

Research Article

SOME ISSUES RELATED TO HUMAN RIGHTS LAW WHEN SOLVING INTERNATIONAL INVESTMENT DISPUTES ARISING FROM NEW-GENERATION FTAS

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ABSTRACT

Vietnam's participation in the negotiation and successful signing of new-generation free trade agreements (FTAs) has opened up many opportunities and challenges with huge impacts on the economy and society. Foreign investors, when deciding to invest in Vietnam, will have to learn very carefully the provisions of the law on investment protection mechanisms, especially issues related to regulations and enforcement of human rights in the host country. In particular, these problems are most evident when there are disputes between investors as well as between investors and the host country. In this article, the authors will analyze issues related to human rights law when settling investment disputes on international investment arising from the new-generation FTAs to which Vietnam is a member.

Keywords: human rights law; investment disputes; new-generation FTAs; Vietnam.

INTRODUCTION

In recently, many new-generation free trade agreements have been successfully negotiated and signed. With the signing and implementation of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Free Trade Agreement between Vietnam and the European Union (EVFTA) through many years of negotiation, Vietnam has basically accomplished the most important goals in the strategy of free trade agreement negotiating for the 2010-2020 period. In particular, the CPTPP and EVFTA agreements are considered as new-generation FTAs, in line with the trend development of modern commerce. These agreements not only open up potential trade opportunities with developed economies, but also make important contributions to promoting administrative reform, improving the business environment and attracting investment for Vietnam. That is the most important value that these agreements bring, contributing to the successful implementation of Vietnam's long-term strategic development goals. However, another problem that these new generation FTAs pose is the issue of human rights protection in Vietnam. When a dispute occurs, investors to protect their interests when participating in lawsuits often invoke human rights regulations. Therefore, it is very necessary to study and clarify factors and issues related to human rights law when implementing regulations related to these new generation FTAs in the current period. It not only contributes to protecting the interests of investors, but also contributes to improving the reputation and creating an attractive investment environment of Vietnam in the coming time. In the framework of this article, the authors only studies within the scope of two new generation FTAs: EVFTA and CPTPP.

LITERATURE REVIEW

In parallel with the WTO accession negotiations, Vietnam also signed FTAs with leading trading partners in the region. These agreements

are all based on the principles of the WTO, so although they play an important role in promoting trade with signatories, they do not create new breakthroughs in terms of trade institutions. Trade institutions during the period since Vietnam joined the WTO have still operated on the principles of this organization. Besides, FTA agreements focusing on regional partners make Vietnam's trade balance tend to be unbalanced, leaning towards Asia. Vietnam's FTA negotiation strategy for the period 2010 - 2020 approved by the Prime Minister has identified the achievements and shortcomings of the FTAs signed in the previous period and set the goal of signing FTAs with other countries. developed economy to support Vietnam's goal of industrialization and reducing commercial dependence on one region. The FTA negotiation strategy has created a directional basis for Vietnam to promote new-generation FTAs with the presence of the world's leading economies such as the United States, the European Union (EU), Canada, and the United States. The CPTPP and EVFTA agreements have really set new standards and rules for international trade, which are expected to provide a growth engine for trade between member countries. Not only Vietnam, but almost all signatories, to some extent, have had to carry out procedures to amend and issue legal documents to implement the agreement. This confirms the pioneering of new generation agreements. From the process of both reforming and learning to negotiate in compliance with the normal rules of international trade. Vietnam has entered the world's leading playing field, participating in setting advanced standards for trade. First of all, the new-generation FTAs aim to completely liberalize trade. In fact, CPTPP and EVFTA have achieved a degree of liberalization of almost 100% of goods. Most tariffs are eliminated after 5-7 years from the date of entry into force of the Agreement. A small percentage of agricultural commodities that are considered sensitive are being subject to quota management or high import duties are transferred to tariff quota management with tariffs within the quotas of 0%. The traditional products Vietnam has strengths such as textiles, footwear, seafood continued to have opportunities for export growth thanks to tariff reductions and trade facilitation mechanisms. In particular, opening the door to the EU market for agricultural products is very important for Vietnam. It is possible that export turnover from new agreements on agricultural

