	*
Korea	13-05-1993	04-09-1993	contradictory	*	*
Korea	15-09-2003	05-06-2004	indefinite extension		
Lithuania	27-09-1995	24-04-2003	indefinite extension		
Malaysia	21-01-1992	09-10-1992	indefinite extension	08-07-2016	09-07-2017
Netherlands	10-03-1994	01-02-1995	renewal for fixed terms	02-08-2019	01-02-2020
Poland	31-08-1994	24-11-1994	contradictory	*	*
Romania	01-09-1994	16-08-1995	renewal for fixed terms	13-02-2025	15-08-2025
Singapore	29-10-1992	25-12-1992	indefinite extension		
Spain	20-02-2006	29-07-2011	indefinite extension	27-07-2020	28-07-2021
Sweden	08-09-1993	02-08-1994	indefinite extension	08-07-2016	09-07-2017
Switzerland	03-07-1992	03-12-1992	renewal for	03-06-2018	03-12-2018

Treaty	Date of signature	Date of entry into force	Definition of temporal validity	Last notice date before tacit renewal (approx. date)	Treaty will be in force at least until (approx. date)
			fixed terms		
Ukraine	08-06-1994	08-12-1994	indefinite extension	08-07-2016	09-07-2017
United Kingdom	01-08-2002	01-08-2002	indefinite extension	08-07-2016	09-07-2017
Philippines	27-02-1992	29-01-1993	indefinite extension	08-07-2016	09-07-2017
Lao PDR	14-01-1996	22-06-1996	renewal for fixed terms	21-12-2017	22-06-2018
United Arab Emirates				*	*
Other agreements					
ASEAN-China Investment Agreement	15-08-2009				
ASEAN-Korea FTA	02-06-2009				
Agreement on Investment under the ASEAN-India CECA	12-11-2014			*	*
ASEAN-Japan CEPA	14-04-2008				
ACIA	26-02-2009				
AANZFTA	27-02-2009				
EU-Viet Nam FTA					
TPP	04-02-2016				

* uncertain

** date cannot be determined with certainty

Notes

1. “Investment means the use of capital in the form of tangible or intangible assets by investors to create assets for carrying out investment activities […]”; direct investment means a form of investment whereby investors use capital for investment and take part in the management of investment activities”; and “indirect investment means a form of investment through the purchase of shares, certificates, bonds, other valuable papers or a securities investment fund and through other intermediary financial institutions whereby investors do not directly participate in the management of investment activities”.

2. The dates noted after the treaties indicate their year of signature.

3. The agreement is negotiated between the ASEAN member states, and the countries of the ASEAN Plus agreements (Australia, China, India, Japan, Korea, and New Zealand).

4. Bloomberg, The Biggest Winner From TPP Trade Deal May Be Vietnam, 8 October 2015, available at: www.bloomberg.com/news/articles/2015-10-08/more-shoes-and-shrimp-less-china-reliance-for-vietnam-in-tpp

5. The review analysed treaties available on different databases (ASEAN Briefing, OECD, UNCTAD).

6. In line with the French model BIT, the French-Viet Nam IIA, Art. 5(2) adds that an expropriation is only lawful if it does not violate a specific commitment of the state (“ni contraires a un engagement particulier”).

7. E.g. Austria-Viet Nam IIA, Art. 1(4) includes in the “expropriation” definition, every other measure with similar effect (“jede sonstige Maßnahme mit gleicher Wirkung“); China-Viet Nam IIA, Art. 4(1): “Neither Contracting State shall expropriate, nationalize or take similar measures (hereinafter referred to as “expropriation”) against investments […]”.

8. See ACIA, Annex 2, para. 4.

9. The Work Programme contains a list of issues that the contracting parties agreed to negotiate upon, including an annex on expropriation, which would typically contain such clarification.

10. The agreements with Slovakia (2009), Kazakhstan (2009), Turkey (2014), Sri Lanka (2009), and Oman (2011) are not publicly available.

11. The numbers are based on the UNCTAD ISDS database (available at: investmentpolicyhub.unctad.org/ISDS/), which refers to 668 cases. Data on alleged breaches is available for 425 of them.

12. E.g. ACIA (2009), Art. 6, fn 4; Eurasian Economic Union-Viet Nam IIA (2015), Art. 8.33(2); ASEAN-China IIA (2009), Art. 5(4).

13. UAE-Viet Nam IIA (2009), Art. 4(2): "The Most Favoured Nation Treatment shall not apply to procedural or juridicial matters."

14. The US government officially withdrew from TPP in January 2017 and the status of the agreement is at this point in time uncertain.

15. EU-Viet Nam FTA, investment chapter, Art. 20.

16. Japan-Viet Nam IIA (2003), Arts. 2(1) and (2).

17. Eurasian-Viet Nam (2015), Section III, Arts. 8.21 and 8.22.

18. ACIA (2009), Arts. 5 and 6; Art. 3(3) for addition of sectors.

19. While the ASEAN-Korea IIA follows the ACIA approach, the relevant provisions are subject to the work programme (Art. 27). The agreement with China provides pre-establishment MFN treatment, but not pre-establishment NT (Art. 4). The agreements with Australia and New Zealand, and with India grant pre-establishment NT, but do not refer to MFN-treatment. (The work programme of AANZFTA provides that the parties shall enter into discussions with a view to agreeing on MFN treatment to the investment chapter (Art. 16(2)(a))).