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products, such as rice, garlic, tapioca starch, mushrooms, honey, etc., is not large but it is generated entirely from domestic resources and has social significance, helping to improve income for a part of farmers in disadvantaged areas. In the context that developed countries are applying a lot of protectionist measures to agriculture, the tax rate within the 0% quota guarantees us a certain share in the market of imported agricultural products of the member countries. In addition, the elimination of tax rates for processed agricultural products will encourage the food industry to invest in the production of items for this market, promoting the process of restructuring agricultural exports towards increase the proportion of processed products. In the services and investment sectors, a high degree of liberalization is reflected in the "select and eliminate" approach compared to the traditional approach. In other words, foreign investors from the place of being only allowed to do business in the areas that are allowed to now can do business in all areas that are not restricted under the agreement. The countries participating in the agreement must provide a schedule of investment commitments that list restrictive measures (NCMs). Member States are bound by this level of openness and are not allowed to introduce new, more restrictive measures. In addition, the principle of "only forward, not backward" (ratchet) will only make the commercial environment more and more open. Once a signatory member voluntarily relaxes a certain NCM, it will have to maintain the new opening level, not be allowed to return to apply more restrictive measures. Second, the CPTPP and EVFTA contain a lot of regulations governing domestic trade policies of member countries. The purpose is to create a transparent, competitive and equal commercial environment; ensure that the value of free trade agreements is not impaired by protectionist measures established in the domestic market. Transparency is a requirement across all areas of the CPTPP and EVFTA agreements. Most of the treaty chapters have provisions on transparency: information disclosure, information update on official websites, right to access information of businesses, society, etc. Thereby, the businesses and society know the guidelines and policies, have the opportunity to participate in expressing their views and monitoring the implementation. The competitive factor is a core part of the market economy, helping the market to operate efficiently. In order to establish a fair competitive environment, the CPTPP and EVFTA have regulations to establish equality between businesses of all economic sectors in terms of legal status as well as the right to participate in activities. The principle of non-discrimination includes the principle of Most Favored Nation (MFN) which is the most important legal principle of the WTO and the principle of National Treatment (NT) which is understood to be based on the in a trade agreement, a country shall accord to the products, services and suppliers of another country preferential treatment no less favorable than that which it is and will accord to the products, services and suppliers of the other country. The Principle of National Treatment ensures equality between foreign-invested enterprises and domestic enterprises. State-owned commercial enterprises must operate under the market mechanism; must not engage in anti-competitive behavior when having a monopoly position, affecting trade and investment. The State shall not provide excessive subsidies to commercial enterprises of its own country to the extent that it greatly affects the interests of other countries. Procurement regulations increase transparency and competition in public procurement; create more options for agencies to use the budget and limit waste and negativity. In its commitment, Vietnam offers a list of 21 central agencies, 38 non-business units and 34 hospitals that will allow member countries' businesses to participate in bidding for packages of goods, services, construction and installation from a threshold specified in the agreement. In line with the trend of knowledge economy development, new generation FTAs have increased the level of protection of intellectual property compared to WTO regulations. The

duration and level of protection for pharmaceutical patent holders and copyrights are increased. Countries must have enforcement measures to protect intellectual property rights in respect of trademarks, copyrights and related rights at their borders. At the same time, criminal sanctions are required for violations of intellectual property rights, focusing on violations of trademarks, copyrights and related rights. In addition, the registration of establishing copyright needs to be simple, transparent, convenient and encouraging electronic application. The strengthened law on protection of intellectual property rights will enhance the effectiveness of the fight against counterfeit goods and encourage research and development activities. Third, the new-generation FTAs always attach importance to the goal of sustainable development. This is reflected in regulations that are not in the commercial category (environment, labor, ...) but will be bound by commercial measures. The CPTPP and EVFTA do not pose new requirements compared to common international labor and environmental standards. Member States are obligated to accede to specific international treaties that are widely recognized in this area. The added value of new-generation FTAs to these regulations is to improve their enforcement by transforming them into mandatory obligations secured by economic tools, dispute settlement mechanisms and trade sanctions. Fourth, the CPTPP and EVFTA emphasize the role of businesses and the importance of establishing mechanisms to facilitate businesses to access the benefits of free trade. This is a progressive and practical approach, because the business is the one who brings the commitments to life. The extent to which enterprises exploit commitments is a measure of the value of the agreement. In order to provide information about the agreement or useful information for businesses to implement, the signatories are obliged to maintain a public portal or website. In the CPTPP, the Committee on Small and Medium Enterprises (SMEs) including government representatives of the parties will regularly discuss measures to support capacity building and remove difficulties for enterprises. Foreign enterprises are not subject to enforcement regulations (minimum export rate, use of domestic raw materials, forced technology transfer, ...) and have the right to use mechanisms international arbitration to protect its interests. In particular, these agreements have detailed provisions on simplifying customs procedures and certification of origin. Exporting enterprises are allowed to present electronic documents, carry out procedures before the goods arrive at the port, apply one-stop-shop mechanism, carry out risk management and post-inspection, allowing self-certification enterprises to apply get origin. These trade facilitation regulations mean that the obligation to prove and explain about the goods of the enterprise is transformed into the responsibility of supervision and inspection of the management agency. Businesses save a lot of transaction costs and time for procedures. At the same time, create a mechanism to encourage businesses to strictly comply with management regulations and implement standard financial management processes. However, the management responsibilities of administrative agencies are heavier. These agencies are required to modernize processes, improve capacity and innovate management methods. New-generation agreements, as soon as they come into effect, have brought positive signals on trade. Export turnover to markets where we did not have an FTA before (Canada, Mexico) increased by 20 to 30% in the first year of implementation. In 2020, despite the adverse impact of the Covid-19 pandemic, exports to these markets still increased by 12 to 15%. For the EVFTA, in the first five months of implementation (from August to December 2020), there were 62,500 sets of Certificates of Origin in EUR; allowing USD 2.35 billion of goods exported to the EU market (approximately 15% of export turnover in the same period) to enjoy preferential treatment. As a result, export turnover to the EU increased by 1.6% compared to the same period in 2019, when the epidemic did not appear. The positive results despite the global economic downturn show the