20. ACIA, Art. 9(4).

21. Chile-Viet Nam IIA, Art. 2; Finland-Viet Nam IIA, Art. 1(1).

22. E.g. Singapore-Viet Nam IIA (1992), Art. 1, defining an investment as "every kind of asset permitted by each Contracting Party in accordance with its laws and regulations…"

23. Japan-Viet Nam IIA (2003), Art. 15.

24. Examples include clauses on security issues (ACIA, Art. 18; ASEAN-India, Art. 22; ASEAN-Korea, Art. 21), the stability of the financial system (e.g. Japan-Viet Nam IIA, Art. 16) and – these provisions are widespread in the ASEAN IIAs – measures to safeguard the balance-of-payments (e.g. ACIA, Art. 16; ASEAN-China, Art. 11; ASEAN-India, Art. 12; ASEAN-Korea, Art. 11; AANZFTA, Chapter 15).

25. Japan-Viet Nam IIA, Art. 21. Similar clauses have emerged more broadly in more recent treaty practice.

26. Draft available at: https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labor-Relations.pdf.

27. United States Government Accountability Office (2009), "Four Free Trade Agreements GAO Have Reviewed Have Resulted in Commercial Benefits,

but Challenges on Labor and Environment Remain", available at: www.gao.gov/assets/300/292204.pdf. In 2014, the US has brought a claim against Guatemala for an alleged breach of obligations regarding labour rights under CAFTA-DR.

28. See Human Rights Watch, Q&A: The Trans-Pacific Partnership, 12 January 2016, available at: https://www.hrw.org/news/2016/01/12/qa-trans-pacific-partnership

29. Malmström, C. (16 September 2015), "Proposing an Investment Court System", https://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system_en

30. The numbers are based on the UNCTAD ISDS database.

31. Assessment based on the OECD investment treaty data base and the analysis of publicly available treaties.

32. E.g. ACIA, Art. 34(1)(a).

33. This information is provided as a matter of general analysis and should not be relied on with regard to individual treaties. Recourse should be had to the precise treaty text in each case. The dates do not take into consideration the possibility of an agreement by the treaty partners to amend and/or terminate the treaty. The reference date for the calculation is 8 July 2016. The calculation is also approximate due to the different length of months and years.

References

Berger, A., M. Busse, P. Nunnenkamp and M. Roy (2013). "Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box", *International Economics and Economic Policy*, Vol. 10, No. 2, pp. 247-275.

Brownlie, I. (2007), *Principles of Public International Law*.

Dolzer, R. and C. Schreuer (2012), *Principles of International Investment Law*.

Gaukrodger, D. and K. Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", *OECD Working Papers on International Investment*, No. 2012/03, OECD Publishing, Paris. http://dx.doi.org/10.1787/5k46b1r85j6f-en

Gaukrodger, D. (2016), "The legal framework applicable to joint interpretive agreements of investment treaties", *OECD Working Papers*

on International Investment, No. 2016/01, OECD Publishing, Paris, http://dx.doi.org/10.1787/5jm3xgt6f29w-en.

Lesher M. and Miroudot, S. (2006), Analysis of the Economic Impact of Investment Provisions in Regional Trade Agreements, OECD Trade Policy Working Paper No. 36, available at: www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TD/TC/WP%282005%2940/FINAL&docLanguage=En .

OECD (2015), Conference on Investment Treaties: Policy Goals and Public Support, 16 March 2015, www.oecd.org/investment/investment-policy/2015-conference-investment-treaties.htm.

OECD (2013), Roundtable on Freedom of Investment 19, 15-16 October 2013, Summary of Roundtable discussions by the OECD Secretariat, www.oecd.org/investment/investmentpolicy/19th-FOIroundtableSummary.pdf.

OECD (2004), ""Indirect Expropriation" and the "Right to Regulate" in International Investment Law", *OECD Working Papers on International Investment*, No. 2004/04, OECD Publishing, Paris. http://dx.doi.org/10.1787/780155872321.

Pohl, J., K. Mashigo and A. Nohen (2012), "Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey", *OECD Working Papers on International Investment*, 2012/02, OECD Publishing, http://dx.doi.org/10.1787/5k8xb71nf628-en.

Pohl, J. (2013), "Temporal Validity of International Investment Agreements: A Large Sample Survey of Treaty Provisions", *OECD Working Papers on International Investment*, No. 2013/04, OECD Publishing, http://dx.doi.org/10.1787/5k3tsjsl5fvh-en.

UNCTAD (2012a), "Expropriation", Series on Issues in International Investment Agreements II, http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf.

UNCTAD (2012b), Fair and Equitable Treatment, *Series on Issues in International Investment Agreements,* II, http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf .

World Bank Group, Investor-State Conflict Management: A Preliminary Sketch, E15 Initiative, November 2015, available at: http://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-World-Bank-Group-FINAL.pdf.

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