attractiveness of newly opened markets and the potential and acumen of businesses. With the implementation of the EVFTA, the EU will surely quickly rise to a higher rank in the list of Vietnamese trading partners. Vietnamese agricultural products have a great opportunity to penetrate this potential market. At the same time, Vietnamese consumers will have access to high-quality European consumer products at cheaper prices. In addition, the network of FTAs has helped Vietnam mitigate the impact of the deterioration of the multilateral trading system. The trade war between major economies, especially between the US and China, has seriously affected the role of the multilateral trading system. Large countries have arbitrarily imposed protectionist measures in defiance of WTO rules and principles and nullified the organization's rules and dispute settlement mechanisms. Small and highly open economies like Vietnam will be vulnerable when the legal foundations for international trade that have existed for many years are weakened. In that context, FTAs have promoted the role of a dialogue forum as well as a legal framework to resolve trade issues between Vietnam and its leading partners, helping us to minimize disputes negative impact on trade. The most significant and lasting benefit to Vietnam's development is the reforming rules for the trade environment in the new generation agreements. Since joining the WTO, Vietnam has just had a review of the legal document system in order to continue to perfect its trade policy as before. Regarding the CPTPP, the Ministry of Justice has presided over and together with ministries and branches to review 256 legal and sub-law documents, proposing to amend 12 documents (including 8 laws) and promulgate 5 new documents. For the EVFTA, on the basis of reviewing 219 documents, the Government has submitted to the National Assembly to amend 4 documents (2 laws) and issue 4 new documents. That is not to mention the dozens of provisions in both agreements that will be applied directly because they have been specified clearly enough and do not conflict with current law. The number of documents that need to be reviewed and need to be revised and issued shows the far-reaching significance and extent of the impact of these agreements on the economy. It should also be noted that the amendment of the law is not limited to Vietnam. A transparent, competitive legal framework and favorable procedures will create far-reaching and long-lasting effects for the economy to operate effectively and sustainably. The World Bank's Global Competitiveness Report 2019 - 2020 shows that the three barriers that investors are most concerned about when accessing markets in developing countries, including Vietnam, are: investment approval procedures, regulations on domestic content and regulations on foreign workers. Therefore, the serious implementation of investment commitments in the new generation FTAs mentioned above together with the potential benefits from the FTA network have created great advantages for Vietnam in attracting investment flows. tends to shift to South Asia. One significance that cannot be ignored is that the process of negotiating new generation FTAs has helped train and form a team of international trade experts for Vietnam. The CPTPP and EVFTA are pioneering agreements in approaching commercial issues and at the same time being the most technically complex. Our negotiators have gradually learned and grown to work with international colleagues to build advanced commercial criteria to meet the development trend of modern trade. The knowledge, negotiation experience, and modern thinking are valuable resources for this team to continue to contribute to management, policy making, and realizing benefits from new generation FTAs.

METHODOLOGY OF RESEARCH

To do this paper, the author used many kinds of methodologies of research to analysis international and national legal policy and documents (law and regulations) related to or govern settling

investment disputes and human rights. Besides, the author base on the hypotheses developed in the study show how to use law and regulation to govern settling investment disputes and human rights. To examine these relationships, the author developed some hypotheses and tested these hypotheses using some empirical models. The developed models confirm the assumptions and demonstrate that increasing the use of law and regulations to govern settling investment disputes and human rights. The hypotheses which are personal views regarding the relationship between independent and dependent variables based on the literature review. Moreover, statistic and survey are also used to finish this research. The author uses the poll to survey the Vietnamese citizens who live in Vietnam. The author also sent the questionnaires to them to ask them some question related to the settling investment disputes and human rights. The research of this paper is finished base on combining all of methodologies above. However, because of time and finance limitation, the paper-working still lack of some information. The author hope to take the opinion of audience and reviewer to do better for the next time.

FINDINGS AND DISCUSSION

Regulations on human rights protection in the new generation FTA

Human rights can be invoked when the Investment Agreement (BIT) contains provisions on the protection of human rights. However, the number of BITs with provisions on human rights protection is not many and in the practice of international investment dispute settlement, a party can still invoke human rights protection provisions even if the BIT has no related regulations. In the past, BITs often did not provide for the protection of human rights, and if they did, they were very general and narrow in scope. In 2014, a study conducted within the framework of the Organization for Economic Cooperation and Development (OECD) for more than 2100 BITs showed that 10% of BITs had regulations related to environmental protection and only 0.5 % BIT has provisions on the protection of human rights in a broad sense. The few BITs that have provisions on the protection of human rights often only mention human rights in the preamble or, if included in the chapters, only stop at the recommendation statements. Referring to new generation free trade agreements (FTAs) such as EVFTA and Investment Protection Agreement (IPA) or CPTPP have clear provisions both in terms of content and enforcement. It can be said that, in the new generation FTAs, human rights regulations play an increasingly important role. The scope of human rights provisions in the FTA is expanded, including not only the group of the first generation provisions (civil and political rights such as: the right to life, the right to freedom of speech, the right to freedom of religion) but also groups that prescribe the second generation (economic, social and cultural rights such as: the right to work, the right to social security, the right to access education, the right to rest and recreation, etc.) and also the third generation regulations (including rights related to environment, security and development). Regarding EVFTA and IPA together with the Partnership Cooperation Agreement (PCA) form the framework that governs operations. In Article 1 of the PCA, the parties affirmed their commitment to "respect the principles of democracy and human rights, as set forth in the United Nations General Assembly Declaration on Human Rights and international human rights instruments." This principle is "an essential part of this Agreement". The preamble to the EVFTA also stipulates that the commercial cooperation relationship between the parties must be based on the principles and values reflected in the PCA, including human rights values. More specifically, paragraph 2, Article 17.22, Chapter 17 of the EVFTA affirms that this Agreement is part of the overall bilateral relationship as stipulated in the PCA and will be part of the common institutional framework. In addition, paragraph 2,

Article 17.18 of the EVFTA stipulates that, in the event of a fundamental violation by one party of the PCA (under Article 57 of the PCA, a violation of human rights principles is considered a fundamental violation of the PCA), the other party may take appropriate measures under this Agreement. This can be understood as when one party fails to fulfill its human rights commitments, the other party has the right to use trade “retaliatory” measures, such as suspending some incentives committed in the EVFTA. In addition, the EVFTA also includes a number of regulations related to human rights such as regulations on trade and sustainable development, which emphasize environmental and labor standards, transparency and construction coordination mechanism between the parties to dialogue, review and check the implementation of commitments related to human rights. When the relevant BIT has provisions on human rights protection, investors can directly invoke the provisions of that Agreement to protect their legitimate interests. Meanwhile, because the dispute settlement mechanism between foreign investors and the State by means of international investment arbitration is a “one-way” mechanism. That is, only investors sue the State for the purpose of protecting its rights against acts of the State, not vice versa, so the State can only invoke provisions on human rights protection in counterclaims to prove that investors have violated the the human rights regulations of the host country. Although the Arbitral Tribunal does not have jurisdiction to hear disputes over violations of human rights regulations as an independent claim, once the infringement is related to an investment, it will become part of an investment dispute and is therefore subject to arbitration by the Investment Arbitration Court. In addition, the State can also invoke human rights protection regulations to justify the violation of its investor protection regulations. When citing human rights protection provisions outside the BIT, one issue that the invoking party needs to address is the conflict between international treaties. Ordinarily, the citing party will argue that the human rights provisions of the human rights conventions to which the country is a party are provisions that have a higher precedence over those relating to human rights. investment, so it needs to be applied to protect basic rights of citizens (such as access to education, right to use water, etc.).When faced with the issue of conflict between human rights treaties and investment treaties, arbitral tribunals often seek to reconcile the two types of provisions so that all provisions are applied to the extent possible.

Some notes on human rights issues when settling disputes arising from new generation FTAs

The human rights provisions are designed to make human rights the subject of political dialogue and cooperation mechanisms, thereby creating a legal basis for the application of trade restrictive measures with the seriousness of human rights violations. In order for the provisions to ensure human rights to be implemented in practice, the new generation FTAs have developed a mechanism to monitor the implementation of these provisions. In the field of human rights, in professional documents, the phrase “United Nations human rights mechanism” is used to refer to the apparatus of specialized agencies and the system of relevant rules and procedures established by the United Nations for the promotion and protection of human rights. Accordingly, referring to the human rights guarantee mechanism in new-generation FTAs is referring to the institutions (agencies, organizations) and institutions (principles, processes and procedures) established by the FTAs. FTA member states are established to enforce human rights provisions contained in FTAs. Although the structure of the human rights guarantee institutions in each new generation FTA may vary depending on the agreement, depending on the outcome of the negotiations, they generally include: i) a “Senior Committee” (responsible for overseeing the implementation of

chapters related to trade, labor and sustainable development); ii) a number of specialized committees; and iii) advisory groups that are “Civil Society Forums” (to facilitate dialogue on labor and sustainable development issues). In particular, the members of this forum include “domestic advisory groups” to implement the consultation mechanism. Domestic advisory groups will be established by each party with the aim of collecting views, evaluations as well as making recommendations within their respective jurisdictions. These groups are often made up of representatives of businesses, trade unions and civil society organizations. For example, all agreements since the EU-Korea FTA have been in a tripartite format, in which: i) Committees of state officials from the two sides have been established to oversee implementation of commitments on human rights; ii) Domestic Advisory Groups (DAGs) consisting of representatives of business, trade unions, non-governmental organizations (NGOs) and sometimes academia; iii) An expert panel investigates the claims made by the parties. Specifically, in the FTA between the EU and the Republic of Korea, the provision provides for the establishment of a Committee on Trade and Sustainable Development consisting of members of the EU Commission and of the Korean Government and domestic advisory groups, including representatives of civil society. Members of the national advisory groups include members of labor unions, environmental organizations, business organizations as well as other stakeholders. These advisory groups will carry out advisory duties on the implementation of the provisions. Under a general cooperation clause set forth in this FTA, the parties commit to open dialogue on a list of 13 topics related to cooperative activities on the assessment of the impact on labor rights of the free process on trade-related aspects of the ILO agenda and cooperation at the multilateral level within the WTO and ILO. By mutual agreement, representatives of the parties will meet regularly to discuss the implementation of the chapter on labor and sustainable development. Thus, instead of using only the official reports of the United Nations or the ILO as in the WTO’s institution, the new generation FTAs establish the institution to use the supervision consultation and arbitration capacity objective independence of expert groups, although the use of this mechanism is infrequent. Institutions include regulations for the operation of human rights guarantee institutions and provisions for the implementation of human rights commitments. Generally, provisions for the implementation of human rights provisions in new generation FTAs are divided into three basic groups: The group of conditional labor provisions are those that use conditions to force participating states to fulfill their commitments. In the event that the signatories to the agreement fail to fulfill their commitments, these countries may suffer economic consequences, in the form of fines or trade sanctions. This type of conditional agreement is commonly used by the US and Canada. Conditional provisions often set standards related to labor and human rights and use conditions to encourage member states to implement and apply those standards. A party will receive incentives (incentives) if it complies with the commitment, in some cases may include other benefits such as technical cooperation if the agreed labor standards are applied. In addition to the three groups of enforcement regulations mentioned above, a number of new generation FTAs have provisions related to “regulatory rights”. Accordingly, in this Trade Agreement there are provisions that weaken the binding validity of the rest of the text. These are the parts of the clause that define the “right to regulate”. The provisions were included not for the purpose of harmonizing labor standards but to determine how the matter should be resolved in the event of a conflict between any part of the free trade agreement and one of the ILO conventions are listed in the sustainable development clause. In these cases, countries will work towards ensuring trade liberalization. Accordingly, labor rights must not impede liberalization, and countries are still free to determine their level of labor protection. As such, governing provisions provide ample time for member states to agree

to regulate their labor laws, even omitting binding references to the ILO Convention.

CONCLUSIONS AND RECOMMENDATIONS

The human rights guarantee mechanism in the new generation FTAs has established a clear legal mechanism for the enforcement of human rights provisions, especially those on labor and environment. Although very early on, international trade agreements often included provisions on human rights, these provisions in previous trade agreements were often difficult to enforce in practice due to the lack of a basis legal regime. Today, the new-generation FTAs have created a solid legal basis for human rights to be enforced in practice. The establishment of a dispute settlement mechanism in the field of human rights helps member states to limit weaknesses in the human rights protection mechanism in the ILO Conventions. Most of the labor and human rights standards in the new generation FTAs refer to the basic ILO Conventions. Vietnam needs to focus on promoting the basic advantages of the human rights guarantee mechanism in the new-generation FTAs, and at the same time limit the negative impacts of these FTAs on the guarantee of human rights in our country. In addition, the enforcement of human rights regulations also creates an attractive investment environment and avoids possible damage by limiting disputes with investors related to the implementation of the law, enforce regulations related to the protection of human rights.

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